

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL NO. 00-CR-629

v.

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STEFAN A. BRODIE, DONALD  
B. BRODIE, JAMES E. SABZALI, :  
JOHN H. DOLAN, BRO-TECH  
CORPORATION d/b/a "THE  
PUROLITE COMPANY"

MEMORANDUM AND ORDER

McLaughlin, J.

August // , 2001

All the defendants, except John Dolan, have been charged with violation of the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. § 5(b) (1990), and the Cuban Assets Control Regulations ("CACRs"), 31 C.F.R. § 515 (1963), promulgated pursuant to TWEA.<sup>1</sup> The indictment charges that defendant Bro-Tech received payment for transactions in which it shipped ion exchange resins to Cuba through intermediary entities. The individual defendants are either owners or employees of Bro-Tech.

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<sup>1</sup> The case against John Dolan has been severed from the case against the other defendants. Mr. Dolan has not moved to dismiss the indictment against him; he is not charged with a violation of TWEA or the CACRs. I will use "the defendants" herein to refer to all the defendants except John Dolan.

The Court decides in this memorandum two motions to dismiss the indictment filed by the **defendants**.<sup>2</sup> In the first motion, the defendants argue that the CACRs were invalidly promulgated for three reasons: (1) they are inconsistent with the Foreign Assistance Act ("FAA"), 22 U.S.C. § 2370 (1990), and Presidential Proclamation 3447, implementing the FAA; (2) they are invalid under TWEA because the President never declared a national emergency with respect to Cuba; and (3) TWEA represents an unconstitutional delegation of legislative power to the Executive Branch. The Court will deny the first motion.

TWEA, enacted in 1917 and amended in 1933, gave the President power in times of war or a national emergency to regulate foreign exchange and credit transactions by banks and the hoarding of gold, silver, or currency by anyone **subject to** U.S. jurisdiction. The FAA, passed in 1961, authorized the President to establish and maintain a total embargo upon all trade between the United States and Cuba. The President implemented the FAA in Proclamation 3447. The CACRs, **issued in 1963**, banned all financial and commercial transactions involving Cuba. They were promulgated pursuant to both TWEA and the FAA.

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<sup>2</sup> The defendants have filed two other motions to dismiss the indictment: one based on asserted principles of foreign sovereign compulsion and the other based on principles of international comity.

Only TWEA, however, carries criminal penalties.

The Court finds no inconsistency between the CACRs and the FAA or Proclamation 3447. TWEA gave the President broader powers than the FAA as to the range of transactions that may be prohibited and the countries that may be the subject of the prohibitions. The FAA dealt specifically with a trade embargo with respect to Cuba. The defendants argue that the FAA narrowed the range of economic sanctions Congress intended to impose on Cuba. But, there is nothing in the FAA or its legislative history, or in Proclamation 3447, to indicate that Congress intended to limit the President's TWEA powers with respect to Cuba. It appears to the Court that the FAA reinforced, rather than limited, the powers of the Executive Branch to deal with the Cuban situation.

The Court also finds that there was a declaration of national emergency under TWEA in the form of Proclamation 3447 and President's Truman's 1950 proclamation concerning the threat of communist aggression. Finally, the defendants' unconstitutional delegation argument is foreclosed by Veterans and Reservists for Peace in Vietnam v. Regional Comm'r of Customs Region II, 459 F.2d 676 (3d Cir. 1972).

