California
Bar
Examination

Performance Tests
and
Selected Answers

July 2002

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2002 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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TUESDAY AFTERNOON
JULY 30, 2002

California
Bar
Examination

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IN RE THOMAS OUTDOOR ADVERTISING

INSTRUCTIONS i

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IN RE THOMAS OUTDOOR ADVERTISING

INSTRUCTIONS

1. You will have three hours to complete this performance test. This session of the examination is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States. Columbia is located within the jurisdiction of the fictional United States Court of Appeals for the Fifteenth Circuit.
3. You will have two sets of materials with which to work: A **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page numbers.
5. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

SCHELLY & KATZ, LLP
2800 BLAKE STREET
FAIRVIEW, COLUMBIA 55515

MEMORANDUM

To: **Applicant**
From: **Judith M. Schelly**
Date: **July 30, 2002**
Subject: **In re Thomas Outdoor Advertising**

The Benton City Council today placed on the agenda for its August 6, 2002 meeting a proposed ordinance relating to outdoor advertising in the form of billboards. The proposed ordinance is quite controversial. It would effect a change from the currently unregulated state of affairs, and impose, for the first time, various restrictions and even outright prohibitions.

We represent Stephen Thomas, the sole proprietor of Thomas Outdoor Advertising, a relatively new but fast growing business. Thomas objects to the proposed ordinance because he believes that, if enacted, it would threaten the general well-being of Benton and his profitability as well.

I have an appointment with the City Attorney to discuss the proposed ordinance. To help me prepare for that meeting, please draft a memorandum for me that:

1. Analyzes the constitutionality of the proposed ordinance, being sure to identify and evaluate the arguments that I can make to the City Attorney in support of the position that it is in fact unconstitutional; and

2. Identifies and discusses specific modifications that can be made to the proposed ordinance that will meet both Thomas's stated goals and the city's expressed concerns and still be constitutional. Do not redraft the proposed ordinance.

BENTON *EXPRESS*
July 15, 2002

* * * * *

Billboards? In Benton?
By Elizabeth D'Orazio, *Express* Staff Writer

You wouldn't think that billboards could have raised such a ruckus — unless, that is, you live in Avalon County and, especially, the City of Benton.

For just about as long a time as most folks can remember, Patrick Curtan has been the "King of Billboards" in this rural county and its oldest city.

Most of Curtan's billboards are like others you see throughout the state, and, indeed, throughout the country, advertising major brands of gasoline, familiar soft drinks, and ubiquitous fast food restaurants.

But some of Curtan's billboards are altogether unique, advertising nothing more or less than his own idiosyncratic views on matters that the public is concerned about — or matters that he thinks the public *should* be concerned about.

Crusty, but somehow endearing in an odd sort of way, Curtan has found it hard to alienate anyone, even though practically no one has ever agreed with him. That's probably because his views have never been either liberal or conservative, progressive or reactionary, left or right. As one long-time friend, Al Waters, puts it, "Pat's a contrarian. He licks his finger, puts it up to see which way the wind is blowing — and then sets himself right into its blast." For example, at the height of the oil embargo in the early 1970's, he waged a campaign on his billboards urging county officials to buy only the most gas-guzzling of cars, ostensibly to put pressure on the federal government to allow wide-scale oil exploration throughout Alaska. But in the late 1990's, appearing on his billboards in a neon purple and pink costume as "SUVerman," he incited teenagers to "liberate" sports utility vehicles from their parents and turn them over to him for transformation into roadside planters.

Although Curtan has found it hard to alienate anyone, he has succeeded so far as one person is concerned — Benton City Council Member Sonia Hemphill. Hemphill is the architect of Benton's remarkable renaissance. About five years ago, with little support, she persuaded the City Council to establish Benton's Historical District. What was formerly a dilapidated collection of ramshackle shops with hardly any merchandise

to speak of, and even fewer buyers, is now becoming a trendy mecca for the upscale visitor who has lots of money to spend on such essentials of the good life as free-range ostrich, heirloom fruits and vegetables, and boutique wines. “Curtan’s billboards,” says Hemphill, “might put off the very people we want to attract. At the very least, they cast an unflattering light on the community, presenting the residents as unsophisticated bumpkins.” She told Benton City Attorney Theodore J. Stroll, “Do whatever you can to deal with the problem.”

This leaves Curtan, one might suspect, exactly where he wants to be — in the middle of the biggest ruckus his billboards have ever raised.

