No. 99-44

In the Supreme Court of the United States

CHRIS PARADISSIOTIS, PETITIONER

v.

LAWRENCE H. SUMMERS, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, grants the President broad authority to impose economic sanctions on foreign governments that threaten the security of the United States. In 1986, President Reagan declared Libya to pose such a threat and issued Executive Order Nos. 12,543 and 12,544, 3 C.F.R. 181, 183 (1987), restricting commerce between the United States and Libya. Pursuant to those Orders, the Department of the Treasury promulgated the Libyan Sanctions Regulations, 31 C.F.R. Pt. 550, and in 1991 it identified petitioner—a Cypriot businessman in high-level positions with corporations controlled by Libya—as a Specially Designated National of Libya. The questions presented are as follows:

1. Whether the listing of petitioner as a Specially Designated National of Libya violated the Bill of Attainder Clause of the Constitution, Art. I, § 9, Cl. 3.

2. Whether petitioner had standing to challenge the requirement that his United States counsel obtain a license before accepting compensation for services provided.

3. Whether the courts below correctly deferred to the Treasury Department's interpretation of the Libyan Sanctions Regulations.

4. Whether IEEPA, as implemented by the Department of the Treasury, effects an unconstitutional delegation of legislative power.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 171 F.3d 983. The opinions of the district court (Pet. App. 12a-39a, 40a-83a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1999. The petition for a writ of certiorari was filed on June 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, "revise[s] and delimit[s] the President's authority to regulate international economic transactions during wars or national

emergencies." S. Rep. No. 466, 95th Cong., 1st Sess. 2 (1977). Under IEEPA, the President is authorized "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, if [he] declares a national emergency with respect to such threat." 50 U.S.C. 1701(a).

Pursuant to his authority under IEEPA and the Constitution, President Reagan issued Executive Order Nos. 12,543 and 12,544. 3 C.F.R. 181, 183 (1987); see Pet. App. 2a, 13a, 41a-42a. The President declared that the government of Libya posed "an unusual and extraordinary threat to the national security and foreign policy of the United States." 3 C.F.R. 181 (1987). The Executive Orders banned commerce with Libya and froze all property interests of the Libyan government and its agents that were or thereafter came within the United States or the possession or control of United States persons. See Pet. App. 2a, 13a, 41a.

The President authorized the Secretary of the Treasury, in consultation with the Secretary of State, to take such actions as might be necessary to carry out the purposes of IEEPA and the Executive Orders. 3 C.F.R. 182, 183 (1987); see Pet. App. 14a, 42a. Pursuant to that authorization, the Secretary of the Treasury, through the Office of Foreign Assets Control (OFAC), promulgated the Libyan Sanctions Regulations. 31 C.F.R. Pt. 550; see Pet. App. 2a-3a, 14a, 42a. Those regulations block assets of the "Government of Libya" and prohibit trade and financial transactions in which the "Government of Libya" has an interest or that involve the territory of Libya. 31 C.F.R. 550.201-550.209. The regulations define the term "Government of Libya" to include the State and government of Libya

and its political subdivisions and agencies, 31 C.F.R. 550.304(a); any corporation or other organization controlled directly or indirectly by Libya, 31 C.F.R. 550.304(b); and "[a]ny person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing," 31 C.F.R. 550.304(c). A person within the latter group is referred to as a Specially Designated National (SDN) of Libya. Pet. App. 15a n.2.

2. Petitioner is a Cypriot national residing outside the United States. Pet. App. 45a; see Pet. 5. In 1991, OFAC listed petitioner as an SDN of Libya. Pet. App. 3a, 16a-17a, 47a. That designation was based on petitioner's position as president and member of the board of directors of Holborn Investment Company Limited and Holborn European Marketing Company Limited, both of which had been listed as SDNs. *Id.* at 3a, 17a n.4, 45a-47a.

Petitioner nevertheless applied to OFAC for various licenses to conduct otherwise prohibited financial transactions with United States persons, including the sale of stock options in a United States company. OFAC granted a license to petitioner's retained counsel in the United States authorizing their receipt of compensation for providing legal advice and representation. However, the agency denied petitioner's request for a license that would have allowed him to conduct personal and private business affairs with United States persons. OFAC also denied petitioner's request to be removed from the list of Libyan SDNs. Pet. App. 3a-4a, 17a-22a, 47a-52a.

3. In 1996, petitioner filed suit in federal district court. Petitioner challenged OFAC's designation of

him as an SDN. In the alternative, he contended that under the Libyan Sanctions Regulations he should be treated as the "Government of Libya" only with respect to financial transactions undertaken on behalf of Libya or a Libyan agency. Petitioner also asserted that OFAC's actions violated IEEPA, the agency's own regulations, and various constitutional provisions.

