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EXPORT CONTROLS

The Axion Case: How a Rare Defense Victory May Shape the Future Of Arms Export Control Act Prosecutions and Defense Trial Strategies

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Shortly after announcing its “enhanced counter-proliferation effort” and appointing a “National Export Control Coordinator,” the government lost its first major Arms Export Control Act¹ trial under the new Justice Department initiative.² The rare defense victory in the recent prosecution of Axion Corp. and its principal, Alex Nooredin Latifi, in the Northern District of Alabama demonstrates how DOJ’s otherwise high success rate in AECA prosecutions can be misleading—with almost all cases resulting in guilty pleas before

trial.³ While journalists and legal commentators have speculated about the potential ramifications of the Axion case, this article, by trial counsel who represented Axion and Latifi, highlights the case’s unique facts, explains why those facts ultimately mandated acquittal, and explores the possible implications that the Axion case may have for future AECA cases.

Government Witness Problems

The government’s case against this small family-owned defense contracting business and its principal was arguably doomed from the first day of the investigation, which began when an unsolicited confidential informant contacted Army officials and began reporting on Axion and Latifi. During the next three years, investigators with the Army’s Criminal Investigation Command built their entire case upon what was later revealed to be misinformation from this primary informant—a receptionist at Axion who was eventually detected embezzling money from the company and subsequently convicted of forging Latifi’s signature on Axion checks that she made payable to herself. Rather

¹ 18 U.S.C. § 2778.

² See DOJ press release: *Justice Department Appoints National Export Control Coordinator as Part of Enhanced Counter-Proliferation Effort* (June 20, 2007) at http://www.usdoj.gov/opa/pr/2007/June/07_nsd_440.html.

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³ See Pedro Ruz Gutierrez, “DOJ Revs Up Export Prosecutions,” *Legal Times* (Dec. 17, 2007). Of the record 100 AECA prosecutions reported by DOJ in 2007, the Axion case was the only one that resulted in an acquittal.

than re-evaluating the case after the informant's arrest, investigators scrambled to parlay the receptionist's disinformation into a search warrant. They raided Axion's facilities and Latifi's office and home, not once but twice, seizing equipment, supplies, computers, records, and even laptops and cell phones belonging to Latifi's wife and four children.

The ultimate indictment read like a Tom Clancy novel. Latifi, a naturalized American citizen originally from Iran, together with his company, were charged with sending technical drawings of Blackhawk helicopter parts to China in violation of the AECA. The government also alleged that Axion and Latifi falsified test reports for the Blackhawk and for the Bradley assault vehicle. The six-count superseding indictment accused Latifi of defrauding the government of millions of dollars and compromising Army secrets. Prosecutors also sought forfeiture of Axion's assets and a substantial prison term for Latifi. The government heralded the indictment through press releases posted on numerous Web sites, which resulted in a cloud of suspicion descending upon Axion, Latifi, and his family in the town of Huntsville, Ala. Huntsville is a high-tech community in northern Alabama, densely populated with defense contractors, engineers, and scientists who support the local Redstone Arsenal and NASA's Marshall Space Flight Center.

Decision to Waive Right to Jury

Due to the potential bias against Latifi as an Iranian-American, the current disdain for the Iranian government, and the inflammatory nature of the charges, the defendants carefully considered their right to a jury trial and ultimately settled on the extraordinary measure of waiving this constitutional right in favor of a bench trial. Waiver of a jury trial is rarely sought in criminal cases, but it can be an effective strategy where the allegations involve complex criminal statutes or facts that might inflame the bias of potential jurors, especially given the pretrial publicity by the government in the Axion case. Securing a bench trial in a criminal case, however, can be easier said than done. The Constitution establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"⁴ and that "[t]he trial of all crimes . . . shall be by jury."⁵ Accordingly, unlike in civil cases, a bench trial cannot be effected simply by waiver of the right. In *Patton v. United States*, the U.S. Supreme Court first acknowledged that, in some circumstances, a defendant may waive a jury trial.⁶ According to the federal rules, such waiver must be in writing and approved by both the government and the court.⁷ The Supreme Court validated the rule of dual prosecutorial and judicial consent in *Gannett Co. Inc. v. DePasquale*, holding that "because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases, a defendant cannot waive a jury trial without the consent of the prosecutor and judge."⁸

⁴ U.S. Const. amend. VI.

⁵ U.S. Const. art. III, § 2.

⁶ 281 U.S. 276, 298 (1930).

⁷ Fed. R. Crim. P. 26.

⁸ 443 U.S. 368, 383 (U.S. 1979) (citing *Singer v. United States*, 380 U.S. 24, 38 (1965)).

