

## THE UNITED STATES ANTIBOYCOTT LAW AND OTHER EXPORT CONTROLS

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I approach an occasion like this thinking that perhaps I should come equipped with a mask from ancient theatre so I could flip to one side and show my benign visage as a trade promoter and then quickly flip to the other side to show the scowl of the regulator and the enforcer. It is true that both roles are combined in my job; it is true that both are combined in the International Trade Administration in the Department of Commerce, where I provide legal counsel; and it is true that this split personality, schizophrenia if you will, runs through the Executive Branch as a problem in managing the separation of powers. This confusion of Executive roles is part of the history of United States law and practice in dealing with the regulation of international trade.

There has been over the decades a struggle for balance, a struggle for balance of some very important competing interests. This effort has involved the difficult task of trying to strike a balance between the urge and necessity of increasing exports on the one hand and the strong and vital interest in protecting national security on the other. In recent years one side of that balance has increasingly moved beyond traditional national security concepts to the advocacy of the use of export controls to achieve foreign policy interests. That development has been a difficult and complicated component of the balance striking process.

I cannot accept the segmentation of this process by decades as has been proposed, because the foreign policy export controls have really been with us for twenty to thirty years in the form of the embargoes against Cuba.<sup>1</sup> These are foreign policy export controls;

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<sup>1</sup> See Proclamation No. 3447, 27 Fed. Reg. 1085 (1962). Regulations based upon this proc-

they are broad embargoes. They illustrate, I believe, another ingredient of the problem with which our nation must cope. That problem is the tendency in our system toward accretion of controls, toward the continuation, perhaps in some cases mindless continuation, of controls beyond the circumstances that have given them their birth. Congress attempted to deal with the growth of regulation in the Export Administration Act of 1979<sup>2</sup> with a one-year sunset provision on foreign policy based controls.<sup>3</sup> The Administration has now given the controls three years of almost complete roll-over extension<sup>4</sup> and I, for one, am surprised at the degree of tolerance that has been shown by the Administration in this regard.

The battle for balance in this area is inherently colored by our constitutional separation of powers. The President, with his pow-

lamation were originally issued at 31 C.F.R. §§ 515.201-515.801 (1962), and those regulations now appear at 31 C.F.R. §§ 515.101-515.809 (1984) as amended.

<sup>2</sup> Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), 50 U.S.C. app. §§ 2401-20 (1982). For review and criticism of the workings of the Act, see Evvard, *The Export Administration Act of 1979: Analysis of its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1 (1982); Note, *The Export Administration Act's Technical Data Regulations: Do They Violate The First Amendment?*, 11 GA. J. INT'L & COMP. L. 563 (1981); Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255 (1981).

<sup>3</sup> 50 U.S.C. app. § 2405(a)(2) (1982).

<sup>4</sup> The President must use the criteria set out in 50 U.S.C. app. § 2405(b)(1)(6) to determine whether to extend the controls past the one-year limit. The required considerations are:

(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States policy toward the country which is the proposed target of the controls;

(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effect of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of controls on existing contracts;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.

50 U.S.C. app. § 2405(e) requires the President to notify Congress of his findings under this subsection and of his intent to extend controls.

*Id.*

ers in the areas of both national defense and foreign relations, must try to reach the correct balance between his assertions of inherent authority and his deference to the very explicit constitutional grant of power to the Congress with respect to the enactment of laws regulating the foreign commerce of the United States.

Another ingredient in the process, and one that I think is coming more into focus once again, is the need to strike a balance between various economic interests in our country. I would submit that these interests are agriculture services and financial services on the one hand versus domestic manufacturing on the other. The promotion of either set of interests has been seen as bringing retaliation against the other.

Another complex aspect of our system of export controls concerns regulatory procedures or techniques. We must constantly inquire about the correct balance between the desire for predictability and precision in regulations and the need in areas of diplomacy, international relations, and national security for a fairly broad degree of executive flexibility. Similar considerations are sometimes thought to call for a reduced degree of transparency in the governmental process.

The often uncertain and contentious distribution of Export Administration Act functions and authorities among the Department of Commerce, the Department of Defense, and the Department of State, is another product of this difficult political process of trying to reach an appropriate balance. Another speaker has correctly cited a number of current issues on Capitol Hill that reflect the continuation of this process. We are certainly going to continue to have an export control structure, but we can hope to see it perfected in years to come.

Let me turn from these questions of balance to state what in my view are the necessary ingredients of an appropriate export control system. I believe there is a triad upon which a proper control system should be based. One leg of the triad is the scope of controls. We have seen over the last decade, for example, a well considered attempt in the area of national security to narrow the focus of export controls. In the mid and late 1970's the so-called Bucy Report gave expression to the concept that the focus of controls should shift from end products to controls over the critical technologies that could be used by potential adversaries to leap ahead in military capability or to narrow the technological lead of the West. The goals were to reduce the controls on end items, to concentrate on those technologies that yield design and productive capacity,

and to focus on keystone equipment which can be used for strategically sensitive production.

