
I. Introduction

The defense and aviation industries play a significant role in Oklahoma’s economy. In the last three years alone, at least $155 million in defense contracts have been awarded to Oklahoma-based companies, signaling an increase in defense research and development in the state.1 According to the Oklahoma Department of Commerce, aerospace-related companies accounted for 6.2% of Oklahoma’s exports in 2010.2 Notably, Oklahoma’s total exports grew more than 20% between 2006 and 2010.3 Defense contractors and aerospace-related companies generally provide services, aircrafts, equipment or other defense items to purchasers. Before these companies can sell their items or services internationally or expose their technology to many foreign nationals, they must obtain a license from one of several executive agencies.4

The U.S. system of export controls prohibits or limits the export of items or services that could detrimentally affect national security or U.S. foreign

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3. Id. at 6.

policy. Although these are legitimate concerns, exporters can be unwittingly entangled in the system. Exporters navigating the numerous regulations can have difficulty determining which agency to consult and whether a license is required at all. Some exporters may not even know that such regulations exist. Regardless, the U.S. export control system expects industry insiders to comprehend and adhere to applicable regulations.

In August 2010, President Obama introduced the groundwork for sweeping changes in the U.S. export control system, intending to reinforce national security while increasing U.S. competitiveness in manufacturing and technology.\(^5\) The changes came in the wake of an interagency review that recognized the disparate approaches of the primary export licensing agencies.\(^6\) The review noted jurisdictional disputes between regulatory agencies arising from an inconsistency and lack of transparency in agency decisions.\(^7\)

As part of the changes, the President introduced a new webpage to aid exporters in navigating export controls and planning international sales.\(^8\) The changes also included a proposed revision of Category VII of the United States Munitions List (Munitions List), the list of defense articles and services governed by the International Traffic in Arms Regulations (ITAR).\(^9\) This revision is the first attempt at transforming the categorical Munitions List to a “positive” list.\(^10\)

Presently, the Munitions List includes twenty-one broad categories with subjective criteria—making it difficult to ascertain whether an item fits a category.\(^11\) A positive list will apply new *objective* criteria and provide

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6. *Id.*

7. *Id.*


 clarity to exporters.\textsuperscript{12} By revising the Munitions List into a positive list of items and services that fit \textit{published} criteria, thereby helping exporters decide more easily if an item is controlled, the executive branch hopes to eliminate jurisdictional disputes between agencies.\textsuperscript{13}

These changes may also reduce the number of executive agency decisions subject to judicial review. The most divisive issues surrounding arms export violations include the lack of procedural safeguards in the regulations and judicial review of agency designations of defense items. The regulations, even with the reforms, create the possibility of unintentional criminal violations. Newcomers to international trade, especially from smaller companies, are likely unaware of the federal licensing requirements. Although the government must show that an exporter willfully violated the regulations,\textsuperscript{14} what constitutes a “willful” violation of the regulations remains widely debated. The present circuit split\textsuperscript{15} regarding procedural safeguards and judicial review of defense item designations necessitates either amended legislation or guidance from the Supreme Court.

This note examines \textit{United States v. Pulungan}, a recent appellate court decision involving the Munitions List.\textsuperscript{16} This decision revealed a definite reluctance by the Seventh Circuit to favor broad regulatory power free from judicial review when the executive agency decision lacked transparency—subjecting exporters to the whims of an unchecked, unelected agency. This note focuses on understanding the regulation of defense articles and services by the Directorate of Defense Trade Controls (DDTC). Part II summarizes the legislative history of export controls and case law prior to the Seventh Circuit decision. Part III discusses the facts and issues addressed in \textit{United States v. Pulungan}. Part IV presents the holding and Part V analyzes how the decision appropriately increased pressure on the DDTC to operate with more transparency and how the court correctly

\begin{itemize}
\item \textsuperscript{12} December Press Release, \textit{supra} note 8.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} 22 U.S.C. § 2778(c) (2010).
\item \textsuperscript{15} \textit{Compare} United States v. Tsai, 954 F.2d 155 (3d Cir. 1992); United States v. Murphy, 852 F.2d 1 (1st Cir. 1988); \textit{and} United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976) (applying a broad interpretation of “willfully”), \textit{with} United States v. Smith, 918 F.2d 1032 (2d Cir. 1990); United States v. Adames, 878 F.2d 1374 (11th Cir. 1989); \textit{and} United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (applying a narrow interpretation of “willfully”).
\item \textsuperscript{16} United States v. Pulungan, 569 F.3d 326 (7th Cir. 2009).
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exercised judicial review and applied a narrow definition of willfulness. This note concludes with Part VI.

II. The History of Export Controls
A. An Explanation of Present Regulatory Agency Roles

An exploration of export controls unavoidably begins with decoding the barrage of acronyms governing the trade of items that could detrimentally affect U.S. foreign policy or national security. The responsibility for implementing export controls is dispersed among several administrative agencies. These agencies decide whether an item may be exported, where the item may be exported, and who may receive the item.

Within the United States Department of State, the DDTC regulates the export of defense articles and services that have primarily military purposes. The DDTC governs the export and temporary import of these defense items through the ITAR. These regulations contain the presently categorical list of export-controlled defense items that constitute the Munitions List.

