

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004,

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, NY 10012,

Plaintiffs,

v.

TIMOTHY F. GEITHNER, in his official capacity as
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220,

ADAM J. SZUBIN, in his official capacity as Director of
the Office of Foreign Asset Control
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220,

Defendants.

No.

Case: 1:10-cv-01303
Assigned To : Bates, John D.
Assign. Date : 8/3/2010
Description: TRO/PI

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Improper governmental interference with the right of legal representation)

1. This case challenges the legality of a regulatory scheme that requires attorneys to seek permission from the government before providing uncompensated legal representation to or for the benefit of individuals whom the government has designated as terrorists. In this case, the effect of the scheme may be to deny legal representation to a

United States citizen whom the government is attempting to kill without any legal process.

2. On July 7, 2010, Plaintiffs American Civil Liberties Union Foundation (ACLU) and the Center for Constitutional Rights (CCR) were retained by Nasser al-Aulaqi to provide uncompensated legal representation in connection with the government's reported decision to add his son, U.S. citizen Anwar al-Aulaqi, to its list of suspected terrorists approved for "targeted killing." According to published reports, Anwar al-Aulaqi has already been the target of several unsuccessful drone strikes, and both the CIA and the U.S. military are actively attempting to kill him.

3. Many months after the government had made clear its intention to kill Anwar al-Aulaqi, it undertook to freeze his assets. On July 16, 2010, the Office of Foreign Asset Control (OFAC), a division of the Department of the Treasury, labeled Mr. Aulaqi a "Specially Designated Global Terrorist" (SDGT). As a consequence of that designation and regulations promulgated by OFAC, Mr. Aulaqi's assets have been blocked, and U.S. persons are generally prohibited from engaging in any transactions with him or for his benefit under threat of criminal sanction.

4. OFAC's regulations make it illegal for attorneys to provide "legal services" to or for the benefit of a blocked individual in Aulaqi's circumstances without a license from OFAC. Unless the government grants the ACLU and CCR a specific license, OFAC's regulations make it a criminal offense for ACLU and CCR attorneys to file a lawsuit on Mr. Aulaqi's father's behalf seeking to protect the constitutional rights of his U.S. citizen son. In other words, under the regulations at issue in this case, the same

government that is seeking to kill Anwar al-Aulaqi has prohibited attorneys from contesting the legality of the government's decision to use lethal force against him.

5. Pursuant to this regulatory scheme, on July 23, 2010 Plaintiffs ACLU and CCR submitted to OFAC an application for a license to provide uncompensated legal representation to Nasser al-Aulaqi as representative of the interests of his son, Anwar al-Aulaqi, who remains in hiding. Plaintiffs emphasized that the application was extremely urgent because of the nature of the action planned by the government against Mr. Aulaqi, and they requested that the license be issued immediately. Nonetheless, more than ten days have now elapsed, and Defendants have not granted the requested license.

6. Plaintiffs bring this action challenging the legality of the regulatory and licensing scheme as applied to attorneys seeking to provide uncompensated legal representation. As an initial matter, OFAC has exceeded its statutory authority by promulgating regulations that purport to prohibit a U.S. citizen or a person acting on his behalf or in his interest from retaining even uncompensated lawyers to assert legal rights; no plausible reading of the relevant statutes evinces a congressional intent to regulate non-economic activity of this nature.

7. Even if this Court were to conclude that the regulations at issue are not *ultra vires*, those regulations are unconstitutional insofar as they condition the provision of uncompensated legal services on the acquiescence of the very government that the designated citizen and his attorneys are seeking to sue.

8. As non-profit organizations dedicated to protecting civil and human rights and civil liberties, Plaintiffs have a First Amendment right to represent clients in litigation consistent with their organizational missions. Even if OFAC could constitutionally

regulate this activity, the licensing scheme established by its regulations is unconstitutional because it fails to provide procedural safeguards against abuse and invests executive officers with unbridled discretion to suppress activity that is protected by the First Amendment. By allowing the government to deprive a U.S. citizen of the ability to obtain representation in litigation against the United States in U.S. courts, the regulations also violate due process and the separation of powers.

9. Plaintiffs seek a declaration from this Court that the regulations at issue in this case are unlawful or unconstitutional, and that, accordingly, Plaintiffs may proceed with their uncompensated legal representation of Nasser al-Aulaqi without a specific license from OFAC. Alternatively, Plaintiffs seek an injunction directing the government to grant the specific license that Plaintiffs have sought.

