D.C. Circuit Clarifies ITAR Criminal Intent Requirement

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On August 20, the U.S. Court of Appeals for the D.C. Circuit clarified the criminal intent requirement under the International Traffic in Arms Regulations' ("ITAR") willfulness standard. In *United States v. Burden*, No. 17-3018, 2019 U.S. App. LEXIS 24713 (D.C. Cir. Aug. 20, 2019), the appellate court expressed concern with a jury instruction that suggested any criminal intent, even if it were not relevant to the export control violation, would suffice for conviction. In other words, if a person intended to violate the import laws of another country, or some other law, then that intent could be transferred to find criminal intent under the ITAR.

The D.C. Circuit squarely rejected that premise: "The conduct that [the defendant] must know was unlawful is the *actus reus* of the crime with which he is charged." *Id*. at *38-39. Thus, criminal intent under the ITAR requires "proof that defendants knew it was illegal to export the items they shipped without a license." *Id*. at *34. Consequently, the D.C. Circuit vacated the original judgement and ordered a retrial. It also noted that the jury "instruction should make clear than an [ITAR] conviction requires that defendants knew of the unlawfulness of the charged unlicensed export of the items from the United States, and that a willfulness finding cannot draw on evidence that they knew the related, but legally and factually distinct, import of those items into [another country] was illegal." *Id*. at *39.

The D.C. Circuit's decision is similar to the explanation provided by Judge Easterbrook on behalf of the Seventh Circuit in 2009:

> As the prosecutor sees things, an intent to violate one law is as good as the intent to violate any other. The United States' appellate brief essentially invokes the doctrine of transferred intent (though it does not use that name or cite authority) . . . So far as we can tell, however, transferring intent from one genus of offense to another has never been permitted. Suppose [the defendant] had believed (wrongly) that the United States imposes an excise tax on exports of optical gear and had tried to avoid payment; an intent to evade a nonexistent tax would not transfer to an intent to export riflescopes without a license; the crimes are too different for one intent to suffice for the other. The crime that [the defendant] set out to commit was unrelated to unlicensed exports.

United States v. Pulungan, 569 F.3d 326, 330-31 (7th Cir. 2009).

Additionally, the D.C. Circuit weighed in as to whether the ITAR is a set of highly technical regulations warranting a heightened scienter requirement: that a criminal defendant knew of the specific regulation he or she is alleged to have willfully violated. The court followed a growing number of circuits that distinguish the ITAR from highly technical regulatory schemes, such as tax laws and currency structuring. Accordingly, ITAR criminal intent does not "require specific awareness of the Munitions List as such," though once again it does require "proof that defendants knew it was illegal to export the items they shipped without a license." *Burden*, at *34.

It is important to remember that the impact of this recent decision may be limited because it directly affects only criminal cases that appear in the U.S. District Court for the District of Columbia. Other circuits and district courts are not required to follow the D.C. Circuit's instructions, although they may be persuaded by it. Moreover, there is also a circuit split concerning how to approach criminal intent under the ITAR. *United States v. Roth*, 642 F. Supp. 2d 796, 799-803 (E.D. Tenn. 2009) (acknowledging and discussing circuit split). Nevertheless, the *Burden* decision may provide criminal defendants with better legal authority to use when advocating what the jury instructions will state.

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