Federal prosecutors in the Axion case showed initial hesitation but ultimately did not oppose a nonjury trial and consented to the defendants' jury waiver. Because of the result in the Axion case, however, it may be problematic for future defendants in AECA cases to secure government consent to a bench trial. It may nevertheless be an effective strategy for future AECA litigants to pursue. Even if a defendant is not saddled with the potential problem of a xenophobic jury, as was one of the potential problems in the Axion case, the very nature of an arms export allegation has the potential to raise the bias of an otherwise well-meaning patriotic citizenry—especially during a time of international conflict. Moreover, the complex statutory framework of the AECA and the Byzantine structure by which it is implemented also favor the strategy of seeking a bench trial. Jurists are more likely than jurors to recognize and comprehend the complex issues common to AECA cases.

While the government may oppose jury waiver in post-Axion AECA prosecutions, defendants may argue that a bench trial is warranted despite government opposition if the circumstances and charges are extremely complex—although scant, there is some authority that a defendant has a right to a bench trial in such unique circumstances.⁹ Even if the government ultimately succeeds in opposing a bench trial, raising the issue will effectively alert the trial judge to the potential problems of prejudice and complexity. Likewise, opposition to a bench trial by the government may send negative signals about its strategy, such as: (1) that prosecutors intend to rely on their ability to impassion a jury; or (2) that prosecutors ultimately do not trust the judge as trier of fact. Either implication is a preliminary sign of a weak case.

Intent Under AECA

Pursuant to the AECA, anyone desiring to export certain specifically listed "munitions" must register with the State Department's Office of Munitions Control and obtain an export license for each shipment of arms

⁹ In *Singer v. United States*, the Supreme Court noted, in dictum, that there may be "some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." 380 U.S. 24, 37 (1965). Thus if "passion, prejudice, public feeling, or some other factor" renders "impossible or unlikely an impartial trial by jury," there may be rare circumstances when a defendant may waive a jury trial without the consent of the prosecutor. *Id.* at 37-38. Federal courts have been almost uniform in their rejection of waivers of jury trials absent governmental consent. See, e.g., *United States v. Jackson*, 278 F.3d 769, 771 (8th Cir. 2002); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217 (2d Cir. 1983); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975); *United States v. Wright*, 491 F.2d 942 (6th Cir. 1974); *United States v. Mayr*, 350 F. Supp. 1291 (S.D. Fla. 1972); *United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir. 1971); *United States v. Daniels*, 282 F. Supp. 360, 361 (N.D. Ill. 1968). However, at least two federal courts have found an exception to the government-consent requirement in cases involving extremely complex circumstances and charges. See *United States v. Braunstein*, 471 F. Supp. 1 (D.N.J. 1978), and *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976). In both cases, the courts determined that the cases were too complex for lay jurors to understand and that alternative measures such as jury instructions would not cure the problem.

abroad.¹⁰ However, the AECA imposes criminal sanctions only on those who “willfully” violate the act.¹¹ “[T]his requirement of willfulness connotes a voluntary, intentional violation of a known legal duty.”¹² Accordingly, courts have held that the government must prove specific intent to violate the AECA in order to sustain a conviction.¹³ Proof that the defendant negligently failed to investigate the legal prerequisites for exportation, therefore, cannot support a conviction under the AECA.¹⁴

In *United States v. Adames*, the U.S. Court of Appeals for the Eleventh Circuit upheld an acquittal because the government failed to prove that the defendant acted willfully.¹⁵ Adames was a vice-consul at the Panamanian consulate in Miami who used her position to help her brother export firearms from the United States for use in his investigation and security firm in Panama. Adames exhibited suspicious behavior from which it could be inferred that she was aware of the generally unlawful nature of her actions, such as backdating consular letters authorizing the firearms purchases and lying to employees of the shipping firm, Air Panama, about the true nature of her brother’s business. When Adames picked up the shipment of firearms, she initialed a notice that warned that certain products could not be exported without approval from the Department of Commerce. The Eleventh Circuit held that such evidence demonstrated, “at most, that Adames was negligent in not investigating the legal prerequisites to the exportation of firearms. It does not prove that she intentionally violated a known legal duty not to export the firearms or purposefully perpetuated her ignorance of the AECA to avoid criminal liability.”¹⁶

United States v. Markovic is particularly illustrative of the AECA’s specific-intent element because the Eleventh Circuit affirmed convictions of certain defendants but reversed the conviction of one defendant based upon a nuanced inquiry into specific intent.¹⁷ The acquitted defendant was a Yugoslavian seaman named Mijodrag Petrovic who purchased revolvers and ammunition in port at Mobile, Ala., with the purpose of taking them back to Yugoslavia for resale. It was undisputed that the revolvers and ammunition were articles enumerated on the munitions list and that Petrovic did not have a license or written approval from the State Department to export the guns. Special undercover agents warned Petrovic that the transaction was illegal, but because the warning was given in English and Petrovic did not understand English, the court reversed his conviction, finding that the government’s proof of willful intent was insufficient.

