1966

Customs Censorship

Jay A. Sigler

Customs Censorship

*Jay A. Sigler**

THE AMERICAN NATIONAL GOVERNMENT is engaged in a vast program of censorship which includes a wider range of materials than that usually controlled by local government authority. The attention of the courts and the press has been concentrated primarily upon state and local censorship, but federal activity is usually more significant. The federal government has used the postal and customs powers, derived from Article I, Sec. 8 of the Constitution, to regulate both the internal movement of undesirable material and its entry from abroad. The postal power has been treated elsewhere,[1] but the customs power is at least as important because it can reach any material transported by any mode of communication as long as the point of origin is outside the United States.[2] Not only is the customs power broader in scope, but its administration has been met with much less criticism and resistance than that of the Post Office.

The first successful Congressional attempt at censorship resulted in the passage of the Customs Law of 1842. This statute contained a section which prohibited pictorial art from being imported if it was "indecent or obscene."[3] It did not, as later statutes have done, regulate the printed word. From time to time the areas of censorship have been expanded, culminating in the censorship sections of the Tariff Act of 1930, which is the basic source of authority for the Bureau of Customs.[4]

Prior to the passage of the Tariff Act the customs officers often acted arbitrarily, excluding a great many acknowledged masterworks of art and literature.[5] As a response to unfavorable

---

* B.A., M.A., LL.B., Ph.D., Rutgers Univ.; Ass't. Professor of Political Science, Rutgers Univ.

1 Sigler, Freedom of the Mails: A Developing Right, 54 Georgetown L. J. (#1) (Fall 1965).

2 U. S. v. 10,000 Copies New York Nights et al., 10 F. Supp. 726 (S. D. N. Y., 1935) rests upon this fundamental presumption. See also McGlinchy v. U. S., 4 Cliff. 319, Fed. Cas. No. 8, 803 (D. Maine, 1875).

3 5 Stat. 566, Sec. 18 (1842).

4 46 Stat. 688 (1930); 19 U. S. C. 1305(a) (1952). The Act's provisions were in substantially the same language as those of the previous Act of October 3, 1913 (C. 16, Sec. IV, subsec. 1, 2 and 3, 38 Stat. 194) although many minor changes had been made from 1913 to 1930.

5 Gellhorn, Individual Freedom and Governmental Restraints (1956), p. 89. See also 59 New Republic 176 (1930) and Publisher's Weekly, Feb. 22, 1930, p. 984.

publicity and to judicial pressure the Customs Bureau came to rely upon the advice of an outside expert to determine the quality of a claimed literary work.[6] Since 1934 Huntington Cairns has advised the Treasury and the Customs Bureau on questions of obscenity in imported items. Cairns serves, officially, as secretary, treasurer and general counsel of the National Gallery of Art. As a lawyer Cairns came to the attention of the then Secretary of the Treasury, Henry Morgenthau, because of his critical writing in the *Baltimore Sun* and because he had successfully defeated the government in a censorship case.[7] Since the appointment of Cairns as unofficial censor little public controversy and few contests over determination of obscenity have arisen.[8] Nonetheless, Cairns and Customs officials have encouraged several test cases so that the limitations of Customs censorship are marked out to some extent.[9] Statutory language also tends to protect works determined to be of "established literary or scientific merit." [10] Other kinds of Customs censorship remain controversial and some unresolved issues of obscenity remain.

The Tariff Act of 1930

The basic source of authority for Customs Censorship is found in Section 305 of the Tariff Act of 1930 which treats the problem as an aspect of Congress' general control over imports.[11] Despite some minor changes in language the current statute is essentially the same as the parallel portion of the Act of October

---

[6] See Huntington Cairns, Freedom of Expression in Literature, 200 Annals of Am. Acad. of Pol. and Soc. Sci. 81 (November, 1938).

[7] Whitehead, Border Guard (1963), pp. 234-235.

[8] On taking the position Cairns inquired of a customs employee on what grounds he excluded books from entry. The clerk replied "Well, if I see a book with a naked woman in it, a photograph, I hold it up." This same clerk had refused admittance to the third shipment of James Joyce's Ulysses because it was a "dirty book." This was ascertained in a first reading after several hundred books had already entered. The clerk's suspicion had been aroused by the high price ($15) for the paperbound volume (In Ibid., p. 238).

[9] According to Gellhorn, op. cit., *supra*, n. 5, p. 90, "because the censorial judgment is now excercised with good sense and moderation, few adverse rulings are sought to be appealed."

[10] As an exception to the general restrictions upon importation of obscene materials the Secretary of the Treasury may "admit the so-called classic or work of recognized and established literary or scientific merit . . . when imported for non-commercial purposes," 62 Stat. 862 (1948).

[11] 46 Stat. 688 (1930) 19 U. S. C. 1305. The C. F. R. contains substantially the same language at 19 C. F. R. 12.40.

