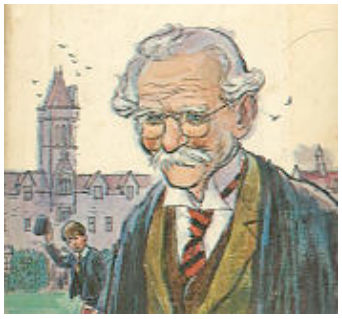
May 22

Mr. Chips or Professor Moriarty?

Posted by Clif Burns at 8:28 am
Category: General



Professor John Roth, an electrical engineering professor at the University of Tennessee, has been **indicted** for violations of the Arms Export Control Act. The indictment alleges, among other things, that Roth disclosed to a Chinese graduate student controlled technical information on a drone aircraft being developed for the Air Force. Additional charges relate to Professor Roth traveling to China with controlled technical data. There is no charge that this data was disclosed to anyone in China, and the charge apparently arises from the fact that the data was on the laptop computer which he took with him to China.

Violations of the Arms Export Control Act must be premised on willful conduct and specific intent, *i.e.*, a "voluntary, intentional violation of a known legal duty." **United States v. Adames, 878 F.2d 1374 (11th Cir. 1989).** The indictment alleges that Professor Roth's exports were willful, but it is, shall we say, sketchy on alleging, much less demonstrating, that Professor Roth knew that his actions were unlawful.

The charges relating to his taking his laptop computer to the PRC seem particularly vulnerable in this regard. There is no suggestion that Professor Roth disclosed this information while in China and thus it is perfectly reasonable to suppose that he had no idea that he needed a license from the Directorate of Defense Trade Controls ("DDTC") to take his computer with him on his trip to China. (He was in China to teach a course at a Chinese university).

The deemed export charges — *i.e.* disclosure of the technical data in the United States to a PRC national — also seem to lack the requisite criminal intent. The concept of a "deemed" export is not something naturally intuited by everyone. Many people don't realize that it might be criminal to disclose non-classified data in the United States to a foreign national. The indictment attempts to allege, unsuccessfully I think, specific intent by Professor Roth by claiming (a) that Roth sent an email in which discussed U.S. nationals as potential students who might assist the project and (b) that there were references to export controls in a contract reviewed by Roth and relating to the drone project. None of this makes a convincing case that Roth knew that having a Chinese student work on the drone project was a federal crime.

There is, I think, a big missing piece to the puzzle here. Nothing in the

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There is, I think, a big missing piece to the puzzle here. Nothing in the indictment provides any motive or reason that Professor Roth would intentionally commit a federal crime. There is no reason to think that he had any financial motivation here. Nor is this a case where a motive might be inferred because of any ethnic loyalty of the defendant to the country of his birth. Nor was there any apparent attempt by Professor Roth to conceal that the Chinese student was working on the project. In short, nothing adds up here. In my view, it seems that Professor Roth is more likely to be Mr. Chips than Professor Moriarty.

[Thanks go to Josh Gerstein of the New York Sun for sending me a copy of the indictment.]

Jan 6

Sixth Circuit Dismisses Professor Roth's Appeal

Posted by Clif Burns at 8:45 pm on January 6, 2011
Category: Arms Export • Criminal Penalties

On Wednesday, January 5, the Sixth Circuit dismissed the appeal of Professor J. Reece Roth, a professor emeritus at the University of Tennessee who had been convicted of violating the Arms Export Control Act ("AECA"). The conviction was based on, among other things, Professor Roth permitting access by a foreign graduate student to technical data relating to an Air Force military drone project.

ABOVE: Professor Reece Roth

Professor Roth argued in his appeal that the technical data was not export-controlled under the International Traffic in Arms Regulations because the next phase of the project involved testing his research on commercial aircraft. The Sixth Circuit dismissed this by noting that the project ultimately contemplated a military application of the research.

In reaching this result, the Sixth Circuit cited the Seventh Circuit's decision in *United States v. Pulungan*, 569 F.3d 326, 328 (7th Cir. 2009). That decision held that although the AECA banned judicial review of a decision to place a category of items on the United States Munitions List {"USML"), it did not prohibit judicial review of the question as to whether a particular item fell within a category of items designated by the USML.

