Legal Backgrounder

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FEDERAL JUDGE INTRUDES UPON EXECUTIVE AUTHORITY TO DESIGNATE TERRORIST ORGANIZATIONS

by

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In an epic litigation already immensely damaging to government's anti-terrorism arsenal, a California federal court has yet again invalidated a law that bars private individuals from abetting terrorists. In doing so, it has disregarded executive authority in the teeth of an extraordinarily strong endorsement from Congress – and within a realm where judicial competence is at its nadir.

The *Humanitarian Law Project* litigation has been underway for nearly a decade in the Central District of California. It involves self-styled human rights activists seeking to support the Kurdistan Workers Party (the *Partiya Karkeran Kurdistan*, or PKK) and the Liberation Tigers of Tamil Elam (LTTE). The PKK and the LTTE are terrorist organizations – or, as presiding federal judge Audrey B. Collins refers to them, "political organizations" – which have killed tens of thousands in agitating for, respectively, independence for Kurds in Turkey and Tamils in Sri Lanka, nations whose cooperation is important to the United States' intercontinental struggle against al Qaeda and its affiliates. The plaintiffs have sought declaratory judgments that anti-terror laws violate constitutional free-speech, free-association and due process protections.

During the litigation, Judge Collins gained the distinction of being the first federal jurist to nullify a Patriot Act provision when she found the legislation's prohibition against providing terror groups with *expert advice or assistance* to be void for vagueness. *Humanitarian Law Project* v. *Ashcroft* 309 F. Supp. 2d 1185 (C.D. Cal. 2004). This ruling, she explained, followed logically from her years earlier holding in *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), *aff'd* 205 F.3d 1130 (9th Cir. 2000), that the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) was unconstitutional to the extent it barred providing terror organizations with *personnel* and *training* – again reasoning that these commonly understood terms were too imprecise to put reasonable people on notice of what was disallowed. It is also of a piece with *Humanitarian Law Project* v. *Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005), in which Judge Collins similarly invalidated the assertedly vague proscription against contributing *services* to terrorists. Meanwhile, the same plaintiffs convinced the Ninth Circuit to hold that material support convictions must be reversed absent proof not merely of general criminal intent to support a designated foreign terrorist organization but specific knowledge about either the formal designation or the particular facts that underlay it. *Humanitarian Law Project* v. *United States Department of Justice*, 352 F.3d 382 (9th

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Cir. 2003).

The target of the newest case, *Humanitarian Law Project* v. *United States Department of Treasury*, is the International Emergency Economic Powers Act (IEEPA), codified in Title 50 of the U.S. Code. Congress enacted IEEPA in 1977 to modify the 1917 Trading with the Enemy Act (TWEA), which conferred authority on the president to regulate or prohibit transactions with enemies of the United States. Congress wanted to limit TWEA to wartime, but recognized that there would be national emergencies, short of war, when the nation would need to respond for foreign threats. IEEPA thus broadly authorizes the president "to deal with any unusual or extraordinary threat," the source which is substantially outside the United States, by, among other things, investigating, regulating, voiding or prohibiting all manner of commerce involving foreign countries or nationals. To invoke this authority, the president must declare a national emergency; he is permitted, but not required, to issue implementing regulations.

Pursuant to IEEPA, President Bush issued Executive Order 13224 (the EO) shortly after the 9/11 attacks that killed nearly 3000 Americans. The EO is the specific subject of the new case. Citing the continuing and grave threat of international terrorism, the president's EO immediately designated 27 entities and individuals as "specially designated global terrorists" (SDGTs), blocking transactions with them. Further, he delegated to the Secretary of the Treasury authority to designate additional SDGTs provided that they satisfied certain criteria set forth in the EO, including assisting, sponsoring, or providing *services* to an SDGT, or being *otherwise associated with* an SDGT.

The *Humanitarian Law* plaintiffs lodged several objections to the EO, most of which were rejected by the court – such as the claim, successful in their AEDPA challenge, that the term *services* was vague. Nevertheless, on November 21, 2006, Judge Collins ruled that two aspects of the EO were constitutionally infirm. First, and most alarmingly, the court nullified the president's unilateral authority to designate foreign terrorists. Second, it found the *otherwise associated with* provision void for vagueness.

Strangely, Judge Collins invalidated the president's designation power despite simultaneously finding that the Treasury Secretary's similar power, delegated to him *by the president*, passed muster. The distinction, she reasoned, was that the president had "unfettered discretion" whereas the Secretary's authority was extensively regulated by the EO. This is ill-conceived on multiple levels.

To begin with, the president does not have unfettered discretion. His statutory authority is cabined by the IEEPA, which permits him to affect commerce only in the (concededly broad) manners prescribed in IEEPA and only upon declaring a national emergency. Moreover, as the Second Circuit observed while upholding IEEPA in *United States* v. *Dhafir*, 461 F.3d 211 (2d Cir. 2006):

> The IEEPA reserves a continuing role for Congress. Thus, the IEEPA provides that "[t]he President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted," that he "shall consult regularly with the Congress so long as such authorities are exercised," and that he shall report periodically concerning any actions taken in the exercise of the delegated authority…. Congress can terminate the President's declaration of emergency "by concurrent resolution pursuant to section 202 of the National Emergencies Act[.]"

This raises a related point. The EO here involves foreign affairs (and, more basically, foreign threats to the United States), a sphere in which, as the Second Circuit observed, delegations to the executive branch are "afforded even broader deference" than the wide leeway courts routinely extend. This is because the Supreme Court has forcefully recognized the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations[.]" *United States* v. *Curtiss-Wright Export*, 299 U.S. 304, 320 (1936) (further noting that the president's foreign affairs power, rooted in Article II, "does not require as a basis for its exercise an act of Congress"; and thus that a delegation that

might be questionable if confined to internal affairs might "nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory").

