

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

Procedural Issue	CAFRA ¹	IEEPA ²
<i>Recognized Standard of Proof:</i> Is a recognized standard of proof required before the U.S. Government (USG) may seize or freeze assets?	<i>Yes:</i> If the USG's theory of forfeiture is that the property was used to facilitate a criminal offense or was involved in such offense, prove a "substantial connection between the property and the offense." ³	<i>No:</i> The Office of Foreign Assets Control (OFAC) needs 1) a presidential declaration of national emergency ⁴ and 2) a designation by the President ⁵ or the Secretary of the Treasury ⁶ based on his or her finding that an entity may, at a minimum, be "otherwise associated with terrorism," ⁷ except that the Secretary may also freeze assets during the pendency of an investigation. ⁸
<i>Government's Burden of Proof:</i>	<i>Yes:</i> The USG bears the burden of proving the forfeitability of the targeted property by a preponderance of the evidence. ⁹	<i>No:</i> The USG enjoys a presumption in favor of its allegations. ¹⁰
<i>Limited Basis for Deprivation:</i> Is the USG restricted to using evidence normally admissible at trial in proving that assets are seizable/freezable?	<i>Yes:</i> The USG may not use hearsay evidence or other secondary sources of information to satisfy its evidentiary burden. ¹¹	<i>No:</i> Practically any information is valid, including that from secondary sources such as news reports, intelligence reports, raw intelligence data, hearsay declarations, and even trash. ¹²
<i>Pre-Deprivation Notice:</i> Is pre-seizure/-freeze notice required?	<i>No:</i> Pre-freeze notice is not required. ¹³	<i>No:</i> Pre-freeze notice is not required. ¹⁴
<i>Pre-Deprivation Hearing:</i> Is a pre-seizure/-freeze judicial-type hearing required?	<i>No:</i> The USG may afford a prompt post-seizure hearing to satisfy due process. ¹⁵	<i>No:</i> OFAC need only provide an opportunity for an entity to submit responsive evidence in writing. ¹⁶
<i>Limited Sanctions:</i> Are sanctions and prohibitions limited to the seizure/freezing of the targeted assets?	<i>Yes:</i> By definition, civil forfeiture is limited to indicted property.	<i>No:</i> All transactions involving domestic assets of a designated entity are frozen; ¹⁷ a designated entity may not receive, and no one may provide it with, any material support; ¹⁸ and the President may forfeit the

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<i>Restricted Official Use of Assets:</i> Is the USG restricted from putting seized/frozen assets to official use?	<i>No:</i> Forfeited or seized assets are available for funding various law-enforcement activities. ²⁰	assets without complying with CAFRA. ¹⁹ <i>No:</i> The USG may retain frozen assets for various instrumental policy purposes. ²¹
<i>Duty of Maintenance of Assets:</i> Does the USG have a duty to maintain the integrity of assets under its control?	<i>Yes:</i> A court may appoint a provisional custodian to manage forfeitable property, ²² and mandamus relief may be available to compel the USG to perform maintenance duties. ²³	<i>No:</i> The USG has no apparent duty to appoint a custodian for frozen assets ²⁴ and could foreseeably return property in a damaged condition. ²⁵
<i>Payment of Operational Expenses:</i> May a claimant pay operational expenses from seized/frozen assets?	<i>Probably Not:</i> A claimant may file a hardship petition (see below at "Humanitarian Exception"), but a court granting such a petition must balance the potential hardship with the risk that the property will be made unavailable for forfeiture upon its return to the claimant.	<i>No:</i> Under no circumstances may a blocked entity apply to OFAC for a license to continue its operations. ²⁶
<i>Humanitarian Exception:</i> May a claimant access seized/frozen assets for humanitarian needs?	<i>Yes:</i> A claimant may file a petition for the release of seized property pending trial to avoid hardship. ²⁷	<i>No:</i> The President has explicitly foreclosed the exception for provision of humanitarian-relief aid by charitable organizations. ²⁸
<i>Payment of Overhead:</i> May a claimant pay administrative overhead from seized/frozen assets?	<i>Probably Not:</i> A claimant may file a hardship petition (see above at "Humanitarian Exception"), but a court granting such a petition must balance the potential hardship with the risk that the property will be made unavailable for forfeiture upon its return to the claimant.	<i>Maybe,</i> but this requires discretionary, modifiable, and revocable license issued by OFAC on a case-by-case basis. ²⁹

