August 23, 2004

VIA FACSIMILE and FEDERAL EXPRESS

R. Richard Newcomb
Director
Office of Foreign Assets Control
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Annex Bldg., 2nd Fl.
Washington, DC 20220

RE: Ryan Clancy/Prepenalty Notice/FAC No. IQ-214111

Dear Mr. Newcomb:

We write this letter on behalf of our client, Ryan Clancy, in response to a July 8, 2004 Prepenalty Notice issued by the Office of Foreign Assets Control ("OFAC"), based on Mr. Clancy's alleged violations of the Iraqi Sanctions Regulations, 31 C.F.R. Part 575 (the "regulations"). We appreciate this opportunity to respond to the Prepenalty Notice, and we appreciate your agreement to extend our response deadline until this date. For the reasons set forth below, however, we believe that the regulations are procedurally and substantively flawed and, accordingly, OFAC should not impose any penalty against Mr. Clancy.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Prepenalty Notice, Mr. Clancy departed the United States on January 28, 2003 and arrived in Baghdad, Iraq on February 5, 2003. He allegedly returned to the United States on March 7, 2003. The United States began offensive military operations in Iraq on March 19, 2003.

On August 7, 2003, Mr. Clancy received, by facsimile, a Case Referral Acknowledgement from the Department of the Treasury. The Acknowledgement states as follows:

> This is to acknowledge the referral of your case to OFAC's Civil Penalties Division. The referral has been assigned FAC No. IQ-214111. Please refer to the FAC number if you wish to contact us or send supplemental information. If you would like to discuss this matter, please call L'Erin

> Barnes of the Civil Penalties Division at (202) 622-6140. Thank you for your cooperation in this matter.

Mr. Clancy has never received a Requirement to Furnish Information ("RFI") or any warning from OFAC. *See Office of Foreign Assets Control v. Voices in the Wilderness*, 2004 U.S. Dist. LEXIS 15484 (D.D.C. Aug. 9, 2004) (in which defendant received a "warning").

In order to better understand the Case Referral Acknowledgement, counsel for Mr. Clancy filed a Freedom of Information Act ("FOIA") request with the Department of the Treasury on September 24, 2003. The FOIA request seeks, among other things, all OFAC and Treasury records concerning Mr. Clancy; policies, procedures, and guidelines concerning travel to Iraq; and, statistical information on individuals who allegedly traveled to Iraq in violation of the regulations. The Department of the Treasury responded on October 7, 2003, indicating that it had received the FOIA request and that the "request will be answered as soon as possible." Mr. Clancy has received no further communications concerning his FOIA request.

OFAC issued a Prepenalty Notice to Mr. Clancy on July 8, 2004 based on his alleged "exportation of services to Iraq and [] unauthorized travel-related transactions in Iraq." In the Notice, OFAC alleges as follows:

> On January 28, 2003, you departed the United States with an ultimate destination to Baghdad, Iraq. The cost of the transportation totaled £300, including ground transportation between Amman, Jordan and Baghdad. You arrived in Iraq on or around February 5, 2003, where you stayed in the Andalus Apartments, a hotel in Baghdad, and a food storage facility 30 to 40 minutes north of Baghdad. While in Iraq, you provided services by shielding Government of Iraq facilities from possible U.S. military action. You returned to the United States on March 7, 2003.

Those are the only factual allegations that OFAC has presented to Mr. Clancy. The Prepenalty Notice indicates that "OFAC intends to issue a claim against [Mr. Clancy] for a monetary penalty in the amount of $10,000.00."

