BYU Law Review

Volume 1989 | Issue 2 Article 18

5-1-1989

The Toshiba Sanctions Provision: Its Constitutionality and Impact on COCOM

Spencer L. Kenner

Mark A. Russell

The Toshiba Sanctions Provision: Its Constitutionality and Impact on COCOM

I. INTRODUCTION

In 1983, Toshiba Machine Company Ltd. (hereinafter TMC)[1] sold four nine-axis propeller milling machines to the Soviet Union.[2] In 1984, an additional four five-axis propeller milling machines were delivered.[3] Kongsberg Vaapenfabrikk (hereinafter Kongsberg)[4] sold the requisite numerical controller to the Soviet Union at or near the time the TMC milling machines were delivered.[5] Thus, Kongsberg and TMC worked jointly in providing the Soviet Union with the technology and machinery necessary to manufacture sophisticated submarine propellers equally as quiet as those made in the United States.[6] As a result,

---

1. For purposes of this article TMC, the subordinate, must be distinguished from Toshiba Corp., the parent. Toshiba Corp. holds the majority stock interest (50.08%) in TMC. Memorandum of Mudge, Rose, Guthrie, Alexander & Ferdon, Counsel for Toshiba Corp., Investigation into Sales of Propeller Milling Machines to the Soviet Union by Toshiba Machine Co., Ltd.: Report to the President and Directors of Toshiba Corp., at i (1987) [hereinafter Memorandum I].

2. *Id.* at i.

3. *Id.* at i, 29-32. The number of axes on the milling machines is significant in two respects. First, Japan's Foreign Exchange and Foreign Control Law and Regulations requires a license for the export of any milling machine capable of simultaneous control possessing greater than 3 axes (such as those delivered to the Soviet Union). *Id.* at 11. Second, TMC falsified documents which classified the machines as "other than propeller milling machines . . . and capable of only two-axis simultaneous control" in order to obtain approval of The Ministry of International Trade and Industry [hereinafter MITI]. *Id.* at ii, 1. MITI administers Japan's Foreign Exchange and Foreign Trade Control Law "through a series of Orders and Regulations." *Id.* at 8.

4. *Id.* at i. Kongsberg is a state-owned Norwegian based company. *Id.* at 1. For purposes of a more encompassing coverage of the legal issues which arise because of the Toshiba sanctions provision, this article focuses more precisely on the sanctions' effect on Toshiba Corp. and TMC rather than their effect on Kongsberg Vaapenfabrikk and its parent company, Kongsberg Trading Company.

5. *Id.* at 1, 27. The numerical controller provides the commands from which the milling machines operate. Without this technologically advanced computer, the milling machines would not function. *Id.* at 9.

6. Propellers, when churning the water, make noise detectable from large distances. The louder the noise, the more easily detectable the submarine. Dryden, *Inside the Toshiba Scandal*, REGARDIES 49, 53-55 (1988). The TMC milling machines, previously unavailable to the Soviets, have the technological capability of manufacturing a propeller that is virtually silent, thus allowing a submarine to maneuver undetected. *See* Memorandum I, *supra* note 1, at 1. Until TMC's diversion of the nine-axis and five-axis milling

the diversion of the military sensitive milling machines violated Japan's export controls[7] enacted pursuant to its membership in the Coordinating Committee on Multilateral Export Controls (COCOM).[8]

II. Background to the Toshiba Sanctions Provision

As international trade and high technology escalate to ever-increasing levels, COCOM has recognized a need to coordinate the efforts of its members and more actively prevent Eastern Bloc acquisition of sensitive Western technology.[9] Similarly, the United States has become aware of its need to protect its national technology interests through stricter export controls. Over time, the U.S. has increased its export restrictions on militarily sensitive technology from no controls to very stringent ones.[10] In 1988, Congress responded to TMC's actions, and passed the Multilateral Export Control Enhancement Amendments Act (hereinafter Toshiba sanctions provision), as part of the Omnibus Trade and Competitiveness Act of 1988 (hereinafter Trade Bill).[11] The Toshiba sanctions provision arguably affects foreign

---

machines, the U.S. maintained a clear military advantage over the Soviets in submarine detection because of its quiet fleet. Dryden, *supra* at 55. Now, however, the technology gap has been reduced, if not completely closed.

7. The members of the Coordinating Committee on the Multilateral Export Controls (COCOM) voluntarily agree (by applying their own laws and regulations) to restrict exports of militarily sensitive technology to specific countries (e.g. the Soviet Union). Memorandum I, *supra* note 1, at 8.

