CURRENT DEVELOPMENTS

RESTRICTIONS ON U.S. ATTORNEYS PRACTICING BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

On May 28, 2003, President Bush issued Executive Order No. 13,304[1] under the International Emergency Economic Powers Act (IEEPA),[2] thereby "blocking" the property of individuals who, he determined, threatened efforts to bring stability to the Balkans. The blocking order prohibited U.S. citizens from, among other things, "making or receiving . . . any contribution or provision of funds, goods, or services to or for the benefit of " any of the targeted individuals unless the U.S. citizen received a license from the U.S. government.[3] Included in the list of targeted persons were more than eighty individuals indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[4] EO 13,304's sweeping prohibition on U.S. citizens' economic relations with the targeted persons consequently appeared to ban U.S. lawyers from representing virtually any defendants being prosecuted at the ICTY—a ban that would have required the twenty or so U.S. lawyers with such clients to break off their representation immediately, regardless of the stage that their cases had reached.[5] Indeed, the U.S. Treasury Department office that administers IEEPA blocking orders informed three U.S. attorneys representing a client in a complex, lengthy appeal that, without a license, their continued representation of that client constituted a "prohibited exportation of legal services" and thus violated the order and its accompanying regulations.[6]

Urgent efforts by ICTY President Theodor Meron quickly convinced the Treasury Department both to reconsider its interpretation of the executive order and its accompanying regulations, and to read them, instead, as permitting U.S. attorneys to practice as defense counsel before the ICTY.[7] In early July 2003, acting to implement that interpretation, the Treasury Department issued a general license expressly authorizing U.S. attorneys to represent clients before the ICTY and permitting them to receive fees for their services—on the condition that the attorneys were being paid by the Tribunal.[8] Since most, though not all, American ICTY

[1] Exec. Order No. 13,304, Termination of Emergencies with Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001, secs. 1–3, 68 Fed. Reg. 32,315, 32,315–16 (May 29, 2003) [hereinafter EO 13,304]. Executive Order Nos. 13,304 and 13,219, as well as the regulations implementing them, *see infra* notes 11–12 and accompanying text, are available online at <http://www.ustreas.gov/offices/eotffc/ofac/legal/balkans.html>.

[2] 50 U.S.C. §§1701–1706 (West Supp. 2002) [hereinafter IEEPA].

[3] Exec. Order No. 13,219, Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans, sec. 1(c), 66 Fed. Reg. 34,777 (June 27, 2001) (incorporated by reference in EO 13,304) [hereinafter EO 13,219].

[4] EO 13,304, *supra* note 1, annex, 68 Fed. Reg. 32,318–22 (May 29, 2003). The annex indicates which of the listed individuals are ICTY indictees.

[5] This information concerning the U.S. attorneys representing defendants at the ICTY (as of June 21, 2003) was supplied by the ICTY Registry.

[6] Letter from David W. Mills, Chief of Licensing, Office of Foreign Assets Control, to Russell Hyman 1 (June 17, 2003) [hereinafter Mills letter], *attached to* Appellant's Urgent Request for Temporary Suspension of Appellate Proceedings (June 18, 2003), Prosecutor v. Blaškić, Case No. IT-95-14-A [hereinafter Appellant's request for temporary suspension].

[7] Letter from R. Richard Newcomb, Director, Office of Foreign Assets Control, to Theodor Meron, President, International Criminal Tribunal for the Former Yugoslavia 1 (June 19, 2003) (on file with author) [hereinafter Newcomb letter].

[8] Office of Foreign Assets Control, U.S. Dep't of the Treasury, General License No. 1, Legal Representation in Matters Pending Before the International Criminal Tribunal for the Former Yugoslavia, July 9, 2003 (issued under

defense attorneys are paid on that basis, the immediate disruption caused by the executive order for the ICTY and the U.S. attorneys working in its defense bar has largely been remedied. Privately paid U.S. lawyers remain subject to a licensing requirement.

EO 13,304 and its accompanying regulations raise a variety of legal and policy issues that merit further reflection. The questions are all the more significant in view of the increase in the number and the activity of international criminal tribunals over the past decade. If the Treasury Department had stuck to its original interpretation of the blocking order and its associated regulations, and had thus required that all legal services be licensed, would the licensing requirement have been legally effective? Are the executive order and the regulations, whether in their original form or as modified by the general license, consistent with the United States' international obligations? More generally, if the U.S. government did genuinely want to prohibit U.S. attorneys from representing defendants before international criminal tribunals, whether the ICTY, the International Criminal Court (ICC), or others, are there any colorable arguments that such bans would exceed the president's powers under IEEPA or violate either the lawyers' or their clients' constitutional rights?