CITY OF BENTON
PROPOSED ORDINANCE RELATING TO OUTDOOR ADVERTISING

Section 1. Legislative Findings.

A. Aside from this ordinance, outdoor advertising in the form of billboards, as herein defined, is not regulated by any ordinance.

B. The lack of regulation of billboards has led in the past, and may lead in the future, to aesthetic blight because of visual clutter.

C. The lack of regulation of billboards has created in the past, and may create in the future, traffic safety hazards because of visual distraction.

D. The regulation of billboards specified herein is necessary to prevent aesthetic blight and traffic safety hazards.

Section 2. Definitions.

A. "Billboard" is any structure, object, device, or part thereof, situated outdoors that advertises, identifies, displays, or otherwise relates to a person, thing, institution, organization, activity, condition, business, good, service, event, or location by any means, including words, letters, numerals, figures, designs, symbols, fixtures, colors, motion, illumination, or projected images.

B. "On-site/commercial" billboard is any billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any business conducted on the parcel on which it is located and/or any good or service produced by such business or made available by such business for purchase thereon.

C. "Off-site/commercial-or-noncommercial" billboard is any billboard, as defined herein, other than an on-site/commercial billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any person, thing, institution, organization, activity, condition, business, good, service, event, or location.

D. "Historical District" is that area of the city so established by the City of Benton Historical District Ordinance enacted on July 14, 1997.

Section 3. Regulation.

A. Any person may erect and maintain an on-site/commercial billboard in the Historical District.

B. No person shall erect or maintain any off-site/commercial-or-noncommercial billboard in the Historical District, with the exception of off-site/commercial-or-noncommercial billboards with commemorative historical signs, service club signs, or signs depicting time, temperature, and news.

Section 4. Declaration of Public Nuisance and Removal.

A. Any billboard erected or maintained in violation of any of the provisions herein is declared a public nuisance.

B. Any billboard declared a public nuisance hereunder may immediately be removed by the Director of Public Works.

Section 5. Expenses and Fine.

A. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is jointly and severally liable for any and all expenses incurred by the Director of Public Works in its removal.

B. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is subject to a fine not exceeding $10,000.

OFFICE OF THE CITY ATTORNEY

July 19, 2002

COLUMBIA OUTDOOR ADVERTISING ASSOCIATION
FACT SHEET

In 2001, individuals and entities in the United States spent about 2% of their advertising budget on outdoor advertising by means of billboards.

Over the years, individuals and entities have increasingly spent more money on billboards, and have increasingly made greater use of this medium.

Billboards have been shown to possess various strengths. For example, they quickly build awareness; create continuity of a brand or message; are adaptable, applying national or regional strategies within a local context; and provide geographic and demographic flexibility.

Judged by the cost of reaching their audience, billboards are more affordable than other media.

The appearance of billboards has changed in recent times, largely through the use of computer-painted vinyl, which provides high quality and consistent images; three-dimensional and moving displays; and innovative lighting.

Billboards provide significant direct economic contributions in wages and benefits to employees, in payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies, especially in rural areas and small cities.

Billboards also play a substantial role for businesses and other activities that are small, local, or tourist-related, especially, again, in rural areas and small cities.

TRANSCRIPT OF STEPHEN THOMAS INTERVIEW
July 25, 2002

Judith M. Schelly: Mr. Thomas, thank you for coming in. We're recording this session on audiotape with your permission, right?
Stephen Thomas: Yes.
Schelly: Could you tell me a bit about the outdoor advertising business in the County of Avalon and the City of Benton?
Thomas: Sure. For years, the business has been dominated by Patrick Curtan. Still is. The county is rural, and there's lots of space for billboards. He's tied up most of the best sites outside of the city and just within its fringes, with generous payments to the property owners. Over the years, he's made a great deal of money. Even when times were tough, he devoted space to his personal agenda. Now, when he's made more money than he could spend in three lifetimes, there's no stopping him. He's quite a character, that's for sure. But beneath all his flamboyance, he's a solid businessperson and a solid citizen. In any event, when the Benton Historical District Ordinance was under consideration about five years ago, I decided to get into outdoor advertising, not like Curtan with his national advertisers and his conventional billboards, but in a niche that would anticipate where I thought Benton would go.
Schelly: What do you mean?
Thomas: Benton's Historical District had a number of sites that could be used for billboards. All of them were available for lease. No one had tried to secure any of them.
Schelly: Why not?
Thomas: Benton was a city that time had passed by. There was hardly anyone there. And those who were there had little to sell and little to buy. But I thought that would change. It did. Well, I leased many of the best sites in the Historical District that could be used for billboards. The leases were generally for 25 years. I guaranteed the lessors a fixed minimum payment and provided for increased payments as my revenues increased. I manufactured the billboard structures myself to last at least 25 years — two and one-half times as long as the best billboards in the state. That kind of manufacturing makes my costs two or three times higher than those for conventional structures.
Schelly: You mentioned a niche?

