Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS, Plaintiff, v. OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, Defendant.	NO. C04-108C REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS Note on Motion Calendar: May 28, 2004

Preliminary Statement

The bulk of Plaintiff's opposition to the Office of Foreign Assets Control's ("OFAC's") motion to dismiss is an exercise in bait and switch. Plaintiff is determined to focus this Court's attention on the government's regulation of medical supplies exported to Iraq. This effort stumbles on one sterling fact: It is absolutely clear—even from the complaint alone—that Plaintiff was fined by OFAC pursuant to §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207[1] for travel-related expenditures, not pursuant to 31 C.F.R. §575.205 for providing medical supplies to Iraq. See Pl. Compl., Ex. 2 (Penalty Notice). This lawsuit, then, which challenges the fine levied on Plaintiff, raises only the legal issue whether §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207 are valid and constitutional exercises of the power delegated to the President by Congress.

[1] As in OFAC's motion to dismiss, all cites to the Code of Federal Regulations in this reply memorandum are to the regulations as they existed at the time Plaintiff traveled to Iraq in November 1997.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

It is also important to identify what is not at issue in this lawsuit. Plaintiff's complaint (and his opposition) makes clear that he challenges his fine on three grounds only: First, Plaintiff argues that the President did not have authority from Congress to promulgate §2(d) of Executive Order 12,724. Second, Plaintiff argues that §2(d) violates international law. Finally, Plaintiff argues that the statute of limitations in 28 U.S.C. §2462 defeats OFAC's motion to dismiss. Plaintiff does *not* bring a claim under the Administrative Procedure Act alleging that the factual basis for his fine was "arbitrary and capricious." 5 U.S.C. §706. Indeed, Plaintiff merely notes that he might have brought this claim, without raising it in his complaint or opposition. See Pl. Opp. at 16 n.68. Accordingly, if OFAC prevails on the three challenges that Plaintiff actually raised in response to his fine, OFAC is entitled to the dismissal of this lawsuit.

OFAC's motion to dismiss established definitively that §2(d) of Executive Order 12,724 is both constitutional and a valid exercise of the authority delegated to the President by Congress. Nothing in Plaintiff's opposition undermines that showing. Hardly anything in Plaintiff's opposition even addresses it. And this reply demonstrates conclusively that Plaintiff cannot use a statute of limitations argument to undermine the penalty assessed by OFAC. As a result, this Court should dismiss Plaintiff's lawsuit for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

Argument

I. The Federal Government's Regulation of the Export of Medical Supplies to Iraq Is Not at Issue in this Lawsuit.

As noted in OFAC's motion to dismiss, see Def. Mot. at 5, the federal government's regulation of the export of medical supplies to Iraq is not at issue in this lawsuit, despite Plaintiff's repeated efforts to make it the centerpiece of his complaint and opposition memorandum. This lawsuit challenges only the fine levied by OFAC against Plaintiff.[2] See Pl. Compl., p. 18, *Relief Requested* (seeking "[a] declaration that OFAC is not entitled to collect a

[2] Plaintiff's complaint also purports to seek an injunction preventing "OFAC from further efforts to collect civil penalties from individuals who seek to travel to Iraq or donate food or medicine to civilians there." Pl. Compl., p. 19. Plaintiff has not supported this request for relief with any legal argument. Nor, as discussed below, would Plaintiff have standing to bring such a claim. See *infra*, at 3–4.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

civil penalty from [Plaintiff]"). Accordingly, the only issue relevant to this lawsuit is whether the regulation under which Plaintiff was actually fined—not any other regulation under which Plaintiff *could have* been fined—is valid and constitutional. And the simple fact is that OFAC penalized Plaintiff for engaging in "currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC." Pl. Compl., Ex. 2, p. 1 (Penalty Notice) (also citing 31 C.F.R. §575.207). Accordingly, the only issue properly before this Court is the prohibition on travel-related expenditures; Plaintiff's lengthy discussion of the government's regulation of medical supplies is wholly irrelevant.

Because the federal government's regulation of medical supplies exported to Iraq is not relevant to this lawsuit, OFAC did not address that regulation in its motion to dismiss. So while Plaintiff is correct that "[n]owhere in OFAC's motion does OFAC" defend the regulation, it is of no significance. Pl. Opp. at 16. The government's regulation of the export of medical supplies to Iraq is legal. And in a lawsuit that properly presented that question, OFAC would vigorously defend the regulation. But in this lawsuit, any such defense would merely allow Plaintiff to distract attention from his willful violation of a separate, plainly valid regulation.[3] OFAC will not take the bait.