As suggested by its title—"Termination of Emergencies with Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001"—EO 13,304 amended or revoked a number of previous executive orders, notably Executive Order No. 13,219. That earlier order had blocked the property of twenty-three people and five organizations that President Bush had determined were supporting "extremist violence" in the western Balkans or were hindering implementation of the Dayton Peace Accords or operation of the international administration in Kosovo.[9]

Within ten days of EO 13,304's promulgation, one U.S. lawyer with a client at the ICTY sought clarification from the Treasury Department's Office of Foreign Assets Control (OFAC) as to whether his continued representation of his client violated the order.[10] OFAC promptly replied that the "unlicensed representation" of his client constituted "a prohibited exportation of legal services in violation of " the Treasury Department regulations that implement EOs 13,219 and 13,304,[11] known as the Western Balkans Stabilization Regulations.[12] Heeding OFAC's warning, the attorney immediately requested a license. At the same time, though, concerned that his "failure to comply with upcoming deadlines and obligations" before the ICTY's appeals chamber "would seriously jeopardize [his client's] due process rights, and potentially could subject counsel to sanctions by the Tribunal," he sought a suspension of the appellate proceedings in his client's case while OFAC considered his license request.[13] Two other American lawyers also requested that their client's trial for genocide and war crimes be suspended until they could acquire licenses.[14]

Fortunately, neither proceeding had to be formally suspended. Responding to requests from ICTY President Meron,[15] the Treasury Department quickly did an about-face. In a letter to the ICTY's president, the head of OFAC explained that "attorneys who are subject to the jurisdiction of the United States . . . are authorized to continue to represent" any ICTY indictee whose property was blocked by EO 13,304—but only if payments received for fees and reimbursement of expenses came from "sources not currently within the United States or within the

Western Balkans Stabilization Regulations, *infra* note 12) [hereinafter General License]. This document is available online at <http://www.ustreas.gov/offices/eotffc/ofac/sanctions/sanctguide-balk.html>.

[9] EO 13,219, *supra* note 3, preamble, 66 Fed. Reg. at 34,777. The targeted individuals were members of extremist Albanian nationalist groups in Kosovo, Macedonia, and Serbia. *Id.*, annex, 66 Fed. Reg. at 34,780–81.

[10] Appellant's request for temporary suspension, *supra* note 6, para. 3.

[11] Mills letter, *supra* note 6, at 1.

[12] 31 C.F.R. pt. 588 (2003). These regulations prohibit U.S. persons from providing funds, goods, or services to blocked individuals. *See* 31 C.F.R. §588.201(b).

[13] Appellant's request for temporary suspension, *supra* note 6, para. 6.

[14] Prosecutor v. Brdjanin, Case No. IT-99-36, Transcript, at 17,870–72 (June 19, 2003).

[15] *U.S. Treasury Allows American Lawyers to Defend Yugoslav War Crimes*, ASSOCIATED PRESS, June 20, 2003.

possession or control of a U.S. person."[16] The OFAC letter requested that U.S. counsel representing ICTY defendants notify OFAC within ten days of their continued representation based on this ruling.[17] While leaving EO 13,304 and its associated regulations unchanged, the OFAC letter gave U.S. attorneys paid by the Tribunal or from private accounts held outside the United States some assurance that they would not face prosecution for working as defense counsel at the ICTY.[18]

Modification of the regulations took another few weeks. On July 9, 2003, the Treasury Department issued a "general license" authorizing U.S. attorneys to provide legal services to ICTY defendants who were subject to the blocking order.[19] The authorization did not extend, however, to the receipt of fees by U.S. attorneys who received the pay for their services from sources other than the Tribunal. In that respect, the general license was narrower than the assurance provided in OFAC's letter of a few weeks before, which had also expressed OFAC's approval of payments "from sources not currently within the United States or within the possession or control of a U.S. person."[20] The narrower scope of the general license therefore left the small group of U.S. lawyers receiving payments from sources other than the Tribunal itself still subject to a licensing requirement on the receipt of payments for their legal services.