Upon researching the regulations, Mr. Clancy's counsel learned that, based on OFAC's allegations, Mr. Clancy could be subject not only to the civil penalty indicated in the Prepenalty Notice, but also to criminal sanctions. Accordingly, by letter dated August 4, 2004, counsel for Mr. Clancy requested that OFAC either: 1) grant Mr. Clancy immunity from criminal prosecution with respect to the allegations in the July 8, 2004 Prepenalty Notice, or 2) stay all proceedings with respect to the civil penalty until the criminal statute of limitations has expired. OFAC has not formally responded to that request. Michael Neufeld at OFAC informed counsel for Mr. Clancy by telephone that the request would not be granted because OFAC purportedly cannot bind the Department of Justice. While the civil penalties set forth in the regulations are significant – OFAC intends to seek $10,000.00 and notes that it could seek as much as $250,000.00 for each violation of the regulations – the potential criminal penalties are even more

severe. If convicted of certain related criminal offenses, Mr. Clancy could face up to 12 years in prison and $1 million in fines.

Without the protections requested in the August 4, 2004 letter, therefore, Mr. Clancy simply cannot afford to waive his Fifth Amendment privilege against self-incrimination. For purposes of this response only, and without waiving his right to object to or deny OFAC's allegations in future proceedings, Mr. Clancy will accept as true the allegations that he departed the United States for Iraq on January 28, 2003, and that he returned to the United States on March 7, 2003. He neither admits nor denies OFAC's remaining allegations.

ARGUMENT

I. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fifth Amendment to the U.S. Constitution provides "nor shall [any person] be compelled in any criminal case to be a witness against himself …." In this case, Mr. Clancy's alleged conduct could subject him both to the civil penalties that are at issue in this proceeding and to criminal sanctions in the future. Mr. Clancy has asked OFAC to consider procedural alternatives that will permit him to assert his privilege against self-incrimination, while also providing a means for OFAC to prosecute this civil matter. OFAC has refused to consider such alternatives. While there is no *per se* constitutional violation in forcing an individual to choose between asserting his Fifth Amendment privilege on the one hand and defending himself by testifying in a parallel, non-criminal proceeding on the other, "[t]he Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another." *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th Cir. 1979).

OFAC *must* make some meaningful attempt to accommodate Mr. Clancy's right to assert his Fifth Amendment privilege and OFAC's interest in pursuing this civil enforcement action. *See, e.g.*, *United States v. Certain Real Property and Premises Known as: 4003-4005 5th Avenue*, 55 F.3d 78, 83 (2d Cir. 1995) ("[U]pon a timely motion by the claimant [in a civil forfeiture action], district courts should make special efforts to accommodate both the constitutional [privilege] against self-incrimination as well as the legislative intent behind the forfeiture provision ….") (internal quotation marks and citation omitted). Any accommodation should take into account the potential for harm or prejudice to both parties. *Id*. at 84; *see also Wehling*, 608 F.2d at 1088 (a court should "measure [] the relative weights of the parties' competing interests with a view towards accommodating those interests"). Several courts have found that issuing a stay is one appropriate accommodation. *See Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975); *Iannelli v. Long*, 487 F.2d 317, 318 (3rd Cir. 1973) (recognizing district court's authority to stay tax refund suit until criminal statute of limitations has expired); *United States v. U.S. Currency*, 626 F.2d 11, 16-17 (6th Cir. 1980) (noting that alternative procedures include a stay or immunity from criminal prosecution).

A neutral decision maker – a court, in most instances – must be responsible for attempting to accommodate the respective interests of the parties in light of one party's Fifth Amendment privilege. The OFAC regulations ignore that requirement. Here, Mr. Clancy must choose between asserting his Fifth Amendment privilege against self-incrimination and contesting the factual basis for OFAC's proposed penalty. The OFAC regulations, however, provide no opportunity to seek a stay or other accommodation from a neutral decision-maker. Instead, Mr. Clancy was compelled to seek some accommodation from OFAC itself – the very same entity attempting to penalize him. And OFAC has not granted his request.