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<i>Payment of Debts:</i> May a claimant pay outstanding debts from seized/frozen assets?	<i>Probably Not:</i> A claimant may file a hardship petition (see above at "Humanitarian Exception"), but a court granting such a petition must balance the potential hardship with the risk that the property will be made unavailable for forfeiture upon its return to the claimant.	<i>Maybe,</i> but this requires discretionary, modifiable, and revocable license issued by OFAC on a case-by-case basis. ³⁰
<i>Payment of Attorney from Assets:</i> May a claimant pay attorneys' fees from seized/frozen assets?	<i>Yes,</i> but only if the claimant can defeat the USG's showing of probable cause. ³¹	<i>Unlikely:</i> Requires discretionary, modifiable, and revocable license issued by OFAC on a case-by-case basis, ³² and OFAC has generally required blocked entities to pay fees from extra-jurisdictional "fresh funds." ³³
<i>Contingent Payment of Attorney:</i> May a claimant retain counsel on a contingency basis?	<i>Yes:</i> Because a claimant who substantially prevails at trial is entitled to recover fees and costs (see below at "Recovery of Fees & Costs), the right to retain counsel according to any payment method is not impaired.	<i>Unlikely:</i> OFAC has in the past refused to authorize the retention of counsel on a contingency basis that would entail payment of attorneys' fees by a blocked entity from any funds recovered by settlement or judgment. ³⁴
<i>Post-Deprivation Notice:</i> Is the USG required to provide post-deprivation notice of its actions to interested parties?	<i>Yes:</i> In general, the Government has 60 days from the date of the seizure of the property to send notice of the forfeiture action to all interested parties. ³⁵	<i>Yes:</i> The USG may withhold notice until after a designation or freeze is made. ³⁶
<i>Right to Counsel:</i> Does a claimant have a right to retain counsel?	<i>Yes:</i> Retention of counsel is not prohibited because forfeiture, by definition, only applies to subject assets and not to persons.	<i>Maybe,</i> but as of yet has not been addressed by courts. ³⁷
<i>Court-Appointed Counsel:</i> Does a claimant	<i>Yes:</i> Judicial appointment of counsel is	<i>No,</i> unless the litigant is at risk of losing his

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

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have a right to court appointment of counsel?	discretionary for criminal defendants in related civil cases ³⁸ and mandatory for litigants in cases involving forfeiture of primary residences. ³⁹	or her personal freedom (which is unlikely because courts have already held freezing to be non-punitive). ⁴⁰
<i>Judicial Review:</i> Is a claimant entitled to judicial review?	<i>Yes:</i> Seizures may be reviewed after a final agency action in the corresponding U.S. District Court pursuant to the Administrative Procedures Act (APA). ⁴¹	<i>Yes:</i> Designations and freezes may be reviewed after a final agency action in the corresponding U.S. District Court pursuant to the APA. ⁴²
<i>New Evidence as Basis of Review:</i> May a court review new evidence?	<i>No:</i> Judicial review under the APA is normally confined to the full administrative record already in existence at the time the decision was made, ⁴³ but supplementation of the administrative record is occasionally appropriate. ⁴⁴	<i>No:</i> Review is limited to the administrative record as presented by OFAC, including normally inadmissible evidence, and claimants cannot submit new evidence. ⁴⁵
<i>Substantive Remedies Available:</i> May an administrative panel or court review the substantive reasonableness of a seizure/freeze?	<i>Yes:</i> Claimants have three remedies for challenging civil forfeitures: petitions for hardship, ⁴⁶ disproportional-punishment challenges, ⁴⁷ and the innocent-ownership defense. ⁴⁸	<i>No:</i> Review is limited to the procedural reasonableness of OFAC's action, ⁴⁹ determinations that an entity threatens national security have been deemed non-justiciable, ⁵⁰ and extraordinary deference is given to OFAC determinations. ⁵¹
<i>Discovery of All Relevant Evidence:</i> May a claimant compel disclosure of all relevant evidence?	<i>No:</i> The USG may present classified information <i>ex parte</i> and <i>in camera</i> . ⁵²	<i>No:</i> OFAC may submit evidence <i>ex parte</i> and <i>in camera</i> for judicial review; classified information is undiscoverable as long as it remains classified. ⁵³
<i>Recovery of Fees & Costs:</i> May a claimant recover fees and costs upon a successful judgment?	<i>Yes:</i> Payment of fees and costs is mandatory for all litigants who substantially prevail in litigation. ⁵⁴	<i>Unknown</i>

