VAGUENESS AND INTENT ISSUES IN CRIMINAL EXPORT CASES

By Gary S. Lincenberg and Benjamin D. Lichtman[1]

Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C.

Los Angeles, CA

I

INTRODUCTION

In the wake of 9/11, federal prosecutions of export control violations are on the upswing. In fiscal year 2007, the U.S. Department of Justice (DOJ) reported an increase of more than 50% over 2006 in the number of defendants charged with violating the primary export control statutes.[2] In June 2007, DOJ created the new post of National Export Control Coordinator within the Department's National Security Division.[3] In October 2007, DOJ and several other government agencies launched a national export enforcement initiative focused on illegal exports of restricted technologies.[4]

---

[1] Gary S. Lincenberg chairs the ABA Southern California Regional White Collar Crime Committee. Benjamin D. Lichtman is an associate working with Mr. Lincenberg at the law firm of Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C.

[2] Press Release, Department of Justice, *Justice Department and Partner Agencies Launch National Counter-Proliferation Initiative* (Oct. 11, 2007) *available at* http://www.usdoj.gov/opa/pr/2007/October/07_nsd_806.html.

[3] Press Release, Department of Justice, *Justice Department Appoints National Export Control Coordinator as Part of Enhanced Counter-Proliferation Effort* (June 20, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/June/07_nsd_440.html.

[4] *See supra* note 1. Monetary penalties have also been increasing. On October 16, 2007, President Bush signed the International Emergency Economic Powers Enhancement Act, which (footnote continued)

As enforcement officials reach for more cases, they risk sweeping in well-intentioned exporters who made mistakes, either because they did not understand the complexities of the classification and jurisdiction scheme or because they relied on mistaken advice. Many of these mistakes are understandable; export control laws are highly complex, involving multiple agencies and sources of law. Classification analyses require parsing through highly technical products. Issues are nuanced. Experts provide inconsistent advice. In this atmosphere, exporters will increasingly find themselves the subjects of investigations where they did not have fair notice that they were in violation (much less willful violation) of a regulation. This article discusses fair notice in the context of the constitutional vagueness doctrine and the willfulness element under several of the export statutes. To demonstrate how vagueness challenges may arise, the article focuses on a 1993 change in the ITAR regulations as a paradigm.

II

THE ITAR PRESENTS VAGUENESS AND FAIR NOTICE PROBLEMS

A. The Void-for-Vagueness Doctrine

The Supreme Court has explained the void-for-vagueness doctrine by declaring that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal

---

considerably increases the monetary penalties for civil and criminal violations contained in the original International Emergency Economic Powers Act (IEEPA). The new act increases the maximum civil monetary penalty for each violation from $50,000 to $250,000 or twice the value of the transaction, whichever is greater, and increases the maximum criminal monetary penalty for each violation from $50,000 to $1 million. In addition to increasing the monetary penalties, the act contains *ex post facto* provisions that provide for the application of the higher penalties to all actions brought by the government after the passage of the act, regardless of when the violation occurred.

statutes. All are entitled to be informed as to what the State commands or forbids."[5] This is a constitutional principle based on a policy of fair notice. The Due Process Clause of the Fifth Amendment requires that a criminal statute be declared void when it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[6] The Supreme Court has emphasized that a statute is unconstitutionally vague when it gives neither the defendant nor the jury which would try him a basis upon which to safely and certainly judge the result.[7] More recently, the Court has stated that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and must "provide explicit standards for those who apply them."[8]

The Supreme Court recently reinforced the importance of the fair notice doctrine to corporate defendants in the *Arthur Andersen* case,[9] where the Court reversed the accounting firm's conviction for obstruction of justice. In deciding that a jury instruction had failed to convey a statutory element of intent, the Court cited its traditional "concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"[10]

---

[5] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[6] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[7] Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

[8] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[9] Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

[10] *Id.* at 703, *quoting* McBoyle v. United States, 283 U.S. 25, 27 (1931) and United States v. Aguilar, 515 U.S. 593, 600 (1995).

Defendants may argue that a statute or regulation is facially void for vagueness, or that it is void for vagueness as applied to their specific case. Because courts are reluctant to strike statutes or regulations as facially vague, this article focuses on "as applied" challenges.

B. <u>The ITAR Regulations</u>

The Arms Export Control Act ("AECA") controls the transfer of arms and military goods, services, and technology into and out of the United States. The statute is administered by the Directorate of Defense Trade Controls ("DDTC") at the Department of State ("DOS") in consultation with the Department of Defense ("DOD"). The AECA authorizes the president to control the import and export of defense articles and defense services by designating such items to the United States Munitions List ("USML").[11] Once an item is on the USML, unless it is otherwise exempted, it requires a license before it can be imported or exported.[12] The DDTC has promulgated regulations under the AECA known as the International Traffic in Arms Regulations ("ITAR").[13]

Categories of items covered by the USML are enumerated in section 121.1 of the ITAR.[14] The ITAR allows for a "commodity jurisdiction procedure" by which DOS determines if an article is covered by the USML when doubt exists.[15] Also contained in the ITAR are the licensing requirements for defense articles[16] and technical data.[17]

---

[11] 22 U.S.C. § 2778(a)(1).

[12] 22 U.S.C. § 2778(b)(2).

[13] 22 C.F.R. §§ 120.1 *et seq.*

[14] 22 C.F.R. § 121.1.

[15] 22 C.F.R. § 120.4(a).

[16] 22 C.F.R. § 123.