3, 1913,[12] which superseded previous tariff act provisions. The act prohibits all persons "from importing into the United States from any foreign country any book, pamphlet, paper . . . containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States or containing any threat to take the life of or inflict bodily harm upon any person in the United States." [13] In addition the act prohibits importation of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation." [14] Also prohibited are any drugs or medicines "or any article whatever for the prevention of conception or for causing unlawful abortion." Lottery tickets are included within the ban. The procedure for seizure is described and protests are to be taken to the United States District Court rather than to the Customs Court. Formal legal proceedings are to be instituted through the Federal district attorney, so that all the protections of a normal judicial hearing are provided in order to complete the process of forfeiture, confiscation or destruction of the matter involved.

The novel initial portion of the statute, which refers to importation of matter containing threats to do bodily harm to any person, is the result of a 1929 Congressional compromise. The section is clarified by the Congressional debates which indicate that the original intent was to block threats to the life of the President.[15] The first part of the phrase is of considerably greater significance. Taken literally, the phrase "any matter advocating or urging treason or insurrection" could reach mere abstract ideas or non-action.[16] Professor Chafee expressed his doubts as to the constitutionality of this provision because, he felt, the clause created an effective censorship over foreign liter-

---

[12] 38 Stat. 194 (1913).

[13] Ibid., sec. a.

[14] Ibid. This applies explicitly to any "image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral." The language is obviously as comprehensive a prohibition as possible.

[15] Senator Couzens submitted an amendment to add after the words "forcible resistance to any law of the United States" the phrase "or containing any threat to take the life of or inflict bodily harm upon any person in the United States" (71 Cong. Rec. 4463).

[16] See Ibid., p. 4471. Many of the defenders of the language appeared to have a morbid fear of Communism and anarchism while its detractors quoted Milton, Franklin and Jefferson.

ature, including many desirable books and pamphlets which contain discussions of social and economic matters.[17]

Senator Cutting sought to strike out Section 305 entirely and return to the substance of the law of 1842 which barred works of art of an indecent character and instruments for the prevention of conception. This amendment was defeated and the passages referring to the advocacy of treason or insurrection were retained.[18] Section 305 passed the Senate in substantially its present form by a vote of 38 to 36.[19] The language of this section could be used to cover virtually any radical document imported into the country. In the absence of Supreme Court interpretations, or even lower court opinions, the Customs Bureau seems to possess sweeping authority in this area.[20] Senator Burton K. Wheeler expressed his opposition to this innovation in the most colorful language:[21]

> Just think of what we are doing in these times. We are leaving it up to some clerk in a department to say whether or not some individual is bringing in a treasonable article. An individual might bring in a paper which some little two-by-four clerk in the department might say is treasonable. The man who brought the paper in, then, would be branded all over this country as one who had treasonable literature in his possession. . . It seems to me it is absolutely foolish to leave the decision of such a question in the hands of some clerk and give such power to him when we have all the laws upon the statute book at the present time which we need.

Customs procedures under the Tariff Act differ from those of the subsequent provisions of the "communist political propaganda" portion of the United States Code.[22] Upon seizure of an item under the Tariff Act a notice of the seizure is sent to the consignee or addressee.[23] If the articles are of slight value and

---

[17] Professor Chafee pointed out that the language seemed directed against any kind of revolution, whether within or without the United States (Ibid., p. 4450). Fears were expressed by others that the works of Marx, Proudhon, Bakunin, Bertrand Russell, or even the English edition of Jefferson's works could be excluded. (Ibid.)

[18] Ibid., p. 4457.

[19] Ibid., 4472. Cutting's amendment had been defeated by 44 to 33 (Ibid., p. 4461).

[20] This question is treated in the concluding section, but it is surprising that there are no cases directly concerned with this issue.

[21] 71 Cong. Rec. 4446.

[22] 74 Stat. 654, 39 U. S. C. 4008.

[23] Sec. 12.40(6), Customs Regulations of the United States (1964).

no criminal intent is apparent, a blank assent to forfeiture (Customs Form 4609) is sent together with the notice. If the form, duly executed, is returned to Customs authorities the articles are destroyed "if not needed for official use" and the case closed.[24] In cases involving repeated offenders or clear intent to evade the law the material is sent to the United States attorney who may institute prosecution as well as an in rem action for condemnation of the articles under Section 305.[25] The importer has 30 days to submit to Customs forfeiture by assent, or else risk a similar suit. Most cases result in voluntary compliance by the importers as evidenced by the very few recorded instances of formal actions instituted by the United States attorney.