Before considering the more general legal issues raised by the EO 13,304, it is worth pausing to ask why the U.S. president would issue an executive order that had the effect of imposing a special licensing requirement on U.S. attorneys representing defendants at the ICTY. While a number of stories in the European press quickly interpreted the order as an expression of the Bush administration's hostility to international institutions or as an indirect slap at the ICC,[21] those interpretations hardly seem plausible. The United States remains, as it has been from the start, both a staunch supporter of the ICTY and the largest single contributor of funds to its budget.[22] If the administration had wanted to express its displeasure at the ICTY (let alone the ICC), it could easily have chosen much more direct methods. Moreover, the Treasury Department's extraordinarily quick about-face, in which it authorized at least Tribunal-paid defense work by U.S. attorneys, hardly bespeaks an executive branch bent on attacking international criminal justice (or, indeed, one that even intended the disruptive effect that the blocking order had on U.S. attorneys' participation in the ICTY's defense bar).

The terms and timing of the executive order suggest, instead, that it was part of an American effort to ease some restrictions on the government of Serbia-Montenegro in the wake of Serbian Prime Minister Djindjic's assassination in March, while at the same time tightening the noose around war crimes suspects who remain at large. The first goal was evident in EO

[16] Newcomb letter, *supra* note 7, at 1.

[17] *Id.*

[18] Indeed, IEEPA provides:

> Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

50 U.S.C. §1702(a)(3).

[19] General License, *supra* note 8.

[20] Newcomb letter, *supra* note 7, at 1.

[21] *See, e.g.*, *Fila: Bush Decree Is a Blatant Case of American Harassment*, BALKAN (Belgrade), June 20, 2003, at 5 (translation on file with author). Toma Fila is a defense lawyer practicing before the ICTY.

[22] *See, e.g.*, *The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice? Hearing Before the House Comm. on Int'l Relations*, 107th Cong. (Feb. 28, 2002) (statement of Pierre Prosper, ambassador-at-large for war crimes issues) ("The United States remains proud of its leadership in supporting the two ad hoc Tribunals and will continue to do so in the future."); *U.S. Lauds Stakic Verdict, Says Mladic, Karadzic Must Be Caught*, AGENCE FRANCE-PRESSE, Aug. 1, 2003 (quoting statement of Richard Boucher, U.S. Department of State spokesman, applauding *Stakić* trial chamber judgment); Status of Contributions as of 28 February 2003, UN Doc. ST/ADM/SER.B/602, at 80–83 (2003) (showing that United States contributed approximately $31 million of the ICTY's approximately $119 million budget for 2003).

13,304's revocation of a series of earlier orders that had blocked property of the governments of Serbia and of Serbia-Montenegro.[23] It was also evident when, two weeks after the issuance of EO 13,304, Secretary of State Powell certified to Congress that Serbia-Montenegro's cooperation with the ICTY had been sufficient to allow it to receive certain types of U.S. financial assistance.[24] The second goal was expressed directly in EO 13,304's preamble, which singled out "the harboring of individuals indicted by" the ICTY as a major continuing threat to stability in the region.[25] The U.S. attempt to cut off financial support to fugitives charged with war crimes was itself part of a joint effort with the European Union and the Office of High Representative for Bosnia-Herzegovina, both of which announced related restrictions about the same time.[26] All of these actions came on the heels of stepped-up efforts by the NATO force in Bosnia-Herzegovina, SFOR, to arrest war crimes suspects and disrupt their networks of support.[27]

If EO 13,304 was intended to support the work of the ICTY by putting financial pressure on war crimes suspects still at large, why did it target a much broader group, including many already in ICTY custody and some already serving their ICTY-imposed prison sentences? Perhaps the drafters of the order believed that even some of those already facing justice at The Hague could be used as conduits of financial assistance to those still at large. If so, the failure to exclude from the ban those legal services paid for by the ICTY itself was an oversight. The oversight was surprising since the existing regulations drawn up to implement the earlier Balkans blocking order, E.O. 13,219, had included a section—as had other OFAC sanctions regulations—specifically authorizing the provision of certain classes of legal services in U.S. courts and also the "[p]rovision of any other legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense."[28] This last category, which presumably includes representation by court-appointed defense counsel in criminal cases, might have led EO 13,304's drafters to recognize that ICTY-appointed defense counsel were entitled to similar authorization.[29]

[23] EO 13,304, *supra* note 1, preamble & sec. 1.