8. COCOM "is an informal, nontreaty organization composed of Japan and all the member nations of the North Atlantic Treaty Organization (NATO) except Iceland." Panel on the Impact of Nat'l Sec. Controls on the Int'l Technology Transfer—Comm. on Science, Eng'g, and Pub. Policy, Balancing the Nat'l Interest— U.S. Nat'l Sec. Export Controls and Economic Competition 2 (1987) [hereinafter National Security Export Controls].

9. National Security Export Controls, *supra* note 8, at 2.

10. Overman, *Reauthorization of the Export Administration Act: Balancing Trade Policy with National Security*, 17 Law & Pol'y Int'l Bus. 325, 325 (1985).

United States export controls have been in effect since the Trading with the Enemy Act of 1917. Subsequent export control provisions have increased in complexity and have imposed more severe penalties for noncompliance with the provisions. *See* Export Control Act of 1949, Pub. L. No. 81-11, 63 Stat. 7 (1949); Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969); Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C.A. §§ 2401-20 (Supp. 1988)); Export Administration Amendments of 1985, Pub.L.No. 99-64, 99 Stat. 120 (1985) (codified as amended at 50 U.S.C.A. §§ 2401-20 (Supp. 1988)); *see generally*, Thomsen, *Export Controls After the Toshiba Affair*, 35 Fed. Bar News & J. 85 (1988) (discussing the history of export control provisions in the United States).

11. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) [hereinafter Trade Bill].

export controls in a more substantial way than any previous export control act or amendment. Moreover, of all export control regulations enacted, the Toshiba sanctions provision imposes the most specific and severe punishment to date.

This note addresses the potential unconstitutionality of the Toshiba sanctions provision. In particular, part III discusses whether Congress enacted an unlawful bill of attainder, an unlawful ex post facto law, and whether the provision denies due process. In addition, part IV of the note examines the possible impact the Toshiba sanctions provision will have on members of COCOM. This note concludes that the Toshiba provision oversteps constitutional bounds. Further, the provision's negative impact on COCOM members could result in reciprocally imposed stringent restrictions on U.S. corporations who violate COCOM standards.

III. Constitutionality of the Toshiba Sanctions Provision

The Toshiba sanctions provision presents several constitutional questions.[12] First, in Congress' zeal to levy stringent sanctions on Toshiba Corporation and TMC,[13] it may have enacted

---

12. The Multilateral Export Enhancement Amendments Act, Pub. L. No. 100-418, §§ 2441, 2443, 102 Stat. 1107, 1365 (1988) (reproduced in part, *infra*, note 33) [hereinafter the Toshiba sanctions provision].

The Toshiba sanctions provision raises a threshold issue: whether the protections of the Constitution apply extraterritorially to foreign entities. While the language of some constitutional provisions is limited to U.S. citizens, this is not true with respect to the language of the constitutional provisions applicable to Toshiba Corporation and TMC. *See e.g.*, U.S. Const. art. I, § 9, cl. 3 (stating only that "No Bill of Attainder or ex post facto Law shall be passed"). Furthermore, the Supreme Court has ruled that foreign states may sue as foreign plaintiffs. Pfizer v. India, 434 U.S. 308, 318-20 (1978); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964) and cases cited within; *cf.*, Russian Volunteer Fleet v. U.S., 282 U.S. 481, 489 (1931) (the Court found a Russian corporation, as "an alien friend," was entitled to the protection of the fifth amendment and could claim compensation for property requisitioned in WWI); *see generally*, Damrosch, *Foreign States and the Constitution*, 73 Va. L. R. 483, 531 (1987). Public policy dictates in favor of allowing foreign entities to invoke the protections of the Constitution for three reasons: first, the promotion of good relations with foreign states; second, the encouragement of equal access elsewhere; and third, the problems entailed in trying to apply a test of reciprocity under which U.S. courts would need to evaluate foreign states' judicial systems. *See id.* at 498. Furthermore, since foreign states can be hailed into U.S. courts as defendants and made subject to the restrictions contained in the Constitution, the same parties should be permitted to address their grievances as plaintiffs in the same forum relying on the same constitutional provisions.