In the second motion, the defendants argue that the CACRs terminated in 1991 because the President failed timely to

send to the Office of the Federal Register ("OFR") his determination that it was in the national interest to extend them. The Court holds that the statutory requirement that the President must determine to extend the CACRs annually by a certain date or they will terminate does not include the obligation to file the determination with the OFR. The Court will deny this motion as well.<sup>3</sup>

I. Were the Cuban Assets Control Regulations Invalidly Promulgated?

A. Statutory Framework

The Constitution grants Congress the power to regulate foreign commerce. U.S. Const. art. I, § 8. In 1917, Congress delegated a portion of this power to the President in Section 5(b) of TWEA. Section 5(b) empowers the President to regulate foreign exchange and credit transactions by banks and the hoarding of gold, silver, or currency by anyone subject to United States jurisdiction. As originally enacted, Section 5(b) conferred these emergency economic powers upon the President only "[d]uring the time of war." In 1933 Congress amended Section

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<sup>3</sup> The underlying facts and procedural history of this case are set forth in a June 25, 2001 memorandum and order deciding certain discovery motions. They are not repeated here, but are incorporated by reference.

5(b) to permit the President to use Section 5(b) powers not only during war, but also "during any other period of national emergency declared by the President." Act of Mar. 9, 1933, ch. 1 § 2(b), 48 Stat. 1.

President Roosevelt first exercised the amended Section 5(b) powers in a series of executive orders relating to the 1933 banking crisis. Executive Order No. 6560, signed on January 15, 1934, prohibited certain transactions with foreign banks to prevent the flight of capital from the United States. After the outbreak of war in Europe, the President declared a national emergency and adapted Executive Order 6560 for foreign policy purposes by proscribing certain financial transactions with Norway and Denmark which had been invaded by Germany. Throughout World War 11, the President issued numerous amendments to the executive order, adding new countries to the list of banned countries as the Germans advanced across Europe. On April 10, 1940, President Roosevelt republished Executive Order 6560, as amended, and re-named it Executive Order No. 8389. The order was based on the existence of a period of unlimited national emergency related to the war in Europe.

On December 16, 1950, President Truman declared a new national emergency due to "recent events in Korea and elsewhere." Citing the "increasing menace of the forces of communist

aggression," President Truman stated that his purpose in declaring the national emergency was "that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."

Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

In 1961, after the United States terminated diplomatic relations with Cuba, Congress instituted a statutory scheme to place economic sanctions on Cuba. The Foreign Assistance Act of 1961 ("FAA"), denied foreign assistance to Cuba, denied Cuba a quota authorizing the importation of Cuban sugar into the United States, and authorized the President "to establish and maintain a total embargo upon all trade between the United States and Cuba." 22 U.S.C. § 2370(a) (1).

On February 3, 1962, "acting under the authority of section 620(a) of the Foreign Assistance Act of 1961," President Kennedy proclaimed "an embargo upon all trade between the United States and Cuba." Proclamation 3447, 27 Fed. Reg. 1085 (Feb. 3, 1962). President Kennedy stated that the embargo on trade would have two components: a ban on imports from Cuba and a ban on exports to Cuba. Id. The proclamation divided the

responsibility to carry out the embargo between the Secretary of the Treasury and the Secretary of Commerce; the former was assigned responsibility for regulating imports from Cuba, the latter for regulating exports to Cuba.

On October 15, 1962, the Secretary of the Treasury delegated all of his Section 5(b) powers to the Office of Foreign Assets Control (OFAC). Treas. Dept. Order No. 128 (Rev. 1, Oct. 15, 1962). These powers had been previously delegated by the President to the Secretary of the Treasury during World War II. Exec. Order No. 9193, 7 Fed. Reg. 5205 (Jul. 6, 1942).

On July 9, 1963, OFAC issued the Cuban Assets Control Regulations (CACRs). 31 C.F.R. § 515 (1963). The CACRs banned "all financial and commercial transactions involving Cuba," or in which a Cuban national had an interest, including transfers of credit and payments through banks, foreign exchange transactions, exportation, and importation. Other activities included payment of expenses while traveling in Cuba and remittances of living expenses to persons living in Cuba. In 1963, criminal penalties for violating the CACRs were a fine up to \$10,000 or imprisonment for up to ten years or both. 31 C.F.R. § 515.701(a) (1963).