In the Axion case, the government sought to distinguish such specific intent cases through reliance upon *Bryan v. United States*,¹⁸ the oft-cited Supreme Court

case that elaborated on the meaning of “willful” intent and held that particularized knowledge was not contemplated by the willfulness intent element in the context of the Firearms Owners Protection Act. Ultimately, the Axion trial judge was not convinced by the government’s citation to *Bryan* and its progeny, which do not address the AECA. The Supreme Court has yet to provide any instruction on the topic, but the judge in the Axion case noted that *Bryan* recognized that “willful” intent can require such particularized knowledge for “highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct.”¹⁹

Until the Supreme Court weighs in on the exact meaning of “willful” intent in the AECA context, prosecutors and defense attorneys will continue to debate the issue. Regardless, it is clear that even if the *Bryan* standard applies to the AECA and knowledge of the specific prohibitions of the AECA is not required for a conviction, the government must nevertheless “prove that the defendant acted with knowledge that his conduct was unlawful.”²⁰ In the Axion case, this prosecutorial burden proved insurmountable.

Government’s Insurmountable Burden

Ultimately, the government could not meet its burden of proving AECA criminal violations in the Axion case, because the undisputed evidence demonstrated that the defendants had acted in good faith. The drawings that the government claimed had been wrongfully sent outside the United States lacked the mandatory AECA warning in direct violation of the Defense Department’s and the Army’s own directives. Through its own recklessness or negligence, Army contracting officers disseminated the drawings without the mandatory warning to various potential bidders for the helicopter part, including Axion and Latifi. The government’s own witnesses—including experts from the Army and the State Department—testified that the drawings were improperly marked and that nothing on the face of the drawings would indicate that the drawings were restricted in any way. In fact, the State Department expert even testified that the drawings were labeled “non-critical” and “uncontrolled.”

The part itself was a simple muffler built from tungsten, an extremely dense material that is mined almost exclusively in China. The government, therefore, was on notice that potential contractors would necessarily seek to procure tungsten from Chinese sources and that the drawings would conceivably be sent to China, yet they made no effort to alert potential bidders that the Army considered the drawings to be subject to export control. Furthermore, evidence was adduced at trial that other technical drawings of the same helicopter part were and are widely available on the Internet for worldwide consumption. Finally, several witnesses—including the government’s experts—testified that the U.S. government sold Blackhawk helicopters to the People’s Republic of China and numerous other foreign militaries, all of which were presumably in possession of the actual part, rendering the drawings of little practical significance.

¹⁰ See 22 U.S.C. § 2778; 22 C.F.R. §§ 122-23; see also *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989).

¹¹ 18 U.S.C. § 2778(c).

¹² *Adames*, at 1377.

¹³ See, e.g., *id.*; *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978); *United States v. Johnson*, 139 F.3d 1359 (11th Cir. 1998); *United States v. Cardoen*, 898 F. Supp. 1563, 1568 (S.D. Fla. 1995).

¹⁴ See *Adames*, at 1377.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 911 F.2d 613 (11th Cir. 1990).

¹⁸ 534 U.S. 184 (1998).

¹⁹ *Id.*

²⁰ *Id.* at 191.

The government was unable to produce even one witness who could testify that Latifi or Axion knew that the drawings in question were subject to export control or that it was otherwise unlawful to send the drawings outside the country. Army quality-control representatives who worked closely with Latifi testified to his good character and to the fact that Axion enjoyed an excellent record as an Army contracting business with no quality deficiency reports in its 20-plus year history. By the close of the evidence, it was abundantly clear that the government had no hope of meeting its burden, and the trial judge immediately granted the defendants' motion for judgment of acquittal as to the AECA counts and dismissed the entire case at the conclusion of the defendants' case in chief.

Conclusion

The Axion case is a signal to DOJ and to future defendants that a negotiated plea is not always the answer to an AECA charge. From the date that Latifi and Axion were arraigned, prosecutors made overtures regarding settlement, and they reiterated such overtures right up

until the time of trial. The fact that most AECA charges result in settlement may have been a factor in the government's decision to seek an indictment against Latifi and Axion on such weak evidence.

Ironically, the Axion case may ultimately have the positive effect of encouraging the government to focus its new initiative on developing meritorious cases, rather than pursuing weak or marginal cases that have little trial appeal. More importantly, it may prompt government agencies to take more seriously their own responsibilities under the AECA by implementing preventive measures, rather than solely relying on DOJ to enforce the AECA through prosecution.

Finally, the Axion case demonstrates effective trial strategies for future AECA defendants to consider, including: (1) the possibility of a bench trial; and (2) focusing the question of intent upon the government's own actions, inactions, and failures. Post-Axion, the essential questions for AECA defendants should be whether the government complied with its own AECA directives and manifested the intent to safeguard its own secrets. In the Axion case, the unequivocal answer was no.