Within the United States Department of Commerce, the Bureau of Industry and Security (BIS) regulates the export of commercial items and “dual use” technologies and products through the Export Administration Regulations (EAR). “Dual use” items are those “that have both commercial and military or proliferation applications,” such that the trade of these items prompts national security concerns. The primary list of the items regulated by the EAR is the Commerce Control List (CCL), which is more objective and positive than the Munitions List.

Within the United States Department of Treasury, the Office of Foreign Assets Control (OFAC) enforces national sanctions against other countries and monitors trade restrictions on suspected criminals. Unlike the DDTC

17. See 22 C.F.R. § 120.1(a) (2009).
18. Id. §§ 120-130. DDTC only has authority over temporary imports, which are by definition “exports” because they will leave the country at some point. See id. § 120.18. Permanent imports are under the jurisdiction of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. See 27 C.F.R. § 447.1 (2010).
19. See Arms Export Control Act, 22 U.S.C. § 2778(a)(1) (2010). As part of the changes to the export control system, the DDTC is revising this list into a positive list. See December Press Release, supra note 8.
21. Id. § 772.1.
22. Id. § 774.1.
and BIS, OFAC generally focuses on the geographical destination of an item rather than the nature of the item itself. For instance, OFAC has imposed comprehensive sanctions upon Burma, Cuba, Iran, and Sudan.24

The DDTC, BIS, and OFAC comprise only a portion of the alphabet soup of agencies that govern foreign trade. Unsurprisingly, both experienced exporters and novices encounter great difficulty navigating the complex maze of lists and regulations these agencies create.

B. The History and Purpose of the AECA

In 1976, Congress passed the Arms Export Control Act (AECA), which granted the president authority to control the trade and licensing of defense articles and services.25 President Ford delegated this authority to the U.S. Department of State.26 Through this delegation, the DDTC is authorized to designate which items constitute the Munitions List, the list of defense items subject to export regulations.27 A defense item is an article or service without a predominantly civilian application that “[i]s specifically designed, developed, configured, adapted, or modified for a military application . . . .”28

Importantly, the Munitions List specifies twenty-one categories of items rather than a list of each individual item subject to control.29 The DDTC determines the published categories and designates whether a specific item falls within a category.30 An item designated on the Munitions List may not be exported or temporarily imported without a license from the DDTC.31 Any person who willfully exports designated defense items without a license violates these regulations and may be subject to a fine up to $1,000,000 and up to twenty years’ imprisonment.32 The DDTC’s power to publish categories without judicial review is uncontested, but whether the designation of an item as fitting a category is subject to judicial review remains open for debate.

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28. 22 C.F.R. § 120.3(a) (2010).
29. See id. § 121.1.
30. See id. § 121.1(a); see also infra Part II.C.
32. Id. § 2778(c).
Perhaps the most controversial aspect of Munitions List designations is the DDTC’s claimed freedom from judicial review and rule-making procedures. The Administrative Procedure Act (APA), which outlines procedures for rule-making by executive agencies, applies to agency decisions unless the regulations involve “a military or foreign affairs function of the United States” or another expressed exception.\(^\text{33}\) The AECA does not expressly state that the designation of an item is a foreign affairs function exception to the APA, but it does expressly exclude published regulations from judicial review.\(^\text{34}\) The AECA declares, “[t]he designation by the President (or by an official to whom the President’s functions . . . have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for purposes of this section shall not be subject to judicial review.”\(^\text{35}\) The DDTC asserts that the AECA involves a foreign affairs function because it permits the agency to monitor trade of defense items with the purpose of furthering world peace and security.\(^\text{36}\) Consequently, the DDTC considers the designation of a particular item to a Munitions List category as exempt from APA rule-making procedures and judicial review.\(^\text{37}\) As this note will discuss, some circuit courts interpret the AECA as allowing judicial review of unpublished Munitions List designations.

What exactly constitutes a foreign affairs function exemption from the APA is not fully defined in legislative history. In 1947, one year after President Truman signed the APA into law, the Attorney General released a manual to aid government agencies and the general public in interpreting the APA.\(^\text{38}\) The Attorney General construed the exemption as applying to most actions of the State Department.\(^\text{39}\) The manual referenced Senate and House Reports that declined exempting all overseas functions, and instead limited the exemption to “those ‘affairs’ which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences.”\(^\text{40}\) Using this

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\(^{34}\) See 22 U.S.C. § 2778.
\(^{35}\) Id. § 2778(b) (emphasis added).
\(^{36}\) 22 C.F.R. § 128.1 (2010).
\(^{37}\) Id.
\(^{39}\) Id. at 27.
\(^{40}\) Id. at 26 (quoting S. Rep. No. 752, at 13 (1946), and H.R. Rep. No. 1980, at 23 (1946)).
interpretation, if requiring the DDTC to conform to the APA rule-making procedures would provoke undesirable international consequences, then creating Munitions List categories is exempt from judicial review as a foreign affairs function.

The Supreme Court has not addressed the definition of a foreign affairs function or whether implementing the ITAR is a foreign affairs function exempt from APA rule-making procedures. The United States Court of International Trade (CIT) has addressed this issue. According to the CIT, judges must narrowly construe whether the regulations “clearly and directly” entail a “foreign affairs function.” To determine a foreign affairs function exemption, the CIT examines the function of an agency regulation, not the document granting the agency authority. Under this approach, the function of the ITAR, not the authority granted by the AECA, determines whether or not implementing the ITAR is exempt from the APA rule-making procedures. The DDTC lists the function of the ITAR as executing “[t]he statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services . . . .”

