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Roth Asks Supreme Court to Review His Conviction

Lawyers for former University of Tennessee Professor J. Reece Roth filed a petition for a writ of certiorari with the Supreme Court April 5, seeking a review of his criminal conviction for violating the Arms Export Control Act (AECA). The petition argues the Supreme Court needs to step into the case because of split opinions among federal circuit courts over the legal standard for what level of knowledge is needed of the law and the International Traffic in Arms Regulations (ITAR) to show someone “willfully” violated the act. “Only this Court can resolve the ever-widening split of authority on this important and recurring question of federal law. It is a mature split openly acknowledged by the Government and both lower courts in this case,” it states.

The petition asks the high court to consider: “Whether a ‘willful’ violation of the complex regulatory provisions of the Arms Export Control Act may be established merely by proof that a defendant intended to violate any law whatsoever.” It claims the Supreme Court’s previous decision on this subject in *Bryan v. U.S.* has not resolved the issue among lower courts. Split authority among circuit courts is often a key argument needed to get the high court to accept a case.

The petition cites conflicting circuit decisions in *Pulungan* and *Wu*. “Because the Government did not seek a writ of certiorari in *Pulungan*, this case is the Court’s first opportunity to consider the arguments raised in those cases,” states the petition written by Roth’s lawyer, Stephen Miller of Cozen O’Connor in Philadelphia. Miller, who clerked for Justice Antonin Scalia and has experience arguing before the Supreme Court, joined Roth’s legal team at Neal & Harwell, which represented Roth in his district court trial and in the appeal to the Sixth Circuit.

“This case allows the Court to consider a critical question relating to the application of an important federal law in a novel context,” the petition argues. “It is the first known prosecution of an American college professor under the AECA where the charged conduct consists mainly of allowing the professor’s foreign-born graduate students to access their common research,” it says. “The case is also important to all academics and the public at large given the broad and elastic terminology of the various categories of ‘defense articles and services’” in the ITAR, it adds.

Bersin Says Customs Moving Beyond National Security

Ten years after 9/11, Customs and Border Protection (CBP) is ready to shift its focus from national security to trade facilitation. “It is time to adjust our notion,” CBP Commissioner Alan Bersin told 700 private-sector representatives at the CBP Trade Symposium April 13. “I make no



apologies for the monomaniacal focus we have had on security,” he said. With this year’s symposium, he said the agency is “reconceiving” its mission, starting with symposium’s theme: Working Together to Strengthen Economic Competitiveness. “We cannot be strong without being economically strong,” Bersin said. In addition to securing the borders from unwanted or dangerous cargo, Bersin stressed the need to streamline the 99% of people and cargo that mean no harm.

“Facilitating and expediting legitimate traffic is not just desirable; it is necessary to heightening our security profile,” he said. “It is only by making the haystack smaller that we can focus our scarce resources on either the people or the cargos about which we have derogatory information,” Bersin added. The CBP chief asked attendees to work with Customs to put that mission into practice. “Help us turn that insight into programs that create a Customs approach that is customer friendly; that actually functions efficiently; that eliminates the dumb rules; and focuses on the smart practice,” he said.

In an open forum during the symposium, questions were raised about the multitude of requirements at the border, including food safety, immigration or product recalls. “Absent one U.S. face at the border, we will continue to be defeated in the effort to move legitimate traffic,” Bersin admitted. “We understand the issue of needing to actually create partnerships within the U.S. government before we make great demands on the private sector,” he added.

Bersin said he was committed to working with the other 10 agencies that oversee imports to streamline border crossings. From Customs’ point of view, he said, this includes the automated commercial environment (ACE), which is seven years behind schedule. This would signify that “we can create an international trade data system. At that point, we can then create processes that harmonize executive decisions at the border,” Bersin said. This would also include common trusted trader programs across departments, he said.

U.S. Trade Representative (USTR) Ron Kirk told the symposium the U.S. is working in the Asia-Pacific Economic Cooperation Forum (APEC) to expedite trade among its members through development of a Supply Chain Connectivity Action Plan. “Under the Action Plan, one of the areas we seek to discuss with our APEC partners is how to expedite the shipment of goods under a certain value by establishing a baseline de minimis value for APEC,” Kirk said in his prepared remarks. “This would eliminate duties or taxes on relevant low-value shipments. And it would allow for customs officials to process those relevant shipments more quickly,” he added. He also noted that APEC has put the tariff schedules and rules-of-origin information for virtually all 21 APEC economies in English on the APEC website (APEC.org) under the heading of WebTR.