The need to accommodate the parties' respective interests weighs heavily in favor of staying the civil enforcement action. Mr. Clancy risks potentially exposing himself to significant criminal penalties while OFAC lacks any significant interest in the immediate imposition of the proposed civil penalty. There is no risk of on-going harm, for example, because Mr. Clancy's alleged travel took place more than one year ago and OFAC has no reason to believe he is planning another trip. Even if OFAC were to impose the threatened civil penalty, moreover, it would have no impact on Mr. Clancy's future conduct.

By forcing Mr. Clancy to contest OFAC's allegations without any meaningful attempt to accommodate his Fifth Amendment privilege against self-incrimination, OFAC has violated that privilege.

II. MR. CLANCY DID NOT "EXPORT SERVICES" TO IRAQ.

In the Prepenalty Notice, OFAC sets forth two alleged violations of the regulations: 1) Mr. Clancy exported services to Iraq; and 2) Mr. Clancy traveled to Iraq without authorization. The Notice explains the first violation as follows: "While in Iraq, you provided services by shielding Government of Iraq facilities from possible U.S. military action." That claim is both factually and legally inaccurate.

The claim is based on Mr. Clancy's alleged stay at a Baghdad hotel and "a food storage facility 30 to 40 minutes north of Baghdad." That conduct simply does not constitute "the provision of services" to the Iraqi government. "Services" is not defined in the regulations. Legal definitions of "services" abound. *Black's Law Dictionary* defines "services" as "[t]hings purchased by consumers that do not have physical characteristics …." (6th ed. 1990), p. 1369. With respect to consumer transactions, as another example, the Wisconsin Legislature – like many other states – defines "services" as:

1. Work, labor and other personal services;

2. Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and

> 3. Insurance provided in connection with a consumer credit transaction.

Wis. Stat. § 421.301(42)(a). What services did Mr. Clancy allegedly provide? The Prepenalty Notice identifies none. Furthermore, the Notice alleges that Mr. Clancy "returned to the United States on March 7, 2003." U.S. bombing of Iraq started two weeks later. His alleged conduct could not have assisted Iraq.[1]

III. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY EXCEED STATUTORY AUTHORITY.

The regulations, in 31 C.F.R. § 575.207, provide:

> Except as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq, after the effective date, other than transactions:
>
> (a) Necessary to effect the departure of a U.S. citizen or permanent resident alien from Kuwait or Iraq;
>
> (b) Relating to travel and activities for the conduct of the official business of the United States Government or the United Nations; or
>
> (c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.
>
> This section prohibits the unauthorized payment by a U.S. person of his or her own travel or living expenses to or within Iraq.

This sweeping ban on travel to or from Iraq far exceeds any authority granted by Congress to the executive branch pursuant to the United Nations Participation Act ("UNPA"), the International Emergency Economic Powers Act ("IEEPA"), the Iraqi Sanctions Act of 1990, or any other legislation. Therefore, the regulations are invalid and OFAC may not penalize Mr. Clancy for allegedly violating them. *See, e.g.*, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

The UNPA provides for criminal penalties "upon conviction," but does not explicitly authorize civil penalties, like the fine OFAC seeks to collect from Mr. Clancy. 22 U.S.C. § 287c(b). The UNPA also authorizes certain actions by the President, including restricting or

[1] In the alternative, the word "services" may be unconstitutionally vague. *See, e.g.*, *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000); *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1199-1200 (C.D. Cal. 2004).

prohibiting certain communications between foreign countries or their nationals in the United States and persons subject to U.S. jurisdiction – but only when asked to do so by United Nations Security Council resolution. Neither of the two Security Council resolutions setting forth sanctions against Iraq calls upon the President to prohibit travel to or from Iraq or otherwise provides support for the Regulations' sweeping travel ban. *See* Security Council Resolution ("SCR") 661 (August 6, 1990); SCR 670 (September 25, 1990).

