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5 MAR 1980



United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Use of IEEPA for Measures Against the Soviets

This responds to your request of February 19, 1980, for our comments on Lloyd Cutler's suggestion that the IEEPA be used for various measures against the Soviets. We will give you our preliminary views according to the organization of Mr. Cutler's memorandum of February 28, 1980.

A. Measures in Aid of Export Controls:

(1) Forbidding American grain dealers to make indirect sales to the Soviet Union through purchases in third countries.

The International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., is probably available for this use. Its authorities "may be exercised to deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." § 1701(a). The legislative history of the Act provides little help in defining the nature of such a threat, except for an emphasis that it must be external to the United States rather than domestic in nature. See H.R. Rep. No. 459, 95th Cong., 1st Sess. 7, 10-11 (1977). ^{1/} To constrain presidential discretion, the Act relies principally upon the substantive constraint of its limitation to international economic transactions and the procedural controls of consultations with Congress, periodic reporting requirements, and provisions for terminating states of emergency. For the latter, see 50 U.S.C. § 1622. The Soviet invasion and occupation of Afghanistan seem to be a clearly sufficient external threat to our national security to justify the declaration of a national emergency.

^{1/} The elaboration in the House Report provides little guidance: "A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose A state of national emergency should not be a normal state of affairs." Id. at 10.

The operative provisions of the IEEPA seem ample authority for this measure as well. 2/ Under the closely similar language of the predecessor statute, the Trading With the Enemy Act of 1917, Presidents employed this statutory authority for a wide variety of purposes, including President Roosevelt's Bank Holiday of 1933, his imposition of consumer credit controls to fight inflation, President Johnson's imposition of foreign direct investment controls on U.S. investors, and President Nixon's imposition of a ten percent surcharge on imports. See generally S. Rep. No. 466, 95th Cong., 1st Sess. 2 (1977). The significant changes with the adoption of the IEEPA in 1977 were restrictions on the duration of emergencies (through application of the National Emergencies Act, 50 U.S.C. § 1601 et seq.), and insertion of language to deny the President authority "to regulate purely domestic transactions or to respond to purely domestic circumstances." House Report, supra, at 11. Thus, President Roosevelt's two actions would no longer be authorized.

2/ Section 1702(a)(1) reads as follows:

At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise--

(A) investigate, regulate, or prohibit--

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

We would note that this suggested action might well be possible under the Export Administration Act of 1979, Pub. L. No. 96-72. The IEPA contained an amendment to the Export Administration Act of 1969 to provide authority for controls of exports of non-U.S.-origin goods and technology by foreign subsidiaries of U.S. firms. See House Report, *supra*, at 17. An amendment to remove this authority was considered and rejected in drafting the 1979 Act. See S. Rep. No. 169, 96th Cong., 1st Sess. 4-5 (1979). Because the Export Act governs exports "by any person subject to the jurisdiction of the United States" (§ 6(a)), it may apply to exports from another country that are arranged by a U.S. citizen, even if the transaction is not through a subsidiary of an American firm. The Act's explicit policies urging the President to attempt to restrict foreign availability of embargoed goods to a recipient nation suggest such a reading, as does the technical nature of the amendment, which was to remove from the Export Act of 1969 the phrase "from the United States" where it appeared after reference to an export. (Pub. L. No. 95-223, § 301, 91 Stat. 1629).

(2) Forbidding Americans from Entering Industrial Joint Venture Investments in the U.S.S.R.

The foregoing analysis suggests strongly that the IEPA is available to prevent this kind of transaction, under the broad terminology of § 1702(a)(1)(B). We would note that unlike the measures considered above under (1), the Export Administration Act probably would not reach many of these transactions.

B. Measures to Aid in Olympic Boycott:

(1) Blocking payment of the \$20 million NBC owes to the Moscow Organizing Committee.

Much depends on whether the purpose of blocking this payment is to prevent NBC from broadcasting the Olympics. See Mount Healthy School District v. Doyle, 429 U.S. 274 (1977) (otherwise permissible administrative action may not be taken for purpose of burdening protected speech). Blocking NBC's payment as part of a general program of isolating the Soviet Union economically would present few, if any, constitutional problems. But if the purpose of blocking the payment is to prevent NBC from broadcasting the Olympics, we seriously doubt that the President can legally block it. A broadcast of the Olympics would be communication protected by the First Amendment. A measure aimed directly at preventing such communication is unconstitutional unless the Government can show a very strong interest in enacting it. See, e.g., First National Bank v. Bellotti, 435 U.S. 765, 786 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion). While we do not now know what interests the Government might

assert in support of such a restriction, we doubt that a general concern for foreign policy will suffice to uphold it. 3/ We made these points in our comment on subsection (b) of the White House Counsel's proposed Olympic Boycott statute. See OLC Memorandum to the Attorney General, February 15, 1980, at 2-3. The Attorney General forwarded that memorandum to the White House Counsel.

In addition, the Supreme Court has suggested that any executive action significantly affecting the exercise of constitutional rights must be based on a clear and specific congressional authorization. See Kent v. Dulles, 357 U.S. 116, 129 (1958). While this principle may not apply to emergency legislation like the IEEPA, it does suggest that IEEPA delegations of power might not be given their full, literal breadth when the President attempts to use them for the purpose of limiting first amendment freedom. The IEEPA, of course, does not expressly authorize the President to interdict or prevent communications. Moreover, Congress was very concerned that the Act not be used to violate First Amendment rights. See House Report, supra, at 15-16. The House committee noted that it did "not intend . . . to authorize regulation or prohibition of the collection and dissemination of news." Id. at 15. Thus the IEEPA is plainly not the clear statement of authority that the President might need. For this reason, and, principally, because of the constitutional problem, we seriously doubt the President's power to use the IEEPA to block NBC's payment for the purpose of preventing the broadcast.