NAFTA Trucking Proposal Met with Usual Response

Even before it was out in print, the Transportation Department’s request for comments on a Federal Motor Carrier Safety Administration pilot program to allow Mexican trucks into U.S. roads met with both applause and opposition. The proposed plan, based on a concept document that Transportation Secretary Ray LaHood issued in January 2011, was published in the Federal Register April 13, requesting public comments in the next 30 days (see **WTTL**, April 11, page 3).

As expected, unions generally oppose the plan, while manufacturers and agricultural producers, whose products have been the target of Mexican retaliatory tariffs, look forward to the removal of sanctions Mexico imposed in 2009. “The Transportation Department’s move shows reckless disregard for American jobs and for public safety as well as for the stewardship of U.S. tax dollars,” declared Teamsters General President Jim Hoffa in a statement April 11.

On the other hand, the National Milk Producers Federation and the U.S. Dairy Export Council sent a letter to House Speaker John Boehner (R-Ohio), House Minority Leader Nancy Pelosi (D-Calif.), Senate Majority Leader Harry Reid (D-Nev.) and Senate Minority Leader Mitch McConnell (R-Ky.), applauding the program. “We strongly urge Congress to support swift progress

towards putting this process in place so that the retaliatory tariffs can be lifted and trade can be normalized in our largest export market,” the letter said. “This is a very welcome development and one that is overdue,” blogged National Association of Manufacturers (NAM) Director of International Trade Policy Doug Goudie. “The loss of exports to our second largest trading partner as a result of the tariff retaliation by Mexico forced manufacturers in America to cut production and lay off workers,” he said. The American Trucking Associations (ATA) shared those views. “This proposal requires Mexican carriers to follow all the same rules and regulations that their American counterparts are subject to and takes steps to monitor Mexican trucks to ensure that those rules are being followed,” said ATA President and CEO Bill Graves.

Administration Ready Soon to Move FTAs

Obama administration officials claim the White House is ready to send pending free trade agreements (FTAs) to Congress sooner than many expected. “Korea is ready to go now,” USTR Ron Kirk told the CBP Trade Symposium April 13. “The Colombia trade agreement could be ready in a matter of weeks. And we expect the same to be true for Panama, since the ball is in their court and they are making good progress,” he said. House members are also gearing up for action on the trade pacts, with one congressional delegation heading to Korea during Congress’ spring recess starting April 18, and another one going to Colombia (see **WTTL**, April 11, page 1).

“Among the key items on our agenda this year are pending trade agreements with Korea, Colombia, and Panama, along with renewal of Trade Adjustment Assistance (TAA), the Andean Trade Preference Act (ATPA), and the General System of Preferences (GSP), in addition to the granting of permanent normal trade relations (PNTR) to Russia as that country joins the WTO,” Kirk said. “But make no mistake – the administration is also considering timing of next steps on the Korea, Colombia and Panama agreements in the context of a larger discussion about sequencing a comprehensive trade agenda this year,” he told the symposium.

Report Claims Focus on Chinese Currency Is Distraction

In a report to Congress April 13, the U.S.-China Business Council contends too much attention is being paid to Beijing’s manipulation of the renminbi and not enough to other trade distorting factors. Overall, it urges continued high-level dialogue between American and Chinese leaders rather than confrontation, noting that China is the fastest growing market for U.S. exports. “A single-minded focus on China's currency is a distraction,” the report argues. While a market-oriented exchange rate would improve trade flows, “China's exchange rate is not the significant factor in the U.S. trade deficit or U.S. employment that many make it out to be,” it says.

The report also tries to dispel some misconceptions about U.S.-China trade and investment relations. “Many of the goods the United States used to import from Japan, Taiwan, and other Asian economies now come from China because Asian companies have shifted their export manufacturing base there,” the report notes. “As China's share of the U.S. trade deficit has risen with this shift, the share of the U.S. deficit from the rest of East Asia has declined,” it adds.

While U.S. companies invested \$18 billion in China between 2000 and 2008 and increased capital expenditures in China by 208%, this represented only 4% of such expenditures outside the U.S., the report notes. “When comparing capital expenditures in China by American manufacturers over the past decade to what they invested in American manufacturing, there isn’t much to compare. Aggregate capital expenditures spent by American multinationals in their U.S.-based manufacturing facilities between 2000 and 2008 totaled \$1.5 trillion—84 times what they spent on their China facilities over this period,” the report states. “Clearly, the presumed shift of the U.S. production base to factories in China is greatly exaggerated,” the report declares. “Though some claim that U.S. companies only produce goods in China for export to the United States, displacing manufacturing here at home, the facts say otherwise. Between 2000 and 2008, only 8

percent of total product sales by China-based U.S. facilities were exported back to America. By contrast, the vast majority of sales of U.S. companies in China—more than 70 percent—were within China’s local market,” it points out.