[24] *Serbia and Montenegro Meet Test for War Crimes Tribunal, U.S. Says*, N.Y. TIMES, June 17, 2003, at A4.

[25] EO 13,304, *supra* note 1, pmbl.

[26] On July 1, 2003, the European Union imposed a travel ban on fourteen individuals identified as "involve[d] in the evasion of justice under the [ICTY]." *See* Council of the European Union Press Release 11024/03, The Council of the European Union Extends Travel Ban on Persons Involved in Evasion of the International Criminal Tribunal for the Former Yugoslavia (July 1, 2003), *at* <http://ue.eu.int/newsroom/newmain.asp?LANG=1>. The Office of the High Representative froze the bank accounts of the same individuals a week later. *See* Office of the High Representative Press Release, High Representative Announces Further Action in the Fight Against Crime (July 7, 2003), *at* http://www.ohr.int/ohr-dept/presso/pressr/archive.asp>.

[27] *See, e.g.*, *Targeting Karadzic's Bosnian Financiers Signals Strategy Change—Commentary*, NIN (Serbia), Mar. 14, 2003 (describing coordinated raids at seven locations undertaken by SFOR, with the approval of the United States and the Office of the High Representative for Bosnia and Herzegovina, during the first week of March 2003); *Nato Warns Karadzic and Mladic*, BBC NEWS, Apr. 11, 2003, *at* <http://news.bbc.co.uk/2/hi/europe/2938715.stm>.

[28] 31 C.F.R. §588.507(a). The authorization was subject to the condition, however—also like other OFAC sanctions regulations—that any payments for professional fees and expenses would need to be specifically licensed. *Id.* The regulations were first issued in May 2002, *see* 67 Fed. Reg. 37,671 (May 30, 2002). Regulations implementing other OFAC-administered blocking orders contain identical (or nearly identical) provisions authorizing the provision of certain classes of legal services but requiring individual licenses for the receipt of payment for those services. *See, e.g.*, 31 C.F.R. §515.512 (2003) (Cuban Assets Control Regulations); 31 C.F.R. §550.517 (2003) (Libyan Sanctions Regulations); 31 C.F.R. §595.506 (2003) (Terrorism Sanctions Regulations).

[29] The general license that the Treasury Department belatedly added to the Western Balkan Stabilization Regulations has the effect of adding defense work at the ICTY to the list of legal services permitted without specific licensing. The general license thus renders moot a Supremacy Clause argument that—even if the general license had not been promulgated—might have been used to justify the legality of unlicensed defense work *paid for by the Tribunal*. The argument would have gone as follows. The UN Charter is a treaty to which the U.S. is a party, and is thus a part of "the supreme Law of the Land." U.S. CONST. Art. VI. The Tribunal's Statute was adopted by the Security Council pursuant to Chapter VII (Article 41) of the Charter, and Article 25 of the Charter obligates member states to "to accept and carry out the decisions of the Security Council." Article 21 of the Statute, which was adopted through a resolution of the Security Council, guarantees defendants the rights to have "legal assistance of [their] own choosing" and "to have legal assistance assigned to [them], in any case where the interests of justice so require, and without payment by [them] in any such case if [they] do[] not have sufficient funds to pay for it."

If EO 13,304's imposition of licensing requirements on U.S. defense attorneys at the ICTY was inadvertent, it nonetheless raises some interesting questions about the president's authority to place restrictions on U.S. attorneys representing criminal defendants before international tribunals. Are licensing requirements for the provision of legal services to criminal defendants appearing before international courts—such as the requirements imposed by EO 13,304 and the Western Balkan Stabilization Regulations before the issuance of the general license—authorized by IEEPA and consistent with the Constitution? What about licensing requirements on the receipt of fees for such services? Legal challenges to either sort of licensing requirement would be unlikely to succeed, but several possible claims and their limitations may briefly be canvassed.

As a general matter, it seems clear that the EO 13,304 and, in particular, its ban on unlicensed provision of services for the benefit of targeted persons constitute a legitimate exercise of the president's authority under IEEPA. That statute gives the president the authority—in response to "an 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," with respect to which the president has declared a national emergency—to block "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 persons "subject to the jurisdiction of the United States."[30] In exercising that power, the president may require affected individuals to keep records of the transactions and to furnish those records or reports about them under oath.[31] When issuing blocking orders such as EO 13,304, the president acts pursuant both to an express and broadly worded congressional grant of authority and to whatever of his own constitutional powers in the realms of national security and foreign policy may be relevant. The courts have consistently understood IEEPA as giving the president sweeping powers and have interpreted its terms so as to allow presidential flexibility and creativity in the face of foreign crises.[32] Since individuals

Therefore, the ICTY Statute's guarantee of legal counsel at public expense is a piece of "prevailing U.S. law requir[ing] access to legal counsel at public expense," thus falling within 31 C.F.R. §588.507(a)(5).