The IEEPA permits the President, during a national emergency, to investigate, regulate, and prohibit a range of transactions involving foreign countries and the United States. 50 U.S.C. § 1702(a). The authority granted under the IEEPA is limited, however, to activities that result in an economic benefit to the sanctioned nation. In 1994, Congress amended the IEEPA, clarifying "that the President should not restrict travel or exchanges for information, educational, religious, cultural, or humanitarian purposes … between the United States and any other country." P.L. 103-236, § 525(a) (April 30, 1994). Furthermore, "[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly … any transactions ordinarily incident to travel to or from any country … maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel …." 50 U.S.C. § 1702(b)(4).[2] The purpose of the amendment was to "protect the constitutional rights of Americans to educate themselves about the world by communicating with peoples of other countries …." House Conf. Rep. No. 103-482, at 239.

Finally, the Iraqi Sanctions Act of 1990 bans the use of *federal* money to benefit Iraq and grants the President the authority to impose sanctions on nations not abiding by the Iraq sanctions. It does not specifically ban travel to Iraq. While the Act gives the President authority to continue the trade embargo and other economic sanctions that were imposed in response to Iraq's 1990 invasion of Kuwait pursuant to various Executive Orders, none of those Orders authorizes a sweeping ban on travel by U.S. citizens to or from Iraq where that travel does not provide an economic benefit to Iraq or Iraqi nationals.

No statute authorizes the breadth of the restrictions contained in the regulations.

[2] This limitation on the President's power arguably does not apply to restrictions in force on the date Congress enacted the 1994 IEEPA amendments with respect to countries embargoed under the IEEPA on that date. Because the IEEPA always has excluded from its prohibitions activities that do not result in an economic benefit to the sanctioned nation or its nationals, however, there never has been a basis for the sweeping travel restrictions in the Iraqi Sanctions Regulations, which prohibit travel-related transactions *even if they do not result in any economic benefit to the sanctioned nation or its nationals*.

IV. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Iraqi Sanctions Regulations violate the Due Process Clause of the Fifth Amendment, which guarantees that "no person shall … be deprived of life, liberty, or property, without due process of law." Accordingly, OFAC may not penalize Mr. Clancy pursuant to the regulations.

At its core, the constitutional guarantee of due process prohibits the government from depriving an individual of liberty or property without prior notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In order to be meaningful, the time to be heard ordinarily must take place *before* the deprivation. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). The law will tolerate narrow exceptions to the rule requiring a predeprivation notice and hearing, but only in "*extraordinary situations* where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id*. (emphasis added) (internal quotation marks and citation omitted); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1978). "[A]bsent the necessity of quick action by the [government] or the impracticality of providing any predeprivation process, a post-deprivation hearing … would be constitutionally inadequate." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (internal quotation marks and citations omitted).

To determine what process is constitutionally required in a given situation, courts must balance the private and governmental interests involved. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). More precisely, courts balance: (1) the significance of the private interest at stake, and (2) the extent to which additional procedures would reduce the risk of an erroneous deprivation of that interest, against (3) the government's fiscal and administrative interest in a more summary proceeding. *Id*. When significant private interests are at stake, the administrative procedure must provide individuals with some or all of the following:

(a) Timely and adequate notice.

(b) A right to legal representation.

(c) Discovery of evidence to be used to justify the deprivation and an ability to present evidence to justify the opposite.

(d) An opportunity for oral argument and cross-examination of adverse witnesses.

(e) An unbiased and impartial decision-maker.

(f) A decision based solely on the record without *ex parte* evidence.

(g) An oral or written explanation of the reasons for the final decision and the evidence relied upon.

See, e.g., Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

In *Goldberg*, the Supreme Court emphasized the fundamental importance of the opportunity to appear personally before, and be heard orally by, the decision maker before a deprivation. Specifically, the Court stated that written submissions alone do not satisfy due process because they lack "the flexibility of oral presentations [and] do not permit the [defendant] to mold his argument to the issues the decision maker appears to regard as important." *Id*. at 269. In addition, the Court noted that oral presentations are particularly critical when credibility and veracity are at issue, such as when a defendant challenges a proposed deprivation as resting on (1) incorrect or misleading factual allegations, or (2) misapplication of rules or policies to the facts of a particular case. *Id*. at 268-69.