This shift in emphasis gave rise in the 1979 Act to the concentration of controls on militarily critical technologies.<sup>5</sup> The statute gave the Department of Defense the job of drawing up a list of militarily critical technologies, which was then to be translated into a new narrowed list of commodities and technologies to be controlled for export. The process has floundered for many reasons. It has floundered because of conceptual difficulties and because the need to define what is sensitive resulted in the classifying of the Department of Defense's list so that it ceased to be a potential guide to exporters or export controllers. The control attempt has also failed due to a lack of consensus and definition of what is critical technology and what are our true national security goals. A process initiated to focus controls, therefore, yielded instead a militarily critical technologies list that was gargantuan. Work continues in this area, and progress is being made, but much more work remains. In any event, one leg of the triad is eventually going to be the determination of the proper scope of the controls and their translation into understandable and predictable terms to avoid problems of vagueness and overbreadth.

The second element in the triad is the question of foreign availability, which is really a question of the effectiveness of controls. If impact on the target country is our objective and the goods our country seeks to control for national security or foreign policy purposes are effectively available from other markets, our controls are rendered ineffective. That situation suggests two alternatives. First, we could increase our efforts to reduce or eliminate foreign availability where we are convinced that our vital interests require effective controls; second, we could adopt mechanisms for reducing or eliminating our controls where we perceive that they will be unilateral and ineffective.

Again, Congress perceived the problem and in 1979 enacted strong foreign availability provisions dealing with both the effort to reduce foreign availability and the reduction of United States controls when foreign availability persists.<sup>6</sup> Very briefly, I would suggest that some real progress has been made in the first branch of that program, for in the last two to two and a one-half years there

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<sup>5</sup> See 50 U.S.C. app. § 2404(d) (1982). Subsection (d)(1) illustrates the mandate of Congress "that export controls. . . are limited to militarily critical goods and technologies."

<sup>6</sup> See, e.g., 50 U.S.C. app. § 2404(f) (1982).

have been significant advances in the area of cooperatively maintained national security controls. The United States has sought to heighten the interest of foreign governments in the perfection of the Coordinating Committee for Multilateral Export Controls (CoCom) process and in the operation of their domestic control systems.<sup>7</sup> This effort has not been without controversy, but there have been advances. The United States full - court press to get its allies to take some of these controls more seriously has not, to date anyway, resulted in overloading the circuits of CoCom, and a breakdown of what is properly characterized as a loosely structured "non-organization" has not occurred.

My reports cannot be sanguine concerning the second element of the foreign availability leg of the three-legged stool. We have not seen the dismantling of foreign policy controls or national security controls on the basis of continued foreign availability of controlled products; neither have we witnessed as yet a real implementation of the 1979 legislative mandate to increase the ability of the United States export control system to determine and take into account, both on a regulation by regulation basis and on an application by application basis, the factor of foreign availability. Additional resources have been committed in the past six months to the foreign availability assessment effort in the Department of Commerce, but it will take six to twelve months to take stock and see what this increase in personnel means in terms of export control actions.

The third leg of my triad is enforcement. If a government has properly focused controls and has dealt with the effectiveness of those controls by making them appropriately multilateral, it must then assure that they are observed and enforced. Here other speakers have probably conveyed my message better than I can convey it myself. I think they have sent shivers through the audience in describing the process of enforcement and have implied, if not expressly stated, that the enforcement desire is growing in intensity.

The theme of this Conference is "Exporting in the 80's", and perhaps my main observation as to what is going to change in the exporting climate for the 80's is that increased resources and in-

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<sup>7</sup> CoCom is a 15-member "informal cooperative arrangement through which the United States and its allies seek to coordinate the national controls they apply to the export of strategic goods and technology to the Communist world." Hunt, *Multilateral Cooperation in Export Controls—The Role of CoCom*, 14 U. Tol. L. Rev. 1285, 1285-86 (1983). For more information on CoCom, see Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 834-42 (1967).

creased attention will be given to the enforcement of the export control laws. When I came to the Department of Commerce something under five years ago, I was personally appalled at the low level of enforcement activity with respect to the export control laws. I use the term "low level" both because of the number of administrative and criminal cases that were open and because the cases were the kind that I would describe as "shooting fish in a barrel." The people who slipped up in observing the regulations were for the most part the people being pursued. The international operators, meanwhile, who were deliberately compromising our security for their financial gain or their political interests were not being effectively pursued.