Not only does Plaintiff's complaint not present a challenge to the government's regulation of medical supplies, but the complaint *could not* present a cognizable challenge to that regulation even if Plaintiff intended it to. Plaintiff does not have standing to challenge that regulation. The standing requirements of Article III of the Constitution require a plaintiff to demonstrate that he has suffered an "injury in fact" that is "fairly traceable" to the challenged regulation. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, it cannot be said that Plaintiff's "injury"—that is, the penalty that OFAC has levied on him—is traceable to government's regulation of medical supplies exported to Iraq; this regulation was never applied to Plaintiff. That Plaintiff was fined under one regulation does not give him standing to challenge regulations

[3] The validity of the government's regulation of the export of medical supplies to Iraq is currently briefed and pending in *Office of Foreign Assets Control v. Voices in the Wilderness*, Civ. No. 03-CV-1356 (D.D.C.).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

that have not been applied to him. See, e.g., *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997); *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1097 (2d Cir. 1997); *Madsen v. Boise State University*, 976 F.2d 1219, 1220–21 (9th Cir. 1992). Because he was not "injured" by the regulation of the export of medical supplies to Iraq, then, Plaintiff lacks standing to challenge it.[4] (Additionally, Plaintiff has no standing to seek an injunction preventing OFAC from assessing penalties in the future. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–112 (1983).)

In sum, because this lawsuit challenges the fine assessed against Plaintiff by OFAC, Plaintiff's argument regarding the government's regulation of the export of medical supplies to Iraq is irrelevant. Further, Plaintiff would have no standing to challenge that regulation even if his complaint did adequately raise the issue.

II. The Government's Prohibition on Travel-Related Expenditures Regarding Iraq Is Legal and Constitutional.

Government regulation of travel-related transactions is nothing unfamiliar to the courts. The Supreme Court and the Court of Appeals for the Ninth Circuit have each considered and rejected constitutional challenges to the federal government's regulation of travel-related expenditures regarding Cuba. See *Regan v. Wald*, 468 U.S. 222, 240–244 (1984); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437–1439 (9th Cir. 1996). As a constitutional matter, the Cuba regulation is no different than §2(d) of Executive Order 12,724. The result in this lawsuit, then, should be no different than the result in those lawsuits.

As OFAC's motion to dismiss established conclusively, international law is not a basis on which Plaintiff may challenge §2(d) of Executive Order 12,724: The international texts cited by Plaintiff are not binding domestic law; the international texts do not create private rights; the international texts pre-date the Iraq Sanctions Act of 1990; obligations under the U.N. Charter govern over any other obligation of international law; and customary international law is only binding in domestic courts in the absence of legislative or executive action. See Def. Mot. at 10–19. Plaintiff's opposition does not respond. Instead, it discusses the federal government's

[4] Additionally, because OFAC has altered the regulation of medical supplies in response to the recent events in Iraq, a facial challenge against the regulations as they were in 1997 would be moot. See 68 Fed. Reg. 28753 (May 27, 2003); 68 Fed. Reg. 11741, 11743–45 (Mar. 12, 2003) (also discussed at Def. Mot. at 3 n.2).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

regulation of medical supplies, continuing to contend that the regulation of medical supplies violates international law. Plaintiff's position, even if it were correct (which it is not), cannot undermine the penalty levied against Plaintiff, which was for travel-related expenditures, not for exporting medical supplies to Iraq. Accordingly, it is clear that international law does not affect the validity of §2(d) of Executive Order 12,724 or 31 C.F.R. §575.207.