The process afforded Mr. Clancy under the Iraqi Sanctions Regulations fails to satisfy these core constitutional requirements. In fact, the *only* process the regulations offer Mr. Clancy is an opportunity to make a "written submission" to OFAC – the same agency that is acting, in effect, as the prosecutor, judge, and jury. Due process requires more.

Mr. Clancy clearly has a property interest in his money. *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984); *Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001) ("Herrada clearly has a property interest in her money"). Moreover, the proposed $10,000 fine – not to mention the potential $250,000 fine – is certainly significant.

Despite the significance of Mr. Clancy's interest, the regulations establish no meaningful process to prevent an erroneous deprivation. The regulations offer Mr. Clancy no neutral decision maker, no opportunity to discover the evidence upon which the decision maker will base its decision, and no right to call or cross-examine witnesses. In addition, the regulations deny Mr. Clancy the opportunity to be heard orally before OFAC or any other decision maker at any time, to understand and tailor his responses to the issues OFAC appears to regard as important, and to challenge what he alleges is a misapplication of the law to the facts of his case.

Instead, before incurring the proposed fine, Mr. Clancy's only recourse is to make a written submission to contest the allegations set forth in the prepenalty notice or ask for lenience based on mitigating factors. S*ee* Prepenalty Notice; 31 C.F.R. Part 501, appendix. Unfortunately, as noted above, "written submissions do not afford the flexibility of oral presentations … [and, p]articularly where credibility and veracity are at issue…written submissions are a wholly unsatisfactory basis for decision." *Goldberg*, 397 U.S. at 269.

On the other side of the scale, affording Mr. Clancy additional procedural safeguards – including an opportunity to be heard and respond to the allegations in person before the deprivation – would do nothing to undermine the governmental interests involved. The situation is not so extraordinary as to require "quick action by the [government]." *Logan*, 455 U.S. at 436.

Indeed, in other proceedings, OFAC has taken nearly *four years* after a prepenalty notice and response to impose a penalty under these same regulations. *See Voices in the Wilderness*, 2004 U.S. Dist. Ct. Lexis 15484, at *4. Thus, it would not be impractical to afford Mr. Clancy a predeprivation hearing and an opportunity to be heard in person before imposing any penalty, especially in light of the fact that (1) the Prepenalty Notice provides no evidence to justify OFAC's allegations, and (2) the penalty itself is levied pursuant to a broad and ill-defined standard applied subjectively and enforced by OFAC itself.

In addition, Congress and OFAC have implicitly recognized the need for an oral hearing before imposing similar penalties in directly analogous situations. Specifically, the Cuban Assets Control Regulations give prepenalty notice recipients not only the right to respond in writing but also the right to request a hearing under the Administrative Procedure Act and the right to obtain discovery. *See* 31 C.F.R. §§ 515.702(b)(2)(i) – (iii) and 500.702(b)(2)(i) – (iii). Cuba sanctions hearings also must be held before an Administrative Law Judge with the power to administer oaths, require the production of documents, rule on the admissibility of evidence, authorize depositions, and conduct motion practice. *Id*. §§ 515.706(b), 500.706(b). Moreover, respondents may employ a broad range of discovery mechanisms, including written or oral depositions, written interrogatories, document production, and request for admissions. *Id*. § 515.710(b).

Nothing about the Iraqi Sanctions Act renders such predeprivation procedures impractical, nor does any urgency exist to justify the failure to provide them to Mr. Clancy. On the other hand, many legitimate reasons favor additional predeprivation procedures in this context. For example, even assuming Mr. Clancy traveled to Iraq as alleged, the regulations fail to provide him any opportunity to develop and assert affirmative defenses, including that the travel restrictions are being imposed selectively in violation of the constitutional right to free speech and travel. *See infra* at 10-13. Nor do the regulations permit him to obtain discovery concerning the allegation that he provided services to Iraq. Indeed, without the opportunity to obtain discovery from OFAC, Mr. Clancy cannot adequately present those defenses.