JURISDICTION AND VENUE

10. Jurisdiction is properly vested in this Court pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702 over causes of action arising under 5 U.S.C. §§ 702, 706 and the First and Fifth Amendments to the United States Constitution. The Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

11. Venue is proper in this district under 28 U.S.C. § 1391(e).

PLAINTIFFS

12. The ACLU comprises the American Civil Liberties Union and the American Civil Liberties Union Foundation, both nationwide, non-profit, non-partisan organizations dedicated to the constitutional principles of liberty and equality. The American Civil Liberties Union is an advocacy organization with approximately 500,000 members. The American Civil Liberties Union Foundation, among other things,

conducts public interest litigation in United States courts and wishes to represent Nasser al-Aulaqi. Both organizations are Plaintiffs in this matter (and are referred to collectively as the “ACLU”). The ACLU is committed to ensuring that the U.S. government's response to the threat of terrorism complies with the Constitution and respects fundamental human rights.

13. Plaintiff Center for Constitutional Rights is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR is committed to challenging the abuse of executive power and government practices that have undermined fundamental constitutional and human rights in the name of the “war on terror.”

14. Defendant Timothy F. Geithner is Secretary of the Treasury. Under Executive Order 13,224, which implements the International Emergency Economic Powers Act, the Secretary of the Treasury has the authority to block the property of suspected supporters of terrorism. Defendant Geithner is sued in his official capacity.

15. Defendant Adam J. Szubin is Director of the Office of Foreign Asset Control (OFAC). Under Treasury Department regulations, OFAC has the authority to grant or deny licenses to attorneys who seek to provide legal services to individuals whose property has been blocked. Defendant Szubin is sued in his official capacity.

STATUTORY AND REGULATORY FRAMEWORK

16. The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1705, grants to the President certain authorities that “may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency

has been declared.” *Id.* § 1701(b). Those authorities include the authority to, “by means of instructions, licenses, or otherwise,”

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

Id. § 1702(a)(1)(B).

17. It is unlawful for a person to violate any license, order, regulation, or prohibition issued under IEEPA. *Id.* § 1705(b) (civil penalties); *id.* § 1705(c) (criminal penalties).

18. On Sept. 23, 2001, President Bush issued an executive order declaring a national emergency relating to the Sept. 11 terrorist attacks and the “continuing and immediate threat of further attack.” Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

19. Invoking the authority granted by IEEPA, the order “blocked” the property of:

(a) foreign persons listed in the Annex to this order;

(b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;

(c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order;

(d) except as provided in section 5 of this order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the

Secretary of the Treasury and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General;

(i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order; or

(ii) to be otherwise associated with those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order.

Id. § 1.

20. Persons whose property has been blocked pursuant to Executive Order 13,224 are identified as Specially Designated Global Terrorists (SDGTs).

21. The Office of Foreign Assets Control has promulgated regulations to implement Executive Order 13,224. 31 C.F.R. §§ 594.101-594.901. The regulations generally bar U.S. persons from engaging in transactions with or for the benefit of SDGTs. *Id.* § 594.204 (“Except as otherwise authorized, no U.S. person may engage in any transaction or dealing in property or interests in property of persons whose property or interests in property are blocked . . . including . . . the making or receiving of any contribution of funds, goods, or services to or for the benefit of persons whose property or interests in property are blocked”); *see also id.* § 594.206; § 594.406.

22. The regulations provide a general license for the provision of certain legal services. *Id.* § 594.506(a). The same provision, however, states that “The provision of any other legal services to persons whose property or interests in property are blocked pursuant to § 594.201(a), not otherwise authorized in this part, requires the issuance of a specific license.” *Id.* § 594.506(b).

23. The provision relating to specific licenses states that “Transactions subject to the prohibitions contained in this chapter, or to prohibitions the implementation and administration of which have been delegated to the Director of the Office of Foreign Assets Control, which are not authorized by general license may be effected only under specific licenses.” 31 C.F.R. § 501.801(b)(1). The regulations do not specify the standards by which OFAC determines whether or not to grant an application for a specific license. Nor do they provide any time period within which OFAC will respond to applications for specific licenses.

FACTS

24. In January of 2010, the Los Angeles Times reported that the CIA was considering placing U.S. citizen Anwar al-Aulaqi on its list of suspected terrorists targeted for killing. The same article reported that Aulaqi had already been placed on a corresponding U.S. military list and had been the target of an unsuccessful drone strike in Yemen in December of 2009. In April of 2010, the New York Times confirmed Mr. Aulaqi’s placement on the CIA list and that the U.S. government had taken the “extremely rare, if not unprecedented” step “of authorizing the targeted killing of an American citizen,” Mr. Aulaqi. Numerous subsequent reports have corroborated that the United States has approved the use of lethal military force against Mr. Aulaqi without criminal charge or trial and is actively pursuing him in Yemen, where he is in hiding.