C. Vagueness In The Scope Of The ITAR

1. Pre-1993: The "Inherently Military" Standard

Section 120.3 of the ITAR sets forth the State Department's "Policy on designating and determining defense articles and services." This section of the ITAR presents substantial vagueness problems. Prior to July 1993, under the ITAR, this policy was "based primarily on whether an article or service [was] deemed to be inherently military in character."[18] The pre-1993 text of § 120.3 provided:

> Designations of defense articles and defense services are based **primarily** on whether an article or service **is deemed to be inherently military in character**. Whether it has a **predominantly** military application **is taken into account**. The fact that an article or service may be used for both military and civilian purposes **does not in and of itself determine** whether it is subject to the export controls of this subchapter. (**Narrow exceptions to this general policy exist** with respect to exports of **certain spare parts and components** in Categories V(d); VIII(e) and (g); XI(e); XII(c); and XVI(b).) The intended use of the article or service after its export (i.e., for a military or civilian purpose) is also not relevant in determining whether the export is subject to the controls of this subchapter.

22 C.F.R. § 120.3 (1992) (emphasis added). This section did remarkably little to clarify what constituted "defense articles and defense services." The language was vague—particularly the phrases marked in boldface—because it did not provide notice to exporters of which products and services were subject to control under the ITAR. A common-sense interpretation of "inherently military" would be that the article is only used for military purposes. But over time, many regulators did not want to view it that way.

Consider some of the vagueness issues that arose. First, this section was written in the passive tense; it was thus unclear which person or entity was responsible for making the

---

[17] 22 C.F.R. § 125.

[18] 22 C.F.R. § 120.3 (1992).

“designations” at issue. This was especially confusing in a regulatory context where companies are expected to self-classify their products. Second, the language of § 120.3 did not articulate a coherent standard for such designations. In the first sentence, the qualification “primarily” was left unexplained, leaving the exporter in doubt as to what other factor(s) should form part of this analysis. Once again, it was unclear from this language who was responsible for making this determination, because the passive tense was employed (“deemed to be”).

Third, the phrase “inherently military in character” was particularly problematic—the term was left undefined, and it remained unclear what made a product or service “inherently military.” Confronted with this vague language, companies sometimes asked themselves whether it was sufficient for them to “deem” their own products to be inherently non-military in order to exempt them from the ITAR. The second sentence of this section appeared to offer some clarification by stating that “[w]hether [a product or service] has a predominantly military application is taken into account.” But in practice, this language was hopelessly difficult to apply. It remained unclear what constituted a “predominantly” military application (60% military? 90% military? Defined by customer or by specific application? Defined only currently, or with reference to historical sales?). The exporter was offered absolutely no guidance as to how such a factor was to be “taken into account.”

The third sentence added little clarification, and then only by negative implication. If it is not determinative to the analysis whether a product or service “may be used for both military and civilian purposes,” then what is determinative? What about products used for both military and commercial applications (“dual-use” products)? What role, if any, did a product’s dual-use status play in determining whether it was subject to the export controls of the ITAR? It also remained unclear which “certain spare parts and components” from the enumerated categories were subject

to the "narrow exceptions" to this policy, and what the contours of those "narrow exceptions" were.

Furthermore, it was unclear from this language what weight was to be assigned to the "policy" contained in § 120.3. For example, there was no explanation given as to how this "policy" of designating defense items was meant to augment, override, coextend with, or otherwise bear on the USML, which describes the defense products and services subject to the ITAR.

2. Post-1993: Focus On Design Intent

a. The Amended Language

In May 1992, the Department of State's Bureau of Politico-Military Affairs issued a Proposed Rule amending § 120.3. The amendment was presumably motivated in part by a desire to alleviate the vagueness issues discussed above. This is reflected in the summary of the proposed rule, which states that the amendment was proposed in order to "clarify existing regulations and reduce the regulatory burden on exporters of defense articles."[19] On July 22, 1993, the State Department issued a final rule,[20] and § 120.3 was thereby amended to read:

> An article or service **may be** designated or determined **in the future** to be a defense article (see § 120.6) or defense service (see § 120.9) if it:
>
> (a) Is **specifically designed, developed, configured, adapted, or modified for a military application**, and
>
> (i) Does not have predominant civil applications, and

[19] (Proposed) Comprehensive Revision of the ITAR , 57 Fed. Reg. 19666 (proposed May 7, 1992).

[20] Amendments to the International Traffic in Arms Regulations, Part II, 58 Fed. Reg. 39280 (July 22, 1993).

> (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or
>
> (b) Is **specifically designed, developed, configured, adapted, or modified for a military application**, and has significant military or intelligence applicability such that control under this subchapter is necessary.
>
> **The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant** in determining whether the article or service is subject to the controls of this subchapter. Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).

22 C.F.R. § 120.3 (2007) (emphasis added). This current version of § 120.3 also suffers from substantial vagueness problems—particularly as noted above in boldface—because it fails to give exporting companies notice as to which of their products are controlled by the ITAR. The regulation indicates that an article or service "**may be** designated or determined" to be a defense article or service. This language throws the remainder of § 120.3 into doubt by suggesting that even if a product or service satisfies all of the requirements of subsection (a) or (b), it still may not be ITAR-controlled. Moreover, companies are given no notice as to which criteria might influence such a designation or determination. As with the pre-1993 version of § 120.3, the section is written in the passive tense, making it unclear which person or entity is in charge of making the relevant designations or determinations. Again, this is especially confusing in a regulatory context where companies are expected to self-classify their products.