Furthermore, OFAC has established a range of mitigating and aggravating factors that can decrease or increase the penalty where violations are found. The absence of a neutral fact-finder presiding over an oral hearing where evidence can be presented and witnesses examined and cross-examined poses an unacceptable risk that those mitigating and aggravating factors will be applied incorrectly or inconsistently.

Finally, the post-deprivation procedures set forth in the Iraqi Sanctions Regulations fail to cure the constitutional flaws outlined above. The regulations permit the Department of Justice ("DOJ") to bring a collection action against any individual who refuses to pay a penalty. 31 C.F.R. § 575.705. There is no remedy available to the person fined. It places the person fined in the shoes of a defendant in a collection matter. When the DOJ brings a collection action against a person who refuses to pay the fine, that person will not necessarily have the opportunity to argue the merits of the underlying penalty. Instead, he likely will be forced to argue that OFAC acted arbitrarily and capriciously in imposing the fine, a difficult standard to meet.

More fundamentally, however, post-deprivation procedures are unacceptable except in "extraordinary situations" where the circumstances compel the government to take quick action or where meaningful pre-deprivation processes are impractical. *See*, *e.g.*, *James Daniel Good Real Property*, 510 U.S. at 53. Since neither requirement is met here, limiting Mr. Clancy to post-deprivation process is not warranted.

V. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY VIOLATE INTERNATIONAL LAW.

The Iraqi Sanctions regulations also violate the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S., ratified by the United States on June 8, 1992. Specifically, article 12 of the ICCPR guarantees individuals the right to freedom of movement. Although the ICCPR allows governments to impose restrictions on that freedom, the restrictions must be lawfully imposed and necessary to protect "national security, public order, public health or morals or the rights and freedom of others." ICCPR ¶ 12.3. As described above, OFAC's sweeping ban on travel to and from Iraq is neither lawfully imposed nor necessary to secure the U.S. government's legitimate goals. Accordingly, the Iraqi Sanctions Regulations violate the ICCPR and cannot be the basis to penalize Mr. Clancy.

VI. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY ARE OVERBROAD AND UNREASONABLY RESTRICT FREE SPEECH.

A government regulation that infringes on the right to expressive conduct can be upheld only if 1) it is within the government's constitutional power; 2) it furthers an important or substantial government interest; 3) the government interest is unrelated to the suppression of free expression; and 4) the incidental restriction on First Amendment freedoms is not greater than necessary to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Even if the Iraqi Sanctions Regulations meet the first three prongs of the four-prong test, they clearly run afoul of the fourth prong: An absolute Iraq travel prohibition and sanctions are not necessary to further the government's interest in punishing the government of Iraq for invading Kuwait or violating its citizens' human rights or international law. Indeed, the regulations actually punish U.S. persons for furthering the supposed goals of the statute – to protect the Iraqi people.

OFAC fails to allege or charge – nor could it – that Mr. Clancy interfered with U.S. or allied military action or revealed sensitive military information, posed any threat to the lives of U.S. military, or took any action that jeopardized the goals of the Iraqi Sanctions Act or any other U.S. policy or goal. Absent such evidence, imposing sanctions is beyond OFAC's regulatory authority and inconsistent with the purpose of the Iraq Sanctions Act.

