AIPAC
THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE
America's Pro-Israel Lobby

MEMO

Sept. 6, 2017

U.S. Courts: Anti-Boycott Laws Don't Violate Free Speech

In 1977 and 1979, Congress added provisions to the Export Administration Act (EAA) that prohibits Americans engaged in interstate or international commerce from complying with foreign governmental boycotts of friendly nations. The Israel Anti-Boycott Act of 2017 (H.R. 1697 and S. 720) would extend these rules to also prohibit compliance with new, similar boycotts of Israel initiated by international governmental organizations.

American courts have consistently upheld current law in the face of arguments that it restricts constitutionally-protected free speech. The courts have distinguished between the extensive free speech rights American citizens enjoy and the limited free speech rights enjoyed by persons engaged in commerce. They have consistently found that Congress may prohibit American citizens and companies from complying with foreign boycotts that conflict with U.S. interests, and that Congress may restrict the information Americans can provide to foreign governments with respect to foreign boycotts. Summaries of two key court cases follow:

Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983)

***Background*:** The EAA prohibits American companies from providing information "to comply with, further, or support any boycott fostered or imposed against a foreign country which is friendly to the United States." In 1978, Kuwait's boycott office requested that Trane Company provide information about its activities with Israel, Israeli companies and other non-Israeli companies. The Arab League's Central Boycott Office in 1980 requested similar information from United Technologies Corporation (UTC). Trane Company and UTC sued the Department of Commerce for enforcing the EAA's prohibition on answering such queries.

***Argument*:** Trane and UTC argued that the prohibition against their furnishing requested information violated their free speech rights under the First Amendment. They contended that their proposed responses deserved the full First Amendment protection afforded to "traditional speech," as compared to less protected "commercial speech," and that the EAA prohibitions were unconstitutional because they were overreaching and did not directly advance substantial governmental interests.

***Decision*:** The court held the EAA to be constitutional. The court rejected the plaintiffs' argument that the EAA regulates traditional speech stating that it was "abundantly clear that [the] plaintiffs' sole interest in providing responsive answers is economic" because the questionnaires were solely intended to further potential commercial transactions. The court next disregarded the plaintiffs' claim that the EAA violates the First Amendment protections granted to commercial speech. The court concluded that the government meets the test to determine whether regulation of commercial speech is constitutional. The court found first that the government has a substantial interest because the EAA involves "delicate foreign policy questions and the interest in forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'" Second, the court determined that the EAA directly advances the government's interest to not allow U.S. persons to become involved in perpetuating the Arab boycott. Third, the court held that the EAA is no more extensive than necessary to further the government's interest.

Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984)

***Background*:** This case consolidated the appeals of two lower court rulings—*Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307 (E.D. Wis. 1982)* and *Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983)*—that both held that the EAA did not violate free speech protections.

***Argument*:** The appellants offered three arguments as to why their conduct should be considered highly-protected traditional speech, rather than commercial speech. First, they argued that each question on the boycott questionnaire was implicitly an allegation that they have engaged in conduct contrary to the Arab boycott. They stated both that (a) they should have a right to communicate with boycott offices about the extent of their business dealings with Israel in an effort to promote the truth about their business relationships, and that (b) because such communications may not serve the economic interests of the foreign government they did not constitute commercial speech. Second, they asserted that their proposed communications should be seen as an attempt to influence the political decisions of a sovereign government, and as such should be protected by the First Amendment. Third, the appellants argued that the presence of economic motivation alone was not enough to show that speech is commercial.

***Decision*:** The court rejected each of the appellants' arguments. First, the court held that the companies' interest in disseminating truthful information could not be distinguished from their economic interests. The court was unpersuaded that the appellants had any interest in providing truthful information beyond the potential economic benefits that may result. Second, the court ruled that should the appellants wish to influence the Arab nations' policies regarding Israel they were free to communicate their views. In the course of such attempts to persuade, however, they may not furnish information about the extent of their business dealings with boycotted countries or persons. The court observed that the appellants' desire to answer a boycott questionnaire was not grounded in a desire to influence Arab governments' policies towards Israel, but rather to avail themselves of potential business opportunities. Third, the court stated that while economic motivation alone may not prove that speech is commercial, it was undeniable that the appellants' proposed answers to boycott questionnaires would serve only to allow them to continue their commercial dealings with the Arab world. No claim can be made that this conduct constitutes noncommercial speech.

Conclusion

American courts have consistently held that Congress has full constitutional authority to prohibit Americans engaged in interstate or international commerce from furnishing information about their activities with Israel in order to comply with foreign government boycotts. The Israel Anti-Boycott Act merely extends the congressional authority articulated in federal case law to prohibit a company's compliance with a boycott initiated by an international governmental organization.