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

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<i>Takings Challenge:</i> Can a deprivation lead to a takings challenge?	<i>Yes:</i> CAFRA does not impair a claimant's Fifth Amendment right to challenge deprivations of private property without just compensation. ⁵⁵	<i>Unlikely:</i> Courts so far have held that a freeze on assets does not constitute a constitutionally cognizable taking without just compensation. ⁵⁶
<i>"Double Jeopardy" Limitation:</i> Is the USG prohibited from reinitiating a seizure/freeze of previously seized/frozen assets?	<i>Yes:</i> If the USG fails to file a civil complaint or criminal indictment with 90 days, it must promptly release the property and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense. ⁵⁷	<i>No:</i> Even if a prolonged freeze were to give rise to a takings challenge, the USG could simply release and simultaneously "re-freeze" the targeted property through publication of notice in the <i>Federal Register</i> , without ever returning the property to the designated entity.

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

Endnotes

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- ¹ Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 14 Stat. 202 (codified as amended at various sections of 8, 18, 21, 28, 31, and 42 U.S.C. (2006)).
- ² International Emergency and Economic Powers Act (IEEPA), Pub. L. No. 95-223, tit. II, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707).
- ³ 18 U.S.C. § 983(c)(3).
- ⁴ 50 U.S.C. § 1701(a) (defining "national emergency" as "any unusual or extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States").
- ⁵ 50 U.S.C. § 1702(a)(1).
- ⁶ Exec. Order No. 13,224, § 7, 66 FED. REG. 49079, 49081 (Sept. 23, 2001).
- ⁷ *Id.* at 49079-80. "Terrorism" in this context means any activity that involves a violent act or an act dangerous to human life, property, or infrastructure; and appears to be intended to intimidate civilians, to influence governmental policy by intimidation or coercion, or to affect the conduct of the Government by mass destruction, assassination, kidnapping, or hostage-taking. *Id.* at 49080. After a federal court held the phrase "otherwise associated with" to be unconstitutionally vague, *Humanitarian Law Project v. U.S. Dep't of Treas.*, 463 F. Supp. 2d 1049, 1064 (C.D. Cal. 2006), the Treasury redefined the term. *See* 31 C.F.R. § 594.316. The clarified phrase was upheld as valid. *See Humanitarian Law Project v. U.S. Dep't of Treas.*, 484 F. Supp. 2d 1109 (C.D. Cal. 2007).
- ⁸ 50 U.S.C. § 1702(a)(1)(B) (added by § 6 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at various sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.)); Exec. Order No. 13,224, § 7, 66 FED. REG. at 49081 (transferring to the Secretary of the Treasury "all powers granted to the President by IEEPA"); 31 C.F.R. §§ 535.311-535.312, 595.310 (defining property interests). *See Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 794 (N.D. Ill. 2002) (holding that IEEPA permits the blocking of a U.S. entity's domestic assets "during the pendency of an investigation when there is evidence that a foreign country or a national thereof has any interest in those assets")
- ⁹ 18 U.S.C. § 983(c)(1). If the government's theory of forfeiture is that the property was used to facilitate a criminal offense or was involved in such offense, the government must prove a "substantial connection between the property and the offense." 18 U.S.C. § 983(c)(3).
- ¹⁰ Extraordinary judicial deference is given to OFAC actions. *See Global Relief Found.*, 207 F. Supp. 2d at 793 (in cases involving foreign policy and national security, courts are "particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations" (quoting *Paradissiotis v. Rabin*, 171 F.3d 983, 988 (5th Cir. 1999))).
- ¹¹ Although hearsay may be used to establish probable cause, it is not admissible for establishing the forfeitability of the property by a preponderance of the evidence. 18 U.S.C. § 983(c)(1). However, the government is explicitly permitted to use evidence "gathered after the filing of a complaint for forfeiture" to meet its burden of proof at trial. U.S.C. § 983(c)(2). Nevertheless, the Government must still have had enough evidence to establish probable cause at the time of filing or seizure. *See* 146 CONG. REC. H2040-01, at H2050 (daily ed. Apr. 11, 2001) (statement of Rep. Hyde); Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 108-09 (2001) [hereinafter Cassella, *CAFRA 2000*].
- ¹² *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 11 (2004) [hereinafter NAT'L COMM'N ON 9-11, MONOGRAPH]. Despite the fact that almost all of this evidence would normally be inadmissible in any other civil trial context, courts have not yet blinked at OFAC's the-sky's-the-limit approach to using evidence. *See, e.g., United States v. Soussi*, 316 F.3d 1095, 1108-09 (10th Cir. 2002); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001).
- ¹³ 18 U.S.C. § 983(a)(1).
- ¹⁴ *Global Relief Found.*, 207 F. Supp. 2d at 803.
- ¹⁵ *United States v. Melrose E. Subdiv.*, 357 F.3d 493, 500 (5th Cir. 2004).
- ¹⁶ *Nat'l Council*, 251 F.3d at 209; *Holy Land Found.*, 333 F.3d at 164.
- ¹⁷ 50 USC 1702(a)(1)(B); Exec. Order No. 13,224, §1, 66 FED. REG. at 49079-49080.