13. Excerpts of several legislators' statements from the Congressional hearings provide insight into the vehement opposition expressed toward Toshiba Corp. and TMC: "[I] think the American people have a patriotic obligation to punish the marketplace—there is no simpler way to put it—Toshiba so that other countries around the

an unlawful bill of attainder since the provision "single[s] out the [parent company] for punishment. . . ."[14] Second, Congress may have further enacted an ex post facto law because the provision is retroactive in effect.[15] Finally, Congress may also have violated due process because the provision imposes sanctions against both the parent and subsidiary companies,[16] but "there is no evidence . . . that the parent company played any role in the diversion" of the milling machines.[17] Moreover, the punishment is harsh and oppressive.[18]

A. Bill of Attainder

The United States Constitution states that "[n]o Bill of Attainder shall be passed."[19] The underlying purpose of the bill of attainder clause is to maintain intact the constitutional structure of separation of powers. The Supreme Court stated in *United States v. Brown*:[20]

> The best available evidence, the writings of the architects of our constitutional system, indicate that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implication of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

---

world do not continue this incredible hemorrhage of Western technology." 133 CONG. REC. H5038 (daily ed. June 16, 1987) (statement of Rep. Dornan) (cited in Memorandum of Mudge, Rose, Guthrie, Alexander & Ferdon, Counsel for Toshiba Corporation, The Toshiba sanctions Provision of the Omnibus Trade Bill is Unconstitutional, Unfair and Discriminatory, and Threatens U.S. COCOM Objectives, A-2, April 29, 1988 [hereinafter Memorandum II].

Also note the following by Senator Garn: "[R]eally slapping them not just on the hands but on top of the head, between the eyes with a 6-by-6, and maybe even a little stronger than that."
133 CONG. REC. S8995 (daily ed. June 30, 1987) (statement by Sen. Garn) (cited in Memorandum II, *supra* at A-2).

In an expression of outrage, Congresswoman Bentley and her colleagues smashed a Toshiba radio on the Capitol steps with a sledgehammer. *Id.* at 6.

14. Memorandum II, *supra* note 13, at 1, 9-15.

15. *Id.* at 1, 15.

16. *Id.* at 1, 15-16.

17. Letter from George P. Schultz, Sec. of State, C. William Verity, Sec. of Commerce, and William H. Taft, Dep. Sec. of Defense, to Dante B. Fascell, Chairman, Comm. on Foreign Affairs, House of Representatives (March 29, 1988) [hereinafter Letter].

18. *See infra* notes 67-75 and accompanying text.

19. U.S. CONST. art. I, § 9, cl. 3.

20. 381 U.S. 437, 442 (1965).

A bill of attainder is a legislative act that inflicts punishment on a specified individual or group without the protections of a judicial trial.[21] Thus, to be deemed a bill of attainder, and therefore unconstitutional, a statute must meet three criteria: 1) specification of the affected person or group; 2) forbidden punishment; and 3) no judicial trial.[22]

The Toshiba sanctions provision of the Trade Bill unequivocally identifies Toshiba Corporation and TMC[23] as the "affected" group.[24] Senator Jake Garn spoke for the proponents of the legislation and specified on whom the punishment would fall when he stated that "[t]he required trade sanctions shall apply to the parent, affiliate, subsidiary and successor companies of the Toshiba Corporation. . . ."[25] Thus, the specificity requirement is satisfied.

Whether a particular statute imposes forbidden punishment on the affected group poses a more complex question. The Supreme Court in *Selective Service System*[26] formulated a three-part inquiry: 1) whether the proposed statutory punishment falls within the historical meaning of legislative punishment; 2) whether the statute reasonably furthers the nonpunitive legislation when accounting for the type and severity of the punishment imposed; and 3) whether the legislative record reveals a congressional punitive intent.[27] Each of the three inquiries independently establishes that the Toshiba sanctions provision is forbidden punishment.[28]

Historically, a bill of attainder connoted a legislative punishment that sentenced persons or identifiable group members to death.[29] However, the types of legislative punishment that are

---

21. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977). *See* United States v. Brown, 381 U.S. 437, 445, 447 (1965); United States v. Lovett, 328 U.S. 303, 315-16 (1946); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

22. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 846-47 (1984).

23. Trade Bill, *supra* note 11, §§ 2442, 2443.

24. *Selective Serv. Sys.*, 468 U.S. at 847.

25. 133 CONG. REC. S8996 (daily ed. June 30 1987) (statement by Sen. Garn) (cited in Memorandum II, *supra* note 13, at A-1).

26. *Selective Serv. Sys. v. Minnesota Pub. Interest Research*, 468 U.S. 841 (1984).