Regulating defense exports almost certainly entails a foreign affairs function, but it remains debatable whether or not promulgating those regulations through APA public rule-making provisions, such as advance notice and an opportunity to comment, would have negative international consequences.

C. Judicial Review of DDTC Designations

Only a few circuit courts have addressed whether Munitions List designations are exempt from APA rule-making procedures and judicial review. Most of the discussion arises within vagueness challenges to the AECA.

In United States v. Zheng, the Third Circuit chose to defer to the DDTC rather than review its decision to place an item on the Munitions List. The defendants were charged with violating the ITAR by exporting wave tube amplifiers to China without a license. The DDTC asserted that the amplifiers fell under “active and passive countermeasures” within Category

42. Id. at 230.
43. 22 C.F.R. § 120.1(a) (2010).
44. Administrative Procedure Act, 5 U.S.C. § 553(b), (c) (2010).
XI of the Munitions List. The defendants argued that the broad category created by the DDTC failed to satisfy the AECA requirement of designating export-controlled “items.” The district court agreed with the defendants and determined that “countermeasures” did not constitute “items.” The district court reasoned that Congress meant “to obtain greater particularity in the Munitions List so as to facilitate congressional oversight and ‘increase the quality of notice available to potential exporters.’” The appellate court disagreed. Instead, the Third Circuit gave the DDTC wide latitude in designating which items fell into the broad Munitions List category. The court found that the DDTC’s assertion that wave amplifiers were “countermeasures” was alone sufficient to make them subject to licensing requirements.

In United States v. Gregg, the Eighth Circuit also favored agency discretion over judicial interference in export controls. A jury found the appellant guilty of unlawfully exporting controlled items, including: night vision goggles, military aircraft communication radios, components of a missile system, and a tactical air navigational radio system. Gregg was also convicted for exporting items on the CCL, which is governed by the EAR. The appellant contended that both of the regulations, the ITAR and EAR, were unconstitutionally vague. The Eighth Circuit recognized that Congress granted the executive branch discretion to weigh policy objectives for export controls. The court explained that even if the policy objectives were vague, the government did not need to justify them. The government only needed to prove that the items were on the Munitions List and that the defendant possessed the requisite level of intent.

The court cited a district court decision stressing that Congress “clearly expressed its desire that the executive branch, not the courts, have the final

47. Zheng, 768 F.2d at 519.
48. Id. at 521.
49. Id. at 520.
50. Id.
51. Id. at 523.
52. Id. at 524.
53. United States v. Gregg, 829 F.2d 1430 (8th Cir. 1987).
54. Id. at 1433.
55. Id.
56. Id. at 1437.
57. Id.
58. Id.
59. Id.
word on which items should be restricted.”

This district court decision, however, discussed the congressional intent behind the Export Administration Act of 1979, not the Arms Export Control Act. The Eighth Circuit relied upon the former and extended the same congressional intent to violations of the AECA without any legislative history to support this extension.

D. Proving Willfulness for a Criminal Violation of the AECA

Exempting Munitions List designations from the APA rule-making procedures and judicial review has raised serious issues in proving the requisite level of intent for AECA violations. Some courts have concluded that vagueness arguments due to lack of notice are defeated by the specific intent requirement of AECA. For instance, in United States v. Hsu, the Fourth Circuit found that the AECA was not unconstitutionally vague as applied to the defendants. In this case, the defendants were convicted for conspiring and attempting to unlawfully export military encryption devices to China. The question on appeal was whether the defendants “in fact had fair notice that the statute and regulations proscribed their conduct.” The defendants argued that the Munitions List was unconstitutionally vague as applied to them because it did not clarify that the specific devices they attempted to export qualified as “military” devices. The court stressed that the AECA’s requirement of willfulness counteracts most as-applied vagueness challenges to the AECA because the requirement that a defendant must willfully violate the regulations protects the innocent exporter who unknowingly exports a controlled item. Here, the defendants were repeatedly told beforehand that they needed a license to export in order to avoid illegal activity; therefore, they lost their vagueness challenge because the government proved willfulness.

The mens rea for a criminal violation of the AECA is not absolutely clear. The law states that “[a]ny person who willfully violates any

61. See Moller-Butcher, 560 F. Supp. at 553.
62. See Gregg, 829 F.2d at 1437.
63. See, e.g., United States v. Hsu, 364 F.3d 192, 197 (4th Cir. 2004).
64. Id.
65. Id. at 196.
66. Id.
67. Id.
68. Id. at 197.
69. Id. at 198.
provision” of the AECA is subject to criminal prosecution. The circuit courts, however, have not agreed upon a consistent interpretation of “willfully.”

The most detailed Supreme Court discussion of the definition of “willfully” is in Bryan v. United States. This case interpreted a different, but analogous, federal statute. The petitioner illegally dealt in firearms without a license. The Court determined that within the federal weapons licensing statute, “willfully” only required knowledge of unlawful conduct and did not allow an exception for ignorance of the law. The Court acknowledged that certain regulations are so complicated that they risk “ensnaring individuals engaged in apparently innocent conduct,” yet the Court did not see the risk of ensnaring individuals by requiring a weapons license. The Court noted, however, that ignorance of the law may be a defense when apparently innocent activity is governed by highly technical statutes.