The new language is also vague in terms of its temporal scope. It states that "an article or service may be designated or determined **in the future**…." Although no explanation is given for this phrase, it may be meant to avoid *ex post facto* problems by limiting the effect of the revised § 120.3 to exporting conduct that post-dates the regulation's July 1993 enactment. But there is

no language in § 120.3—or anywhere else in the ITAR—indicating that this is the case. This vague language makes it difficult for companies to accurately classify their products.

b. <u>Vagueness Problems With Design Intent</u>

The current version of § 120.3 focuses on design intent as opposed to whether a product is inherently military.[21] Thus, products or services that fail to meet this design intent standard may not be designated or determined to be "defense articles or services."

For a number of reasons, this design intent language can be difficult to apply. First, the ITAR does not define design intent, which is not always something that can be measured objectively. Often, the designer of a product hopes and intends that it will be used in a variety of applications.

In contrast, the language from § 120.3 regarding three other standards is extensively defined in the regulations. For instance, the ITAR provides extensive objective clarifications of the language in § 120.3 regarding a product's (1) "predominant civil applications"; (2) "performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications"; and (3) "significant military or intelligence applicability."[22] The fact that no objective guidance is set forth in the ITAR to define design intent compounds the difficulty that companies face in applying the phrase.

Second, the design intent standard assumes that products are designed, modified, configured or adapted for only one purpose. In fact, many companies create products with the intent of marketing and supplying them to the broadest possible market.

---

[21] *See* 22 C.F.R. §§ 120.3(a) and (b).

[22] *See* 22 C.F.R. §§ 120.4(d)(1), 120.4(d)(2), and 120.4(d)(3) (setting forth detailed definitions for each of these three terms).

Third, the design intent standard ignores the dynamic nature of modern technology. Given the increasing convergence of military and civilian technology, it is often unclear which applications should be considered "military." This is especially problematic in sectors such as the aerospace industry, where similar technology may be supplied to both military and commercial end users.

Fourth, companies attempting to comply with the ITAR may have considerable difficulty ascertaining the original design intent of a product that was developed before the 1993 change in the ITAR. Until 1993, exporting companies were not on notice that they needed to retain records of design intent for their products. Evidence of the design intent for such products—including design documents and witness accounts—may no longer be available due to loss of documentation, failing memories, or the unavailability of contemporaneous witnesses.

Consider the hypothetical example of a product that was created by a company in 1978. The company created no records regarding the original design intent of the product because that was not the standard in effect in 1978. Assume that the product does not satisfy the pre-1993 "inherently military" standard of § 120.3. It is a dual-use product with a history of both commercial and military sales. Assume further that the development of the product was not funded by the government. In 1993, fifteen years after the product's creation, the ITAR regulations changed to incorporate a design intent standard. In 2008, thirty years after the product's creation, the government sees a predominance of military sales, believes that it was designed for military customers, and charges the company with willfully exporting the product without a license from DOS, in violation of the AECA. The company disputes that the original design intent was military but can produce no documentation or witnesses to establish conclusively the design intent from thirty years ago.

As this hypothetical scenario makes clear, the 1993 change in the ITAR creates a potential dilemma for companies exporting products that were designed before 1993. While the exporter could have sought a commodity jurisdiction determination, DOS encourages companies to self-classify. Particularly if the products are dual-use, it may be difficult or even impossible for companies to determine whether the original design intent was military, and therefore whether the products are ITAR-controlled. In such situations, the ITAR is vague as applied to products designed prior to 1993, because in 2008 companies do not have fair notice that exporting their products without a DOS license constitutes criminal conduct. Because the ITAR requires companies to determine their thirty-year old intent, rather than their current intent and practices, companies lack fair notice as to how to comply with the law.

3. Vagueness Problems With Categories

The ITAR presents many other vagueness problems,[23] beginning with the scope of products that it covers. The USML contained in § 121.1 of the ITAR does not provide comprehensive guidance as to the products that fall under its scope, because it comprises categories of technology rather than specific products. Thus, exporters might be unsure whether

---

[23] Commentators have noted various vagueness problems with the ITAR. *See, e.g.*, Rachel Lehmer Claus, *Space-Based Fundamental Research and the ITAR: A Study in Vagueness, Overbreadth, and Prior Restraint*, 2 SANTA CLARA J. INT'L L. 1 (2004) (asserting that "[a]nyone reading the ITAR will be understandably perplexed and confused by the conflicting, vague, and ambiguous provisions encountered therein, especially when attempting to align the regulations with the concept of fundamental research."); Ronald J. Stay, *Cryptic Controversy: U.S. Government Restrictions on Cryptography Exports and the Plight of Philip Zimmermann*, 13 GA. ST. U. L. REV. 581, 604 (1997) (noting that the ITAR's definitions have not kept up with rapid changes in computer technology, and that the regulations therefore may not give sufficient notice of the type of conduct that is prohibited).

their specific product falls under one of the listed categories in the USML. This problem is compounded by the fact that the USML itself repeatedly qualifies categories of products with the term "specifically designed or modified for," which raises the same issues discussed above with respect to the design intent language of §120.3.

4. The Concept Of "Dual-Use"

A related source of vagueness in the scope of products covered by the ITAR is the widespread confusion in industry regarding the proper treatment of dual-use products. Historically, many companies have held the belief that dual-use products were not subject to the ITAR, but were instead subject to the jurisdiction of the Department of Commerce ("DOC"). Even post-1993, this belief has been reinforced by export consultants advising companies that if their products have both commercial and military applications, they are not governed by the ITAR.