27. *Id.* at 852. In order to satisfy the *Selective Service System* three-part test, the legislative enactment must comply with all three inquiries. If the enactment in question fails any part of the test, it is unconstitutional. *Id.*

28. Memorandum II, *supra* note 13, at 12.

29. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473 (1977).

presently forbidden have expanded to include a broad array of deprivations.[30] In *Cummings v. Missouri*,[31] the Supreme Court so broadened the scope of forbidden punishments as to denote nearly any deprivation as a bill of attainder if its purpose is to punish. The *Cummings* Court explained:

> The deprivation of *any rights*, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from *the pursuits of a lawful avocation, or from positions of trust*, or from the privilege of appearing in courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.[32]

In order to satisfy the initial inquiry as to whether the economic sanctions imposed on Toshiba Corporation and TMC qualify as historical legislative punishment, the Toshiba sanctions provision must fall within *Cummings'* broad parameters. Toshiba, both parent and subsidiary, have suffered and will continue to suffer substantial economic loss. For three years, TMC must forfeit all importation privileges (except for the procurement of defense articles); and Toshiba Corporation must forfeit specific contractual privileges with the U.S. Government.[33] By

---

30. *Id.* at 474 & nn. 36-38 ("Our country's own experience with bill's of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals from participation in specified employments or vocations, a mode of punishment commonly employed by against those legislatively branded as disloyal.").

31. 71 U.S. (4 Wall.) 277, 320 (1866).

32. *Id.* (emphasis added). *See Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866) ("exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct").

33. The Act states in relevant part:

SEC. 2443. MANDATORY SANCTIONS AGAINST TOSHIBA AND KONGSBERG.

(a) SANCTIONS AGAINST TOSHIBA MACHINE COMPANY, KONGSBERG TRADING COMPANY. . . . (1) The President shall impose, for the period of 3 years—

(1) a prohibition on the contracting with, procurement of products and services from

(A) Toshiba Machine Company and Kongsberg Trading Company, and

(B) any other foreign person whom the President finds to have knowingly facilitated the diversion of advanced milling machinery by the Toshiba Machine Company and Kongsberg Trading Com-

revoking these privileges the U.S. Government is effectively "preventing Toshiba Corporation [and TMC] from entering into contracts and making sales."[34] The forfeiture of importation and contractual privileges "disqualifi[es] [the two companies from] the pursuit of a lawful avocation [and] from positions of trust—"[35] a legislative punishment forbidden by the Supreme Court.[36] It can be argued that because Japanese law was violated, under the purview of COCOM regulations, the Toshiba sanctions provision could be construed as being implemented to deter the pursuit of an *unlawful* avocation, rather than a lawful one. However, such a construction would unduly stretch the definition and language of *Cummings*; there is no evidence that the pursuits of Toshiba Corporation and TMC in areas concerning the U.S. have been unlawful.[37] In addition, as mentioned above, the Supreme Court has interpreted the *Cummings* language expansively enough to invoke the protections of the Constitution if the purpose of *any* disqualification from an unlawful avocation is to punish.[38]

It would be premature, however, to conclude that any criminal punishment, disqualification from the pursuit of a lawful avocation, or economic deprivation enacted ex post facto, consti-

---

pany to the Soviet Union, by any department, agency, or instrumentality of the United States Government; and

(2) a prohibition on the importation into the United States of *all products* produced by Toshiba Machine Company, Kongsberg Trading Company, and any foreign person described in paragraph (1)(B).

(b) SANCTIONS AGAINST TOSHIBA CORPORATION AND KONGSBERG VAAPENFABRIKK—The President shall impose, for the period of 3 years, a prohibition on contracting with, and procurement of products and services from, the Toshiba Corporation and Kongsberg Vaapenfabrikk, by any department, agency, or instrumentality of the United States *Government*.

(c) EXCEPTIONS—[The exceptions basically comprise procurement of defense articles].

Toshiba sanctions provision, *supra* note 12, § 2443.

34. Memorandum II, *supra* note 13, at 12.

35. *Cummings*, 71 U.S. (4 Wall.) at 320.

36. *Id.* at 320.

37. *See* Letter, *supra* note 17, at 1.

38. Nixon v. Administration of Gen. Servs., 433 U.S. 425, 475 (1977) ("[o]ur treatment of the scope of the [Bill of Attainder] Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee").

tutes a bill of attainder. The Supreme Court held in *Nixon*[39] that measures taken by Congress which are solely for the purpose of regulation are not prohibited.[40] If the Toshiba sanctions provision could be fairly characterized as regulatory in nature, it would escape the Constitution's ban on bills of attainder. For example, in 1974, Congress passed the Presidential Recordings and Materials Preservation Act[41] which provided for the seizure of President Nixon's papers and recordings, but not those of any other former president.[42] The Court held that the bill was not intended as punishment, but as regulation meant to ensure the preservation of information.[43] Moreover, the *Nixon* Court applied the three-part analysis used in *Selective Service System* and did not find the existence of forbidden punishment. The Court concluded that "no feature of the challenged Act falls within the historical meaning of legislative punishment."[44] The Court reasoned that the provision in the Act for "just compensation"[45] was inconsistent with a lower court finding of a "punitive confiscation of property"[46] since the "owner [thereby] is to be put in the same position monetarily as he would have occupied if his property had not been taken."[47]

In the Toshiba case, no equivalent compensatory provision exists. Accordingly, the Toshiba sanctions provision, unlike *Nixon*, cannot be classified as regulatory in nature. In addition, despite reports that other European countries committed COCOM violations, Congress arbitrarily imposed sanctions on Toshiba Corporation and TMC only.[48] These arbitrarily imposed

---

39. *Id.* at 478.