Justice Scalia objected to the generality of the majority opinion in Bryan. In his dissent, he expressed concern “that the defendant must be ignorant of every law violated . . . to be innocent of willfully violating the licensing requirement.” If “willfully” only requires knowledge that conduct is unlawful, knowledge of any unlawful conduct, even conduct not addressed by the statute, could result in a criminal conviction under an ambiguous statute. Justice Scalia’s dissent articulated the dangers and frustrations resulting from a broad definition of “willfully.”

In cases involving the AECA, the government generally argues for a broad definition of “willfully” on the grounds that the AECA does not present a danger of ensnaring innocent individuals. On the other hand, alleged violators argue that this danger is present because the categorical Munitions List remains too broad to put exporters on notice that their specific items might be subject to licensing requirements. They argue that without objective criteria for what constitutes a defense item, the regulations risk ensnaring innocent individuals. They promote the creation

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73. See Bryan, 524 U.S. at 196.
74. Id. at 194.
75. Id. at 195.
76. Id. at 201 (Scalia, J., dissenting).
77. Id. at 202.
78. Id.
of a positive list, rather than the current categorical list. Apparently, the present administration has finally reacted.\textsuperscript{79}

Several federal circuit court cases have followed the majority’s reasoning in \textit{Bryan}, but some circuits have heeded the concerns Justice Scalia expressed in his dissent. As discussed below, similarly to \textit{Bryan}, the First, Third, and Ninth Circuits use a broad definition of “willfully.” The Second, Fifth, and Eleventh Circuits apply a narrower definition. Prior to its decision in \textit{Pulungan}, the Seventh Circuit applied the broad definition in \textit{United States v. Beck}.\textsuperscript{80} There, the Seventh Circuit dismissed the need to show knowledge of the licensing requirement, but required proof “that the defendant was aware of a legal duty not to export the articles.”\textsuperscript{81}

\textbf{1. Federal Circuits Applying a Broad Definition of “Willfully”}

In \textit{United States v. Lizarraga-Lizarraga}, the Ninth Circuit addressed the willfulness requirement for a violation of 22 U.S.C. § 1934, the predecessor to the AECA.\textsuperscript{82} The defendant was found guilty of illegally attempting to export ammunition to Mexico, but the jury was given a general intent instruction.\textsuperscript{83} On appeal, the defendant argued that he was entitled to a specific intent jury instruction.\textsuperscript{84} The Ninth Circuit required the specific intent instruction, and interpreted “willfully” as requiring proof of “a voluntary, intentional violation of a known legal duty not to export the proscribed articles.”\textsuperscript{85} This decision paved the way for courts to apply a broad definition of “willfully” when interpreting the AECA.

The First Circuit upheld a conviction of conspiracy to export firearms without a license in \textit{United States v. Murphy}.\textsuperscript{86} The defendants argued that “willfully” meant the government must prove that defendants knew of the licensing requirement and knew the items were on the Munitions List.\textsuperscript{87} Citing \textit{Lizarraga-Lizarraga}, the court required proof of specific intent.\textsuperscript{88} The only evidence offered to show that the firearms were on the Munitions List was testimony from a DDTC official asserting that they fit a category

\textsuperscript{79} See December Press Release, \textit{supra} note 8.
\textsuperscript{80} See United States v. Beck, 615 F.2d 441, 451 (7th Cir. 1980).
\textsuperscript{81} Id.
\textsuperscript{82} See United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828 (9th Cir. 1976).
\textsuperscript{83} Id. at 827.
\textsuperscript{84} Id. at 828.
\textsuperscript{85} Id. at 829; \textit{see also} United States v. Tsai, 954 F.2d 155, 162 (3d Cir. 1992); United States v. Murphy, 852 F.2d 1, 7 (1st Cir. 1988).
\textsuperscript{86} See \textit{Murphy}, 852 F.2d at 2.
\textsuperscript{87} Id. at 6.
\textsuperscript{88} Id. at 7.
and required a license for export to Ireland.89 Nevertheless, the court ruled against the defendant and interpreted “willfully” as requiring the government to prove only that the defendant “knew he had a legal duty not to export the weapons.”90 The court did not require proof that the defendant knew about the ITAR or that the items were on the Munitions List.91

In United States v. Tsai, the Third Circuit affirmed the defendant’s conviction for violating the AECA by exporting components of military equipment to Taiwan without a license.92 The components were infrared domes that function as a windshield for military missiles.93 The government offered testimony from a missile system developer, testimony from an advisor to the President on missile systems, and the certification of the State Department to prove that the infrared domes required a license for export.94 The defendant claimed he did not think that the domes required a license for export because they could be used on helicopters rather than missile systems.95 He argued the evidence was insufficient to prove the domes fit Category IV(h) of the Munitions List, which requires a license for components and parts of guided missile systems.96 The Third Circuit rejected the defendant’s argument that the government must prove the defendant knew about the license requirement.97 The court determined that the defendant could be found guilty if he “knew that the export was illegal.”98

2. Federal Circuits Applying a Narrow Definition of “Willfully”

Other federal circuit courts require something more than mere violation of a known legal duty. For instance, the Second, Fifth, and Eleventh Circuits seem to require that the defendant have at least some knowledge of the applicable licensing requirements.99 These circuits apply a narrower definition of “willfully.”