The district court granted the government's motion for summary judgment. Pet. App. 40a-83a. The court rejected petitioner's argument that OFAC had erred in construing the Libyan Sanctions Regulations to apply to (1) transactions in which petitioner had acted in a "personal" capacity rather than as an agent of the Libyan government, and (2) transactions involving property acquired by petitioner before the regulations took effect. The court examined the pertinent regulatory provisions and found "no exception for transactions by a person, who falls within the definition of the 'Government of Libya,' to the extent that a transaction is characterized as in a 'personal sphere.'" *Id.* at 57a. The court found "OFAC's interpretation of the [regulations] to be consistent with and supported by the language of the regulations and the executive orders." *Id.* at 58a.[1] It also noted that "[t]he regulations do not

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[1] The court explained:

> OFAC's interpretation that the executive orders and the [Libyan Sanctions Regulations] allow it to block all property of controlled entities of Libya, without determining whether the particular transaction at issue will ultimately benefit or serve the interests of the Government of Libya, directly or indirectly, is a reasonable interpretation of the language of the provisions. The interpretation is consistent with the sanction's stated goals of isolating Libya by severing its economic ties to the rest of the world.

Pet. App. 58a-59a.

make the date on which property was acquired a limiting factor." *Id.* at 60a.

The district court next addressed and rejected petitioner's constitutional claims. The court held that OFAC's designation of petitioner as an SDN did not inflict punishment and therefore could not be regarded as an unconstitutional bill of attainder. Pet. App. 68a-71a. The court also rejected petitioner's challenges under the Ex Post Facto Clause (U.S. Const. Art. I, § 9, Cl. 3) and the Fifth and Sixth Amendments. Pet. App. 71a-78a. The district court subsequently denied petitioner's motion for reconsideration. *Id.* at 12a-39a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-11a.

The court first rejected petitioner's argument that he is subject to the Libyan Sanctions Regulations only with respect to transactions undertaken on behalf of the government of Libya. The court observed that "an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation." Pet. App. 6a (quoting *Consarc Corp.* v. *United States Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995)). It stated that the definition of the term "Government of Libya" contained in 31 C.F.R. 550.304(c) is intended "to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the government of Libya." Pet. App. 6a. The court of appeals concluded that "OFAC's interpretation of its own regulation is not plainly inconsistent with the regulatory language, nor is it unreasonable, and in fact it represents the only practical interpretation." *Id.* at 8a. The court further held

that the regulation was reasonable and consistent with IEEPA and the Executive Orders. *Id.* at 8a-9a.

The court of appeals next addressed petitioner's constitutional claims.[2] The court held that the designation of petitioner as an SDN did not constitute a bill of attainder because it did not inflict punishment. Pet. App. 9a-10a.[3] The court found that the challenged provision of the Libyan Sanctions Regulations was not void for vagueness, explaining that petitioner "knows he is an SDN and is part of the 'Government of Libya' and is clearly aware of the consequences of that status." *Id.* at 10a. The court held that petitioner lacked standing to challenge the requirement that his United States counsel must obtain a license before accepting compensation for their provision of legal services. It explained that "OFAC granted [petitioner's] only request for a license to obtain counsel, and [petitioner] has not shown that he will be deprived of legal services in the future based on the regulations." *Id.* at 10a-11a. Finally, the court of appeals held that petitioner's takings claim lay within the exclusive jurisdiction of the Court of Federal Claims, and it accordingly vacated the portion of the district court's judgment dismissing that claim on the merits. *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

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[2] The court stated that "[i]t is not clear whether, as a foreign national residing outside the U.S., [petitioner] can assert these claims, but we shall assume *arguendo* that he can." Pet. App. 9a.

[3] The court also noted that "[n]o circuit court has yet held that the bill of attainder clause applies to regulations promulgated by an executive agency." Pet. App. 9a (citation omitted).

any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 8-14) that OFAC's decision to list him as an SDN constituted a bill of attainder. The court of appeals rejected that claim, finding that "[t]he mere publication of [petitioner's] name in the list did not evince an 'intent to punish.'" Pet. App. 10a (quoting *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984)). That holding was correct. Restrictions on the disposition of assets by persons acting on behalf of the government of Libya—a government found by the President to be "an unusual and extraordinary threat to the national security and foreign policy of the United States," Exec. Order No. 12,543, 3 C.F.R. 181 (1987)—serve obvious and important non-punitive purposes. Cf. *Regan* v. *Wald*, 468 U.S. 222, 243 (1984) (government's interest in "curtail[ing] the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—" provided a sufficient justification for ban on travel to Cuba).[4]

Petitioner does not contend that either IEEPA or the relevant Executive Orders constitute bills of attainder. OFAC's listing of petitioner as an SDN is simply a way for the agency charged with administering IEEPA and the Executive Orders to provide notice

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[4] Even if petitioner could demonstrate that his listing as an SDN is punitive in nature, he could prevail on his Bill of Attainder Clause challenge only if he could show that (1) the protections of that Clause apply to foreign nationals residing outside the United States, and (2) the Clause applies to regulatory activities of an Executive agency as well as to legislation passed by Congress. The court of appeals expressed doubt as to each of those propositions but assumed *arguendo* that they are true. See Pet. App. 9a.

of his status under the Libyan sanctions program. The court of appeals properly determined that mere listing "does not inflict * * * punishment." Pet. App. 10a. That fact-specific determination creates no conflict in authority and does not warrant further review.