Of course, the argument founders on (at least) one well-marked shoal: the long-standing distinction between self-executing and non-self-executing treaty provisions. Only the former establish domestic legal rules and thus potentially constitute "prevailing U.S. law." Neither Article 41 nor Article 25 of the Charter is self-executing. Article 41 empowers the Security Council to take certain actions but does not say anything about domestic legal rules in member states. Article 25 represents a promise by member states to assist in carrying out the Security Council's decisions. Language promising future action is the hallmark of a non-self-executing treaty provision. *See, e.g.*, Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court"); *see generally, e.g.*, Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695 (1995). Security Council Resolution 827 (May 25, 1993), by which the Council adopted the Tribunal's Statute, included similarly promissory language—that "States shall cooperate fully" with the Tribunal and "shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute."

Even if the guarantee of Tribunal-paid counsel for indigent defendants does not constitute an obligation in U.S. domestic law, respecting and assisting the fulfillment of that guarantee (because it reflects a decision of the Security Council) remains a U.S. obligation under international law. As initially promulgated, EO 13,304 seemed to be in some tension with that obligation.

[30] 50 U.S.C. §§1701, 1702(a)(1)(B).

[31] *Id.* §1702(a)(2).

[32] *See* Dames & Moore v. Regan, 453 U.S. at 671–74 (1981) (upholding president's authority to nullify judicially ordered attachments and to order transfer of the affected assets); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162–63 (D.C. Cir. 2003) (upholding broad reading of "property in which" targeted entities "have any interest" as including both beneficial and legal interests); Global Relief Found. v. O'Neill, 315 F.3d 748, 752–54 (7th Cir. 2002) (same); Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999) (approving Libyan Sanctions Regulations as consistent with "sweeping powers" given to the president in IEEPA); Consarc Corp. v. Iraqi Ministry, 27 F.3d 695, 701 (D.C. Cir. 1994) (approving OFAC's broad definition of "property" and "property interest" in Iraqi Sanctions Regulations to include letters of credit); United States v. Lindh, 212 F. Supp.2d 541, 558–64 (E.D. Va. 2002) (upholding broad interpretation of "transaction," "dealing," "use," and "property" to include serving in Taliban and Al Qaeda forces); *cf.* Regan v. Wald, 468 U.S. 222, 230–40 (1984) (giving broad reading to IEEPA/TWEA

typically provide services pursuant to a contract that entitles them to some form of compensation, the provision of services for the benefit of someone usually constitutes a "transaction involving" the benefited person's property.[33]

Still, the courts have been willing in certain instances to find that OFAC's regulations exceeded the authority given in IEEPA, or have read the regulations more narrowly in order to avoid such a conclusion.[34] For example, two decades ago, in *American Airways Charters, Inc. v. Regan*,[35] the Court of Appeals for the District of Columbia Circuit was asked to interpret section 5(b) of the Trading with the Enemy Act (TWEA),[36] the language of which is the same as the relevant portion of IEEPA. A divided panel of the court refused to read the section as giving OFAC the power to require a U.S. lawyer to seek a license just in order to enter into an attorney-client relationship with a targeted Cuban company (though the court approved a requirement that the lawyer seek a license in order to receive payment of his fees). The court based its reading principally on two considerations. First, TWEA section 5(b)'s central purpose was to enable the president to harm enemies economically, and preventing an enemy company from simply hiring a lawyer did not serve that purpose.[37] Second, a licensing requirement for the provision of legal services would, in the court's view, "trench on a right of constitutional dimension"[38] because "in our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel."[39]

grandfather clause for Cuban Assets Control Regulations). Courts' deference has been heightened by several factors: IEEPA's express grant to the president of the authority to issue regulations further defining statutory terms, s*ee* 50 U.S.C. §1704, Consarc Corp. v. Iraqi Ministry, 27 F.3d at 701; *Chevron* deference, *see* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984), *see, e.g.*, Consarc Corp. v. Iraqi Ministry, 71 F.3d 909, 914 (D.C. Cir. 1995); and deference to the executive branch in matters of foreign policy and national security, *see, e.g.*, Paradissiotis v. Rubin, 171 F.3d at 988.