89. Id.
90. Id.
91. Id.
92. See United States v. Tsai, 954 F.2d 155, 157 (3d Cir. 1992).
93. Id. at 158.
94. Id. at 158-59.
95. Id. at 159.
96. Id. at 159-60.
97. See id. at 161.
98. Id. at 162.
99. See United States v. Smith, 918 F.2d 1032 (2d Cir. 1990); United States v. Adames, 878 F.2d 1374 (11th Cir. 1989) (requiring specific intent to violate the statute); United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (requiring specific intent when items are
In *United States v. Smith*, the defendants were convicted of conspiracy to violate the AECA by illegally exporting helicopters to the Middle East.\(^{100}\) The Second Circuit upheld the conviction and approved jury instructions requiring "that defendant must have known that the helicopters to be exported were subject to the licensing requirements of the Arms Export Control Act and that he intended to export them in a manner inconsistent therewith."\(^{101}\) Under this court’s rationale, mere knowledge that he was doing something generally unlawful would prove insufficient to support an AECA violation.

The Fifth Circuit not only requires something more than knowledge of illegal activity, but also allows ignorance of the law as a defense.\(^{102}\) In *United States v. Hernandez*, the court reversed two of the three AECA convictions and explained, “While it is true that Hernandez’ concealment of the weapons possibly supported a jury finding that he knew his conduct was unlawful, . . . such a finding falls short of deciding that he knew he was unlawfully exporting weapons on the Munitions List.”\(^{103}\) The court reversed the decision because the lower court failed to instruct the jury on the relevance of ignorance of the law.

In *United States v. Adames*, the Eleventh Circuit cited the broad Ninth Circuit approach to elucidate the requirement of willfulness, but the court required a higher level of proof to demonstrate an intentional violation of the AECA.\(^{104}\) The court stated, “Though it reasonably could be inferred from Adames’ suspicious conduct that she was aware of the generally unlawful nature of her actions, that state of mind is insufficient to sustain a finding of guilt under a statute requiring specific intent.”\(^{105}\) The Eleventh Circuit cited cases supporting the broad interpretation, but the court actually applied a narrow interpretation.

Although the Eighth Circuit resists judicial review of Munitions List designations, in *United States v. Gregg*, it required the highest degree of knowledge to prove willfulness.\(^{106}\) General knowledge of unlawful conduct was not enough to find a willful violation. At the time of export, the

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\(^{100}\) *Smith*, 918 F.2d at 1033.

\(^{101}\) Id. at 1038.

\(^{102}\) See *Hernandez*, 662 F.2d at 290.

\(^{103}\) Id. at 292 (internal citation omitted).

\(^{104}\) See *Adames*, 878 F.2d at 1377.

\(^{105}\) Id. (citing *United States v. Frade*, 709 F.2d 1387, 1392-93 (11th Cir. 1983); *Hernandez*, 662 F.2d at 292).

\(^{106}\) See *United States v. Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987).
defendant must have known that the items were on the Munitions List and that they required a license for export. 107 The Seventh Circuit seems to be shifting towards this approach. Although the Seventh Circuit did not require the government to meet as high a burden as the Eighth Circuit required, the decision in Pulungan indicates that proving general knowledge of unlawful conduct will not suffice for a criminal violation of the AECA.

III. United States v. Pulungan: The Seventh Circuit Allows Judicial Review and Applies a Narrower Definition of “Willfully”

A. Facts and Procedural History

In 2007, Doli Pulungan attempted to export 100 Leupold Mark 4 CQ/T riflescopes through Saudi Arabia to Indonesia. 108 These optical sights attach to both tactical and competitive shooting rifles. 109 Pulungan claimed that he avoided shipping directly to Indonesia because the United States had imposed an embargo on defense exports to Indonesia. 110 Although an embargo on Indonesia existed between 1999 and 2005, no embargo existed when Pulungan tried to export the riflescopes. 111

The Munitions List includes a category of riflescopes as defense items requiring a license for export, specifically “riflescopes manufactured to military specifications.” 112 Thus, Pulungan was charged with conspiring to export defense articles without a license in violation of the AECA. 113 At trial, Pulungan conceded that he attempted to export the riflescopes without a license, but argued that the riflescopes are not “manufactured to military specifications.” 114 Furthermore, because the regulation in 22 C.F.R. §121.1 does not expressly say, “Leupold Mark 4 CQ/T rifleoscope,” he refused to concede that this rifleoscope fit the Munitions List category. 115 Furthermore, even if the Leupold riflescopes do adhere to military specifications, he claimed that he did not willfully violate the AECA. 116

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107. Id.
108. United States v. Pulungan, 569 F.3d 326, 327 (7th Cir. 2009).
110. Pulungan, 569 F.3d at 327.
111. Id.
113. Pulungan, 569 F.3d at 327.
114. Id.
115. Id. at 328.
116. Id. at 327.
Through testimony from a DDTC official, the government asserted that the riflescopes fit the Munitions List category. While testifying, however, the official did not disclose the criteria for the designation nor why the DDTC believes the Leupold riflescopes adhere to military specifications. Rather than require the DDTC official to explain its reasoning, the trial judge determined, as a matter of law under the AECA, that the riflescopes were “manufactured to military specifications . . . .”