Moreover, the regulations also fail the third prong of the *O'Brien's* test: By enforcing the invalid Iraqi Sanctions Regulations, the government appears to be pursuing an interest directly

related to the suppression of free expression. OFAC appears to send notices only to individuals who speak out in the press about their experience as human shields and publicly oppose the government's war policies. To that extent, OFAC's enforcement pattern and practices demonstrate that OFAC is interested in suppressing protected speech.[3]

Speech protected by the Constitution can be restricted in some circumstances, but a restriction that "substantially" restricts Constitutionally-permissible speech is overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Government cannot proscribe speech simply because it "disapproves" of the ideas expressed. U.S. Const., amend. I; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Mr. Clancy's travel to Iraq reflected his deep concern for the innocent in Iraq and his opposition to an invasion and war that would threaten them. By absolutely prohibiting the expression of that concern through the mere act of traveling to Iraq, the Iraqi Sanctions Regulations substantially restrict the expression of Mr. Clancy's anti-war sentiments and thereby violate his First Amendment right of free speech.

The Iraqi Sanctions Regulations prohibit "any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq." The government has a strong interest in security and foreign policy, but these interests must be sufficiently related to the restriction to justify the penalty. Here, no such relationship exists so as to justify the creation of a virtual "First Amendment-Free Zone" in Iraq. *Board of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987); *R.A.V.,* 505 U.S. at 380, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Moreover, although the Iraqi Sanctions Regulations on their face are content-neutral, they appear to be applied in a content-based manner. Indeed, OFAC appears to be targeting and making examples of "high profile" U.S. citizens who traveled to Iraq before the war to serve as human shields or deliver humanitarian aid in opposition to the U.S. invasion and/or received media attention about their activities.

With the adoption of the Iraqi Sanctions Act, Congress intended to punish the Government of Iraq initially for invading Kuwait and, then, for violating the human rights of its own people. Admittedly, that constitutes a valid governmental purpose and a substantial interest in security and the conduct of foreign policy. But, by prohibiting any and all travel to Iraq for any and all purposes, the Iraqi Sanctions Regulations are not narrowly tailored and, therefore, fail to pass Constitutional muster.

The Free Speech Clause of the First Amendment protects expressive conduct intended to communicate a specific message where, under the circumstances, it is probable that the message would be understood by the audience. *Spence v. Washington*, 418 U.S. 405 (1974). Mr. Clancy's alleged travel to Iraq indubitably communicated the specific message that innocent Iraqi civilians should not be harmed either by a U.S. military strike or the Iraqi regime – a

[3] Without any opportunity for discovery and a hearing, however, Mr. Clancy is unfairly and severely handicapped in making this defense.

message most certainly understood by its audience. Such expressive conduct is protected under *Spence.*

VII. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY VIOLATE THE RIGHT TO INFORMATION PROTECTED BY THE FIRST AMENDMENT.

As an adjunct to the protection of free speech and expressive conduct, the First Amendment protects the right to obtain information. *Procunier v. Martinez*, 416 U.S. 396 (1974). The *Procunier* court determined that a California Department of Corrections regulation authorizing censorship of "inflammatory political, racial, or religious or other views" in prisoner mail failed the four-part *O'Brien* test because it authorized far broader censorship than was justified by any legitimate government interest. Similarly, *LaMont v. Postmaster General*, 381 U.S. 301 (1965), involved a U.S. Postal Service requirement that recipients of "communist propaganda" execute a form authorizing delivery of such mail. The Court struck down the requirement, characterizing it as "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *LaMont*, 381 U.S. at 307, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The Iraqi Sanctions Regulations fail *O'Brien*'s four-prong test, too. Effectively prohibiting the right to import information and informational materials originating in Iraq, they insult the First Amendment even more than the regulations invalidated in *Procunier* or in *LaMont.* A blanket ban on information and informational materials far exceeds any restraint necessary to fulfill any legitimate government purpose.

Moreover, the absolute ban on information acts as a prior restraint on First Amendment freedoms. "'Any system or prior restraints of expression … [bears] a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)(citations omitted) *see also Nebraska Press Association v. Stuart,* 427 U.S. 539, 559 (1976) ("Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.")

VIII. THE IRAQI SANCTIONS REGULATIONS ARE INVALID BECAUSE THEY RESTRICT THE RIGHT TO TRAVEL PROTECTED BY THE FIFTH AMENDMENT.