OFAC annually releases a statement of "Authority" for the issuance of its regulations. When the **CACRs** were issued in 1963, the list of authorities included Section 620(a) of the FAA,

Proclamation **3447**, section 5 of TWEA, Executive Order 9193 (delegating Section 5(b) powers to the Treasury), and Executive Order 9989 (transferring jurisdiction over blocked assets to the United States Attorney General). In addition to the above mentioned authorities, the "Authority" section for the CACRs currently includes: 18 U.S.C. § 2332d (prohibiting financial transactions with countries supporting international terrorism), 22 U.S.C. §§ 6001-6010 (the Cuban Democracy Act), 31 U.S.C. § 321(b) (outlining the general authority of the Secretary of Treasury), 28 U.S.C. § 2461 note (mode of recovery whenever a civil fine, penalty, or forfeiture is prescribed for a violation of an act of Congress), and Executive Order 12854 (implementation of the Cuban Democracy Act).

On September 14, **1976**, Congress amended TWEA Section 5(b) by enacting the National Emergencies Act (NEA), Pub. L. 94-412, 90 Stat. 1255 (1976), codified at, 50 U.S.C. § 1601 et. seq. The NEA mandated that "[a]ll powers and authorities possessed **by** the President . . . as a result of the existence of any declaration of national emergency" would be terminated as of two years from the date of enactment. The statute exempted from its coverage certain emergency powers, including Section 5(b) powers. See 50 U.S.C. § 1651(a) (1).

This exemption for Section 5(b) powers was repealed the

following year by the Act of December 28, 1977, Pub. L. No. 95-223, tit. I, § 101(d), 91 Stat. 1625. Repealing the exemption scheduled the President's Section 5(b) powers for termination on September 14, 1978, two years after the date of NEA's enactment. The 1977 Act also amended Section 5(b), striking the language "or during any other period of national emergency declared by the President." Act of December 28, 1977, Pub. L. No. 95-223, tit. I, §101(a), 91 Stat. 1625. This change limited the use of Section 5(b) powers to times of war.

Title II of the 1977 Act also enacted the International Emergency Economic Powers Act (IEEPA), Act of December 28, 1977, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, which enabled the President to exercise essentially the same powers as those in Section 5(b), but with new procedural limitations. When the President's TWEA powers terminated, the President's use of emergency economic powers would be subject to the procedural requirements of IEEPA.

The 1977 amendment to TWEA also contained a grandfather clause under which the President may continue to exercise all TWEA authorities being exercised on July 1, 1977, including the CACRs, even after the September 14, 1978 termination date. Pub. L. No. 95-223, tit. I, § 101(b), 91 Stat. 1625, *codified* at, 50 U.S.C. App. § 5(b) note. The grandfather clause permits the

President to extend the exercise of emergency powers under Section 5(b) for one-year periods beyond September 14, 1978. The President may extend his Section 5(b) powers by making a determination that it is in the "national interest" to do so. Every year since 1978, the President has extended his powers by making such a determination.

B. Analysis

1. Are the CACRs Inconsistent With the FAA and Proclamation 3447?

The defendants' first argument for the invalidity of the CACRs is that they are inconsistent with the FAA and with Proclamation 3447 in three ways: (1) the FAA has narrowed the range of economic sanctions Congress intended to impose on Cuba; (2) Proclamation 3447 gave the power to restrict exports to Cuba to the Secretary of Commerce, not Treasury; and (3) Proclamation 3447 mandates that the embargo be implemented under the FAA and not under TWEA. The Court rejects each of these contentions.

The Fifth Circuit considered and rejected the argument that the CACRs are inconsistent with the FAA in Real v. Simon, 510 F.2d 557, 560-61 (5<sup>th</sup> Cir. 1975):

Appellants do not cite, nor have we been able to locate, any portion of the legislative history of the 1961 Act that would indicate either an explicit or implicit intention on

the part of Congress to limit Executive attempts to respond to the Cuban crisis. Absent clear and unequivocal evidence of such intent we are unwilling to announce a limitation on the President's powers to conduct the foreign affairs of this country. . . . We find no inconsistency in the two acts, and believe that the Foreign Assistance Act of 1961, should be viewed as bolstering, rather than limiting, the powers of the Executive Branch to deal with the Cuban problem.