In order to prove that Pulungan acted willfully, the government presented three pieces of evidence. First, the prosecution presented Pulungan’s printouts of a website where the riflescopes could be purchased. The website included notifications that the riflescopes could only be shipped to certain countries, but it did not explain why the destinations were limited. Second, the prosecution offered evidence that Pulungan lied to his suppliers. He made inconsistent statements about where he intended to ship the riflescopes, how willing he was to pay over market-value, and how many he intended to purchase. Finally, the prosecution presented email messages and notes from Pulungan indicating that he knew he could not legally ship to Indonesia.

The jury found Doli Pulungan guilty of conspiring to export defense articles without a license. He was sentenced to forty-eight months in prison, but he appealed to the Seventh Circuit.

B. Issues

The Seventh Circuit considered two primary issues on appeal: (1) whether the DDTC designation of the riflescopes was subject to judicial review, and (2) whether sufficient evidence showed Pulungan acted willfully. First, the court addressed whether Pulungan was denied his Sixth Amendment right to trial by jury when the district court refused to allow the jury to question the propriety of the DDTC’s designation of the riflescope as a defense item. Second, the court considered whether the evidence

117. Id.
118. Id.
119. Id. at 328.
120. Id. at 329.
121. Id. at 330.
122. Id.
123. Id. at 329.
124. Id.
125. Id. at 327.
126. Id.
127. See id. at 328.
was sufficient to prove beyond a reasonable doubt that Pulungan acted willfully to violate the AECA. In reversing the trial court, the Seventh Circuit held that the government failed to establish that the defendant knew the riflescopes were designated on the Munitions List and subject to the licensing requirement.

IV. Decision of the Case

The Seventh Circuit began by recognizing the benefits of a categorical Munitions List rather than an enumeration of every possible item. A list identifying attributes of controlled items rather than names avoids the risk of manufacturers changing names of products in order to bypass regulations. Although a categorical list may prove sensible, the court applied a strict interpretation of the text of the AECA, exempting only designations articulated “in regulations” from judicial review.

Pulungan never contested the DDTC’s authority to include “riflescopes manufactured to military specifications” in the regulations. Congress clearly granted the President authority to create the categories in the Munitions List. Rather, he argued, and the court agreed, that the DDTC’s assertion that the Leupold riflescopes fit the category was reviewable. Specifically, “Leupold Mark 4 CQ/T riflescope” was not listed under that category in the Munitions List, so the DDTC designation of these riflescopes as “defense articles” was subject to review.

The court explained that allowing the DDTC to designate items without any known criteria and without the possibility of review would raise serious constitutional issues. The government must prove through more than an assertion that the items fit the regulations. Chief Judge Easterbrook aptly noted, “A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and

128. See id. at 329.
129. Id. at 331.
130. See id. at 328.
131. Id.
133. Brief of Defendant-Appellant at 23, United States v. Pulungan, 569 F.3d. 326 (7th Cir. 2009) (No. 08-3000).
135. Pulungan, 569 F.3d at 328.
136. Id.
137. Id.
138. Id.
immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian régimes.”\(^{139}\)

Even if the government could have proven the riflescopes are controlled defense articles, the government could not prove that Pulungan knew they were on the Munitions List or that he willfully attempted to illegally export them.\(^{140}\) The government stipulated that the standard “willfully” required proof that Pulungan knew the riflescopes were on the Munitions List and that it was illegal to export them without a license.\(^{141}\) Thus, the Seventh Circuit interpreted “willfully” in the AECA as requiring knowledge of the ITAR rather than some other regulation.\(^{142}\) This narrow interpretation departs from the broad definition of “willfully” applied by the Seventh Circuit in *Beck*.\(^{143}\)

Although the government presented several pieces of evidence, the court found this evidence insufficient to prove intent to violate the licensing requirements beyond a reasonable doubt.\(^{144}\) The printouts of websites found in Pulungan’s possession indicated that the riflescopes could not be exported outside the U.S. but they did not give a reason for this limitation or indicate that a license was required.\(^{145}\) Pulungan had no reason to believe the limitation was due to a DDTC regulation, as the limitation could have been self-imposed by the manufacturer or distributor.\(^{146}\) In order to show that Pulungan knew his conduct was unlawful, the government presented proof that Pulungan lied about how much he was willing to pay and how many riflescopes he wanted to purchase.\(^{147}\) The government also presented email messages from Pulungan indicating that he knew exporting items to Indonesia was illegal.\(^{148}\) The court decided this evidence reflected Pulungan’s belief in an embargo rather than his knowledge of the license requirement for defense items.\(^{149}\) His intent to evade a non-existent embargo did not transfer to a willful intent to violate the AECA by exporting riflescopes without a license.\(^{150}\)

139. *Id.*
140. *Id.* at 329.
141. *Id.* at 331.
142. *Id.*
143. *See* United States v. *Beck*, 615 F.2d 441, 451 (7th Cir. 1980).
144. *Pulungan*, 569 F.3d at 331.
145. *Id.* at 330.
146. *Id.*
147. *Id.* at 329.
148. *Id.*
149. *Id.* at 330.
150. *Id.* at 330-31.
The ambiguous scope of the ITAR has a stifling effect on U.S. participation in international trade. The present regulation system increases the likelihood of unintentional violations by reasonably diligent exporters. Since Pulungan admittedly tried to avoid U.S. embargo laws, he would likely not be considered a reasonably diligent exporter. Still, his case reflects the possibility of unintentional violations of U.S. export laws. Potential exporters are understandably reluctant to engage in business when the possibility of a product being designated on the Munitions List without any advanced notice could conceivably lead to a civil penalty or criminal conviction.