Obscene articles (especially books) may be seized, and the importer raise as a defense that the book is a classic, or of recognized and established literary and scientific merit. In such cases a petition may be sent to the Secretary of the Treasury, with supporting evidence. If the ruling is favorable, release of the book is made but only to the ultimate consignee.[26] Films which have been exposed by a foreign concern or individual are previewed by "a qualified employee of the Customs Service." [27] Objectionable films are detained pending instructions from the higher officials of the Customs Bureau or a final decision of the courts.[28] Customs Form 3291 is provided importers in order to certify that the films contain "no obscene or immoral matter, nor any matter advocating or urging treason or insurrection against the United States or any forcible resistance to any law of the United States." [29] Again, considerable voluntary compliance seems to have taken place in this area. Obviously, wide administrative discretion is permitted by these rules.

---

[24] Ibid., 12.40(c). TD 44293; TD 44766; TD 53866. This procedure is not employed in cases of matter advocating treason or insurrection or matter containing threats. Such material "is transmitted to the United States attorney for his consideration and action." (Ibid., 12.40(a), TD 53399).

[25] Ibid., 12.40(a); TD 52025. Criminal prosecution is possible under 18 U. S. C. 1461 and 1462.

[26] Sec. 12.40(g) Customs Regulations. TD 42908; TD 43600; TD 44342; TD 44884 (7); TD 46042 (1); TD 47412. As previously indicated, this may practically mean that the judgment of Huntington Cairns will be consulted.

[27] Sec. 12.41 (b) Customs Regulations.

[28] Ibid., 12.41 (c).

[29] Ibid., 12.41 (2); BCL 1920/38; TD 53268; TD 53336. Curiously, there are very few court cases concerning films (see Eureka Products Inc. v. Mulligan, 108 F. 2d 760 (2d Cir., 1940)).

The rules regarding non-obscene articles reflect the pressure of judicial standards of interpretation.[30] Drugs or medicines which, from information on the container or its immediate surroundings, are "intended for preventing conception or inducing abortion" will be detained and seized.[31] Devices imported by or for the use of a particular physician are not detained if the collector of the customs is satisfied that the ultimate consignee is a reputable physician.[32] If the importer does not satisfy the collector of the customs as to his eligibility he may, nonetheless, file a claim addressed to the Commissioner of Customs.

The Bureau of Customs publishes no list of books, pamphlets or other publications which are officially proscribed. There does exist, for internal use, a file of titles and a list of the disposition made in specific cases. From time to time instructions are issued from the Washington headquarters to collectors of customs which serve as guidelines "but for the most part these are by way of comment on current interpretations by the Federal Courts." [33]

Communist Political Propaganda

On January 7, 1963 the provisions of Public Law 87-793 went into effect. This statute refers primarily to unsealed mailed matter entering the country from abroad, and as such, concerns both the Post Office and the Customs Bureau. The statute empowers the Secretary of the Treasury to determine "pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda.'" [34] At that point the Postmaster General may detain propaganda mail and notify the addressee of the detention, delivering the mail only upon the addressee's request. Exceptions are made for subscription materials or matter addressed to any United States government agency, or to a public library, college or research institution.

---

[30] In U. S. v. One Book Entitled "Contraception," 51 F. 2d 525 (S. D. N. Y., 1931) Judge Woolsey held that a book intended for medical use is not obscene. U. S. v. One Package, 86 F. 2d 737 (2d Cir., 1936) holds that Section 305 does not ban articles used by a physician to prevent conception with the intention of protecting the patient's health. This is the same interpretation applied to postal practices in contraceptive control.

[31] Sec. 12.40 (h), Customs Regulations.

[32] Sec. 12.40 (i); T. D. 53268. The physician must file a statement asserting that the devices are to be used only to protect the health of his patients.

[33] Letter to author from Irving Fishman, Assistant Deputy Commissioner, Bureau of Customs (dated February 10, 1965).

[34] 39 U. S. C. 4008.

In effect, the Bureau of Customs has been assigned the task of censoring certain mail in order to determine whether it is "communist political propaganda." The Bureau is given some standards to gauge the political content of these mails by statutory reference to several earlier acts, but none of the statutes referred to actually provide a definition of communist propaganda.[35]

Even prior to the current statute the Foreign Agent's Registration Act of 1938, as amended in 1942, had been construed by Customs and Postal authorities to imply that political propaganda coming into the country must be labelled as such.[36] For some years the Customs Bureau has been classifying, for purposes of labelling, items regarded as "Communist political propaganda." Typical publications include Lenin's *Selected Works,* and *Happy Life of Children in the Rumanian People's Republic.*[37] Customs officials checked each incoming publication against circulars issued by the Bureau of Customs which contained lists of foreign publications which have been ruled admissible under agency definitions made under the authority of the Foreign Agent's Registration Act.[38] No general publication of these lists was made available to the public. However, under the Act foreign agents were permitted to bring such propaganda into the country with them.