OFAC's motion to dismiss also established that §2(d) of Executive Order 12,274 is authorized by the United Nations Participation Act ("UNPA"), 22 U.S.C. §287c(a). See Def. Mot. at 7–8. In short, the UNPA authorizes the President to comply with requests of the U.N. Security Council to apply economic sanctions or other measures against a country that refuses to comply with Security Council mandates. Section 2(d) was promulgated at the direct request of the U.N. Security Council. Security Council Resolution 661 decided that all member countries of the United Nations would "not make available to the Government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, *any funds or any other financial or economic resources* and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds *to persons or bodies within Iraq* or Kuwait." U.N.S.C. Res. 661, §4 (Aug. 6, 1990) (emphasis added) [Attached to Def. Mot. at Ex. 1]. This broad directive, which extends to all "persons and bodies within Iraq," plainly encompasses §2(d)'s prohibition on travel-related expenditures. Accordingly, because §2(d) fulfills a Security Council decision, it is authorized by the UNPA.[5]

Plaintiff's only objection to this showing is to argue that "section four [of Resolution 661] makes no mention of travel to Iraq whatsoever, and neither does any other section of Resolution 661." Pl. Opp. at 18. While this statement is true, it is meaningless. Section 4 discusses any and all currency transactions with the government of Iraq or its people. Travel-

[5] Plaintiff's opposition makes much of the fact that OFAC's motion to dismiss quoted only portions of the UNPA, omitting the phrase "to the extent necessary to apply such measures." Pl. Opp. at 17–18. This accusation is ill-considered. OFAC's discussion of the UNPA makes absolutely clear that the UNPA authorizes the President only to comply with Security Council requests for action. See Def. Mot. at 7–8. Indeed, that is the very reason that the motion to dismiss explains in detail that §4 of Security Council Resolution 661 called for the prohibition on travel-related expenditures.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

related transactions are a subset of these transactions. See *Regan*, 468 U.S. at 229 (noting that the prohibition on travel-related expenditures regarding Cuba "reduce[s] Cuba's hard currency earnings from travel by U.S. persons to and within Cuba"). Accordingly, the absence of a specific mention of travel-related transactions in Resolution 661 does not undermine OFAC's showing that Security Council Resolution 661 broadly prohibits all economic transactions regarding Iraq.

In addition to being authorized by the UNPA, §2(d) of Executive Order 12,724 was also expressly authorized by §568C(a) of the Iraq Sanctions Act of 1990, Pub. L. 101-513, *codified at* 50 U.S.C. §1701 *note*. See Def. Mot. 8–9. This Act was passed *after* the President promulgated Executive Order 12,724, and expressly approved of that Executive Order.[6] Plaintiff's sole response contends that Executive Order 12,724 explicitly exempts the regulation of medical supplies from its scope. See Pl. Opp. at 23. Again Plaintiff's argument misses the mark, for, regardless of the validity of the regulation of medical supplies, the prohibition on travel-related expenditures is valid. It is under the latter regulation that OFAC fined Plaintiff.

Plaintiff also contends that the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§1701–1707, limits OFAC's authority to penalize him. See Pl. Opp. at 22. This proposition has two flaws. First, the IEEPA's limitations on authority—found at 50 U.S.C. §1702(b)—on which Plaintiff's argument relies, apply only to the "authority granted to the President by this section"—that is, the authority granted to the President by 50 U.S.C. §1702 itself. These limitations, then, do not limit the authority granted to the President by other statutes, such as the UNPA. Further, Plaintiff admits that the IEEPA's limitation on regulating travel, found at 50 U.S.C. §1702(b)(4), was added to the IEEPA only in 1994 and does not apply to travel restrictions promulgated prior to that time. See Pl. Opp. at 22 n.85. Executive Order 12,724 was promulgated in 1990, and so §1702(b)(4) does not apply to the sanctions against Iraq. Plaintiff does note that the limitation in 50 U.S.C. §1702(b)(2) was enacted prior to Executive Order 12,724, but that subsection relates to regulation of medical supplies, which, as

[6] And, as a later-in-time statute, the Iraq Sanctions Act governs over any earlier inconsistent statute or self-executing treaty. See Def. Mot. at 15–17.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

discussed above, is not relevant to the penalty that OFAC levied against Plaintiff.

Perhaps what Plaintiff means to contend is that the right to provide medical supplies to Iraq includes any action necessary to get those supplies there, including, in Plaintiff's view, the right to travel to Iraq and deliver them. Although Plaintiff's opposition does not make this argument outright, it hints at it. See Pl. Opp. at 5 ("Section 575.207 prohibited travel to Iraq without exempting travel for the purpose of sending medicine and medical supplies to the Iraqi citizens."). Plaintiff's argument would contend, then, that although prohibitions on travel-related expenditures are generally permissible, such a prohibition must stand down in the face of a person who travels for the specific purpose of delivering medical supplies.