Although national security is an essential consideration for export controls, expanding trade and preserving procedural due process should also be considered in export control reforms. The court in Pulungan correctly recognized the potential for due process violations, allowed review of DDTC designations of items, and applied a narrow definition of willfulness for an AECA criminal violation. Chief Judge Easterbrook’s opinion reflects the need for more transparency in DDTC designations and pressures the Supreme Court to address the disparity among circuits in defining willfulness within the AECA.

A. Requiring More Proof Than a DDTC Assertion Alone

The Seventh Circuit expressed obvious discomfort in allowing the DDTC unfettered authority. As a result of the DDTC’s interpretation that Munitions List designations are exempt from the APA procedures, the government has previously enjoyed great flexibility in determining and publicizing designations. The DDTC has consistently made designations and then claimed that its decisions are immune from judicial review. From a legal perspective, this makes it difficult for exporters to challenge DDTC designations or to know what alterations might be applied to items to avoid burdensome licensing requirements. The Seventh Circuit rejected the notion that, as an executive agency, the DDTC can claim its

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151. Id. at 327.
152. Id. at 328.
153. See, e.g., id. at 327; United States v. Zheng, 768 F.2d 518, 520 (3d Cir. 1985); see also 22 C.F.R. § 128.1 (2010).
designations are a foreign affairs function and thus have immunity from judicial review.

The primary problem is that DDTC designations frequently fail to provide sufficient notice for exporters. For example, the DDTC did not publicize its decision that Leupold Mark CQ/T riflescopes are covered by the Munitions List. Pulungan did not ask the DDTC or the manufacturer if the riflescopes at issue were on the Munitions List, so he lacked sufficient notice of the designation. The court explained that since Pulungan was not an industry insider, he had no reason to know that he should ask about the Munitions List. As a result of Pulungan’s victory, the Seventh Circuit pressured the DDTC to be more transparent and proactive regarding Munitions List designations.

Furthermore, Pulungan reduced the responsibility for an exporter to utilize commodity jurisdiction requests to determine whether goods are export-controlled by the Department of State. The ITAR provides a method for Munitions List inquiries through commodity jurisdiction. If manufacturers or exporters are unsure whether an item is covered by the Munitions List, commodity jurisdiction allows the manufacturer to request a decision by the DDTC. Commodity jurisdiction, however, is only helpful if the exporter knows that it is available. Pulungan may reduce the impact of commodity jurisdiction procedures and weaken the government’s ability to prove knowledge of the regulations. Without compelling individuals to inquire into Munitions List designations prior to export, the Seventh Circuit ruling makes it more difficult for the government to prove knowledge of the law.

In order to avoid similar, unfavorable decisions, the DDTC should change its method of disseminating information. Unless Munitions List designations and criteria are proactively publicized, the DDTC will likely face more challenges when items do not clearly fit Munitions List categories, and DDTC designations will be more susceptible to judicial review. The Pulungan decision rejects the notion that an executive agency can assume that whatever it asserts is conclusive and unreviewable.

B. Applying a Narrower Definition of “Willfully”

The circuit courts have attempted to outline what the government must prove to show an intentional violation of the AECA, but the inconsistency

154. Pulungan, 569 F.3d at 329.
155. Id.
156. 22 C.F.R. § 120.4(a).
157. See id.
across circuits has only complicated matters. Pulungan adds to this inconsistency and requires more evidence from the government to prove a willful violation of the AECA. Unlike some circuits, the Seventh Circuit ruled that a mistaken belief that conduct is unlawful falls short of proving an intentional violation of the licensing requirement. The Pulungan court stressed that willfulness in a regulatory offense requires knowledge of “this rule,” referring to the Munitions List in the ITAR, rather than knowledge of any other potential regulation. Since the DDTC designation of the riflescopes as export-controlled was unknown to the general public until Pulungan’s trial, the government could not prove that Pulungan knew of the regulation before he violated it.

The Seventh Circuit decision bolsters circuit courts that have applied a narrow definition of willfulness, requiring more than mere knowledge of unlawful conduct. The circuit split is decidedly more pronounced with the addition of the Seventh Circuit applying a narrower definition of “willfully,” along with the Second, Fifth, and Eleventh Circuits.

C. Using Pulungan as Persuasive Authority in Other Federal Circuits

The Pulungan decision has been utilized in subsequent arguments by defendants claiming that the government cannot prove an intentional violation of the AECA. In Pennsylvania, a man who was sentenced to thirty-two months in prison for unlawfully exporting the same riflescopes as Pulungan, filed a motion to vacate his sentence due to ineffective counsel. Citing Pulungan, the movant claimed that his counsel failed to advise him that he could not be found guilty if he had no knowledge of the licensing requirement. The movant maintained that he pled guilty with the understanding that his lack of knowledge of the licensing requirement was irrelevant in his case.