5. Vagueness In The "Public Domain" Exemption

Another vague portion of the ITAR is found in § 120.11, containing exemptions for technical information in the public domain. The scope of information in the public domain is made vague by the government's attempts to punish companies for dissemination of information that the government itself openly disseminates in white papers, conference presentations, and elsewhere. In the internet age, the government's desire to keep things secret is not always clear. The public domain exemption can be extremely difficult to apply where the government publishes in an area but later claims that its publication did not open the door to what a company later published.

D. Analysis Of Vagueness Challenges

These vagueness problems can give rise to a constitutional challenge to criminal enforcement actions brought under the ITAR. In analyzing vagueness challenges, the Supreme Court has considered three questions: (1) Does the statute in question give fair notice to those persons potentially subject to it? (2) Does it adequately guard against arbitrary and discriminatory enforcement? (3) Does it provide sufficient breathing space for constitutionally protected or desirable conduct?[24] As a paradigm, these three questions are discussed below in the context of the 1993 change in the ITAR.

1. Fair Notice

The fair notice rationale of the void-for-vagueness doctrine applies with particular force to the 1993 change in the ITAR. First, the current ITAR language regarding design intent is inherently vague. In 1996, the National Security Council (NSC) gave its guidance to DOC that it should refer product classification requests to DOS for "items/technologies specifically designed, developed, configured, adapted and modified for a military application." This language is drawn directly from the ITAR criteria for designating a defense article. In a recent report, the U.S. Government Accountability Office (GAO) criticized this guidance as not being "generally straightforward."[25] The GAO reasoned that officials at the Departments of Commerce, State, and

[24] *See* Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

[25] U.S. GOV'T ACCOUNTABILITY OFFICE, EXPORT CONTROLS: PROCESSES FOR DETERMINING PROPER CONTROL OF DEFENSE-RELATED ITEMS NEEDS IMPROVEMENT 47 (2002) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d02996.pdf.

Defense had expressed different interpretations of the guidance.[26] If the three key U.S. government agencies tasked with export control cannot agree on the scope of the design intent language in the ITAR, how can exporters be said to have fair notice of whether their products fall under this same language?

Second, as discussed above, companies exporting products manufactured prior to 1993 may lack fair notice as to whether products are ITAR-controlled. Lacking access to documents and witnesses that would be critical to a determination of design intent, and dealing with vague language, exporting companies may be forced to make educated guesses as to the original design intent of their products. If they are mistaken, it is understandable that they might face administrative penalties. But it could be extremely unfair if DOJ were to bring criminal charges in this situation. A criminal proceeding is an inappropriate vehicle for determining historical design intent. If faced with a criminal proceeding, a company's only redress might be to argue lack of fair notice.

2. <u>Danger of Arbitrary and Discriminatory Enforcement</u>

A vague law is also objectionable if it "impermissibly delegates basic policy matters to policemen, judges, and juries" allowing for "arbitrary and discriminatory application."[27] The inherent vagueness in the ITAR's design intent language creates a danger of arbitrary

---

[26] *Id.* at 35 (noting the differing interpretations of the guidance "particularly as it relates to items derived from military applications. There is no 'traditional' interpretation of the guidance. The example Commerce provides in its comments does not reflect the complexity or sensitivity of the types of items, such as night vision devices, which may meet the referral criteria.")

[27] *Grayned*, 408 U.S. at 108-09.

enforcement by prosecutors, particularly given the increasing technical complexity of products and prevalence of dual-use technology.

Arbitrary enforcement may result from prosecutors being too accepting of what their case agents tell them. Most prosecutors are not sufficiently schooled in the intricacies of export law to challenge their case agent's assessment of the design intent of highly technical products. As the 2002 GAO report concluded, even the government's export agencies frequently disagree on whether products are subject to DOS jurisdiction.[28] The GAO reported that between October 1, 1997 and May 31, 2001, DOC and DOD provided conflicting jurisdiction recommendations to DOS 35% of the time.[29] If highly specialized U.S. government agencies cannot agree on which products are subject to the ITAR as defense articles, how can prosecutors be expected to make such determinations correctly and uniformly?

Uniform and fair enforcement is difficult where the line between military and commercial products is blurry. Military and commercial technology often overlap, as in the fields of navigation, cryptography, aerospace, and microelectronics. This convergence is in part a natural result of companies' efforts to broaden the applications of their products in a competitive marketplace. But it is also the result of the government's growing adoption of commercial off-the-shelf (COTS) products for use in military applications. The motivation for using COTS products is that they will reduce the government's development costs and time because the

---

[28] The ITAR itself includes a rather cryptic provision that seems to acknowledge the occurrence of such disputes. *See* 22 C.F.R. § 120.4(f) ("State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures.").

[29] *See* GAO REPORT, *supra note* 25, at 15.

components can be bought instead of being developed from scratch.[30] In a world where the boundaries between commercial and military products are being obscured through technology transfer, the scope of the ITAR is not precise. The likely result is arbitrary enforcement: Some unlicensed exports of dual-use technology will be viewed as legal while other indistinguishable exports are prosecuted criminally.