*** * * Briefs * * ***

TRADE PEOPLE: President Obama sent nominations to Senate April 8 for David S. Johanson to fill ITC seat now held by Charlotte A. Lane, whose term has expired. Johanson had served as Republican trade counsel for Senate Finance Committee and earlier was attorney with law firm of Stewart and Stewart in D.C. Also nominated were Sean Robert Mulvaney and Wanda Felton to Export-Import Bank board. Mulvaney previously served as assistant administrator at USAID during Bush II administration and worked on staff of GOP leadership in House. Felton owns and runs MAP Capital Advisors, financial advisory firm in New York. Early in her career she was Ex-Im loan officer.

TRADE FIGURES: U.S. goods exports in February rose 17.6% from February 2010 to \$118 billion, Commerce reported April 12. Services exports were up 6.5% from year ago to record level \$47.2 billion. Goods imports in February increased 16.8% from year earlier to \$177.3 billion and services imports were up 3.4% to \$33.6 billion. Separately, Labor Department reported that import prices in March rose 2.7% from February and export prices increased 1.5%. “March increase was driven by both higher fuel and nonfuel prices,” department explained.

FCPA: Two of 22 firearms exporting executives caught in 2010 government sting have pleaded guilty to conspiracy to violate FCPA. Daniel Alvarez pleaded guilty March 1 to two counts of conspiracy to violate its antibribery provisions (see WTTL, March 15, 2010, page 3). Under plea agreement, Alvarez agreed to provide “complete information...concerning his wrongful conduct as well as any wrongful conduct involving others.” Jonathan Spiller pleaded guilty March 29 to one count of conspiracy to violate FCPA.

DEFENSE SERVICES: As expected, DDTC proposed amending ITAR rules on export of defense services in April 13 Federal Register (see WTTL, April 11, page 1). “The furnishing of assistance (including training) using other than public domain data to foreign persons” is defense service subject to licensing, proposal states. It says following are not defense services: training in basic operation or maintenance of defense article; mere employment of U.S. citizen by foreign person; testing, repair or maintenance of item subject to EAR and incorporated or installed into defense article; providing law enforcement, physical security or personal protective training to foreign person using only public domain data; or providing assistance or training in medical, logistical or administrative support services to foreign person.

LIBYA: OFAC issued General License No. 4 April 8, providing guidance on investment funds in which Libyan government has minority interest. “Any interest of the Government of Libya or any person whose property and interests in property are blocked pursuant to Executive Order 13566 in an investment fund subject to U.S. jurisdiction is blocked property and may not be transferred or otherwise dealt in without authorization from the Office of Foreign Assets Control,” it states.

SOUTHERN SUDAN: OFAC published new guidance April 12 on application of Sudanese Sanctions Regulations (SSR) to new state to be formed in Southern Sudan as result of independence referendum. “While the new state formed by Southern Sudan will no longer be directly subject to OFAC sanctions, certain activities by U.S. persons in the new state will continue to be prohibited by the SSR absent OFAC authorization given the interdependence between some sectors of the Southern Sudanese economy and infrastructure and those of the rest of present-day Sudan. The SSR will continue to prohibit U.S. persons from dealing in property and interests in property of the Government of Sudan, from performing services that benefit Sudan or the Government of Sudan, from engaging in transactions relating to the petroleum or petrochemical industry in Sudan, and from participating in exports to or imports from the new state that transit through Sudan,” OFAC said.

EXPORT ENFORCEMENT: Two Chinese nationals, Hong Wei Xian, aka Harry Zan, 32, and Li Li, aka Lea Li, 33, waived detention hearing April 7 in Alexandria, Va., U.S. District Court and were ordered to be held without bail until their trial, which is scheduled to start July 18. Pair was indicted in September 2010 on two counts of conspiring to violate AECA and to smuggle items on USML to China from U.S. They were arrested in Hungary in September on provisional arrest warrant and transferred into custody of U.S. Marshals on April 1, after they waived extradition.

CARBOXYMETHYLCELLULOSE: In “sunset” review determinations April 14, ITC on 5-1 votes found injury likely to occur to U.S. industry if antidumping orders were revoked on imports of purified carboxymethylcellulose from Finland and Netherlands. By 6-0 vote, it found injury unlikely to recur if order were revoked on imports from Sweden and by 5-1 vote on imports from Mexico.