This Court agrees with the Fifth Circuit's analysis. The FAA did not repeal or limit TWEA. The FAA established a national policy that "[n]o assistance shall be furnished under this chapter to the present government of Cuba." The FAA contains a specific Congressional mandate that gave the President additional powers to carry out that mandate. I see no inconsistency.

The defendants argue that the Fifth Circuit's analysis is questionable because the Court did not consider Proclamation 3447. In Proclamation 3447, the President divided responsibilities to carry out the embargo between the Secretaries of the Treasury and Commerce; the former restricting imports from Cuba; the latter restricting exports to Cuba. Defendants argue that in Proclamation 3447 the President placed limits on the Secretary of the Treasury that OFAC violated in promulgating the CACRs. The Court disagrees. Proclamation 3447 gave to Treasury some of the President's powers under the FAA. Treasury

already had TWEA 5(b) powers. Proclamation 3447 does not even hint at an intent to rescind Treasury's powers under that earlier statute. Nor does 3447 state that the FAA is the only statute under which an embargo may be implemented - the defendants' third argument.

Defendants' arguments come down to the claim that because the FAA gave the President authority to implement an embargo against Cuba and the President did so in Proclamation 3447, and because the CACRs do the same thing in a broader way than authorized by the FAA, they are inconsistent with the FAA. The Court does not agree that the law or logic requires this result.

## 2. Are the CACRs Inconsistent With TWEA?

The CACRs were promulgated under Section 5(b) of TWEA. The defendants argue that the CACRs are invalid because the President had not declared the national emergency as required by TWEA. The government relies on Proclamation 3447 as the declaration of the national emergency with respect to Cuba. The defendants argue that Proclamation 3447 did not declare a national emergency.

The President's language in Proclamation 3447 supports the government's contention that he recognized an emergency with

respect to Cuba:

WHEREAS . . . the present Government of Cuba is incompatible with the principles and objectives of the Inter-American system; and, in light of the subversive offensive of Sino-Soviet Communism with which the Government of Cuba is publicly aligned . . .

WHEREAS the United States, in accordance with its international obligations, is prepared to take all necessary actions to promote national and hemispheric security by isolating the present Government of Cuba and thereby reducing the threat posed by its alignment with the communist powers . . .

Proclamation No. **3447**, 27 Fed. Reg. **1116** (Feb. 7, 1962). Unless TWEA requires that the President say in these specific words: "I hereby declare a state of national emergency with respect to Cuba under Section 5(b) of TWEA," the language of Proclamation **3447** appears to be enough. The defendants have presented the Court with no case law that holds that the President must use specific words in declaring an emergency. On the contrary, the Supreme Court has described Proclamation **3447** as declaring the national emergency that underpins the CACRs. Regan v. Wald, **468 U.S. 222**, **104 S.Ct. 3026 (1984)**.

In that case, the Supreme Court upheld a **1982** amendment to the CACRs that restricted travel to Cuba. At the beginning of its opinion, the Court stated that the CACRs were implemented under section 5(b) of TWEA, and observed that the regulations

"were originally adopted to deal with the peacetime emergency created by Cuban attempts to destabilize governments throughout Latin America." *Id.* 468 U.S. at 226, 104 S.Ct. at 3030. The Court cites Proclamation 3447 as support for this statement. The defendants argue that this Court should ignore the Supreme Court's statement because it is dictum. The statement may be dictum but it is also persuasive.