The Due Process Clause of the Fifth Amendment protects the right of international travel. *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) (ban on issuing passports to Communist Party members "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment"); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel "part of the 'liberty' of which the [U.S.] citizen cannot be deprived without due process of law"). Accordingly, "[i]nternational travel, like interstate travel, is a fundamental right" subject to strict scrutiny. *In re Aircrash in Bali*, 684 F.2d 1301, 1309 (9th Cir. 1982).

"'Freedom of movement across frontiers in either direction, and inside frontiers as well, is a part of our heritage. Travel abroad, like travel within the country … may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.'" *Aptheker*, 378 U.S. at 505-506, *citing Kent*, 357 U.S. at 125-127.

Restrictions on the right to travel can be upheld only if they are "carefully tailored to serve a substantial and legitimate government interest." *Id*. at 1310-11, citing *Aptheker*, 378 U.S. at 507-08. The government's interest in punishing the Government of Iraq for its 1990 invasion of Kuwait and international law and human rights violations is substantial and legitimate. But imposing significant civil penalties on individuals seeking to alleviate the suffering of the Iraqi people by traveling to Iraq is neither narrowly tailored nor consistent with furthering those same interests. No connection exists between the government's stated interest in punishing the Government of Iraq and extracting monetary penalties from U.S. citizens.

Although the Supreme Court upheld the Cuba travel ban based on foreign policy justifications, *Regan v. Wald*, 468 U.S. 222, 242-44 (1984), in this instance, *Regan* is readily distinguishable and not applicable. Unlike *Aptheker* and *Kent*, which struck down politically-based travel restrictions that implicated both First Amendment and Fifth Amendment rights, *Regan* involved a travel ban applicable to all travelers, regardless of viewpoint or purpose. *Regan*, 468 U.S. at 241-42 (the government "made no effort selectively to deny passports on the basis of political belief or affiliation"). Here, where OFAC's enforcement practices evidence an effort to selectively penalize those who spoke out to oppose U.S. policies in Iraq, the analysis is governed by *Aptheker* and *Kent*, not *Regan*.

Moreover, *Regan* rested on the assumption that the Cuba travel ban effectively prevented the introduction of hard currency to Cuba. "Given the traditional deference to executive judgment [in the conduct of foreign relations] we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism – by restricting travel." *Id.* at 243 (citations omitted). Thus, *Regan* did not endorse an absolute ban on travel *qua* travel or the associational and informational interests served by the freedom to travel. Rather, *Regan* upheld a ban necessary to prevent the introduction of currency that could be used against American interests. That doesn't describe the absolute travel ban at issue here.

CONCLUSION

The United States Constitution protects Mr. Clancy's travel to Iraq to express concern for innocent victims of armed conflict and voice his objection to the impending war. The OFAC regulations impermissibly restrict his constitutional rights to speech, information, and travel. They also exceed the authority Congress conferred in the Iraqi Sanctions Act and violate international law. OFAC's implementation of its Regulations, moreover, violates Mr. Clancy's privilege not to incriminate himself and his right to due process of law before a deprivation of his property. In any case, Mr. Clancy in fact provided no services to the Government of Iraq or any

entity owned by the Government of Iraq. His actions, strictly humanitarian, fostered the spirit of the "Humanitarian Aid" exception in the Iraqi Sanctions Regulations and actually were consistent with the underlying purposes of the Iraqi Sanctions Act.

Mr. Clancy reserves the right to raise additional legal arguments and defenses and, as stated above, reserves his right to object to or deny OFAC's allegations in future proceedings before OFAC or a competent tribunal.

For these reasons, we respectfully submit that OFAC is without authority to penalize Mr. Clancy based on the Prepenalty Notice issued pursuant to the Iraqi Sanctions Regulations.

Sincerely,

LA FOLLETTE GODFREY & KAHN

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