The constitutionality of the registration provisions of the Foreign Agent's Registration Act seems clear.[39] The Supreme Court has upheld a conviction for violation of the statute and

---

[35] Foreign Agents Registration Act of 1938, as amended (22 U. S. C. 611 (j)). Section 5 of the Trade Agreements Extension Act of 1951 (19 U. S. C. 1362) and several other acts are mentioned but the 1938 Registration Act is by far the most important because of the years of experience in its application. It is in that experience, if anywhere, that a definition is to be found. Part 9 of the Customs Regulations was amended to meet the statutory requirement by adding a new section (Sec. 9.13) to place in the collections of customs the authority to determine whether "mailed matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country is 'Communist political propaganda' within the meaning of subsection (b) of 39 U. S. C. 4008." Thus, a completely circular definition of "Communist political propaganda" is provided.

[36] Act of June 8, 1938, 52 Stat. 631, as amended, Act of April 29, 1942, Sec. 4, 56 Stat. 248, 255. See Note, Government Exclusion of Foreign Political Propaganda, 68 Harv. L. Rev. 1393 (1955).

[37] Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 83d Cong., 1st Sess. (1953) p. 237.

[38] Ibid., p. 229; pp. 232-256.

[39] Viereck v. United States, 318 U. S. 236 (1943).

First or Fifth Amendment claims have been rejected in the District Court.[40] Registration under the Act was mentioned in a favorable light by Justice Black in his dissent in a 1961 case, which seems to assure the principle of disclosure upon which the Act is based.[41]

The current Communist propaganda statutes reflect an intention of Congress to keep Communist publications out of the hands of unsuspecting citizens.[42] Thus it is a true censorship statute rather than a mere registration requirement. Constitutional questions of a far graver nature are presented. It is quite possible that the doctrine of prior restraint on speech may yet be applied to restrict or prohibit political censorship of Communist propaganda.[43] Since the doctrine of prior restraint deals with limitations of form rather than substance the constitutional issue involved a possibility of a direct challenge of the activities of the Customs censor (as well as the Postal censor).

The administration of censorship of Communist propaganda requires close cooperation between Customs and Postal authorities, although the Customs officials are charged with detecting propaganda material. Foreign propaganda units are maintained in New York, Chicago, San Francisco, Los Angeles, Honolulu, El Paso, New Orleans, Miami, Seattle and San Juan, Puerto Rico. The postal official shakes out the mail sacks at the

---

[40] United States v. Peace Information Center, 97 F. Supp. 255 (D. D. C., 1951). Judge Holtzoff based the authority for the Act upon the inherent power of Congress to regulate external affairs as well as its power to legislate concerning national defense. The registration provision was regarded as neither a regulation of ideas nor a burden upon speech.

[41] Communist Party v. Subversive Activities Control Board, 367 U. S. 1, at p. 139 (1961). Black approved the registration because, unlike the situation under the Internal Security Act as he saw it, it was based on the principle of disclosure and was not an attempt to incriminate foreign agents or foreign publications.

[42] Representative Morris K. Udall, one of the major supporters of the Communist propaganda statute, stated: "There are really two justifications for this legislation. One . . . is the injustice of our taking the time and expense to deliver all kinds of Communist mail and magazines when they wouldn't deliver ours. The second one was that we ought to protect, somehow, innocent Americans who might be gullible from the flow of Communist propaganda." (Hearings before the Subcommittee on Postal Operations of the Committee on Post Office and Civil Service House of Representatives, 88th Cong., 1st Sess., June 20, 1963, p. 56).

[43] Near v. Minnesota, 283 U. S. 697 (1930). See Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955). Emerson points out that prior restraint prevents advance screening of material which could be subsequently punished after publication. In the case of Communist propaganda, however, no criminal deed is committed by subsequent publication, a fact which makes the censorship even more dubious.

point of entry, sends on the sealed letters and detains the rest for customs examination, excepting matter he feels to be exempt. Customs "divides it up into two piles basically, and they give the Postal officials immediately . . . the non-propaganda which goes back into the mail flow" while the propaganda goes into the file room.[44] The propaganda material is held by the Post Office which informs the addressee of the arrival of the mail and permits him to request forwarding.[45] During the censoring process customs and postal officials work together in the same room, possibly sharing impressions of the propaganda-like character of the mail.[46] When asked whether he thought the propaganda control statutes were in effect diminishing the amount of incoming Communist propaganda, the Deputy Collector of Customs candidly expressed the opinion that it did not.[47]

The practice of Customs seizure of foreign propaganda is not new. During World War I German propaganda and, later, left-wing propaganda was suppressed, even in the absence of any statute.[48] During the 1950's the Post Office and the Customs Bureau engaged in a program of general confiscation of mail thought to be Communist propaganda. This also was done in the absence of specific legislation on the basis of executive orders and interpretations of the Attorney-General. Customs officials, often lacking any training in foreign languages, seized, detained or destroyed all matter deemed by them to be propaganda.[49] It

---

[44] Lamont v. The Postmaster-General of the United States, 229 F. Supp. 913 (S. D. N. Y., 1964) and Heilberg v. Fila, 236 F. Supp. 405 (N. D. Cal., 1964). The latter case declared the statute to be unconstitutional because the law inhibited the spread of ideas and was "a clear and direct invasion of First Amendment territory." As described by Tyler Abell, Associate General Counsel, Post Office Department, June 20, 1963 in Hearings before the Subcommittee on Postal Operations of the Committee on the Post Office and Civil Service, 88th Cong., 1st Sess. (1963), pp. 44-45.