Three Courts of Appeals have upheld the CACRs in the face of a similar challenge, but relied on President Truman's 1950 Proclamation, not Proclamation 3447. In Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966), the constitutionality of the CACRs was challenged because the regulations blocked a New York bank from remitting proceeds of an insurance policy to the beneficiary who was a Cuban national. The Second Circuit held that the CACRs were justified by President Truman's 1950 declaration of emergency. The court held that "[t]he declaration has never been revoked; rather it has been repeatedly upheld and recently reaffirmed." *Id.* at 109 (citing Exec. Order No. 10896, 25 Fed. Reg. 12281 (1960); Exec. Order No. 10905, 26 Fed. Reg. 321 (1961); and Exec. Order No. 11037, 27 Fed. Reg. 6967 (1962)).

In Nielsen v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970), Cuban refugees challenged the statutory and

constitutional validity of the CACRs' prohibition against refugees obtaining their proportionate interests in assets owned by a Cuban corporation and on deposit in a U.S. bank. The court affirmed the validity of the CACRs, holding that the regulations were authorized under TWEA by virtue of the 1950 declaration of national emergency.<sup>4</sup> 424 F.2d at 837.

Lastly, in Real v. Simon, 510 F.2d 557 (5<sup>th</sup> Cir. 1975), surviving heirs of a Cuban national challenged the CACRs' prohibition of the sale or distribution of assets owned by the Cuban government or Cuban nationals but held in the United States. The court rejected the heirs' argument that the CACRs were void for lack of express congressional authorization. The

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<sup>4</sup> The Third Circuit cited Sardino and Nielsen with approval in Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs Region 11, 459 F.2d 676 (3d Cir. 1972). In an explanatory footnote, the Court referred to President Truman's 1950 declaration as the basis for the CACRs. Id. at 678 n.1. The Third Circuit also cited Executive Order No. 11037 as an example of President Kennedy's subsequent recognition of the continued existence of a national emergency established by President Truman. This order was drafted and signed by President Kennedy on July 20, 1962, almost a full year before the CACRs were drafted. The order places restrictions upon the possession of gold bullion situated outside the U.S. The relevant language states "[b]y virtue of the authority vested in me by Section 5(b) of the Act of October 6, 1917 [TWEA], as amended, 12 U.S. C. 95a, and in view of the continued existence of the national emergency proclaimed by Proclamation No. 2914 of December 16, 1950." Exec. Order No. 11037, 27 Fed. Reg. 6967 (1962). The Court of Appeals seems to assume that the state of national emergency was still in effect when the CACRs were promulgated in July of 1963.

court held that the statutory basis for the regulations lay in §5(b) of TWEA and that the nation was under a declaration of national emergency since President Truman's 1950 Proclamation. The court cited Sardino and Nielsen as support for its conclusions. Id. at 560.

Three years after Real v. Simon, on September 14, 1974, Congress enacted the National Emergencies Act, which terminated "(a)ll powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on September 14, 1976." 50 U.S.C. § 1601(a). The act initially exempted Section 5(b) powers from its coverage, but that exemption was repealed by an Act dated December 28, 1977. The 1977 act forbade the declaration of a national emergency during peacetime, but contained a grandfather clause allowing TWEA section 5(b) powers employed before July 1, 1977 to continue to be exercised provided they were renewed annually by the President.

Legislative history surrounding the passage of the 1977 amendment suggests that at least some members of Congress believed that President Truman's 1950 declaration of emergency served as the authority for the CACRs. The chairman of the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations explained why the bill

allowed Section 5(b) powers to continue to be exercised by a determination by the President that they continued to be in the national interest.

We have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam. . . . So we have arrived at this proposed compromise . . . We would not require the President to declare that the emergency of 1950, under which those Powers are now being exercised, continues; we would simply require him to state, beginning in September 1978 and annually thereafter, that such powers are continued in the national interest.

Emergency Controls on International Economic Transactions:  
Hearings on H.R. 1560 and H.R. 2382 and Markup of the Trading  
With the Enemy Reform Legislation before the Subcomm. on  
International Economic Policy and Trade of the House Comm. on  
International Relations, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 207-08 (1977)  
(emphasis added).