40. *Id.*

41. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, tit. 1, §§ 101-06, 88 Stat. 1695-1698 (1974) (current version at 44 U.S.C. §§ 2107 note, 3315-3324 (1974)).

42. A portion of the Act also "establish[ed] a special commission to study and recommend appropriate legislation regarding the preservation of the records of *future* Presidents and all other federal officials." *Nixon*, 433 U.S. at 472 (emphasis added).

43. *Id.* at 478.

44. *Id.* at 475.

45. *See supra* note 41, § 2107 note.

46. *Nixon*, 433 U.S. at 475.

47. *Id.* (citing United States v. Reynolds, 397 U.S. 14, 16 (1970)); *accord* United States v. Miller, 317 U.S. 369, 373 (1943).

48. Ten of the machine technicians who installed the nine-axis milling machines in a building in Leningrad reported seeing a Forest Line multi-axis milling machine in the same building. Memorandum I, *supra* note 1, at 27. *See* Note, *Failures in the Interagency Administration of National Security Export Controls*, 19 L. & POL'Y INT'L BUS. 537, 542-43, n.6 (1987) (citing *Europeans Sold Gear to Soviets*, Wash. Post, Oct. 22,

sanctions manifest the absence of a regulatory motive by Congress and imply a punitive motive. "Were sanctions against past COCOM violators necessary for regulatory purposes, they would be directed at all violators."[49] Thus, the sanctions provision falls within the historical meaning of legislative punishment and the first inquiry in determining whether a statute imposes forbidden punishment is satisfied.

The second inquiry requires that the statute reasonably further nonpunitive purposes "[t]o ensure that the [l]egislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder. . . ."[50] In view of the "type and severity of the burdens imposed" on the two companies, it is difficult to see how the statute reasonably furthers nonpunitive purposes.[51] A three-year moratorium on TMC sales and contracting in the U.S. and a somewhat less burdensome sanction on Toshiba Corporation indicate that Congress intends these measures as punitive in word and effect.[52]

Perhaps Congress' intent that the Toshiba sanctions provision would deter future COCOM violations could be argued as a legitimate nonpunitive purpose. If deterrence were regarded as a nonpunitive purpose, however, bills of attainder would be nonexistent since every punishment has the possibility of deterrence. The *Nixon* Court addressed this issue and concluded from the holding in *United States v. Brown*[53] that deterrence is not an independent nonpunitive purpose in the bill of attainder three-part test:

> In determining whether punitive or nonpunitive objectives underlie a law, *United States v. Brown* establishes that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.[54]

Thus, according to the Supreme Court, deterrence, is an inherent objective of punishment and the Toshiba sanctions provision

---

1987, at 1, col. 6 (a Norwegian investigation uncovered a ten year pattern of illegal sales of highly technical equipment to the Soviet Union by French, Italian and West German companies)).

49. Memorandum II, *supra* note 13, at 16.

50. Selective Serv. Sys. v. Minnesota Pub. Interest Group, 468 U.S. 841, 853 (1984).

51. *Nixon*, 433 U.S. at 475.

52. *See supra* note 33 and accompanying text.

53. 381 U.S. 425 (1965).

54. *Nixon*, 433 U.S. at 476 n.40.

fails the scrutiny of the second inquiry since it furthers no nonpunitive purpose.

The third inquiry into whether a statute imposes forbidden punishment is whether the legislative record "evinces a congressional intent to punish."[55] The legislative record evinces a congressional intent to punish Toshiba Corporation and TMC. The overwhelming sentiment during the Congressional hearings was that "Toshiba ought to be crucified in a commercial sense in the United States of America. . . ."[56] Senator Dixon concurred by stating that "[w]e are punishing Toshiba, as we should, for its role."[57] The third inquiry is satisfied, thus establishing that the Toshiba sanctions provision imposes forbidden punishment.

The final requisite element of an unlawful bill of attainder is the absence of a judicial trial. Neither Toshiba Corporation nor TMC were allowed to appear before any U.S. tribunal.[58] On the contrary, both companies were effectively tried by the U.S. Congress.[59]

In sum, all elements of the *Selective Service System* test[60] are satisfied; thus, the Toshiba sanctions provision is an unconstitutional bill of attainder.