[45] Post Office Notice Form 21403X is employed for this purpose.

[46] "In point of fact, you have customs people and postal people working in a room . . . they kind of exchange functions, and there is not too much we can do about it, we just hope that it goes right most of the time," Abell, op. cit., *supra.*, n. 44, at p. 40.

[47] "If the intent is to keep this mail out of the country, then we are not accomplishing our purpose," Testimony of Irving Fishman, on June 19, 1963, in ibid., p. 20.

[48] See United ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 (1921).

[49] Schwartz and Paul, Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship, 107 U. of Pa. L. Rev. 621 (1959). Mathematical magazines, chess magazines and academic journals

(Continued on next page)

remains to be seen whether the current more orderly statutory procedure will result in careful, judicious practices.

The Case-Law Limits

There is a paucity of case-law material interpreting the power of Customs censorship. This is probably due to the generally non-contested character of issues arising under the Tariff Act of 1930. However, it is possible that challenges to the Communist propaganda statutes may generate a subsequent challenge to long-accepted practices of Customs officials. It is also likely that questions which have been treated in another context, such as the nature of obscene materials,[50] will make unnecessary further litigation in the Customs area. Existing cases do disclose a definite pattern of limitation and will probably determine the future contours of the law of customs censorship.

That Congress possesses the authority "under its general power to regulate commerce with foreign nations" to "prescribe what articles shall be admitted and what excluded" has been long established.[51] No case represents a successful challenge to that general assertion, although, as with other powers of Article I, there may be some ultimate limitation on Congressional authority. Occasionally the statutory language has been narrowly

---

(Continued from preceding page)

were among the victims. In 1940 Attorney-General Robert H. Jackson held that the use of our mails by persons outside the United States for the purpose of committing an act which, if committed here, would constitute a violation of a criminal statute renders the disseminator an unregistered agent here if the conduct involved a violation of Section 22 of the Espionage Act (30 Ops. Atty. Gen. 535). As a result of this ruling Customs and Postal officials were apparently authorized to intercept and destroy any material which they considered to be political propaganda. At times in the past customs officials have stopped vast quantities of "Back to the Homeland" mailings as political propaganda. Consent of the addressees was first obtained (Hearings before the House Committee on Un-American Activities, 84th Cong., 2d Sess., 4705-18; 6055-56; 6070-71 (1957)).

[50] The most important recent expression of Supreme Court views is represented by Manual Enterprises v. Day, 370 U. S. 478 (1962). This case exhibits a distrust of administrative determinations of obscenity generally (pp. 497-98). Roth v. United States, 354 U. S. 476 (1957) sets the standard of prurient interest as determined by applying community standards perceived by a hypothetical average person. Obscenity has been the subject of a vast and growing literature but it is noteworthy that the judicially announced standards have been applied to every type of determination, judicial or administrative; state, federal or local.

[51] The Licence Cases, 5 How. 577 (1847). These cases affirmed the principle as applied to state regulations on imported liquor.

interpreted,[52] but no significant substantive restrictions have as yet been announced. Claims of prior censorship in the application of Customs censorship to books have been rejected,[53] and other First Amendment contentions dismissed.[54]

Special procedural rules have evolved around obscenity cases. Recently a California District Court held that seizure and forfeiture of obscene materials under the Tariff Act does not permit forfeiture of non-obscene material in the same package.[55] Seizure of the package is permissible but forfeiture depends upon proof of the obscenity of each item. The collector of customs is authorized by statute to seize any obscene matter and hold it awaiting the judgment of the district court. The collector is to send information to the district attorney who institutes proceedings for forfeiture, confiscation or destruction of the seized matter.[56] Any party in interest may on demand have the fact of obscenity determined by a jury.[57] A decision in one federal court on a particular book will be *res judicata* in another court.[58]

The discretion of the Secretary of the Treasury to admit certain literary classics does not establish his discretion as the sole means by which scientists and scholars can import material for their own study. It is open to proof in a federal court that

---

[52] Sec. 1 of the Act of 1912 (37 Stat. 240) prohibited the importation of prize-fight films in categorical language. Rose v. St. Clair, 28 F. 2d 192 (D. C. Va., 1928) narrowed the language greatly to permit an exhibition of a film which itself was not physically imported. (It was projected across the Canadian border.) This District Court case is a rare example of judicial restriction of a substantive provision in the area of Customs censorship.