This argument is faulty, and not only because the position would in theory allow him to commit any crime in service of his mission to deliver medical supplies to Iraq. As an initial matter, even if the IEEPA did deprive the executive branch of any authority to regulate the export of medical supplies to Iraq either "directly or indirectly" (which, as discussed above, it does not), Plaintiff's interpretation of the affect of such a provision on the government's ability to regulate travel-related expenditures is implausible. The D.C. Circuit resolved this precise question in favor of the government in *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991). There the Court confronted a plaintiff's argument that, because the government lacked the authority under the Trading With the Enemy Act to regulate the import from Cuba into the United States of informational materials, such as posters, either "directly or indirectly," the government's prohibition on travel-related expenditures regarding Cuba had to give way to allow the plaintiff to travel to Cuba for purposes of enabling him to import posters to the United States.[7] *Id*. at 1232. The Court rejected the plaintiff's claim, finding "the potential reach of his view . . . extraordinary." *Id*. Once a person is entitled to take any action necessary to accomplish his goal, the Court reasoned, the supposedly limited exception would overwhelm the rule. "Suppose that the Cuban government required any American who wished to import informational items such as posters to pay for a trip to Cuba on a state-owned airline, to pay a substantial fee into government

[7] The Trading With the Enemy Act ("TWEA") is a similar statute to the IEEPA. The TWEA delegates power to the President to promulgate economic sanctions in wartime, and the IEEPA does the same for times of peace. See, e.g., *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1204 n.2 (9th Cir. 2003).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

coffers, and to buy a large amount of (non-informational) Cuban goods. Each of these payments would then be a 'normal and necessary' prerequisite to the importation of posters, and, although all of these transactions are now forbidden by the regulations . . . [the plaintiff's] reading would require the United States to yield." *Id*. This would permit the very country being sanctioned to alter the scope of the sanctions. *Walsh* held this interpretation impermissible.

The *Walsh* decision applies directly to any argument that Plaintiff must be allowed to travel to Iraq as a necessary corollary to providing medical supplies to Iraq. As in *Walsh*, if the government of Iraq had required persons providing medicine to the country to first pay a million dollars to the Iraqi government, that would be "necessary" to providing medicine to the Iraqi people and, therefore, permissible despite the sanctions program. Such an interpretation would be untrue to Congress's intent to deprive the Iraqi government of currency through economic sanctions. It simply cannot be that when a person undertakes a permissible act, he can commit impermissible acts to achieve it: Just because the First Amendment protects freedom of expression does not mean that a person may distribute printed words detailing how to manufacture illicit drugs. See *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). The same holds true for Plaintiff in the instant case. Even if Plaintiff could establish a right to provide medical supplies to Iraq, that right would not include any action necessary to succeed at that task. As established above, separate from its ability to regulate the export of medical supplies to Iraq, the federal government has the ability to prohibit travel-related expenditures regarding Iraq. It is under the latter power that Plaintiff has been fined. That penalty need not give way because Plaintiff took medicine with him when he traveled.

Regardless, in order to even make an argument similar to that of the plaintiff in *Walsh*, Plaintiff here would need to establish that it was *necessary* to deliver medical supplies to Iraq in person, as opposed to sending them. Plaintiff cannot make such a showing. Even under the regulations at the time that Plaintiff traveled to Iraq,[8] OFAC did allow persons to apply for a license to send medical supplies to Iraq. See 31 C.F.R. §575.205. Plaintiff did not apply for a

[8] As mentioned above, the regulations have been loosened considerably in response to recent events in Iraq. See *supra* at 4 n.4.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

license, so it is impossible to know whether an application to send supplies would have been approved. Plaintiff cannot bootstrap his own refusal to apply for a license into an argument that it was necessary for him to travel personally to Iraq to deliver the supplies. See *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) ("[F]ailure to apply for a permit precludes challenge to the manner in which the Act is administered."); *Madsen v. Boise State University*, 976 F.2d 1219, 1220–21 (9th Cir. 1992) (similar). Thus, under no circumstance can Plaintiff subvert the prohibition on travel-related transactions by claiming that he traveled in service of delivering medical supplies.