The government has not relied on the 1950 Proclamation here, although it has done so in the other cases described above. The defendants argue that the Court cannot consider the 1950 Proclamation as a possible basis for the CACRs because the CACRs do not refer to the 1950 Proclamation as authority for their promulgation. As described above, OFAC annually issues a statement of "Authority" for its issuance of the CACRs. Through

the years OFAC has included the following in its statement of authority: the FAA, TWEA, the Cuban Democracy Act, Proclamation 3447, several executive orders, and various statutes. OFAC does not appear to have included President Truman's 1950 declaration of national emergency in any of its statements of authority for the CACRs. See 31 C.F.R. § 515 (1963); 31 C.F.R. § 515 (2000).

The defendants rely on Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575 (1947), and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 83 S.Ct. 239 (1962), as support for its argument that the Court cannot consider the 1950 Proclamation as the basis for the CACRs. Those two cases explore the requirements of the Administrative Procedure Act when a reviewing court considers whether there is substantial evidence to uphold an administrative action that impacts a specific company. Chenery and Burlington reviewed respectively an order by the Securities and Exchange Commission disapproving an amendment to a reorganization plan and an order by the Interstate Commerce Commission granting a limited certificate of convenience and necessity to a motor carrier. The Supreme Court held that where an administrative agency's decision is not consistent with the reasons invoked to support its conclusions, a reviewing court cannot substitute a better reason to justify the agency's decision. Burlington, 371 U.S. at 168-

69, 83 S.Ct. at 246. These cases appear to be inapposite. The defendants here challenge the overall promulgation of the CACRs and not an agency's individual decision with respect to a specific individual or entity.

Further support for upholding the CACRs comes from the fact that since 1977, every President has determined annually that there continues to be a national emergency with respect to Cuba and that the CACRs should continue. In addition, in 1977, as part of IEEPA, Congress grandfathered the CACRs when they could have abrogated them. For all of these reasons, the Court finds that TWEA's requirements of the declaration of a national emergency has been met.<sup>5</sup>

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<sup>5</sup> In support of their argument that there was no declaration of a national emergency, the defendants have submitted the affidavits of a Deputy Special Counsel and an Assistant Special Counsel to President Kennedy. The affiants described why they believe President Kennedy relied on the FAA and not on TWEA in issuing Proclamation 3447. Putting aside the serious question of whether it would be appropriate for a court to use such material to interpret a Presidential Proclamation, the affidavits do not seem to help the defendants' argument.

President Kennedy did not need to rely on TWEA to issue Proclamation 3447. He also did not need to use words like "national emergency." The fact that he did not do so does not mean that in July of 1963 - 9 months after the Cuban Missile Crisis - OFAC could not rely on TWEA and the implicit declaration of a national emergency made in Proclamation 3447. Although OFAC does not mention President Truman's 1950 declaration in its authority section, it also provides a basis for their issuance. Their affidavits are also consistent with the legislative history of IEEPA, described above.

### 3. Unconstitutional Delegation Argument

The defendants argue that the CACRs were invalidly promulgated because Section 5(b) of TWEA is an unconstitutional delegation of legislative power to the Executive branch. The Third Circuit rejected this argument in Veterans and Reservists for Peace in Vietnam v. Regional Comm'r of Customs Region 11, 459 F.2d 676 (3d Cir. 1972). In that case, the Court of Appeals considered a two pronged attack on Section 5(b) of TWEA and the Foreign Assets Control Regulations ("FACRs"), 31 C.F.R. § 500 (2000).<sup>6</sup> The first prong was an argument that the statute and regulations 'establish an unconstitutional delegation of legislative power without adequate standards.' Id. At 678. The second prong was an argument, that is not relevant here, that the statute and regulations violated the First Amendment by prohibiting the receipt of certain publications.