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

¹⁸ 18 U.S.C. § 2339A. "Materials support" includes "any property, tangible or intangible, or service, including . . . expert advice or assistance." 18 U.S.C. § 2339A(b)(1). Providing material support or otherwise attempting or conspiring to do so may result in civil penalties, such as monetary fines or even life imprisonment. 18 U.S.C. § 2339A; 18 U.S.C. § 2339B(a)-(b).

¹⁹ When the USG is engaged in armed hostilities with a foreign country or foreign nationals, the President is empowered to forfeit "any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States." 50 U.S.C. § 1702(a)(1)(C). The USA PATRIOT Act explicitly exempts such forfeiture actions from the procedural safeguards of CAFRA. Pub. L. No. 107-56, § 316(d), 115 Stat. 272, 310 (amending 18 U.S.C. § 983(i)(2)(D)).

²⁰ Federal law permits assets forfeited or seized by the Department of Justice to be placed in a special Department of Justice Forfeiture Fund for funding law-enforcement activities. 28 U.S.C. § 524(c)(1). Similarly, federal law also authorizes the Department of the Treasury to deposit assets seized and forfeited by the Treasury in a Treasury Forfeiture Fund, which can be drawn on to pay for various law-enforcement activities. 31 U.S.C. § 9703(a).

²¹ The USG may retain a pool of blocked assets as a means of leverage in negotiations for the resolution of the broader directive or defensive policy objective underlying the freezing or embargo regime. Alternatively, the USG may hold a pool of blocked assets in order to be used if necessary to solve the claims of U.S. nationals against the target nation or entity. *See* Sokol Braha, *The Changing Nature of U.S. Sanctions Against Yugoslavia*, 8 MSU-DCL J. INT'L L. 273, 287 (1999).

²² 18 U.S.C. § 983(j)(1) (providing that the court may "appoint conservators, custodians . . . or trustees, or take any other action to . . . preserve the availability of property subject to civil forfeiture").

²³ The federal mandamus statute provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus relief is available only if 1) the petitioner's right to issuance of a writ of mandamus is clear and indisputable, 2) the issuing court is satisfied that the writ is appropriate under the circumstances, and 3) no other adequate means to attain the relief sought is available. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004).

²⁴ *See Milena Ship Mgmt. Co.*, 995 F.2d at 625 (5th Cir. 1993) (holding that OFAC had no implied duty of maintenance and care with respect to vessels blocked under the former Republic of Yugoslavia embargo program). *See also* Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 343 (2002).

²⁵ As a corollary to the USG's lack of duty to appoint a custodian, OFAC likely has no duty to ensure the integrity of seized property under its control or to compensate third parties for incidental damages resulting from a freeze and could foreseeably return to the owner property that was blocked in error in a damaged condition. That the USG has no duty to compensate innocent third parties for incidental damage to their property caused by blocking orders is also clear. *See Rockefeller Ctr. Props. v. United States*, 32 Fed. Cl. 586, 591-94 (1995) (holding that a blocking order preventing a landlord from evicting his tenant and from drawing on a letter of credit did not constitute unconstitutional takings within the meaning of the Fifth Amendment, given the importance of the public interest served by presidential actions carried out under the IEEPA).