In the Sixth Circuit, a retired professor from the University of Tennessee (UT), who is now infamous in the export control realm, utilized Pulungan

158. Pulungan, 569 F.3d at 330.
159. Id. at 331.
160. Id. at 329.
161. See, e.g., United States v. Smith, 918 F.2d 1032 (2d Cir. 1990); United States v. Adames, 878 F.2d 1374 (11th Cir. 1989); United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (applying a narrow interpretation of “willfully”).
162. Motion to Vacate at 1, 4, United States v. Komoroski, No. 3:08-cr-00228-EMK (M.D. Pa. Nov. 4, 2010).
163. Id. at 18-19.
164. Id. at 23.
Professor Roth was convicted of violating the AECA by unlawfully exporting technical data and defense services. Roth transported a laptop containing controlled technical data to the People’s Republic of China and allowed two foreign national UT graduate students access to the data and a controlled research item. Both the data and the research item, a Force Stand designed to collect data, involved plasma technology for use on aircrafts. This seemingly innocent activity, traveling with a laptop and collaborating with graduate students, sounded alarms in university legal counsel offices across the country. On appeal, Roth’s counsel cited *Pulungan* as persuasive authority to show that the jury instructions should have required that the defendant knew the items are on the Munitions List.

Notably, instead of relying on a DDTC assertion that the items are controlled as it did in *Pulungan*, the government introduced evidence detailing why the items fit the category of defense articles on the Munitions List. This reveals the government’s recognition that it can no longer rely on the notion that DDTC decisions are unreviewable. Citing *Pulungan*, the Sixth Circuit allowed judicial review of the DDTC determination that the technical data and Force Stand fit the category on the Munitions List. Because the items were intended for military use, the court found the DDTC determination valid. The court opted for the broader definition of willfulness, only requiring knowledge that conduct was unlawful, and upheld Roth’s conviction.

In the First Circuit, which has previously applied a broad definition of willfulness for AECA violations, a district court declined to adopt the *Pulungan* knowledge requirement, but the court did entertain a vagueness challenge to the ITAR similar to Pulungan’s challenge. In *United States v. Wu*, the court decided that the government had failed to prove that the items were controlled under the ITAR, and therefore reversed Roth’s conviction.

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166. *Roth*, 642 F. Supp. 2d at 797.
168. United States v. Roth, 628 F.3d 827, 830 (6th Cir. 2011).
169. Reply Brief, supra note 165, at 23.
170. *Roth*, 628 F.3d at 832.
171. *Id.* at 833.
172. *Id.* at 835.
v. Wu, the jury convicted the defendants of violating the AECA. The defendants sought to vacate the verdict on the grounds that the regulations lacked sufficient notice and that the post-export application of the ITAR violated the Ex Post Facto Clause of the Constitution. In an as-applied challenge to the AECA for vagueness, the judge emphasized that when the military purpose of the items is not obvious, if the defendant was told or aware that the items at issue are controlled defense articles or services, then the regulations are not vague as-applied. The court granted the motions to set aside two counts of violating the AECA because the defendants only had notice that those particular items might be subject to the EAR, but not the ITAR. The court reasoned:

While evidence of willfulness is closely related to due process issues in the case law, due process is not necessarily satisfied if a defendant has fair notice that a license may be required under one law, but is charged under another law that he had no notice he was violating.

The lack of sufficient notice, coupled with agency disagreement as to whether the EAR or ITAR governed the items, led to the court decision that Counts 2 and 3 violated both the Due Process Clause and the Ex Post Facto Clause. As in Pulungan, the DDTC’s delayed designation made it difficult to prove the defendants’ knowledge.

Unpredictability in agency designations exemplifies the need for export control reforms that include increased transparency and judicial review. Otherwise, the U.S. risks losing its economic edge in aviation and defense industries due to a crippling export control system.

VI. Conclusion

As part of President Obama’s export control reforms, the President created the Federal Export Enforcement Coordination Center to minimize enforcement agency conflicts. The most significant change is the
transition to a positive Munitions List. If a positive list had existed prior to Pulungan’s attempted export, he would not have been able to make the argument that the Leupold Mark 4 CQ/T riflescopes did not fit the category of “[r]iflescopes manufactured to military specifications.”\(^{182}\) This change will assist the DDTC because the agency will no longer falter by relying solely on an assertion to prove the item is controlled. Instead, the item will be clearly included on the Munitions List.

The President also indicated that the major control lists, the CCL and Munitions List, could potentially be consolidated.\(^{183}\) This consolidation could reduce confusion and jurisdictional disputes between agencies, eliminating the possibility of exporters inadvertently checking the wrong list.

The inconsistent definitions of “willfully” in the AECA will still exist despite these sweeping reforms. Without an amendment of the AECA, the mens rea requirement and penalties will remain the same, even with a positive Munitions List. Although the reforms will make it easier for the government to prove willfulness, what evidence will be required is still open for debate.

The transition to a positive Munitions List will be gradual and subject to controversy. In the meantime, some circuit courts will allow judicial review of DDTC designations, while other circuits will defer to the agency as a matter of law. The unpublished Munitions List designations will continue to risk ensnaring innocent individuals. Consequently, newcomers to aviation and defense industries within the region should familiarize themselves with these changing regulations. Until Congress or the Supreme Court addresses the present circuit split, the ambiguous regulations will potentially stifle the export of goods, reducing the involvement of American companies in the global economy.

\textit{Cody Jones}

\[^{182}\text{22 C.F.R. } \S\ 121.1(1)(f)\text{ (2010).}\]
\[^{183}\text{November Press Release, } \textit{supra} \text{ note 181.}\]