[53] United States v. One Obscene Book Entitled "Married Love," 48 F. 2d 821 (S. D. N. Y., 1931). Judge Woolsey asserted that the section does not involve the suppression of a book before it is published, but the exclusion of an already published book sought to be imported.

[54] Section 1305 of the Tariff Act has been held not to be an unconstitutional interference with freedom of the press (United States v. One Book etc., 51 F. 2d 525 (S. D. N. Y., 1931); United States v. One Obscene Book, 48 F. 2d 821 (S. D. N. Y., 1931)).

[55] United States v. 18 Packages of Magazines, 227 F. Supp. 198 (N. D. Cal., 1963). By tracing the development of current provisions of Sec. 1305 through its legislative history the Court (Judge Sweigart) distinguished two older precedents which had permitted destruction of the entire package, obscene and non-obscene materials both (United States v. One Case Stereoscopic Slides, 27 Fed. Cas. 255 (1857) and United States v. Three Cases of Toys, 28 Fed. Cas. 112 (1843)).

[56] 19 U. S. C. 1305 a.

[57] Upham v. Dill, 195 F. Supp. 5 (S. D. N. Y., 1961).

[58] United States v. One Obscene Book Entitled "Married Love," op. cit., *supra*, n. 53.

matter which could be obscene in the hands of the general public might be of scientific concern, hence importable for that purpose.[59] In determining whether a book is obscene opinion evidence is useful although not controlling.[60] Literary works such as Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* have been found obscene,[61] while James Joyce's *Ulysses* has been held not to be obscene "in its dominant effect." [62] Recently customs censorship in the area of literary works appear to have become more liberal in response to Supreme Court rulings in other types of obscenity cases, thus permitting the entry of books such as *Candy* which contain some salacious passages.[63]

Any material which is seized must be held in accordance with statutory procedure. Failure to follow that procedure may result in suit against the customs collector, but return of the goods is not a complete remedy nor is repentance.[64] One may not, however, maintain a suit to restrain the customs collector from interfering with importation of an item because the statute provides a libel proceeding to test importability of materials alleged to be obscene.[65] On the other hand, a suit to condemn material seized on land should be brought as an action in law and, if seized at sea, a libel of information in admiralty is the proper procedure.[66] All property taken or detained under the revenue laws are not repleviable, but remain in the custody of

---

[59] United States v. 31 Photographs, 156 F. Supp. 350 (S. D. N. Y., The only case restricting power of the Secretary of 1957).

[60] Besig v. United States, 208 F. 2d 142 (9th Cir., 1953).

[61] Ibid., applying the "dirt for dirt's sake" test of Burstein v. United States, 178 F. 2d 665 (9th Cir. 1949).

[62] United States v. One Book Entitled Ulysses by James Joyce, 72 F. 2d 705 (2nd Cir., 1934).

[63] The book was first printed in France where its co-authors Southern and Hoffenburg wrote it under the pseudonym "Maxwell Kenton." Recent decisions of the Supreme Court favorable to such films as Lady Chatterly's Lover (Kingley International Pictures Corp. v. Regents, 360 U. S. 684 (1959) and homosexual magazines, Manual Enterprises v. Day, op. cit. *supra,* note 50, have, together with the Roth case rules, 354 U. S. 476 (1957) served to discourage literary censorship by Customs.

[64] Truth Seeker Co. v. Durning, 147 F. 2d 54 (2d Cir., 1945). The publications in question included "The Bible Handbook" by Foot and Ball and "Papacy in Politics Today" by McCabe. The customs collector did not transmit information to the district attorney as Sec. 1305 requires. This caused an illegal delay and detention of six months.

[65] Upham v. Dill, op. cit. *supra,* n. 57.

[66] Eureka Products Inc. v. Mulligan, op. cit., *supra,* n. 29. This was a suit brought against a federal marshal for having destroyed a confiscated film during the appeal. The destruction was upheld.

the courts having jurisdiction.[67] The court having jurisdiction is the court located in the district in which the book was seized.[68]

Customs Censorship Abroad

The practices of other common law nations may provide some guidance to the solutions of problems alluded to above. In Australia local officials play only a small part in the whole area of censorship.[69] In order to obtain some uniformity in the treatment of the problem a conference of ministers from all the states met with representatives of the Commonwealth Government in 1962. At this meeting it was decided "that before any action was taken against importers, news agents or booksellers, a consultation should take place between the Commonwealth Department of Customs and Excise and representatives of the state involved." Thus, in another federal system, a working partnership to control censorable materials has evolved.[70] Nonetheless, clearance of a book by Customs does not preclude a subsequent conviction for violation of a state statute.[71]

The British Customs also prosecuted James Joyce's famous novel, *Ulysses.* At the time of its first English importation, by smuggling, copies found in England were seized under the Customs Act of 1867 and burned before the publisher could take any legal action. After the book had been cleared for importation by American courts[72] the book has been permitted entry so that customs censorship is simply ignored.[73] Perhaps the most astonishing instance of British Customs censorship occurred in 1957 when a two-volume edition of Jean Genet's novels were seized. The books, which were in French, had been ordered by the Birmingham Public Library for its reference department. Despite Genet's excellent reputation as a French literary figure, the Bir-

---

[67] 62 Stat. 974, 28 U. S. C. 2463. Applies to customs officials as well, In re Chichester, 48 F. 281 (C. C. Tex., 1891).