B. Ex Post Facto Law

The Constitution states that "[n]o . . . ex post facto law shall be passed."[61] Simply stated, an "*ex post facto* prohibition forbids the Congress . . . to enact any law which imposes a pun-

---

55. *Id.* at 478.

56. 133 CONG. REC. H5037 (daily ed. June 16, 1987) (statement by Rep. Bereuter) (cited in Memorandum II, *supra* note 13, at A-1).

57. 133 CONG. REC. S11676 (daily ed. Aug. 7 1987) (cited in Memorandum II, *supra* note 13, at A-5). Similar statements were made during the course of the debate, e.g., Representative Hunter said, "My suggestion is that the only way in which we are going to be able to deter companies from selling out the West for a few dollars is to punish them in the only way that is meaningful to them, and that is to take away their market." 133 CONG. REC. H4251 (daily ed. June 4, 1987) (cited in Memorandum II, *supra* note 13, at A-1). Representative Kolter agreed: "A ban on imports of Toshiba products is fitting punishment, if not . . . satisfying." 133 CONG. REC. H6043 (daily ed. July 9, 1987) (cited in Memorandum II, *supra* note 13, at A-5). Senator Glenn concurred and noted that, "If our allies will not take the actions needed to discourage and punish . . . irresponsibility, then it falls on Congress to take strong measures." 133 CONG. REC. S8999 (daily ed. June 30, 1987) (cited in Memorandum II, *supra* note 13, at A-5).

58. The Toshiba sanctions provision does not provide a judicial remedy for the accused. *See* Toshiba sanctions provision, *supra* note 33, § 2443.

59. *See supra* notes 22-25 and accompanying text.

60. *See supra* note 22 and accompanying text.

61. U.S. CONST. art. I, § 9, cl. 3.

ishment for an act not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[62]

Typically, the ex post facto clause pertains to criminal legislative acts, but "it [also] applies wherever a statute imposes punishment for acts not punishable when committed or retroactively increases punishment."[63] Furthermore, when the underlying purpose of the legislative act is punitive, the Supreme Court has held that a retroactive sanction is an ex post facto law:

> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for acts. The question in each case where unpleasant consequences are brought to bear upon the individual for prior conduct, is whether the *legislative aim* was to punish that individual for *past activity*, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.[64]

The sanctions imposed on Toshiba Corporation and TMC relate to prior conduct.[65] In addition, the "legislative aim" of the provision is to punish.[66] Accordingly, the Toshiba sanctions provision violates the ex post facto clause of the Constitution.

C. Due Process

Generally, the due process clause does not prohibit retrospective civil legislation, unless the consequences of the statute are particularly harsh and oppressive.[67] However, to pass muster under the Constitution's due process clause, retroactive legislation must withstand a stricter test of scrutiny than prospective legislation.[68] The Toshiba sanctions provision violates the due process clause because Congress' purpose for imposing the retroactive sanctions is to oppress and harshly punish Toshiba Corporation and TMC.[69] Moreover, the sanctions particularly deny

---

62. Weaver v. Graham 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri 71 U.S. (4 Wall.) 277, 325-26 (1867).

63. Memorandum II, *supra* note 13, at 15; *see Weaver*, 450 U.S. at 28.

64. DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (emphasis added).

65. The diversion of milling machines occurred in 1983 and 1984, while the Trade Bill containing the Toshiba sanctions provision was signed into law in 1988.

66. *See supra* note 50 and accompanying text.

67. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 n.13 (1977) (citing Welch v. Henry, 305 U.S. 134, 147 (1976)).

68. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

69. Memorandum II, *supra* note 13, at 16 (Toshiba Corp. is foreclosed from a market in which the contract amounts can reach the hundreds of millions of dollars).

Toshiba Corporation, the parent company, due process since it had no knowledge as to TMC's diversion of the milling machines.[70] Senator Garn, the leading proponent and sponsor of the legislation, concurred that an innocent party who had no part in the diversion should not be unfairly punished, but still contended that the unfairness was justified to "get people's attention."[71] Despite Senator Garn's concern for the possible unconstitutionality of the Toshiba sanctions provision,[72] he clung to his original position that "[m]andatory sanctions and stiff penalties are required"[73] even though Toshiba Corporation had no knowledge of the TMC diversion. However, the Fifth Circuit has recently "recognized that under our system of justice punishment must be predicated only upon personal guilt."[74] Thus, Toshiba Corporation should not be implicated along with TMC for the diversion of the milling machines.[75]

---

70. Letter, *supra* note 17 ("there is no evidence in the Japanese case that the parent company [Toshiba Corp.] played any role in the diversion"); Memorandum I, *supra* note 1, at 36 (after extensive interviewing of Toshiba personnel and reviewing of documents, the investigative team found no evidence that anyone at Toshiba Corp. played any role in, or had any knowledge of, the illegal sales or the TMC cover-up).