This state of affairs is changing, at least to some extent. I cannot say that good faith exporters are not still getting a great deal of attention for what may be relatively minor slip-ups. I can say that the level of criminal enforcement activity, the level of *successful* criminal enforcement, and the resources devoted to going after the real operators have all increased. Moreover, I suggest that from the standpoint of the exporting community this increased enforcement is a positive step. Growth in success in dealing with criminal and deliberate control violations potentially can create the climate of confidence in the Congress and in the Executive Branch that will lead to support of measures to reduce some of the paperwork and compliance burden on the exporting community. I suggest, furthermore, that tightly focused enforcement and successful enforcement can go hand in hand with narrowed and tightly-focused export controls.

I think the following comments will not be good for the organization of my remarks, but I would like to flip the mask to the promoter side and make just a few statements about the Export Trading Company (ETC) legislation.<sup>8</sup> Let me say first, and my comments are going to be brief, that the subject deserves more time. Although I did work on the legislation and on early aspects of its implementation, all ETC activity is now being handled in a separate office.

My ETC comment relates to my general concern with striking the right balance in government activities affecting exports. The Department of Commerce, in close collaboration with the Department of Justice, administers the certification program under Title

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<sup>8</sup> Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of 12, 15, and 30 U.S.C.).

III of the Export Trading Company Act<sup>9</sup> to give antitrust liability protection to certain joint exporting and other export activities. My comment is simply this. What has grown up in the Department of Commerce just in the last year in implementing this new legislation is a process of consulting with the exporting companies and advising them prior to their application for certification. The department advises exporters about the suitability of their proposed activity for the certification process and the means of going about obtaining certification. This pre-filing conference can actually involve consultation on particular issues that might complicate an application. The pre-filing consultation is quite different from what many of you may have been exposed to if you have gone to conferences around the nation at which there has been a fair amount of simple drum beating about the program. This effort is significant in that it is, in my view, representative of a dramatic new move toward a cooperative approach. The contrast between what is taking place now in this collaborative implementation of the export trading company certification process and the business review procedure of the antitrust division of the Department of Justice, which some of you are familiar with, is dramatic. I am confident that we shall see this mindset and approach transferred to other aspects of exporting.

Another subject that I will lightly touch on because of time constraints is the anti-boycott program. I will provide further illustration of export control on ideas. This is truly a profound topic, however, that deserves much more attention than we will be able to give it in the course of this conference. I come to the broad subject of control on ideas through the anti-boycott statute<sup>10</sup> in this way. The anti-boycott law and the regulations under it broadly affect activity by United States persons with respect to their activities in the interstate or foreign commerce of the United States in three ways. One way, the obvious one, involves prohibitions against discriminatory conduct and refusal to do business, that is, implementing a boycott in the classic sense. The second prohibits the furnishing of certain information in response to a boycott request or otherwise with the intent to comply with the boycott. An example could be the sending of a copy of your company's 10K to a boycott office in Damascus, Syria. The third element is the requirement of reporting the receipt of boycott-related requests from foreign

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<sup>9</sup> 15 U.S.C. §§ 4011-21 (1982).

<sup>10</sup> The anti-boycott statute is 50 U.S.C. app. § 2407 (1982).

authorities.

Concerning the second of these elements, the prohibitions on the furnishing of information with the intent to comply with a boycott, there were some early fundamental challenges brought in the courts against the boycott statute and regulations.<sup>11</sup> These challenges were grounded in a variety of constitutional assertions, including claimed denials of substantive and procedural due process, and a ninth amendment ground which neither I nor the courts have ever fully understood.<sup>12</sup> The principal attack, however, was on first amendment free speech grounds, with opponents asserting that these regulations were unconstitutional because they constituted a prior restraint on lawful speech by a citizen of the United States.<sup>13</sup> The challengers in one case, for example, sought to sustain the proposition that answering an Arab boycott questionnaire would be fully privileged speech under the first amendment; they argued that the questionnaire would in turn not be commercial speech, to which a lesser degree of protection is provided.<sup>14</sup> Plaintiffs maintained that the communication to boycott authorities should be fully privileged speech, because it really was done in a political context. They asserted that the companies sought to answer the boycott questionnaire to get particular Arab nations to change their practices, that is, to end or avoid blacklisting.<sup>15</sup>

Let me just cut through this muddle to say that I am inspired to refer to these cases because the Seventh Circuit just about three weeks ago handed down the first decision at the appellate level and upheld the boycott regulations against this challenge in two cases consolidated on appeal.<sup>16</sup> The Seventh Circuit made short shrift of the commercial speech suggestion, saying that it was clearly commercial and not political speech because the object sought was sim-

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<sup>11</sup> See *Trane Co. v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983) (challenge based on first, fifth, and ninth amendment rights); *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307, *reconsideration denied*, 544 F. Supp. 667 (E.D. Wis. 1982) (challenge on first, fifth and ninth amendment grounds).