(2), (3), & (4) Blocking payments to Soviet government agencies for the purpose of preventing American citizens from travelling to, or participating in, the Olympics.

We have some significant doubts about the President's authority to use the IEEPA for the purpose of preventing American citizens from travelling to the Olympics. The IEEPA does not expressly authorize the President to restrict travel; its

3/ A different constitutional issue would be presented if NBC itself genuinely did not wish to make the payment and the President entered an order simply to provide NBC with a defense to an action for breach of contract. While listeners and viewers, as well as the network, probably have First Amendment rights against Government efforts to prevent broadcasts, listeners' and viewers' constitutional rights might not be violated if the decision not to broadcast were the product of NBC's volition alone. See generally Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). We have not yet reached any firm conclusions on these issues.

legislative history does not suggest that it is intended to grant such power to the President. Nor has Congress implicitly granted this power by acquiescing in a "substantial and consistent" administrative practice of using the IEEPA for this purpose. See Zemel v. Rusk, 381 U.S. 1, 12 (1965). More importantly, a strong argument can be made that statutes other than the IEEPA comprehensively define, and limit, the President's power to impose the sorts of restrictions on travel that are proposed here. This suggests that Congress did not expect the IEEPA to be a source of authority to restrict travel in this way.

The proposed restriction is expressly designed to prevent American citizens from travelling to particular countries at particular times. 4/ In 1978, Congress dealt with this subject in an amendment to 22 U.S.C. § 211a, the statute authorizing the Secretary of State to issue passports. The amendment provided:

Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the health or the physical safety of United States travellers.

This amendment followed a Supreme Court decision holding that § 211a gave the President authority to refuse to validate passports for travel to Cuba. Zemel v. Rusk, 381 U.S. 1 (1965). The Senate committee that added the amendment said that it intended to make "the freedom-of-travel principle . . . a matter of law." S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978). Thus Congress apparently intended not only to circumscribe the President's power to place restrictions on passports, but, more

4/ This power to restrict the travel of American citizens generally to a particular place at a particular time is distinct from the power to inhibit the travel of an individual by revoking his passport on the basis of a determination that his activities "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." See 22 CFR § 51.70(b)(4). The existence and scope of this latter power are currently being litigated. See Agee v. Vance, Civ. No. 79-3491 (D.D.C. Jan. 28, 1980), appeal docketed.

generally, to limit the President's power to restrict citizens' travel to certain areas at certain times. Moreover, there are no suggestions in the legislative history of the 1978 amendment--which was enacted shortly after the IEEPA--that the President had other powers that might be used to place this sort of restriction on citizens' travel.

We believe that because it is a grant of emergency powers, the IEEPA should, as a general matter, be interpreted broadly. The purpose of the IEEPA, we believe, is precisely to allow the President to take account of contingencies that Congress did not foresee. But in amending § 211a Congress provided exceptions for certain emergency situations. In other words, Congress took account of the possibility that emergency circumstances would require the President to attempt to deter travel, and Congress specified the extent of the President's power in such circumstances. This weakens the argument that the existence of an emergency under IEEPA vests the President with additional authority to restrict travel.

Finally, the freedom to travel is another constitutionally protected interest which, the Supreme Court has said, the President can act to restrict only under a clear grant of authority from Congress. See Kent v. Dulles, 357 U.S. 116, 129 (1958). As we have said, this principle may not apply to emergency legislation like the IEEPA. But if it does, it magnifies the difficulties of using the IEEPA for the purpose of restricting travel in the way Mr. Cutler proposes.

C. Blocking Loans and Credits to the Soviet Union

This is the easiest of the proposed actions to justify under the IEEPA. Presidents have repeatedly blocked the assets of other nations under the IEEPA 5/ and its predecessor statute; in 1977, Congress clearly contemplated future blockages. Blocking loans and credits appears to be a less drastic version of such an action.

D. Controlling Foreign Credit

Analysis under "C" above suggests that this kind of action is contemplated by the IEEPA; the problem here is the occasion for it. The title, the terms, and the history of the IEEPA are clear in their purpose to limit the President's use

5/ President Carter's freeze of Iranian assets is, of course, the most recent such action, and is the only one since the IEEPA's passage.

of the Act to meet threats with "whole or substantial" origin outside the U.S. (§ 1701). The chain of reasoning that Mr. Cutler's memorandum employs in identifying an external cause for our inflation in Soviet actions is not self-evident. Given the language of the statute and the legislative history we recounted in subpart "A" above, it is difficult to see how these actions could be justified in a way which would demonstrate that the Act is not being used to attack what is essentially a domestic problem. This is not to suggest, however, that there is no available argument for the proposed action. If foreign credit presents its own "extraordinary threat" to our economy, the IEEPA should be available to quell it. It would be necessary to declare a separate emergency, however.

E. Controlling Import Prices

The analysis under "D" regarding whether an emergency exists that meets the statute's requirements applies here as well. The facts, however, may be different. High import prices may pose an even more direct threat to our economy than does foreign credit. Nevertheless, it is not apparent that forbidding high-priced imports will reduce prices on domestic goods--the contrary effect may occur.



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