3. Chilling Effect on Desirable Conduct

Where the scope of conduct covered by a criminal statute is unclear, lawful, desirable conduct is chilled. Faced with vague statutes, risk-averse companies will often take the most conservative course of action. In analyzing vagueness challenges to criminal statutes, the Supreme Court has indicated that it considers the chilling effect on conduct that is constitutionally protected,[31] or even on conduct that is merely desirable.[32] Policy-makers have

---

[30] *See* Carol Booth, *Considering COTS*, AIR FORCE JOURNAL OF LOGISTICS, Vol. 22, No. 4 (1998), *available at* http://handle.dtic.mil/100.2/ADA369389.

[31] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). It its analysis of an anti-noise statute, the *Grayned* Court noted:

> [W]here a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 109 (internal footnotes and citations omitted).

[32] *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). In *Papachristou*, the Supreme Court struck down a city's vagrancy ordinance as void for vagueness. The Court cited its concern with various innocuous activities that could fall under the statute, including evening walks, "loafing," or even being out of work, and explained:

(footnote continued)

the difficult task of encouraging exports while guarding against our products being used for military purposes against us. If the criminal hammer is over-used, we will undermine desirable exports. For example, following the government investigation of major U.S. satellite companies relating to the failure analysis of a launch in China in the 1990s, jurisdiction over certain satellite exports moved from Commerce to State. Some observers believe that the publicity surrounding the government investigation and related congressional hearings hurt the U.S. satellite business. The same could happen if U.S. businesses are subjected to criminal investigation because of aggressive interpretations of vague regulations.

The vagueness of the ITAR language regarding design intent encourages manufacturers of dual-use products to treat their products as defense articles, or to avoid exporting them altogether, rather than risk a possible indictment. This is particularly true if the product was designed so long ago that the company does not have clear evidence of design intent. There is a societal cost to this chilling effect: U.S. manufacturers will lose business in foreign markets. Customers abroad will face delays and other disincentives when purchasing from U.S. suppliers. U.S. exports will suffer, as customers will opt to buy from foreign competitors subject to less burdensome regulations.

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. at 164.

E. Analysis Of Two Decisions Grappling With Vagueness Challenges To The ITAR

1. *Bernstein v. U.S. Department of State*

There is little case law providing direct support for vagueness challenges to the ITAR. One civil case providing some support in this respect is *Bernstein v. U.S. Department of State*, 945 F. Supp. 1279 (N.D. Cal. 1996).[33] In that case, the plaintiff, a mathematician working in the field of cryptography, sought declaratory and injunctive relief from enforcement of the ITAR on the grounds that various of its terms and provisions were impermissibly vague restrictions on protected speech. The plaintiff challenged the ITAR provisions both on their face and as applied to him.[34] On cross-motions for summary judgment, the district court upheld the plaintiff's vagueness challenge to two ITAR provisions dealing with exemptions from the term "technical data" for scientific principles and scientific research information.[35]

Specifically, the court held that section 120.11(a)(8) of the ITAR, which contains an exemption for information available to the public "through fundamental research in science and engineering," was impermissibly vague. The court similarly held that section 120.10(a)(5) of the ITAR, an academic exemption for "general scientific, mathematical or engineering principles" commonly taught in schools and universities, was impermissibly vague. Citing language from

---

[33] A related case, *Bernstein v. U.S. Department of State*, 974 F. Supp. 1288 (N.D. Cal. 1997) was affirmed by the Ninth Circuit in an opinion that was later withdrawn. *See* Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999), *reh'g granted, opinion withdrawn by* Bernstein v. U.S. Dep't of Justice, 192 F.3d 1308 (9th Cir. 1999). None of these related cases addressed the vagueness ruling of the original *Bernstein* case.

[34] *Bernstein*, 945 F. Supp. at 1282.

[35] *Id.* at 1293-94.

the Supreme Court's *Grayned* decision, the court concluded that these two subsections did not give people "a reasonable opportunity to know what is prohibited." The court reasoned that the two exemptions had "direct application … to First Amendment protections," and that "the uncertainty created in scientists about what speech is subject to regulation under the ITAR is unacceptable."[36]

The court explained that according to one provision of the ITAR, cryptographic algorithms and theory were exempted from control, because they fit the description of "fundamental research," namely "basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community."[37] But the court noted that cryptographic algorithms were also covered by Category XIII(b) of the United States Munitions List, indicating that they were ITAR-controlled.[38] The court observed that these two contradictory facts would make it "hard for scientists to discern when their work was a defense article and when it was wholly exempt from the ITAR without going through a [commodity jurisdiction] determination before any effort at publication."[39] The court thus concluded that the deterrent effect on protected expression was both real and substantial, and it struck the exemptions as void for vagueness.[40]

---

[36] *Id.*

[37] *Id.* at 1294 (citing 22 C.F.R. § 120.11(a)(8)).

[38] *Id.*

[39] *Id.*

[40] *Id.*

Although it is a civil case that involved First Amendment concerns, *Bernstein* demonstrates that federal courts will recognize vagueness issues in the ITAR regulations if they fail to provide defendants with fair notice of their obligations under the law.

2. *United States v. Lee*

In *United States v. Lee*, 183 F.3d 1029 (9th Cir. 1999), the Ninth Circuit rejected defendants' vagueness challenge to a provision of the ITAR. The defendants in *Lee* were convicted of illegally exporting cutter blades and an accompanying die mold without a license. Cutter blades are used in proximity fuzes to explode artillery shells in midair, and they have no non-military use.