[68] In re Behrens, 39 F. 2d 561 (2d Cir., 1930).

[69] The Customs Act of 1901, §§ 35, 50, 51 narrowly limits the power of local officials.

[70] Letter from Chief Commissioner of State of Victoria Police, March 21, 1963—in Green, Federalism and the Administration of Criminal Justice, 51 Ky. L. Rev. 667, at 699-700 (1963).

[71] Khyte-Powell v. Heinemann, V. R. 425, 434 (Victoria Supreme Court, 1960) is the only Australian case on this point.

[72] U. S. v. One Obscene Book Entitled Ulysses, op. cit., *supra,* n. 62.

[73] Craig, The Banned Books of England and Other Countries (1962), pp. 78-79.

mingham authorities, under great pressure from Customs and Excise Officers, recanted and refused to resist the seizure of the books.[74]

The treatment accorded specific literary works has varied considerably within the Commonwealth. In New Zealand, Vladimir Nabokov's novel *Lolita* was seized under the Customs Act of 1913 and the Indecent Publications Act of 1910. Despite strong opposition by the New Zealand Council of Civil Liberties, the prohibition was successful.[75] In Canada, however, the Supreme Court held recently that D. H. Lawrence's *Lady Chatterly's Lover* was not obscene within the definition of the Criminal Code.[76] In this case expert evidence was permitted to show the purpose of the author and to demonstrate the book's literary and artistic merits.

Australian censorship appears to be the most rigid in the Commonwealth. There the Customs Department requires bimonthly returns of book importers which are examined against an index of books already approved. If the book possesses literary merit a Censorship Board must still review its content for obscenity according to the Board's own unstated principles.[77] It is probable that these restrictive measures do have impact upon the reading habits of the Australian public.

Conclusion

The constitutional limitations upon the power of customs censorship have never been clearly stated. Only by inference may they be ascertained. It is submitted that the time is at hand when a forthright expression of constitutional doctrine relating

---

[74] The Times (London), July 2, 1957, p. 1, p. 4. It should be pointed out, in passing, that the Irish Board of Censorship has had, since 1929, perhaps the most sweeping powers of customs censorship to be found among democratic nations. One writer comments: "There is now not a single Irish writer of repute, Catholic as well as non-Catholic, and scarcely a well-known foreign writer whose work has not been banned." (Barrington, The Censorship in Eire, 46 Commonweal 429 (1947). See Indecent Publications Act of 1857, 20 and 21 Vict. C. 83, 10 Halsbury (3d ed.) 666.

[75] In re Lolita, N. Z. L. R. 542 (1961). See The Times (London) September 6, 1960, p. 3.

[76] Regina v. Brodie, 32 D. L. R. 2d 507 (1962). The Criminal Code, 1953-54 (Can.) C. 51 definition rejected the classical English test of obscenity, as it has been rejected in the United States, substituting the description: a publication having "a dominant characteristic . . . which is the undue exploitation of sex."

[77] Comment, Australian Censorship 1964, 4 Sydney L. Rev. 396, 401 (1964).

to customs censorship is needed, if only to allay the qualms of those who doubt the propriety of censorship of political ideas by labelling them as propaganda.

It has been intimated that the power of Congress in regard to foreign commerce may be broader than its power over interstate commerce,[78] on the ground that it comprehends a branch of the federal government's power over foreign relations.[79] Even if this may not be so, it is certainly true that the powers are at least equal by virtue of the fact that the Constitution grants both powers in the same clause and in the same words.[80] If this is true, then principles surrounding the concept of interstate commerce are applicable to foreign commerce.[81]

The federal commerce power does not permit Congress to avoid the prohibitions and limitations of the Bill of Rights.[82] If such regulations unduly infringe personal freedom guaranteed by the First Amendment the Supreme Court must declare the statute invalid and unconstitutional.[83]

Congress is powerless to regulate anything unrelated to commerce and the exercise of the power must have a substantial relation to some part of commerce.[84] The power of Congress to regulate commerce includes the power to prescribe the rules by which commerce is to be governed.[85] Since regulation may extend to the point of prohibition Congress has the power to prohibit certain shipments in interstate and foreign commerce.[86] The evil or harm may proceed from the noxious character of articles considered unfit for commerce.[87] Congress may regulate

---

78 Atlantic Cleaners and Dyers v. United States, 286 U. S. 427 (1931).

79 See Brolan v. United States, 236 U. S. 216 (1914) which involves the illegal importation of opium.

80 Art. I, Sec. 8, Cl. 3: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." See United States v. Cardene Products Co., 304 U. S. 144 (1937).

