

May 2010

Pirates, ransoms, and the US Government

Dennis L. Bryant

On April 13, 2010, President Obama signed an Executive Order blocking property of certain persons contributing to the conflict in Somalia. Why did this action create such a stir in the maritime community? Because the wording of the Executive Order sowed uncertainty as to whether it criminalizes the payment of ransoms to Somali pirates who have hijacked merchant vessels and kidnapped the crews.

The blocking order is directed at the Somali rebel group al-Shabaab, its leadership, and any other person subsequently determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or acts that threaten the Transitional Federal Institutions of Somalia, the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia. The blocking order also applies to any other person subsequently determined by the Secretary of the Treasury, in consultation with the Secretary of State: to have obstructed the delivery of humanitarian assistance to Somalia, or access to or distribution of humanitarian assistance to Somalia; to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia, of arms or any related material, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities; to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of activities proscribed in the Executive Order or any person whose property and interests have been blocked by the Executive Order; or to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Executive Order. The Executive Order includes an Annex prepared by the Office of Foreign Assets Control (OFAC) listing eleven individuals (in addition to al-Shabaab) whose properties and interests in properties has been blocked. OFAC asserts that two of the individuals on the list are "known supporters of piracy". Names may be added to the Annex without prior notice of a listing or determination made pursuant to the Executive Order.

The confusion and uncertainty arises from the wording of the preamble to the Executive Order, which is, by definition, non-substantive. The preamble states, in summary, that President Obama finds that the deterioration of the security situation and the persistence of violence in

Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, and violations of the arms embargo imposed by the United Nations Security Council constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

Al-Shabaab and its allies have engaged in piracy and armed robbery at sea off the coast of Somalia, attacking humanitarian food shipments. While these acts of piracy and armed robbery at sea by al-Shabaab have not been on the scale of those engaged in by pirates located in northern Somalia, they have directly threatened the security of the Transitional Government of Somalia, the downfall of which is a stated goal of al-Shabaab. The more traditional pirates of northern Somalia, on the other hand, tend to focus their activities on passing foreign merchant vessels and on foreign commercial fishing vessels.

The last thing desired by the pirates in northern Somalia (Puntland and Somaliland) is the downfall of the Transitional Government and its replacement by al-Shabaab. Due to the quantity of their ill-gotten gains, the pirates are living large. Some of them now own large houses and expensive vehicles. They drink alcohol and consume khat. They hire prostitutes. All of this would end abruptly if al-Shabaab came to power, because that rebel group practices a severe variant of Islam, including stoning and the chopping off of hands.

How does one then align the wording of the Executive Order with the facts on the ground?

Various members of the Obama Administration, including Secretary of State Hilary Clinton, have contended that payment of ransom to the Somali pirates exacerbates the problem by encouraging the pirates to continue their unlawful activities despite the threat of military force and judicial action. Up to that point, they are correct. Some go further, though, and argue that ship owners (and insurers) who pay ransoms for return of their hijacked ships and kidnapped crews are effectively aiding and abetting the pirates and that such payments should be considered violations of the law. No mention is made of the consequences of the alternative: without the payment of ransom, the ship and its crew could rot for an extended period (perhaps indefinitely) anchored off the coast of northern Somalia. Unfortunately, risks to the lives and well-being of merchant mariners increase with time while they are held captive by pirates. This minority-held goal of declaring payment of ransom to pirates to be illegal has found little support, either in the United States or in the international community generally. The vaguely-worded Executive Order achieves the next-best thing. It causes uncertainty and generates a hesitancy on the part of ship owners and insurers worldwide to continue paying ransoms to the Somali pirates.

OFAC recently indicated that it is willing to work with owners and insurers of ships that have been hijacked to seek means for payment of ransom to pirates that will not violate the Executive Order. This would involve, at a minimum, no participation in the process by US citizens or persons located in the United States and no use of US currency. In addition, funds could not move through US banks. OFAC has not indicated what will happen when these conditions cannot be met, as when the ship is owned by a US citizen or entity, the ship is documented in the United States (e.g., the *Maersk Alabama*), or the insurer is a US entity.

Everyone agrees that the piracy situation will not be solved at sea. It is only through re-establishing a functioning government and a viable economy in northern Somalia that the current pirates will be brought to justice and their pool of recruits will dry up. The United Nations is working on this very effort. The problem is that nations, including the United States, have donated only a minuscule portion of the amount required to improve the situation ashore. In the meantime, merchant mariners are daily sailing ships through pirate-infested waters, carrying cargoes vital to the world's economy. If the United States Government and its allies cannot or will not take effective action to stop the pirates, they should at least not imperil the lives of those pursuing a lawful and important profession – the merchant mariner – by impeding a necessary evil, the payment of ransom for the safe return of those mariners. It should be not be forgotten that the United States Government paid annual tribute to the Barbary pirates to ensure the safety of American sailors until, in 1801, the pirates' demand reached the point that the federal budget could not afford it. Only then did President Jefferson send in the US Navy and the US Marine Corps to free the captives and stop the piratical attacks.