[33] This argument, though, would still seem to leave the provision of pro bono legal services as falling outside IEEPA's scope. *Cf.* Dames & Moore v. Regan, 453 U.S. 654, 675–78 (1981) (holding that suspension of lawsuits exceeded president's power under IEEPA to regulate "transactions"); Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 359–63 (11th Cir. 1984) (holding that initiation of an *in personam* lawsuit does not require license under Cuban Assets Control Regulations).

[34] *See, e.g.*, Centrifugal Casting Machine Co. v. Am. Bank & Trust Co., 966 F.2d 1348 (10th Cir. 1992) (refusing to consider letter of credit with respect to which targeted government company was account party as property interest of that company under IEEPA); Dean Witter Reynolds v. Fernandez, 741 F.2d at 359–63 (holding that initiation of an *in personam* lawsuit does not require license under Cuban Assets Control Regulations). In *Dames & Moore*, the Court found that the portion of the president's order suspending lawsuits exceeded the authority granted by IEEPA to regulate "transactions," 453 U.S. at 675, but it sustained the suspension as within the president's constitutional authority in light of Congress's long acquiescence in similar exercises of executive power, *id.* at 686.

[35] American Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984). The court's opinion was written by Judge Ruth Bader Ginsburg. Judge George E. MacKinnon dissented.

[36] 50 App. U.S.C. §5(b).

[37] 746 F.2d at 872 ("It is doubtful whether any of the exclusively economic purposes legitimately served by the Act would be advanced by upholding OFAC's novel position.").

[38] *Id.* at 867.

[39] *Id.* at 872–73. The court also seemed troubled that OFAC had never before included provision of legal services within the licensing requirement, *id.* at 868 n.3, 874 n.17, and that the requirement had the "Catch-22" effect, as the concurring judge emphasized, of requiring a license before a company could get a lawyer to represent it, among other things, in licensing proceedings before OFAC, *id.* at 876 (Greene, J., concurring). One of the categories of legal services now regularly included among the categories of authorized unlicensed legal services in OFAC's regulations implementing blocking orders is "[r]epresentation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons." 31 C.F.R. §515.512(a)(4) (2003) (Cuban Assets Control Regulations); *see, e.g.*, 31 C.F.R. §560.525(a)(4) (2003) (Iranian Transactions Regulations).

The D.C. Circuit did not appear to be troubled by the licensing requirement for receipt of fees. In the domestic criminal context, the Supreme Court held a few years later that the Constitution permits the government to seize funds that a criminal defendant would have used to pay his lawyer if those funds were forfeitable as proceeds of crime. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623–35 (1989); United States v. Monsanto, 491 U.S. 600, 615–16 (1989). In the Court's view, depriving defendants of those funds did not deprive them of the right to counsel of their own choice protected by the Sixth and possibly Fifth Amendments; the funds belonged to the government, not the defendants. "A defendant," the Court said, "has no Sixth Amendment right to spend

The first of those considerations—relating to economic harm—would support invalidation of a licensing requirement on the provision of legal services by U.S. attorneys appearing before international criminal tribunals on behalf of defendants whose property had been blocked. But other courts may not be as strict in their understanding of the purposes of TWEA section 5(b) (or of IEEPA) as was the court in *American Airways Charters.*[40] In any event, what seems to have been decisive for that court was the second factor—the paramount importance of access to counsel. But that factor would almost certainly not weigh against a licensing requirement for U.S. attorneys appearing before international tribunals; aliens (and, indeed, U.S. citizens) appearing before foreign tribunals, even as criminal defendants, possess no constitutional right to representation, let alone to counsel of their choice.[41] Nevertheless, one might argue that, to the extent the U.S. government helps to create, finance, and support a multinational tribunal, the constitutional obligations that the government bears toward criminal defendants in courts at home should, as a matter of law, carry over to that multinational context. Or one might contend that the fundamental importance of access to counsel in the U.S. legal system, which the court stressed in *American Airways Charters,* should limit the government's legal authority when shaping defendant's rights in an international court that the government has the capacity to influence. The former argument is unlikely to be persuasive, however, unless the United States actually controls the tribunal in question. Such control does not exist, of course, with respect to the ICTY, and it would defeat one of the very purposes of establishing international criminal tribunals—namely, to provide a forum for criminal prosecution beyond the control of any one nation. As for the latter argument, one would hope it would have some sway with the U.S. government, but the argument is ultimately an appeal to enlightened policy, not a claim with a clear foundation in the Constitution.