²⁶ *See* Nicole Nice-Petersen, Note, *Justice for the "Designated": The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1406, n.142 (2005).

²⁷ 18 U.S.C. § 983(f). A claimant must show that, among other things, he has filed a claim to the property, he has a possessory interest in the property, and the Government's continued possession will cause hardship outweighing the risk that the property will be made unavailable for forfeiture upon its return to the claimant. 18 U.S.C. § 983(f)(1).

²⁸ Exec. Order No. 13,438, 72 FED. REG. 39719, 39719 (July 17, 2007) (prohibiting donations of "funds, goods, or services"); Exec. Order No. 13,372, 70 FED. REG. 8499, 8499 (Feb. 16, 2005) (amending Executive Orders 13,224 and 12,947 to prohibit donations of "articles, such as food, clothing, and medicine, intended to be used to relieve human suffering"). The IEEPA expressly exempts donations of humanitarian relief aid from the President's regulatory authority unless "the President determines that such donations . . . would seriously impair his ability to deal with any national emergency . . . or . . . would endanger Armed Forces of the United States which are engaged in hostilities . . ." 50 U.S.C. § 1702(b)(2). Executive Orders 13,438 and 13,372 represent such a determination. OFAC has also refused to grant licenses authorizing the transfer of blocked assets to seemingly legitimate charities due to concerns that such funds can be at least partially diverted to terrorist activities and that OFAC has limited ability to monitor the use of funds overseas. *See* NAT'L COMM'N ON 9-11, MONOGRAPH, *supra* note 12, at 101. In one highly publicized case, *Benevolence International Foundation, Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002), a blocked charity sought a license to transfer \$700,000 to \$800,000 of its

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

funds blocked by the Government to overseas charitable causes, even offering to have Treasury officials escort the money to the intended recipient and monitor its eventual use. Predictably, OFAC denied the license. *Id.*

²⁹ 31 C.F.R. § 501.801 (authorizing specific licenses on a case-by-case basis).

³⁰ *Id.*

³¹ See *Melrose E. Subdiv.*, 357 F.3d at 501, 508 (denying claimant's motion to release restrained funds needed to retain an attorney in a related criminal case, upon finding that the government had met its burden of having to show probable cause at a post-restraint hearing to believe that the restrained assets were forfeitable). The government's burden of proof for justifying a pretrial restraining order is probable cause to believe that the restrained assets are subject to civil forfeiture. 18 U.S.C. § 983(c)(1). However, such a showing may not be necessary if not all of the claimant's assets have been seized because forfeiture only applies to targeted assets and not to persons, meaning that legal uses of non-seized assets are not prohibited. Moreover, the court may appoint attorneys to represent criminal defendants in their related civil forfeiture proceedings. 18 U.S.C. § 983(b)(1). In addition, when the Government seeks to forfeit an indigent claimant's primary residence, the court must afford the person with representation. 18 U.S.C. § 983(b)(2).

³² OFAC may issue licenses authorizing a designated entity to access frozen funds for paying attorneys' fees. 31 C.F.R. § 595.506; *Global Relief Found.*, 207 F. Supp. 2d at 786.

³³ "Fresh funds" are funds drawn from unblocked, foreign sources of funding not subject to USG jurisdiction, such as foreign bank accounts held at non-U.S. financial institutions. See William B. Hoffman, *How to Approach a New Office of Foreign Assets Control Sanctions Program*, 27 STETSON L. REV. 1413, 1422-23 (1998). At least one court has upheld OFAC's fresh-funds rule. *Beobanka d.d. Belgrade v. United States*, Nos. 95 Civ. 5138 (HB), 95 Civ. 5771 (HB), 1997 WL 23182, at *2 (S.D.N.Y. Jan. 22, 1997) (holding that the fresh-funds policy was "rationally related to the legitimate goals of the [Federal Republic of Yugoslavia] sanctions program").