The Court quickly disposed of the first argument. It noted that the statute contains two express limitations: "(1) it

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<sup>6</sup> On December 19, 1950, OFAC promulgated the FACRs under Section 5(b) to impose economic sanctions on China and North Korea. 31 C.F.R. § 500. Transactions involving North Vietnam, Cambodia, and South Vietnam were similarly prohibited under the FACRs on May 5, 1964, April 17, 1975, and April 30, 1975 respectively. The 1977 grandfather clause in IEEPA permitting the exercise of emergency powers under Section 5(b) for one year periods beyond September 14, 1978 includes the FACRs. Since 1978, Presidents have annually renewed the exercise of authorities to countries affected by the FACRs.

becomes operative only during 'the time or war' or 'any other period of national emergency declared by the President,' and (2) it applies only to 'property in which any foreign country or national thereof has or has had any interest.'" Id. at 679. The Court stated that without the First Amendment considerations present in Veterans, it "would have no difficulty holding that the delegation does not render the statute unconstitutional.'" Id. at 679-80; see Sardino, 361 F.2d at 110.

In an attempt to avoid the holding of Veterans, the defendants argue that even if the statute is facially constitutional, the limitation in the statute requiring a state of war or a national emergency has been rendered meaningless by what they call the "permanent exercise of Section 5(b) powers from 1933 until 1977." Defendants' Mot. to Dismiss Due to the Invalid Promulgation of the CACRs at 31. I do not see how this is an unconstitutional delegation argument. If it was constitutional for Congress to give the President the power it did under Section 5(b), I do not see how the President's abuse of that power would support an unconstitutional delegation argument. It may support an argument that the President violated the statute by declaring a national emergency when there was not one; but this Court will not evaluate the merits of Presidents' declarations of national emergencies in deciding this pending

motion.

11. Termination of TWEA Authority

The defendants have also moved to dismiss the indictment on the ground that the President's TWEA authorities terminated on September 14, 1991, when the President failed to file with the Office of the Federal Register ("OFR") a determination to extend those powers. Because the Court finds that the President's determination was effective on September 13, 1991, when he signed the determination, the Court will deny the motion.

A. Statutory Framework

In 1977, Congress amended Section 5(b) of TWEA to limit the President's authority, to times of war. Act of December 28, 1977, Pub. L. No. 95-223, Title I, § 101(a), 91 Stat. 1625. In the same piece of legislation, Congress enacted the International Emergency Economic Powers Act (IEEPA) enabling the President to exercise essentially the same emergency economic powers as those in Section 5(b) of TWEA, but with new procedural limitations. The 1977 amendment to TWEA, however, contained the following **grandfather clause**:

Notwithstanding the amendment made by subsection (a) [limiting Section 5(b) to times of war] . . . the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977 . . . may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate . . . at the end of the two-year period beginning on the date of the enactment of the National Emergencies Act [Sept. 14, 1976] . . . The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Act of Dec. 28, 1977, Pub. L. No. 95-223, Title I, § 101(b), 91 Stat. 1625 (codified at 50 U.S.C.A. App. § 5(b) note) (emphasis added). Under this provision, all TWEA authorities being exercised on July 1, 1977, including the CACRs, were scheduled to terminate on September 14, 1978 - - "the end of the two-year period beginning on [September 14, 1976]." Id. Upon termination of those TWEA authorities, the President's use of emergency economic powers would be subject to the more stringent procedural requirements of IEEPA.

The grandfather clause permitted the President to avoid IEEPA's procedural requirements by extending the exercise of emergency powers under Section 5(b) of TWEA for one-year periods

beyond September 14, 1978 by making a determination that it was in the national interest to do so.<sup>7</sup> At the end of each one-year period, unless extended for an additional year, the Section 5(b) powers would automatically terminate.

## B. Analysis

On September 13, 1991, the President signed Presidential Determination No. 91-52, 56 Fed. Reg. 48,415 (Sept. 13, 1991) determining that it was in the national interest of the United States to extend for one year all TWEA authorities, including the CACRs. This document was filed with the OFR on September 23, 1991. The question for decision is whether the signing by the President on September 13 effectively extended the President's TWEA powers.