2. Under the Libyan Sanctions Regulations, an attorney in the United States cannot accept compensation from petitioner without first obtaining a license from OFAC. Petitioner contends (Pet. 14-20) that the license requirement violates his Fifth and Sixth Amendment right to assistance of counsel. The district court and the court of appeals held that petitioner lacked standing to bring that claim because OFAC had previously authorized petitioner's attorneys to accept compensation for legal services, and petitioner could not show that he would be deprived of legal services in the future based on the Libyan Sanctions Regulations. Pet. App. 10a-11a, 34a-35a; see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (under Article III, a plaintiff must demonstrate actual or imminent injury in order to invoke the jurisdiction of a federal court). That holding represents a fact-specific application of established legal principles and raises no issue warranting this Court's review.

In any event, petitioner's underlying Fifth and Sixth Amendment claims lack merit. If the restrictions on petitioner's financial transactions are otherwise valid, the absence of a blanket exception for payments to lawyers creates no constitutional infirmity. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989). Moreover, petitioner cites no authority recognizing a constitutional right to pay counsel in the United States for advice in future business transactions. Cf. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 333-334 (1985) (Due Process Clause

and Sixth Amendment do not require counsel in proceedings that do not approximate trials; citing several cases holding that counsel is not required in various forms of administrative proceedings).[5]

3. A court in reviewing administrative action owes substantial deference to the agency's construction of pertinent statutory and regulatory provisions. See,

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[5] Contrary to petitioner's contention (Pet. 17-19), neither *Bernstein* v. *United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999), nor *American Airways Charters, Inc.* v. *Regan*, 746 F.2d 865, 866 (D.C. Cir. 1984) (Ginsburg, J.), supports his constitutional claim. The Ninth Circuit in *Bernstein* found that the source code of a mathematician's encryption software is speech protected by the First Amendment and that the government's licensing requirements for export of encryption technology imposed an invalid prior restraint on his speech. 176 F.3d at 1138-1145. The decision has nothing to do with access to counsel. *American Airways*, far from supporting petitioner's legal theory, indicates that petitioner's United States counsel can validly be required to seek a license from OFAC before receiving compensation for legal services. Petitioner relies (Pet. 19) on the D.C. Circuit's holding that under the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, OFAC cannot condition the formation of an attorney-client relationship on the acquisition of a government license. *American Airways*, 746 F.2d at 871-876. Whatever the merits of that holding, however, it has no application here, since the *American Airways* court carefully distinguished between the formation of an attorney-client relationship and the payment of fees to counsel. The D.C. Circuit observed that "OFAC has undisputed power to deny [a designated Cuban national] permission to engage in specified commercial transactions. We caution here that nothing in our disposition is properly read as authorizing payment to counsel without the approval of OFAC." *Id.* at 875. In the instant case, the district court correctly distinguished *American Airways*, explaining that "the issue is not the 'bare formation of an attorney-client relationship' but the compensated representation of an SDN by a United States attorney." Pet. App. 78a; see also *id.* at 33a-34a & n.9.

e.g., *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Consarc Corp.* v. *United States Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995). Petitioner contends (Pet. 21-26) that OFAC's interpretation of the relevant provisions raises serious constitutional concerns, and that judicial deference is therefore unwarranted. The court of appeals, however, correctly rejected petitioner's constitutional challenges. See Pet. App. 9a-11a. In any event, the court found that "OFAC's interpretation of its own regulation is not plainly inconsistent with the regulatory language, nor is it unreasonable, *and in fact it represents the only practical interpretation.*" *Id.* at 8a (emphasis added). The court's ultimate disposition of the case therefore did not depend on deference—let alone inordinate deference—to the responsible agency's construction of the Libyan Sanctions Regulations.

4. Finally, petitioner contends (Pet. 26-29) that under OFAC's approach to the implementation of IEEPA, the Act effects an unconstitutional delegation of legislative power. Petitioner cites no decision, and we are aware of none, holding any provision of the Libyan Sanctions Regulations to be invalid on that ground. OFAC's authority to publish the SDN list and to apply the Libyan Sanctions Regulations is ultimately derived from the power vested in the President by IEEPA to "regulate, * * * prevent or prohibit, any * * * use, transfer, withdrawal, * * * or dealing in, or * * * transactions involving, any property in which any foreign country or a national thereof has any interest." 50 U.S.C. 1702(a)(1)(B); see Exec. Order Nos. 12,543, 12,544, 3 C.F.R. 181, 183 (1987) (authorizing the Secretary of the Treasury to employ all powers of the President to carry out his Executive Orders

regarding Libya). As petitioner recognizes (Pet. 29), Congress's power to confer broad discretionary authority upon Executive Branch officials is particularly clear with respect to matters touching upon national security and foreign relations. Cf. *Loving* v. *United States*, 517 U.S. 748, 768 (1996). Petitioner's claim therefore lacks merit and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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