<sup>12</sup> In *Trane*, the plaintiffs asserted the statute violated their ninth amendment "fundamental right to correct misapprehensions by providing truthful information about themselves." *Trane Co.*, 552 F. Supp. at 1390-91. The court rejected out of hand the plaintiff's argument that such a right existed under the ninth amendment. *Id.*

<sup>13</sup> See, e.g., *Trane Co.*, 552 F. Supp. at 1385-88; *Briggs & Stratton Corp.*, 539 F. Supp. at 1317-19; *New Orleans Steamship Ass'n.*, 626 F.2d at 462-63.

<sup>14</sup> *Briggs and Stratton Corp.*, 539 F. Supp. at 1317-19.

<sup>15</sup> *Id.*

<sup>16</sup> *Briggs and Stratton Co. v. Baldrige*, 728 F.2d 915 (7th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 106 (1984).

ply to open the market to the company's products.<sup>17</sup> The court then applied the commercial speech standards established in a number of recent Supreme Court cases and found that the regulations served the significant governmental purpose of having persons subject to United States jurisdiction effectively involved in, manipulated, and made instruments of the fact-finding process of the foreign boycott apparatus.<sup>18</sup> The court further found that the regulations were reasonably designed to further that governmental purpose and that they were not overbroad.<sup>19</sup>

This decision on anti-boycott rules translates into the broader concept of controls on ideas by providing just one more illustration of the marked deference that the courts appear willing to give to legislation and to executive action in the area of furthering national foreign policy and security interests.<sup>20</sup> The courts are finding it easier to expand the limits in that area because of a number of principles that we will find, I predict, repeated in many future adjudications of export control cases. These cases can and will get to court, whether or not Congress changes the Export Administration Act exemption from judicial review.<sup>21</sup> Significant evidence of deference to the Executive in the national security area exists. We see such deference illustrated in *United States v. Edler Industries, Inc.*,<sup>22</sup> an export control case involving regulations on the export of technical data.

The concept of nonjusticiability is present in other examples of judicial deference to the Executive in the area of international trade. The Executive is judged to be exercising foreign policy functions and to have been given broad grants of authority under much of the legislation in the trade area. This view has been applied, for instance, to our negotiations under bilateral and multilateral textile arrangements. The actions taken by the Executive in pursuing our international trade interests, even though they translate into border limitations on the importation of textiles or other con-

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<sup>17</sup> *Briggs and Stratton Corp.*, 728 F.2d at 917-18.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Supreme Court, for example, has held that "[i]n this vast, external realm (foreign affairs), with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). "The courts may not so exercise their jurisdiction. . . as to embarrass the executive arm of the government in conducting foreign relations." *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943).

<sup>21</sup> 50 U.S.C. app. § 2412 (1982).

<sup>22</sup> 579 F.2d 516 (9th Cir. 1978).

trolled products, may often be found to be nonjusticiable. A case decided by the Court of International Trade just two weeks ago, *The American Association of Exporters and Importers - Textile and Apparel Group v. United States*,<sup>23</sup> for example, upheld the government position on these same grounds. The extent of proper judicial deference to international trade control actions is, I suggest, another area in which the balance-striking is going to have to be carefully considered. I think the issues go simply beyond the provision by the Export Administration Act for almost forty years of an exemption from APA type judicial review of export control actions.<sup>24</sup> A broader concern is what will happen in the courts with challenges to the exercise of the broad delegation of authority to the Executive in this field.

I will just finish with a very few direct responses to Art Downey. He discussed processing time, and I shudder myself over the delays that often arise in the export control process. But let's maintain some perspective. I suggest that it is attorneys who may have a distorted perspective. A week ago I was speaking in Pittsburgh to a group of business people, the people who are on the line in dealing with their companies' exports. Although there were plenty of complaints, I saw the perspective differently there. Lawyers hear about the cases that stick out like a sore thumb in terms of delay: the novel cases, the tough cases, cases that the system simply cannot cope with quickly. The shipping and export service managers and vice-presidents of international affairs, my Pittsburgh audience if you will, have realized that, more frequently, they are the beneficiaries of so-called front-door licensing that results in an average turn around time for the issuance of licenses of eighteen working days. These are cases in which the lawyers do not get involved. The horror stories of delay illustrate one problem in the system, which is that at base export control is a political problem which entails finding the workable balance and getting decisions in the bureaucracy when there are close cases and tough cases. The eighteen day average does represent a management problem. If there are not any tough calls to be made, we should do better than eighteen days; perhaps we should even have eliminated, in some cases, the need for advanced export clearance.

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<sup>23</sup> 583 F. Supp. 591 (Ct. Int'l. Trade 1984).