In addition, Roth argued that the lower court's jury instruction on the "wilfulness" standard required for a conviction under the AECA was incorrect. According to Roth, the court should have given the jury an instruction that he could only be convicted if he was aware that the controlled technology was on the USML. The Sixth Circuit rejected this contention and held that the lower court properly instructed the jury that Roth could be convicted simply if he was aware that his conduct was unlawful. Although the Eight Circuit in *United States v. Gregg*, 829 F.2d 1430, 1437 & n.14 (8th Cir. 1987) appeared to hold that the defendant needed to be aware that the exported item was on the USML, the Sixth Circuit followed the looser rules of the First, Second, Third and Fourth Circuits which only require that the defendant knew

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that the export was unlawful.

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While it was not as bad as it could have been, the Roth opinion is still a caution to all in the compliance community who struggle with these issues on a daily basis. We are more at risk at being second guessed after the fact by the government than ever before.

It was a bit disappointing that the Sixth Circuit disposed of the government's argument that the determination of whether the plasma actuators were in fact USML Cat. VIII(h) was a political question not subject to judicial review in two sentences that, other than the citation to the 7th Circuit's decision in Pulungan, really didn't analyse either the government's or the defense arguments. However, the citation to Judge Easterbrook's opinion in Pulangan and the statement that their role was to determine whether the program was to determine whether the hardware and software in question were within the definition of the items on the USML does seem to reject the government's argument and sets up a conflict with other circuits such as the Ninth that have bought the government's determination of jurisdiction and classification is a "political question" not subject to judicial review.

The Sixth's conclusion that the actuators and related tech data were in fact covered by USML Cat. VIII (h) and (i) respectively, even though the test bed used was a civilian aircraft, because the ultimate aim of the research project was to develop plasma actuators for military drones is a bit alarming for those of us in the defense and aerospace industry because the Court never considered any of the factors listed in ITAR 120.3 and 120.4 for determining commodity jurisdiction. Nor did the Court rely on USML Cat. VIII(f), which specifically covers research and development for military aircraft, parts and components, explicitly including R&D that is funded by DoD.

The Sixth can be somewhat forgiven because none of the parties ever briefed what most export practitioners and compliance staff regard as the touchstone for export jurisdiction determinations. Indeed, neither the government nor the defense ever mentioned ITAR 120.3 and 120.4 or that there was an entirely separate and competing set of export control regulations, the EAR, that might have some effect on the determination.

As became clear in its discussion of degree of intent required to "willfully violate" the AECA, the Sixth seems to think that determination of export jurisdiction and classification is a comparatively simple and straightforward exercise as compared to tax law. This will come as a surprise to the thousands of export practitioners and in-house compliance staff in the United States and NATO who wrestle with jurisdiction and classification issues evedryday.

I respectfully suggest that all of us, as an industry, begin routinely submitting Commodity Jurisdiction requests to DDTC on everything we make or sell for export just to protect ourselves.

Comment by Mike Deal on January 7th, 2011 @ 8:44 am

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Actually, the situation is worst than described by the above comments. The technical facts and timeline of events for this case are being played with fast and loose by everyone involved for their own agendas.

I am the Sherman that was sentenced to 14 months of incarceration for this mess, I was a witness against Roth for the government, and my only agenda is to try and limit this insanity from happening to some other researcher. My comments and opinions are just that mine. With that said, here's some questions you need to ask and consider within your own context.

At what point does the government get to say a new idea or invention is being "ultimately contemplated (for) a military application"? Aren't all new technologies eventually considered for military use? Roth's atmospheric plasma work started in the late 1980's using 6.1 funds provided by the Air Force for exploring plasma for aircraft stealth. Several years later, in 1995 Roth got additional NASA 6.1 funding for exploring the plasma interaction with air over a surface. During the beginning of that contract, I figured out how to make the surface plasma, and during the end of that contract (1997) I figured out it had an momentum effect and how to control it. We sought patent protection, and published the designs and data in my University of TN Master's in 1998.

Even in 2004 when the government made available a SBIR plasma actuator opportunity, that same design was in use and has been ever since, by numerous laboratories in both the U.S. and aboard.

Some key points for the defense industry are illustrated by the neglected or obscured details of this case. You can decide for yourself if similar mistakes can be made by you or your colleagues.

1. What makes a device qualify for military hardware status? The USML Cat. "list" isn't just it. The force measurement test stand in this case was developed in-house for the project. While we thought it was unique at the time, I've subsequently been shown that the technology used in the device has existed in textbooks for at least a decade or so prior. Also, I later demonstrated a common laboratory digital scale to have more resolution for that particular kind of research.