81 This is the conclusion of Chief Justice Taney in the License Cases, op. cit. *supra*, n. 51 at p. 583 in which he says that the doctrines of Gibbons v. Ogden, 9 Wheat 1 (1824) apply as well to foreign commerce, an assumption that has been since adopted by the court.

82 United States v. Darby, 312 U. S. 100 (1940); United States v. Joint Traffic Association, 171 U. S. 505 (1897).

83 American Communications Assn. v. Douds, 339 U. S. 382 (1949).

84 Carter v. Carter Coal Co., 298 U. S. 238 (1935).

85 United States v. Darby, op. cit., *supra*, n. 82.

86 United States v. Cardene Products Co., op. cit., *supra*, note 80.

87 Kentucky Whip and Collar Co. v. Illinois C. R. Co., 299 U. S. 334 (1936).

commerce to prevent it from being used as an agency to promote immorality.[88]

That no one has a vested right to carry on foreign commerce is established.[89] But although the importer may not have a right to import, it is not clear whether the eventual recipient of the imported item has any rights in the matter. Is not my freedom to read or to enjoy a picture affected by Customs censorship? If the exporter abroad and the importer in the United States have no rights, or have waived them, may the potential customer complain? Apparently the doctrines on standing and justiciable interest preclude that possibility.[90] There is probably at present no constitutional right to receive an import, or at least no enforceable right. Unless the standing of the potential recipient can be established by extension of a few available precedents[91] only the importer can resist customs censorship.

An importer may raise constitutional or procedural barriers to customs censorship, but in the case of communist propaganda there is no apparent importer who may lodge a protest. The statute may be immune from direct constitutional challenge because of the absence of any individual with standing to sue. This regrettable situation could only be remedied by Congressional amendment of the statute to permit challenge, or by judicial expansion of the rules concerning standing.

The restrictions on customs censorship of obscene matter are the same as those applied to any censorship of obscenity by any agency, state or federal. Trends toward further restrictions upon censorship bodies will be effective to restrain customs censorship of materials on the borderline of obscenity. However, it is difficult to envisage the application of prior censorship concepts to

---

[88] Bell v. United States, 349 U. S. 81 (1955). Whether the same rules applicable to the control of prostitution should apply is another question. See Caminetti v. United States, 242 U. S. 470 (1916).

[89] University of Illinois v. United States, 289 U. S. 48 (1932).

[90] Massachusetts v. Mellon, 262 U. S. 447 (1923); especially Tileston v. Ullman, 318 U. S. 44 (1943).

[91] Barrows v. Jackson, 346 U. S. 249, 257 (1953) provides a dim hope of this. A note in 68 Harv. L. Rev. 1400 (1955) ingeniously suggests that Martin v. City of Struthers, 319 U. S. 141 (1943) provides the necessary wedge. That case held that, with respect to handbills distributed from door to door, that each householder had a right to determine whether he would receive such visitors and a municipal ordinance could not prohibit that choice. The court said that "freedom (of speech) embraces the right to distribute literature . . . and necessarily protects the right to receive it." (Ibid., p. 143) A handbill is not usually an import item, however.

customs censorship of obscenity, because such an interpretation would destroy the very foundations of the power of customs censorship which naturally precedes the potential impact of the prohibited material.

Customs censorship of "matter advocating or urging treason or insurrection" under the Tariff Act would seem to be subject to the same objections as have been raised with only slight success, against the Smith Act.[92] Customs censorship of contraceptive information and devices or of lottery materials is also similar to other federal legislation which has been sustained.[93] Other substantive aspects of the Tariff Act also seem safe against legal attack.

Perhaps the most interesting feature of customs censorship is the extent to which procedural safeguards have been effective in reducing complaints to a minimal level. Unlike the case of postal censorship, recourse to the federal courts is readily available to those who disagree with the interpretations of the customs censor. The public character of these proceedings lends reassurance and provides guidance to prospective importers. Secrecy or arbitrary conduct is not entirely absent but the experiences under the current Tariff Act have been largely satisfactory, as evidenced by the rarity of litigation. As compared to the practices of many other nations American customs censorship seems quite mild.

Nonetheless, the temptation to extend the borders of customs censorship is ever present. It must be remembered that the nation was inspired by "foreign" ideas and has been frequently reinvigorated by them. It is to be hoped that the traffic in ideas will never cease.

---

[92] Dennis v. United States, 341 U. S. 494 (1951); Yates v. United States, 354 U. S. 298 (1957).

[93] Besig v. United States, *supra* n. 60—contraceptives; United States v. 83 Cases Labeled "Honest John," 29 F. Supp. 912 (D. C. Md., 1939).