The answer to this question must start with the statute. The statute says that the President may extend his authority upon a "determination" that the exercise of such authorities is "in the national interest of the United States." Congress obviously wanted to make sure that the President focused

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<sup>7</sup> The grandfather clause changed the standard for exercising Section 5(b) powers. Prior to 1977, Section 5(b) powers could be exercised only during war or national emergency; after 1977, they could be exercised continuously as long as it was in the "national interest" to do so.

on this issue annually and made a judgment that the exercise of specific authorities, like the **CACRs**, was still in the national interest. There is nothing in the statute to suggest that anything else need be done to extend the President's authorities. The President made the required determination by the deadline of September 14, 1991. That would seem to end the matter.

The defendants argue, however, that the Federal Register Act of 1935 ("FRA"), Pub. L. No. 74-220, 49 Stat. 500 (Jul. 26, 1935), requires the Presidential determination to be filed with the **OFR** and that the determination is not effective until filed. Because the determination was not filed until September 23, 1991, they argue that the President's Section 5(b) powers terminated and could not be revived by presidential action.

The first issue is whether the FRA applies at all to the determination. 44 U.S.C. § 1505 lists documents that must be published in the federal Register:

- (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;
- (2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and

- (3) documents or classes of documents that may be required so to be published by Act of Congress.

The parties spend pages of their briefs arguing over this issue. The Court declines to decide this issue, however, because even if the Presidential determination was required to be filed with the OFR, that requirement is independent of the statutory requirement that the President extend his powers by a certain date.'

Section 1507 of the FRA sets forth the consequences of not filing a document with the OFR that is required to be published: such a document "is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection . . ." Even if the determination was required to be filed with the OFR, the only consequence is that it is not valid against a person without knowledge of its existence until it is filed. The TWEA determination was filed on September 23, 1991, well before the conduct at issue in the indictment.

The defendants' response to this point is that it is

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<sup>8</sup> Since the inception of the 1977 amendment to TWEA, all presidential determinations or memoranda extending the exercise of Section 5(b) powers included a concluding sentence directing that the determination be published in the Federal Register.

irrelevant to their motion because they are not arguing that anyone did or did not have knowledge but that the President did not validly extend his Section 5(b) powers. The defendants appear to want to use the substantive requirements of the FRA but not the remedy provided by the FRA. Or to put it another way, they seek to engraft onto the 1977 amendment to TWEA Section 1505(a) but not Section 1507. The Court rejects this approach.

The primary purpose of the FRA is to serve as a notice statute -- to eliminate secret law. See Cervase v. Office of the Federal Register, 580 F.2d 1166, 1169 (3d Cir. 1978); United States v. Flovd, 477 F.2d 217, 222 (10<sup>th</sup> Cir. 1973). The FRA is being given full effect in this case. It was filed on September 23, 1991, well before any conduct at issue in the indictment.

**An** appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL NO. 00-CR-629

v.

STEFAN A. BRODIE, DONALD  
B. BRODIE, JAMES E. SABZALI, :  
JOHN H. DOLAN, BRO-TECH  
CORPORATION d/b/a "THE  
PUROLITE COMPANY"

ORDER

AND NOW, this 11<sup>th</sup> day of August, 2001, upon consideration of defendants Bro-Tech Corporation, Stefan Brodie, Donald Brodie, and James Sabzali's Motion to Dismiss Counts 1-41 and 43-77 of the Indictment for Failure to Allege an Offense Due to the Invalid Promulgation of the Cuban Assets Control Regulations (Docket #78), and defendants Bro-Tech Corporation, Stefan Brodie, Donald Brodie, and James Sabzali's Motion to Dismiss Counts 1-41 and 43-77 of the Indictment for Failure to Allege an Offense Due to the Termination of the Trading With the Enemy Act Authority (Docket #79), the Government's response and replies thereto, and after oral argument, IT IS HEREBY ORDERED that, for the reasons stated in a memorandum of this date, the motions are denied.

BY THE COURT:

  
MARY A. McLAUGHLIN, J.