2. What's the threshold for deeming a foreign national has access to the device or technology? A.) The foreign student used the device in question 1 for a year, which makes measurements similar to that shown in openly available technical papers. B.) The foreign students involved never even actually saw the remote controlled airplane because it didn't even arrive at AGT until after the investigation started, and we had already pulled the plug on Roth and his foreign student's participation. Note, it was a large off-the-shelf remote controlled airplane, in which there was a picture and other manufacturer details in the infamous monthly and quarterly reports. I don't believe that in 2004 they were calling RC airplanes drones; if not for it's size it could have been called a toy. And there was nothing every unmanned about it, except that it never flew with research equipment on board!

3. Who's responsible at your place of employment for your institution complying with Federal Regulations? There's typical a page or more of regulations attached to every government contracts, do you personally read them all and check off that your company is complying with them for each project you work on? Maybe you should, both AGT and UT administrations had copies of the Federal regulations covering the SBIR contracts prior to the

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beginning of the participation of the foreign student.

4. What kind of internal review process for compliance does your company have, and how frequently does it examine compliance? Note that the administrations had signed contracts with the regulations both prior to beginning of participation of the foreign student and for a year during the student's participation. Roth was well known for Asian student involvement in his labs. Roth and AGT had for years disagreed about him teaching foreign students our technology because we were trying to make a business with it.

5. Even if you have management that is responsible – do you dare trust them?

6. Do you expect fairness in the BIS self-reporting of a export-control issue? The only reason this case ever got turned into a federal investigation, is because I told Roth no to participation of his Iranian student. That set off a chain of events leading to Roth asking the UT administration for help in allowing the student on the project, and UT, not AGT, eventually self-reporting the possible export-control violation. AGT didn't get the chance. The only entity fined was AGT, but it was already bankrupt with its' assets sold. This case is truly one in which the messengers were the only ones to be punished.

My advice to any researcher in America, is to get a written statement from your immediate supervisor stating that whatever your working on isn't subject to compliance, and that if it is, your boss takes full responsibility, with your full cooperation, for insuring your project's compliance. If your boss won't sign such a document, then quit or at the very least do something else. Because if there's a problem, this is a good sign that they'll be willing to pass the blame onto you, which is the only real example Roth's case really teaches to administrations.

The fact of the matter is you can't prove you didn't know something, which makes extricating yourself from a federal investigation on this subject damn near impossible. This is why I suggest something to at least indicate your own personal awareness and responsibility. However, the consequences of getting hit with something like a "deemed export-control violation" is to have your professional career destroyed, be disbarred from federal contracting/funding (wiping out your future career opportunities) and subsequently having your finances wrecked. Even afterwards there's the joy of being forever branded with a federal felony and the second class citizenship.

[*This comment was edited by blog owner*]

Comment by Daniel Max Sherman on January 7th, 2011 @ 3:17 pm

Roth's research compliance office told him – on too many occasions – that his research was controlled, that he couldn't have foreign nationals working on it (to which he replied "I choose who works on my projects) but he ignored every single warning. His claims of ignorance are thankfully falling on deaf ears.

However, speaking from experience, there is very little guidance available to the academic community with regards to export compliance. Every single piece of training available is 100% focused towards industry, with the exception of a brief webinar or conference call sponsored by NCURA or COGR. Yes, both organizations address export controls in their

monthly/quarterly or annual meetings, but very seldom is the person ACTUALLY managing exports allowed to attend these (due to "travel budget cuts").

Comment by Jennifer May on January 18th, 2011 @ 11:15 am

Ms. May: With respect, I am acquainted with both Dr. Roth and the UT Export Control Officer. At the time of the events in question, she had just been appointed to the newly created position from within the UT admin staff, i.e., neither she nor the school had much if any prior experience in export controls. Don't get me wrong, she is a bright, earnest, sincere and hardworking; but, just think about it: A young, dewey-eyed, inexperienced, largely self-taught export control officer, learning on the job with no experienced older hand to teach the fine points or without any real gravitas trying to instruct a professor emiratus? The lesson, not just for academia but for industry, is that export compliance is not just a paper exercise that can be entrusted to clerical staff.

As events of last year taught all too well, there is a name for companies that treat export compliance as a clerical function: Defendants.

Comment by Mike Deal on January 18th, 2011 @ 4:46 pm