Thus, it is unsurprising that the president's authority under the IEEPA has repeatedly been upheld by the federal courts – including the Supreme Court and Ninth Circuit, which, of course, binds California's federal courts, although Judge Collins did not address the relevant line of cases. *See Dames & Moore* v. *Regan*, 453 U.S. 654, 675 (1981) (upholding president's attachment and transfer of Iranian assets under the IEEPA and reasoning that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility'") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., *concurring*); *Regan* v. *Wald*, 468 U.S. 222, 232-33 (1984) (regulations promulgated under IEEPA and TWEA held constitutional); *Freedom to Travel Campaign* v. *Newcomb*, 82 F.3d 1431, 1437-38 (9th Cir. 1996) (upholding renewal of Cuban embargo solely upon presidential determination that it was "in the national interest").

Yet, Judge Collins determined that even if the president has IEEPA authority, it must be exactingly regulated, as the Secretary's is under the EO. This is simply wrong. The statute permits but does not require implementing regulations. And, wholly apart from its prior approval of the IEEPA, the Supreme Court in 1965 upheld the 1926 Passport Act even though that legislation gave the Secretary of State power to grant and issue passports without setting forth standards to guide the use of his discretion. *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *see also Dhafir*, *supra*. The Court reasoned that "Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in domestic areas."

By contrast, the instant case involves an exercise of IEEPA authority not by a cabinet official but by the president himself during a time of armed conflict. And here again, the president plainly has a strong congressional endorsement, supplemented by all the foreign affairs power he possesses under Article II, to designate foreign terrorists at a time when the U.S. requires counterterrorism support from nations like Turkey and Sri Lanka, where the enemy is known to operate. Further, even though exacting regulations were unnecessary, the EO sets forth such standards. They expressly control the exercise of IEEPA authority by the Treasury Secretary, and, having been promulgated by the president himself, should sensibly be interpreted to reflect the benchmarks by which the president exercises his own broad authority.

Given that the subject matter involves foreign affairs, that the president is acting with the endorsement of and in consultation with Congress, and that Congress may curtail IEEPA authority if it is abused, the federal courts owe the executive branch broad deference here. Under such conditions, it is highly inappropriate for a court to second-guess a president based on its dubious perception that terrorist organizations are mere "political entities" which can compartmentalize their mass-murder and other criminal operations from their "political" and social welfare activities. Judge Collins may well believe, as a matter of policy, that it would make better sense to allow human rights activists to attempt to reform terror organizations by increasing their political prowess through training in humanitarian aid and peace negotiations; nonetheless, it is perfectly rational for our political branches to conclude, contrarily, that assistance to terror groups is fungible, and that anything which makes such an organization more adept and politically appealing increases the assets, recruiting, and efficiency by which it kills. In our system, that is a choice the political branches get to make and courts are without institutional competence to overrule.

In connection with the vagueness invalidation of the *otherwise associated with* term, the Justice Department made a tactical error by not defending it on the merits, asserting only that the plaintiffs lacked standing to raise it (an error compounded when DOJ had to correct its erroneous representation that the term had "never been used as the sole legal basis for a blocking designation"). Once Judge Collins turned aside the standing claim, she was left with nothing but the plaintiffs' contention that prohibitions against mere association violated the First Amendment.

The court's ruling was based on the legal principles that criminal guilt may not be premised on mere association with criminals, and that "the First Amendment protects a citizen's right to associate with a political organization[,]" even if that organization "advocate[s] illegal conduct or engage[s] in illegal acts." (Quoting *American-Arab Anti-Discrimination Committee* v. *Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995) (*AAADC*).). Yet, the PKK and the LTTE are not political organizations; they are foreign terrorist organizations which engage in politically motivated mass killings at a time when the United States is engaged in an international armed conflict against foreign terrorist organizations and requires, to protect American lives, the cooperation of foreign governments in countries where terrorists operate. In addition, the designation is not a criminal proceeding but a blocking of assets of those found confederating with foreign terrorists.

The right of association is expansive but, as even *AAADC* acknowledged, it is not absolute ("the power of government to penalize association is narrowly circumscribed") (*id*.). In responding to foreign threats against the United States, the president has broad powers to enjoin commerce between Americans and those foreign entities. Still, even assuming *arguendo* that there is an unlimited right to associate with foreign terrorist organizations, the *otherwise associated with* provision could easily have been saved by applying the interpretive canon of *ejusdem generis*. That is, rather than the drastic step of holding the executive's response to a foreign threat constitutionally infirm, Judge Collins could have found the proscription against being *otherwise associated with* SDGTs to be a general term duly qualified by the specific terms that precede it (e.g., *acting for*, *assisting*, *sponsoring* and *providing services to* SDGTs), each of which calls for some positive facilitation. Indeed, in January 2007, a few weeks after Judge Collins' ruling, the Treasury Department refined its regulations to make what was already obvious explicit: being *otherwise associated with* a person's whose property has been blocked is to be "one who: (1) [o]wns or controls such persons; or (2) attempts, or conspires with one or more persons, to provide financial, material, or technological support, or financial or other services, to such persons." 72 Fed. Reg. 4206 (No. 19, Jan. 30, 2007) (Rules and Regulations).

The government has moved for reconsideration of the ruling. Failing that, it should appeal. The president's designation authority, rooted in the Constitution and based on strong congressional support, is a crucial tool for strangling murderous international terrorist organizations, today's most immediate national security threat. There is no right to reform terrorists, and it is not the place of the courts to second guess counterterrorism policy.

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