³⁴ See *Beobanka*, 1997 WL 23182, at *1 (upholding OFAC's denial of applications to retain counsel to be paid either on a contingency basis from blocked funds recovered by settlement or judgment). Restrictions on the method of payment of counsel have been found not to deprive a litigant of due process of law. See *id.* at *1-2. Such restrictions are upheld against equal protection challenges if they are rationally related to the advancement of legitimate governmental purposes. See *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

³⁵ 18 U.S.C. § 983(a)(1). The imposition of strict deadlines on the Government is meant to curb prosecutorial abuse. See Cassella, *CAFRA 2000*, *supra* note 12, at 125.

³⁶ See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.C. Cir. 2002); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 49-50 (D.D.C. 2005).

³⁷ Though the right of a designated entity, under either the IEEPA or the AEDPA's licensing authority, to hire counsel without first obtaining a license from OFAC has not yet been addressed by the courts, at least one court has held that, under licensing provisions of the Trading with the Enemy Act (TWEA), Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 App. U.S.C. §§ 1-44), nearly identical to those of the IEEPA, OFAC "lacks authority to condition the bare formation of an attorney-client relationship on advance government approval." *Amer. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 866-67 (D.C. Cir. 1984) (interpreting 50 App. U.S.C. § 5).

³⁸ 18 U.S.C. § 983(b)(1).

³⁹ 18 U.S.C. § 983(b)(2).

⁴⁰ See *Lassiter v. Dep't of Soc. Svcs. of Durham Cty., N.C.*, 452 U.S. 18, 26-27 (1981). In *Lassiter*, the Supreme Court called for this presumption to be balanced against three factors: 1) the private interests at stake, 2) the government interest involved, and 3) the risk that the procedures used will lead to an erroneous decision. *Id.* at 27. This burden is almost impossible to satisfy, leading to the common perception that appointment of counsel in a civil case is "a privilege and not a right." *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965). See generally Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2003).

⁴¹ 5 U.S.C. §§ 702-703.

⁴² 5 U.S.C. §§ 702-703.

⁴³ *Environ. Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981).

Illustrating the "Necessity Conundrum": A Comparison of Due Process Entitlements in the Cases of Civil Asset Forfeiture Under CAFRA and Terrorist-Asset Freezing Under IEEPA

⁴⁴ Supplementation of the administrative record is appropriate when "(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

⁴⁵ 5 U.S.C. § 706; *Holy Land Found.*, 219 F. Supp. at 67 ("the Court does not undertake its own fact-finding" but "review[s] the administrative record assembled by the agency to determine whether its decision was supported by a rational basis").

⁴⁶ Under the hardship remedy, a claimant may file a petition for the release of seized property with the seizing authority, asserting that the property should be released to the claimant pending trial to avoid hardship outweighing the risk that the property will be made unavailable for forfeiture upon its return to the claimant. 18 U.S.C. § 983(f).

⁴⁷ A claimant may challenge the forfeiture on the ground that it is grossly disproportionate to the gravity of the crime. 18 U.S.C. § 983(g); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that any forfeiture that is grossly disproportional to the gravity of the offense violates the Excessive Fines Clause of the Eighth Amendment).

⁴⁸ Pursuant to the innocent owner defense, a person who held a property interest at the time of the alleged crime bears the burden of proving either that he was unaware that his property was being employed for an illegal purpose or that, upon learning of the illegal use, he "did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2).

⁴⁹ 5 U.S.C. § 706(2). See *Holy Land Found.*, 219 F. Supp. 2d at 66-67 ("In making this determination, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971))).

⁵⁰ See *Regan v. Wald*, 468 U.S. 222 (1984) ("[m]atters related 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))), quoted in *Global Relief Found.*, 207 F. Supp. 2d at 787-88.

⁵¹ See *Global Relief Found.*, 207 F. Supp. 2d at 793 (in cases involving foreign policy and national security, courts are "particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations." (quoting *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999))).

⁵² 28 C.F.R. § 17.46(c).

⁵³ 50 U.S.C. § 1702(c).

⁵⁴ 28 U.S.C. § 2465(b)(1)(A).

⁵⁵ U.S. CONST. amend. V.

⁵⁶ *Global Relief Found.*, 207 F. Supp. 2d at 802 (a "temporary blocking of assets does not constitute a taking"); *DC Precision, Inc. v. U.S. Government*, 73 F. Supp. 2d 338, 343 n.1 (S.D.N.Y. 1999).

⁵⁷ 18 U.S.C. § 983(a)(3)(B).