Another approach would be for defense lawyers to invoke their own constitutional rights. For example, since U.S. defense lawyers possess First Amendment rights, they might try to attack a licensing requirement on the provision of legal services as an infringement on their freedom of association or expression.[42] The Supreme Court has recognized the ability of lawyers to solicit clients as a protected form of association when the lawyers work for an organization, such at the ACLU or the NAACP, for which litigation is "a form of political expression" and of "political association."[43] If a U.S. attorney could show that he undertook the defense of a client at the ICTY as part of his larger involvement in the activities of, say, a group promoting Serbian nationalist political aims, he could potentially claim some First Amendment protection (though the fact that his legal work was being undertaken overseas might undercut his position). But even if a defense counsel's motives were genuinely political in this sense—which appears to be the case with only a small number, if any, of the American members of

another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale*, 491 U.S. at 626.

OFAC's intrusion on defendants' right to counsel of their own choosing—by imposing a licensing requirement upon the receipt of fees for legal services—is both less and potentially more severe than the intrusion upheld in *Caplin & Drysdale* and in *Monsanto.* It is fundamentally less severe because the licensing requirement need not deprive defendants of funds to pay their chosen attorneys. It simply mandates government permission before the funds may be so used. Nevertheless, the licensing requirement is more severe in that it applies to all of the defendants' property (in the United States or possessed or controlled by a U.S. person) and not just to the property that the government can show is connected to the defendant's alleged criminal activity.

[40] *Cf., e.g.*, Regan v. Wald, 468 U.S. 222, 225, 242–44 (1984) (noting "broad authority" given to the president by TWEA and upholding travel restriction as valid exercise of authority under §5(b)); United States v. Plummer, 221 F.3d 1298, 1310 n.8 (11th Cir. 2003) (describing TWEA's "original goal" as "promoting national security"). Even if one understands TWEA as limited to empowering the president to inflict economic damage on enemies, a ban on acquiring legal representation may in some circumstances have the effect of causing financial harm.

[41] *See* United States v. Balsys, 524 U.S. 666, 671–700 (1998) (criminal prosecution by a foreign government does not constitute a "criminal case" within the meaning of the Fifth Amendment's protection against self-incrimination; Sixth Amendment guarantees "clearly appl[y] only to domestic criminal proceedings").

[42] The Supreme Court first recognized a right of association as implicit in the First Amendment in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[43] *In re* Primus, 436 U.S. 412, 428 (1978); *see NAACP v. Button*, 371 U.S. 415, 444 (1963).

the ICTY defense bar—the scope of a counsel's First Amendment right would still be determined by balancing the strength of his or her interests in free association and free expression against the importance of the government's regulatory aims.[44] The balance is likely to tip against the claim even of a U.S. defense lawyer genuinely motivated by political aims. Not only do courts generally take a deferential approach to executive assertions of regulatory interests based on foreign policy considerations, but they might also give reduced weight to associational claims relating to litigation overseas.

Another possibility would be for affected U.S. defense lawyers to raise due process claims against orders such as EO 13,304. The legal theory would be that either the lawyers' capacity to practice law or their contracts with their clients constitute property of which the government has deprived them—and that the government may not do so without an advance hearing. The first theory, however, is flawed, at least in the context of the executive orders in question: although the ability to practice a profession *is* a constitutionally cognizable property interest,[45] the ability to represent a particular group of clients is not. The second theory would apply in the case of attorneys who are already representing clients at the ICTY and who must suspend their work while waiting for licenses (or, even more emphatically, who have simply been denied licenses to continue that work). In such cases, the lawyers would have been deprived of their property interests in their contracts with their clients, as well as in the associated remuneration. Nevertheless, courts have been hesitant to impose a pre-deprivation hearing requirement in the context of foreign policy decisions.[46]