On appeal, defendants claimed that the definition of "ammunition" in the USML was unconstitutionally vague as applied to them.[41] The court disagreed, reasoning that (1) defendants had fair notice that their actions were covered by the ITAR because cutter blades had only military uses; (2) the USML included a category listing "fuzes and components therefor," which covered cutter blades; (3) the ITAR was "directed to a relatively small group of sophisticated international businessmen," placing exporters on notice to consult the applicable regulations; (4) exporters in doubt could "contact the appropriate government agency to resolve any perceived ambiguity"; and (5) the statute's willfulness requirement mitigated its vagueness and "protects the innocent exporter who might accidentally and unknowingly export a proscribed component or part whose military use might not be apparent through physical appearance…."[42]

---

[41] *Lee*, 183 F.3d at 1032.

[42] *Id.* at 1032-33.

Defense counsel should not be deterred by the *Lee* case from bringing vagueness challenges to the ITAR. The *Lee* court addressed a narrow issue: the definition of "ammunition." Ammunition is not an obvious dual-use product. The *Lee* case has no application, for example, to the problem posed by the 1993 change to the ITAR. It does not govern challenges involving products suffering from the vagueness problem involving uncertain design intent. The *Lee* court's reasoning that the product at issue had only military uses is essentially an application of the pre-1993 version of section 120.3 of the ITAR, which asked whether a product was "inherently military." As noted above, since 1993 the focus is on design intent. Thus, the *Lee* court's reasoning should not apply to exports made after the 1993 change to the ITAR.

Nor is it clear that other courts will agree with the suggestion in *Lee* that the ability to seek clarification from government agencies is enough to resolve ambiguities. As observed in the GAO report discussed above, there is a significant amount of confusion and inter-agency feuding as to which agency has jurisdiction over which products. A company may approach DOC, receive a response that no export license is required, and then find that DOS is aggressively asserting jurisdiction over a product and claiming that it is ITAR-controlled.[43]

Moreover, there are practical problems. The overburdened agencies encourage self-classification in part because requests to government agencies can be incredibly time-consuming.

---

[43] *See, e.g.,* John R. Liebman, *Product Classification and Regulatory Compliance*, 857 PLI COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 581, 583 (2003) ("Too often inexperienced exporters obtain a formal classification or an export license from the Commerce Department, only to learn to their regret that the State Department claims the product is subject to its regulatory grip.").

For example, commodity jurisdiction requests filed with DOS' Directorate of Defense Trade Controls are supposed to be completed within 45 days,[44] but the requests are often subject to lengthy delays. Additionally, § 120.4 requires that a commodity jurisdiction request "include a history of the product's **design, development** and use."[45] Because the commodity jurisdiction process itself depends on evidence of a product's design and development, it is unclear how the procedure can be used to cure the uncertainty surrounding the original design intent of a product when a company lacks this information.

Finally, the *Lee* court's reliance on the willfulness element to protect innocent exporters is problematic. As discussed below, courts are split on what willfulness means under the export statutes. The willfulness requirement will protect innocent defendants only if juries are instructed that a genuine, good-faith belief that one is not violating the export laws is a defense to a charge of willfulness.

Because of the *Lee* court's narrow reach and questionable reasoning, it should not deter vagueness challenges to the ITAR.

---

[44] 22 C.F.R. § 120.4(e).

[45] 22 C.F.R. § 120.4(c) (emphasis added).

III

KNOWLEDGE REQUIREMENTS IN CRIMINAL EXPORT CASES

A. Competing Definitions Of Willfulness

Criminal violations of several export laws, *i.e.*, violations under the AECA,[46] EAA,[47] IEEPA,[48] and the Trading with the Enemy Act ("TWEA")[49] require that a jury find the defendant acted willfully. Because the statutes do not define willfulness and the Supreme Court has not addressed the meaning of the term in the context of export control laws, courts adjudicating criminal export cases must come up with their own definition. Defense counsel should be prepared for prosecutors to request a definition which is easier to satisfy. To respond, counsel should be familiar with a split in the circuits[50] and the Supreme Court decisions in *Cheek*, *Ratzlaf*, and *Bryan*.

---

[46] 22 U.S.C. § 2778(c).

[47] *See* 50 U.S.C. App. § 2410(b), providing criminal penalties for willful violations. Note that § 2410(a) of the EAA imposes lesser criminal penalties for knowing violations.

[48] 50 U.S.C. § 1705(b).

[49] 50 U.S.C. App. § 16(a).

[50] The First, Second, Third and Fourth Circuits apply a definition of willfulness requiring only that the government prove knowledge of unlawfulness. In contrast, the Fifth, Ninth, and Eleventh Circuits require a level of specific intent beyond knowledge of general unlawfulness. *Compare* United States v. Murphy, 852 F.2d 1 (1st Cir. 1988) (AECA requires knowledge of unlawfulness), *cert. denied*, 489 U.S. 1022 (1989), *and* United States v. Homa Int'l Trading Corp., 387 F.3d 144 (2d Cir. 2004) (IEEPA requires knowledge of unlawfulness), *and* United States v. Brodie, 403 F.3d 123 (3d Cir. 2005) (TWEA requires that defendant had general knowledge of the law which forbade his actions and acted with intent to circumvent that law), *and* United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) (AECA does not require knowledge of
(footnote continued)

1. *Cheek v. United States*

In *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court held that in order to establish a willful violation of the tax laws, the government must prove that the defendant was aware of the specific provision of the tax code that he was charged with violating.[51] The Court also held that a genuine, good-faith belief that one is not violating the federal tax laws is a defense to a charge of "willfulness," even if that belief is irrational or unreasonable.[52]