25. In June of 2010, Plaintiffs ACLU and CCR were retained by Nasser al-Aulaqi, through a power of attorney, to provide him with legal representation in connection with the government’s reported decision to add his son, Anwar al-Aulaqi, to its list of suspected terrorists authorized to be killed.

26. Plaintiffs wish to represent Nasser al-Aulaqi in connection with the government's reported decision to add his son to its list of suspected terrorists approved for targeted killing. Plaintiffs wish to file a lawsuit in connection with that situation.

27. On July 16, 2010, many months after the government had made clear its intention to kill Anwar al-Aulaqi, it undertook to freeze his assets by labeling him a "Specially Designated Global Terrorist." As a consequence of that OFAC designation and OFAC regulations, Mr. Aulaqi's assets have been blocked, and U.S. persons are generally prohibited from engaging in any transactions with him or for his benefit under threat of criminal sanction. OFAC's regulations make it illegal for attorneys to provide "legal services" to or for the benefit of a blocked individual in Aulaqi's circumstances unless they first obtain a license from OFAC.

28. Pursuant to this regulatory scheme, on July 23, 2010 Plaintiffs ACLU and CCR submitted an application for a license to provide uncompensated legal representation to Nasser al-Aulaqi, who is not himself designated as an SDGT, as representative of the interests of his son, Anwar al-Aulaqi. Plaintiffs emphasized that the application was extremely urgent because of the nature of the action planned by the government against Mr. Aulaqi, and they requested that the license be issued immediately. OFAC has not responded to Plaintiffs' application.

29. Because Plaintiffs' ability to file a lawsuit as quickly as possible may spell the difference between life and death for Anwar al-Aulaqi, whose rights Plaintiffs seek to protect, Plaintiffs are suffering and will continue to suffer irreparable injury in the absence of immediate relief from this Court.

CAUSES OF ACTION

30. The SDGT Regulations exceed statutory authority and are arbitrary and capricious insofar as they prohibit attorneys from providing uncompensated legal representation without first obtaining a license from OFAC.

31. The SDGT Regulations violate the First and Fifth Amendments insofar as they prevent SDGTs who are U.S. persons from obtaining legal representation of their interests in U.S. courts.

32. The SDGT Regulations violate the First Amendment insofar as they impose a licensing requirement on non-profit civil liberties organizations seeking to represent clients in litigation consistent with their organizational missions.

33. The SDGT Regulations violate the First Amendment insofar as they invest executive officers with unbridled discretion to suppress activity protected by the First Amendment, and insofar as they fail to provide constitutionally required procedural safeguards.

34. The SDGT Regulations violate Article III of the U.S. Constitution and the principle of separation of powers insofar as they invest executive officers with unfettered discretion to determine whether designated citizens can have access to federal courts in order to bring particular litigation.

REQUEST FOR RELIEF

For the foregoing reasons, plaintiffs request that the Court:

1. Declare that the SDGT Regulations exceed statutory authority and are arbitrary and capricious insofar as they prohibit attorneys from providing uncompensated legal representation without first obtaining a license from OFAC;

2. Declare that the SDGT Regulations violate the First and Fifth Amendment because they prevent SDGTs who are U.S. persons from obtaining legal representation of their interests;

3. Declare that the SDGT Regulations violate the First Amendment insofar as they impose a licensing requirement on non-profit civil liberties organizations seeking to represent clients in litigation consistent with their organizational missions;

4. Declare that the SDGT Regulations violate the First Amendment because they invest executive officers with unbridled discretion to suppress activity protected by the First Amendment, and because they fail to provide procedural safeguards required by the First Amendment;

5. Declare that the SDGT Regulations violate Article III of the U.S. Constitution and the principle of separation of powers insofar as they invest executive officers with unfettered discretion to determine whether designated citizens can have access to federal courts in order to bring particular litigation.

6. Enjoin Defendants from imposing any penalty whatsoever on Plaintiffs for representing, without a license, Nasser al-Aulaqi in civil litigation or for other advocacy in connection with the targeting of his son for killing by the U.S. government, or, in the alternative, require defendants to grant Plaintiffs a license;

7. Award Plaintiffs fees and costs pursuant to 28 U.S.C. § 2412; and

8. Grant any other and further relief as is appropriate and necessary.

Respectfully submitted,

/s/ Arthur B. Spitzer

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