Finally, lawyers denied licenses to represent clients before the ICTY or another international criminal tribunal might raise takings claims based on the loss of income from their contracts with clients. Such a claim, however, would face several obstacles. A number of cases suggest that the frustration of a contractual agreement by otherwise lawful government action not aimed at the affected party—and in EO 13,304 the government's action was aimed at the ICTY indictees, not their lawyers—does not constitute a taking of property, regardless of the extent of the loss.[47] If the frustration of the lawyers' contracts through license denials was analyzed, instead, as a kind of regulatory taking under the factors announced in *Penn Central Transportation Co. v. New York City*,[48] the lawyers would have to demonstrate that, among other things, they possessed reasonable, investment-backed expectations of receiving compensation for their services. The courts have uniformly held, however, that individuals engaging in international transactions of virtually any kind are on notice that their activities may be subjected to regulation and frustration by the government's foreign policy decisions—and that individuals' expectations that their transactions would be free from such interference were consequently not reasonable.[49] For this reason, although representation of a defendant in a domestic criminal trial may well be an activity that one might reasonably expect to engage in free of intrusive federal regulation, it is questionable whether such an expectation would be found reasonable in the case of representing an alleged war criminal before an international tribunal.

Although EO 13,304 and its accompanying regulations are likely to be immune from challenge in U.S. courts, they still raise the question whether such licensing requirements on the provision of legal services—or even on the receipt of payment for legal services—may stand in some tension with the United States' commitment to ensuring the effective protection of

[44] *See Primus*, 436 U.S. at 424–25; *Button*, 371 U.S. at 444.

[45] *See, e.g.*, Schware v. Bd. of Bar Examiners, 353 U.S. 232, 238–39 (1957).

[46] *See, e.g.*, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 163–64 (D.C. Cir. 2003).

[47] *See* 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1581–83 (2d Cir. 1995); Chang v. United States, 859 F.2d 893, 896 (Fed. Cir. 1988).

[48] 438 U.S. 104 (1978).

[49] *See, e.g.*, Paradissiotis v. United States, 304 F.3d 1271, 1276 (Fed. Cir. 2002); *767 Third Ave. Assocs.*, 48 F.3d at 1580–81; *Chang*, 859 F.2d at 896–97.

defendants' rights under the ICTY Statute (and also under the statutes of other international criminal tribunals). Article 21 of the ICTY Statute guarantees defendants the rights to have "legal assistance of [their] own choosing" and to have "legal assistance assigned to [them], in any case where the interests of justice so require, and without payment by [them] in any such case if [they] do[] not have sufficient funds to pay for it."[50] Of course, blocking orders such EO 13,304 and their associated regulations do not impose outright prohibitions. They merely establish licensing requirements. The conflict between the orders and regulations, on the one hand, and the ICTY Statute or other sources of U.S. obligations under international law, on the other, will become concrete only if U.S. lawyers representing criminal defendants are denied individual licenses. Still, as the experience following the issuance of EO 13,304 suggests, any delay in the issuance of individual (or general) licenses may well disrupt ongoing criminal proceedings. Not only would such disruptions potentially hinder the ability of defendants to get fair trials and appeals, but they would also slow the ICTY or other tribunals in their efforts to complete their mandates expeditiously—a goal that, in the case of the ICTY, the United States has been pressing for with increasing urgency. Moreover, given that the United States has the ability to track payments by licensing the receipt of fees, the licensing of representation itself seems unnecessary. Thus, in order to avoid both the sort of disruption caused by EO 13,304 at the ICTY and the loss of time and energy associated with the issuance of a general license in such circumstances, OFAC may well want to consider expanding its blocking-order regulations to include an additional category in which unlicensed legal representation is authorized—namely, when U.S. treaty obligations require access to counsel at public expense.

JONATHAN G. CEDARBAUM*

[50] The statutes of the International Criminal Tribunal for Rwanda (Article 204(d)), the Special Court for Sierra Leone (Article 14(4)(d)), and the International Criminal Court (Article 67(1)(d)) contain similar guarantees. For example, Article 204(d) of the ICTR Statute states that the defendant has the right "to defend himself or herself . . . through legal assistance of his or her own choosing . . . and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it." The language in all three statutes, as well as that in the ICTY Statute, borrows from that in Article 14(3)(d) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

* Associate, Wilmer, Cutler & Pickering; former Legal Officer and Deputy Chef de Cabinet, Office of the President, ICTY. I am grateful to Guido Acquaviva, Nancy Combs, Theodor Meron, Igor Timofeyev, Alice Winkler, and two anonymous AJIL reviewers for helpful comments on earlier drafts.