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MEMORANDUM FOR LT. GEN. BRENT SCOWCROFT

Atty. Gen.

Assistant to the President Scalia

for National Security Affairs Rosenthal, Antitrust

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EDWARD C. SCHULTS

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Deputy Counsel to the President

Re: Anti-boycott Provisions of the
Export Administration Act

*Out 9/28/76
@ 4:30pm*

This memorandum is in response to the request for the views of the Department of Justice regarding the boycott provisions of the Export Administration Act amendments passed respectively by the Senate and the House of Representatives. In our opinion, the Senate version does not represent a significant extension of existing law. The House version, on the other hand, constitutes an extreme approach to the regulation of boycott-related conduct and could have severe consequences. The main issues presented are not legal ones, but pertain to international relations and domestic politics. Regarding the questions of legislative strategy and the possibility of a veto, we defer to the agencies which are more directly involved.

This memorandum discusses the bills' provisions prohibiting boycott-related conduct and the means of enforcing such prohibitions. It does not discuss the matter of availability to the public of exporters' boycott reports or the portions of the legislation unrelated to boycotts.

1. Discussion

a. The Present Act

The policy section of the Export Administration Act (hereafter the "Act") provides, in part, that it is the policy of the U.S. (A) to oppose boycotts imposed by foreign

countries against other countries friendly to the U.S. and (B) to "encourage and request" domestic concerns engaged in exporting to refuse to take any action, including the furnishing of information, which has the effect of furthering such a boycott. Section 3(5), 50 U.S.C. App. 2402(5).

Section 4 of the Act directs the President (whose authority has been delegated to the Secretary of Commerce) to issue regulations implementing § 3(5) and requiring domestic concerns to report the receipt of any request to provide information or sign an agreement which would further a boycott.

The boycott regulations of the Commerce Department, 15 CFR part 369, basically track § 3(5) of the Act ("encourage and request . . ."). The regulations do not impose a general prohibition against compliance with boycotts. There is a prohibition against furnishing information or signing an agreement which would further a boycott-related practice that discriminates against U.S. persons on the basis of race, religion, sex or national origin. However, the Commerce Department does not regard as coming within the foregoing prohibition the ordinary Arab request for information concerning dealings with Israel or with blacklisted firms. The regulations note that certain boycott-related practices may violate the antitrust laws. Now pending is a civil action by the Antitrust Division which charges Bechtel Corporation and four affiliates with an Arab-boycott-related conspiracy in violation of the Sherman Act, 15 U.S.C. 1.

The Export Administration Act provides several means of enforcement. Administrative proceedings, leading to civil penalties, may be brought by the Commerce Department. In the event of non-payment of a penalty, the matter may be referred to the Justice Department for the bringing of a civil action.

Under § 4(b), in order to effectuate the Act's policies, the President may prohibit or curtail exports. To our knowledge, this authority has not been used with regard to the Arab boycott. Under § 6(a), criminal penalties are provided

for "knowing" violations of the Act or the implementing regulations. There have been no prosecutions relating to the Arab boycott.

b. The Senate-passed bill

On August 27, 1976, the Senate passed S. 3084, Title II of which is the "Foreign Boycotts Act." The text of Title II, as passed, appears at 122 Cong. Rec. S 14866 (daily ed., Aug. 27, 1976).

The Senate bill does not significantly alter the Act's policy section. The Senate report explains why, in general, the "encourage and request" approach is retained (as opposed to a blanket prohibition against furnishing boycott information, etc.). S. Rep. No. 94-917 (1976), p. 21.

The key provision of the Senate bill would require the Commerce Department regulations to prohibit domestic concerns 1/ from

. . . refusing to do business with any other domestic concern . . . pursuant to an agreement with, requirement of, or a request from . . . any foreign country [or] national . . . made . . . for the purpose of enforcing . . . [a] boycott against a country friendly to the United States2/

The Senate bill would not significantly change the means of enforcing the Act. The Senate report explains why no provision is made for enforcement by private lawsuits. S. Rep. No. 94-917 (1976), p. 22.

1/ The term "domestic concern" is defined in § 206 of the Senate bill.

2/ A proviso to the above provision would nullify certain conditions of letters of credit, e.g., a condition regarding the U.S. payee's dealings with other domestic concerns.

In our view, enactment of the Senate provisions would not amount to a significant extension of existing law. The refusal-to-deal provision is similar to the theory of the Bechtel suit, although it might encompass, in addition to conspiracies, some unilateral refusals. A greater enforcement burden would be placed upon the Commerce Department, and enforcement would be particularly difficult if Congress failed to provide additional resources. Still, the main disadvantage would seem to be possible effects upon relations and trade with Arab countries, matters regarding which the Departments of State, Commerce and Treasury have expressed great concern.

c. The House-passed bill

On September 22, 1976, the House of Representatives passed H.R. 15377, § 14 of which is entitled "Foreign Boycotts." See 122 Cong. Rec. H 10866 (daily ed., Sept. 22, 1976).

The House bill would amend the policy section so as to "require" domestic concerns engaged in exporting to refuse to take any action to further a foreign boycott against a country friendly to the U.S. Moreover, the House bill would require the Commerce Department regulations to impose a blanket prohibition upon any action by any "United States person" ^{3/} taken with the intent of furthering such a boycott (unless the country at which the boycott is aimed is the object of an embargo by the U.S.). The regulations would be required to prohibit certain specific types of action, taken by U.S. persons with the requisite intent. Such actions would include (1) refraining from doing business with the boycotted country, any business concern in that country or any business concern which deals with that country and (2) furnishing information about any business dealings with the boycotted country or boycotted firms.

The bill states that the mere absence of a business relationship with a boycotted country does not indicate the requisite intent. However, the House debate suggests that any firm, even one which never had occasion to deal with Israel or with blacklisted firms, that answered an Arab-boycott questionnaire would violate the bill's prohibition.

The House bill's prohibition goes beyond the Arab boycott and would include, e.g., a U.S. firm's refusal to deal with South Africa where the refusal is based upon a third country's boycott.

Another significant provision of the House bill is § 14(a), which would authorize any aggrieved U.S. person to bring a civil action seeking treble damages and attorney fees. There would also be Government enforcement by the present means.

^{3/} The definition of "United States person" is broad and includes, e.g., any foreign affiliate of a domestic concern. See § 14(d) of the House bill.

Clearly, the House provisions are much more far-reaching than the Senate version. As noted above, the House bill would seem to prohibit any "United States person" from even responding to an Arab boycott questionnaire. ^{4/} Thus, depending upon the Arab response, implementation of the House bill could have a drastic effect upon trade with Arab countries.

2. Conclusion

a. Assuming that there has been no agreement among the conferees regarding the boycott provisions, the immediate question is what position, if any, the Administration should present to the conference committee. Regarding this question, we defer to the Departments of State, Commerce and Treasury.

b. The matter of timing may be crucial. That is, if Congress adjourns sine die on October 2, there would not necessarily be an opportunity to override a veto. The President might use a pocket veto. Art. I, § 7, cl. 2 of the Constitution.

c. In the event that Congress fails to act by September 30 or Congress acts and there is a veto or pocket veto, we believe that the existing export administration regulations, including the boycott provisions, could be continued on the basis of the Trading with the Enemy Act, 50 U.S.C. App. 5(b). This alternative has been used in the past when the Export Administration Act lapsed. A Commerce Department inquiry regarding this matter is now pending in our office.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

cc: Mr. Oakley
Mrs. Kilberg

^{4/} The prohibition may extend to such transactions as a U.S. person's purchase of oil from an Arab country. It is not clear that only exports from the U.S. would be covered.