In *Cheek*, a commercial airline pilot appealed his conviction under various criminal tax statutes, arguing that he had not acted with the willfulness required under those statutes, because of his good-faith mistaken belief that the tax laws at issue did not apply to him.[53] The Supreme Court held that the defendant's good-faith belief that the tax laws did not impose a duty on him

---

specific statutory requirements), *with* United States v. Dien Duc Huynh, 246 F.3d 734 (5th Cir. 2001) (TWEA requires that defendant had knowledge of legal restrictions and acted with intent to circumvent them), *and* United States v. Tooker, 957 F.2d 1209 (5th Cir. 1992) (same), *and* United States v. Covarrubias, 94 F.3d 172 (5th Cir. 1996) (AECA requires proof that defendant acted with specific intent to violate a known legal duty), *and* United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (same), *and* United States v. Davis, 583 F.2d 190 (5th Cir. 1978) (AECA predecessor statute entitled defendant to "ignorance of the law" instruction), *and* United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976) (AECA predecessor statute required that defendant voluntarily and intentionally violate a known legal duty), *and* United States v. Macko, 994 F.2d 1526 (11th Cir. 1993) (TWEA and EAA require proof that defendant actually knew of the prohibitions and intentionally violated them).

[51] Cheek v. United States, 498 U.S. 192, 201 (1991).

[52] *Id.* at 202.

[53] *Id.* at 198.

did not have to be objectively reasonable in order to negate willfulness.[54] The Court noted that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."[55] The Court reasoned that willfulness requires the government to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."[56] The Court held that in order to carry its burden on the element of willfulness, the government must "negat[e] a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws."[57] The Court reasoned that this was so because a defendant could not be aware that the law imposed a duty upon him while simultaneously suffering from ignorance of the law, misunderstanding of the law, or a belief that the legal duty did not exist.[58] Thus, the Court concluded that if the defendant in *Cheek* genuinely believed the tax laws did not apply to him, and if the jury believed the defendant, the government would not have carried its burden to prove willfulness, however unreasonable the defendant's belief.[59] The Court also observed that there was a constitutional dimension to its ruling.[60]

---

[54] *Id.* at 202.

[55] *Id.* at 199-200.

[56] *Id.* at 201.

[57] *Id.* at 202.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 203 ("[F]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.").

2. ***Ratzlaf v. United States***

In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the defendant appealed his conviction under a currency structuring statute. The Supreme Court reversed the conviction, concluding that the statute's willfulness element required the government to prove both the defendant's knowledge of the specific reporting requirement and a specific intent to disobey the law.[61] The Court reasoned that currency structuring is not inevitably nefarious, rejecting the government's argument that the willfulness requirement was satisfied irrespective of the defendant's knowledge of the illegality of structuring.[62] The Court noted that its ruling was not incompatible with the general principle that ignorance of the law is no defense, because Congress may decree otherwise in particular contexts, and it had done so in this case by adding a willfulness requirement.[63]

3. ***Bryan v. United States***

In the case of *Bryan v. United States*, 524 U.S. 184 (1998), the Supreme Court ruled that the term "willfully" in a federal firearms licensing statute required only that the government prove the defendant knew that his conduct was unlawful, not that the defendant also knew of the federal licensing requirement.[64]

Prosecutors pursuing export control cases will argue for the *Bryan* definition of willfulness. In an article published in *The Export Practitioner*, DOJ's National Export Control Coordinator Steven Pelak has argued that the *Bryan* definition of willfulness should be adopted

---

[61] *Ratzlaf*, 510 U.S. at 141, 149.

[62] *Id.* at 144.

[63] *Id.* at 146-47, 149.

[64] *Bryan*, 524 U.S. at 186, 196.

by courts in criminal export cases.[65] Mr. Pelak also indicated that DOJ relies on and cites *Bryan* as the "controlling word" on the meaning of willfulness in the export control context.[66] This approach to the definition of willfulness is problematic for several reasons.

First, unlike export cases, *Bryan* did not involve a complex set of regulations or highly technical products. There the defendant engaged in extensive behavior that clearly demonstrated his knowledge of the illegality of his conduct. The defendant used "straw purchasers" to acquire firearms he could not have purchased himself, the straw purchasers made false statements when purchasing the guns, the defendant assured the straw purchasers that he would file the serial numbers off the guns, and the defendant resold the guns on Brooklyn street corners known for drug dealing.[67] The *Bryan* Court interpreted this behavior as proof that the defendant knew his conduct was illegal, stating, "[t]he evidence was unquestionably adequate to prove that petitioner was dealing in firearms, and that he knew that his conduct was unlawful."[68] The Court then stated expressly that it rested its holding regarding the meaning of the term "willfully" on the defendant's knowledge of illegality:

---

[65] *See* Steven W. Pelak, *"Willfully" and "Knowingly" In Export Control Prosecutions,* THE EXPORT PRACTITIONER, Vol. 20, No. 2 (2006) (hereinafter cited as Pelak).

[66] *Id.*

[67] *Bryan*, 524 U.S. at 189.

[68] *Id.* at 189. The Court also made the following observations in a footnote:

> Why else would he make use of straw purchasers and assure them that he would shave the serial numbers off the guns? Moreover, the street corner sales are not consistent with a good-faith belief in the legality of the enterprise.