71. Memorandum II, *supra* note 13, at 16 (quoting MacNeil/Lehrer News Hour, PBS television broadcast, Oct. 28, 1987) (transcript of the interview with Sen. Garn).

72. Recognizing that the Toshiba sanctions provision could prove to be unconstitutional, Senator Garn stated:

> I wish to suggest that we cut the amendment into two sections, one to punish Toshiba . . . , and a second section with all of the sanctions and all of the same provisions so that it will apply to the future. One of the reasons that I think that it is important to have the bill in sections is that there are some who would argue that either a permanent ban or a 2-to-5-year ban applied retroactively may be unconstitutional. . . . [T]he way this amendment has been written by my colleagues and me is so that they can be severed if the retroactive mandatory sanctions on Toshiba . . . are deemed unconstitutional.

133 CONG. REC. S8998 (daily ed. June 30, 1987) (cited in Memorandum II, *supra* note 13, at 5).

73. 133 CONG. REC. S9003 (daily ed. June 30, 1987) (statement of Sen. Garn) (cited in Memorandum II, *supra* note 13, at A-3).

74. Sawyer v. Sandstrom, 615 F.2d 311, 316-17 (5th Cir. 1980); *see* Scales v. United States, 367 U.S. 203, 224-25 (1961).

75. A plausible argument can be made that Toshiba Corp., as the parent company, should be liable for the acts of its subsidiary, TMC, under an agency theory. If Toshiba Corp. is not held responsible for the acts of TMC (of which Toshiba Corp. is a majority stockholder) then Toshiba is effectively insulating itself from liability. However, as a result of an independent investigatory audit performed by Price Waterhouse, Toshiba Corp. should be exonerated of any liability concerning the diversion of milling machines by TMC. The audit stated that because of the uncharacteristically distant relationship between the two companies "no one at Toshiba Corp. knew of, or had reason to know of, the wrongful actions of [TMC]." *See* Dryden, *supra* note 6, at 59, 63. Furthermore, TMC officials had destroyed critical documents relating to the diversion of the technology and had lied about their involvement to Japanese officials. *Id.* at 63. In addition, Secretary of

As shown, the Toshiba sanctions provision violates a number of constitutional provisions. At this point, however, it appears that Toshiba Corporation will not take steps to challenge the sanctions on constitutional grounds. Its strategy has been to placate rather than create controversy. Toshiba has run full page apologies in major U.S. newspapers. Moreover, Toshiba's president has resigned and all responsible employees have been dismissed or punished. After being indefinitely barred from exporting to the Warsaw Pact, internal export control at Toshiba has now become the model for Japanese Industry.[76] Therefore, the remaining query relates to the effect the sanctions provisions will have on COCOM and other countries.

IV. The Impact of the Toshiba Sanctions on COCOM

Congress intended that the Toshiba sanctions provision would increase compliance with guidelines promulgated by COCOM and deter future violations of export controls. Congress has stated its purpose behind the sanctions: "In order to protect United States national security interests the United States must take steps to ensure the compliance of foreign companies . . . ."[77] The sanctions may not achieve that result. The sanctions communicate to other COCOM members that the United States intends to unilaterally enforce COCOM guidelines against countries adjudged, after the fact, to be lacking zeal in export control. The Toshiba sanctions provision undermines COCOM cooperation because other member countries will perceive the sanctions as being inequitably enforced. The sanctions are not applied to any other violations that occurred at any time previous to the sanctions imposed on Toshiba Corporation and TMC for the diversion of the milling machines.[78] The Conference Committee on the Toshiba sanctions provision reported the following: "The conference agreement is the Senate provision with an amendment specifying sanctions in the Toshiba-Kongsberg case, and eliminating application of the provision to other cases."[79] This discriminatory treatment creates a controversy

---

State Schultz, Secretary of Commerce Verity and Deputy Secretary of Defense Taft all agreed that no evidence existed implicating Toshiba Corp. as participating in the diversion. *See* Letter, *supra* note 17, at 1.

76. Witkin, *Samurais for Hire*, U.S. News & World Rep., Oct. 5, 1987, at 50.

77. *See* Toshiba sanctions provisions, *supra* note 33, at § 2443.