III. This Lawsuit Presents No Statute of Limitations Problems.

Plaintiff's lead argument in his opposition is that "OFAC's claim is time-barred" because "the limitations period for bring[ing] suit expired in November 2002." Pl. Opp. at 14. This argument is puzzling. OFAC has not brought a "claim" against Plaintiff; Plaintiff has brought this lawsuit against OFAC. Thus, there is no existing lawsuit that Plaintiff's statute of limitations argument can bar.

Perhaps Plaintiff means to contend that, because more than five years has elapsed since Plaintiff's November 1997 trip to Iraq, OFAC can no longer institute a civil action to enforce its penalty notice issued in May 2002 (which was within five years of Plaintiff's trip to Iraq) and, as a result, the penalty notice should be wiped from the books. If this is Plaintiff's argument, it fails for complete lack of support. "It is well settled that the running of a statute of limitations merely bars the assertion of a particular remedy outlined in the statute and does not extinguish the underlying claim." *Roberts v. Bennett*, 709 F. Supp. 222, 224 (N.D. Ga. 1989). Indeed, courts have crafted a definitive line concerning statutes of limitations, holding repeatedly that when a limitations period expires, it merely prevents the government from collecting the debt through the courts, not from using extra-judicial means of collection. See *id*. at 224; *Jones v. Cavazos*, 889 F.2d 1043, 1047–1049 (11th Cir. 1989); *Thomas v. Bennett*, 856 F.2d 1165, 1168–69 (8th Cir. 1988); *Gerrard v. Office of Education*, 656 F. Supp. 570, 573–75 (N.D. Cal. 1987). The analysis in these cases is supported by the text of the relevant statute of limitations itself, which provides only that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

forfeiture" must be commenced within five years "from the date when the claim first accrued." 28 U.S.C. §2462. Thus, the statute explicitly indicates that when the limitations period expires, the only power affected is the government's ability to bring an enforcement proceeding.[9]

OFAC has not brought an enforcement proceeding against Plaintiff. Rather, it is currently collecting the penalty against Plaintiff through Ocwen Federal Bank, an extra-judicial means of collection. This manner of collection is specifically allowed by 31 U.S.C. §3718(a), which provides that, "[u]nder conditions the head of an executive, judicial, or legislative agency considers appropriate, the head of the agency may enter into a contract with a person for collection service to recover indebtedness owed, or to locate or recover assets of, the United States Government." Accordingly, OFAC's extra-judicial actions are proper, and 28 U.S.C. §2462 has no relevance to those actions.[10]

Plaintiff's statute of limitations argument also contends that Plaintiff must be permitted to raise a statute of limitations argument because, if he cannot, "how is Mr. Sacks to contest the validity of the claimed penalty?" Pl. Opp. at 14. The answer is obvious: Plaintiff can challenge the validity of the penalty by doing exactly what he has done—filing a lawsuit challenging the validity of the penalty. Plaintiff need not wait (and has not) for OFAC to initiate an enforcement action. He is free to do exactly as he has done; he simply cannot raise an affirmative defense against an enforcement action that OFAC has never brought.

Finally, Plaintiff contends that this lawsuit must be dismissed because OFAC did not issue the penalty notice within the five year limitations period. But, first, 28 U.S.C. §2462 applies only to legal proceedings to enforce a penalty; it does not apply to an administrative procedure to assess a penalty. And, second, OFAC did issue the penalty notice in May 2002, within five years of Plaintiff's November 1997 trip to Iraq. See Pl. Compl. at ¶ 41. Accordingly, Plaintiff has no statute of limitations argument based on the date that OFAC issued the penalty

---

[9] To be clear, OFAC does not concede that Plaintiff could defeat an enforcement action with this statute of limitations argument. Rather, OFAC believes that this issue is not appropriately before the Court at this time.

[10] Additionally, the propriety of OFAC's attempts to collect the penalty through Ocwen Federal Bank is not at issue in this lawsuit, which challenges only the validity of the fine itself.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

notice.

Conclusion

For the foregoing reasons, and for the reasons raised in OFAC's motion to dismiss, this Court should dismiss this lawsuit for failure to state a claim upon which relief may be granted.

Dated: May 24, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JOHN McKAY
United States Attorney

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney

s/ Joshua Z. Rabinovitz
SANDRA M. SCHRAIBMAN
Assistant Branch Director
JOSHUA Z. RABINOVITZ
Trial Attorney

Counsel for the Office of Foreign Assets Control

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970