Id. at 189 n.8.

> The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in [*Cheek*] and *Ratzlaf* is not present here because the jury found that this petitioner knew that his conduct was unlawful.

Id. at 195. This language, which was critical to the Court's holding, manifests the danger of using a lower intent requirement in export cases: there is a great risk of convicting individuals who believe in good faith that they were complying with the export laws.

Echoing the reasoning of *Bryan*, Mr. Pelak's article asserts that applying the less stringent *Bryan* standard of willfulness to federal export licensing statutes "will not result in innocent actors being ensnared in criminal prosecutions," and that "[t]here is no risk that the criminal prohibitions in the AECA, IEEPA, EAA or TWEA would ensnare innocent exporters if the *Bryan* standard were employed."[69] We disagree. Given the complexity of the export control system, the vagueness of various regulatory provisions, and the uncertain line between military and commercial products, there is real reason to be concerned about criminal investigations targeting parties who believe in good faith that they are complying with the export regulation. This is particularly true because companies often have numerous employees who gain comfort that their exports are lawful because an export control manager is aware of and approves them. Because export control is a specialized area, it is the norm for most of a company's employees to rely on specialists. If the government wants to impose **criminal** sanctions, it should be required to show that the defendant was aware of the applicable regulation and knew his conduct was in violation of it.

---

[69] Pelak, *supra* note 65.

Mr. Pelak also argues that exporters, as sophisticated actors, generally understand their legal obligations and should inform themselves of export regulations.[70] But in light of the serious vagueness deficiencies in the ITAR, it is not clear that even the best-informed, most conscientious exporters agree on how the law applies to their products, and therefore what the law requires of them.

B. ***Cheek* And *Ratzlaf* Should Govern Export Cases**

A fair reading of the *Cheek* and *Ratzlaf* cases is that in a complex regulatory environment such as the export control regime, the government must prove willfulness by showing that a defendant violated a known legal duty, and that an exporter's good-faith belief that no legal duty existed negates willfulness. Thus, exporters who had a good-faith belief that their products were not subject to export controls should argue under *Cheek* and *Ratzlaf* that their good-faith belief negates willfulness.

1. **The Export Laws Are Complex And Largely Involve *Malum Prohibitum* Conduct**

The *Bryan* Court distinguished the *Cheek* and *Ratzlaf* cases because they "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct."[71] But in the field of export control, this reasoning favors application of the *Cheek/Ratzlaf* standard.

Export control, like tax and currency structuring, is governed by a highly complex set of statutes and regulations. It is enforced by multiple government agencies with occasionally

---

[70] *Id.*

[71] *Id.* at 194.

conflicting interpretations of the law. The "proliferation of statutes and regulations" has made it difficult for regulated entities to know and comprehend the extent of their duties under the law. To this intricate regulatory backdrop, export law adds the complicating factors of constant technological change and vagueness in several key regulatory provisions. Thus, there is even greater reason to apply the *Cheek/Ratzlaf* standard in the area of export control.

Moreover, just as the Court in *Ratzlaf* reasoned that currency structuring was "not inevitably nefarious,"[72] there is nothing inherently wicked or immoral about exporting products, especially given the broad sweep of products and technical information that the ITAR appears to cover. Contrast this with the *Bryan* case, which involved an unlicensed firearms dealer with clear knowledge of the unlawfulness of his actions.

2. <u>The Policy Goals Of The Export System Would Not Be Threatened</u>

Adopting the *Cheek/Ratzlaf* standard would not, as some have suggested, hinder enforcement of the export laws. If the government's position, as articulated by the court in the *Lee* case, is that exporting companies are sophisticated parties with knowledge of export statutes and regulations, the government should not be heard to argue that prosecutors will be unable to prove that exporters knew of specific laws or regulatory requirements.

Furthermore, adopting the *Cheek/Ratzlaf* standard would not open the floodgates to frivolous use of an ignorance defense by black market exporters. As the Court explained in *Cheek*, "in deciding whether to credit [a defendant's] good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that [the defendant] was

---

[72] Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

aware of his [legal] duty…."[73] Moreover, the *Cheek* Court reasoned that defendants would be limited by their own credibility, in that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the [laws] and will find that the Government has carried its burden of proving knowledge."[74]

Particularly in light of the vagueness of the ITAR and the current aggressive enforcement atmosphere, there are serious concerns about arbitrary and unfair prosecution of exporters. Adopting the *Cheek/Ratzlaf* standard would provide courts with a check to help protect those who act in good faith.

IV

CONCLUSION

Criminal enforcement of the export scheme is made difficult because of the government's competing purposes. The government wants to encourage U.S. companies to sell their products abroad, so long as those exports do not aid our enemies. But determining what needs a license for export is often difficult because of the vagueness of the ITAR and the nature of the technology.

Export control laws are complex, and their application may depend on subjective determinations regarding highly technical products. There is often disagreement between and among expert consultants, companies, and governmental agencies as to how products should be classified for export purposes. The difficulty of compliance is compounded by vagueness

---

[73] Cheek v. United States, 498 U.S. 192, 202 (1991).

[74] *Id.* at 203-204.

problems that deprive exporters of fair notice that their conduct is prohibited, as exemplified by the 1993 change to the ITAR. Mistakes are easy to make, and in the current aggressive enforcement atmosphere, even exporters acting in good faith may be subjected to criminal investigations. Defense counsel who can help prosecutors and the courts understand these issues will provide an important service to their clients.