78. *See supra* note 48 and accompanying text.

79. 133 Cong. Rec. H2091 (daily ed. April 19, 1988).

analogous to the "national treatment" debate surrounding the General Agreement on Tariffs and Trade (GATT),[80] although GATT does allow discriminatory treatment in support of a reasonable national security interest.[81]

The sanctions also provide a negative incentive for cooperation between members of COCOM. Meaningful application of COCOM rules is heavily dependent on the voluntary cooperation of member countries. Unilateral actions by the United States intended to coerce cooperation on the part of other member countries undermines the premise of voluntariness on which the organization is based. For example, a COCOM country which assists in the investigations of technology transfers may reveal information that will subject its domestic companies to drastic sanctions. If a country is heavily dependent on exports to the U.S., they may be reluctant to reveal information which could summarily destroy access to a vital export market. Some COCOM members have understandably reacted with frustration at the American reaction to the Toshiba episode. The official British response was:

> By seeking to supplement the enforcement measures of COCOM partners by unilateral American penalties, the proposal would discourage other countries from sharing information about attempted or actual diversions of controlled goods and from taking their own enforcement action in response to export control violations, since by so doing they would expose their companies to U.S. sanctions. Implementation of the amendment, which is presumably intended by its authors to encourage other countries to take export controls more seriously, would have just the opposite effect.[82]

The Administration took a similar stance on the issue after its initial reluctance to join the fray:

> Imposing such legislation would undermine this multilateral effort and potentially destroy the COCOM system . . . Would we pass punitive, retroactive legislation against the Toshiba and Kongsberg Corporations . . . we will destroy the rationale for Japan's and Norway's leaders having turned their export control systems around. Such action on our part would

---

80. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. III, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

81. *Id.* at art. XXI.

82. *Speaking Note*, British Embassy (Jan. 20, 1988) (cited in Memorandum II, *supra* note 13, at 20).

> also have a chilling effect on the excellent cooperation we are now receiving from the Governments of Japan and Norway in uncovering past diversions and halting illegal exports. . . . Such language would seriously undermine our efforts to date, and would be counterproductive to our future efforts in seeking multilateral cooperation.[83]

Some members of Congress also reacted in a similar fashion. Congressman Bonker's statement prior to the final vote exemplifies the feeling among some Congressmen that the guilty parties had learned their lesson and that the sanctions could be counter-productive: "I am deeply concerned that the actual imposition of sanctions could well be counterproductive to the continued cooperation of these countries and the multilateral efforts necessary to ensure success of our export control goals."[84]

Whether or not the sanctions will ultimately undermine COCOM cooperation remains to be seen. The effect the sanctions will have on member countries depends largely on how they are characterized: as rationale for retaliatory measures or as inducement to enhance the export control regime. Other countries may follow the lead of the United States in providing similar sanctions against "foreign corporations" in the name of reciprocity or national treatment. Even though it currently appears that the greatest danger of a retaliatory reaction has passed without incident, the potential for a future schism among members of COCOM remains. The United States has arguably violated its own laws in an attempt to coerce other COCOM countries into action. Given this precedent, other members of COCOM may act similarly in the future if they perceive that it is in their best interest to do so.

V. Conclusion

The Toshiba sanctions provision provides a classic example of an attempt by Congress to use its legislative powers to vent its frustrations with past COCOM violators by legislatively punishing two Japanese companies, one of whom is arguably innocent. Even if both companies were guilty of diverting sensitive

---

83. *See* Letter, *supra* note 17, at 1 (cited in Memorandum II, *supra* note 13, at 20-21).

84. 133 Cong. Rec. H2305 (daily ed. April 21, 1988) (cited in Memorandum II, *supra* note 13, at 21). Congressman Bonker later reversed his earlier stance against the sanctions.

technology to the Soviet Union, imposing retroactive sanctions on a readily identifiable group for punitive purposes is unconstitutional. Furthermore, the sanctions are unnecessary and unfair in two respects. First, Toshiba Corporation had no knowledge of the diversion and neither Toshiba Corporation nor TMC violated U.S. law. Second, MITI has already punished TMC by banning TMC from exporting to Communist Bloc countries for one year.[85]

In sum, the Toshiba sanctions provision is an unlawful bill of attainder, an unlawful ex post facto law, and violative of the due process clause. It is also unnecessary legislation which may inhibit COCOM countries in cooperating with each other. The threat of sanctions in the provision may thus undermine the ultimate goal of export control.

Spencer L. Kenner
Mark A. Russell

85. Memorandum I, *supra* note 1, at ii (stating that the one year ban is the maximum civil penalty allowable under Japanese law).