Thomas: Yes. I figured that conventional billboards would look out of place in an historical district, even, and especially, the computer-painted vinyl ones with their sharp images. So I came up with a notion for something different. The displays on structures would conform to their surroundings — bricks and wood and stucco, as the case may be, and not paper or plastic. They would not change monthly, as is typical. Rather, they would vary with the seasons, and with local festivities within each season. Thus, there would be autumn displays, with appropriate adjustments for Harvest Time, Halloween, and Thanksgiving. Most important, to my mind, would be their character. They would not advertise only the goods or services on sale at the location in question.

Schelly: You mean that a billboard at my antique store — let's say I owned an antique store — would advertise other antique stores?

Thomas: In a way. The billboard would advertise a group of antique stores. No, better, it would actually help create an antiques district.

Schelly: Doesn't that cut against the interests of the owner of the individual antique store?

Thomas: Not at all. You're acquainted with the "Diamond District" in midtown Manhattan in New York City?

Schelly: Of course.

Thomas: Well, it's a fact of economic life that when a vibrant area like the Diamond District is created, each business gets more customers, in spite of the competition it faces from other businesses, than it would have gotten otherwise — indeed, it gets more customers because of the competition.

Schelly: We see that phenomenon closer to home in the various "Auto Rows" throughout Columbia, don't we?

Thomas: Right.

Schelly: Have you put any displays up?

Thomas: Not yet, but we're not far off.

Schelly: Now, turning to the proposed ordinance —

Thomas: It's simply bad news all the way around. The Historical District as a whole depends on its various subdistricts — antiques, as we mentioned, gourmet, arts, etc. It needs ambience. Without ambience, you're not going to get enough people to come to buy the upscale commodities that it specializes in, certainly not enough people with the money to buy them. To be frank, the ordinance would be devastating to my business. I've invested about $2.5 million. Under the ordinance, I would lose most of it. I would probably have to shut down and let my employees go.

Schelly: How many employees do you have?

Thomas: I have a permanent staff of 10, plus 15 others who will stay with me until we finish manufacturing the structures.

Schelly: Why does the city want the proposed ordinance?

Thomas: It claims that it wants to avoid aesthetic and traffic problems. But billboards have never been regulated in the city. I've never heard any complaints about unsightliness. Then again, there haven't been many billboards. As for traffic, what traffic? The Historical District is basically a pedestrian mall. Everybody knows what's driving this — Hemphill's fight with Curtan. But Curtan's billboards are nowhere near the Historical District. I recognize that cities commonly regulate the appearance of billboards. I wouldn't have a problem with that. How could I? That's what I'm selling. But what the city's proposing? No.

Schelly: So, what would you like to see happen?

Thomas: I just want to be able to run my business as planned.

Schelly: So, no ordinance would be best?

Thomas: No, some kind of design review and approval would be appropriate. Conventional billboards like Curtan's would be out of place in the Historical District. But they might prove tempting to some merchants because they would probably be much less expensive than mine.

Schelly: I think you've given me enough information to proceed. I'll keep you informed as things develop. Thanks for coming by.

Thomas: You're welcome.

OFFICE OF THE CITY ATTORNEY
CITY OF BENTON
1000 GROVE STREET
BENTON, COLUMBIA 55155

July 26, 2002

Judith M. Schelly
Schelly & Katz, LLP
2800 Blake Street
Fairview, Columbia 55515

Re: Proposed Ordinance Relating to Outdoor Advertising

Dear Ms. Schelly:

I am writing to memorialize our telephone conversation concerning the City of Benton's proposed ordinance relating to outdoor advertising in the form of billboards.

You stated that your client, Stephen Thomas of Thomas Outdoor Advertising, objects to the proposed ordinance on the ground that, if enacted, it would threaten the general well-being of Benton.

I responded that outdoor advertising ordinances are now as common as outside advertising itself, and that the proposed ordinance is hardly out of the mainstream.

I noted the background to the proposed ordinance, which was well known to you: Together with its residents and businesses, the city, as a small municipality in a rural county, had long been affected by the general decline that has plagued this area of the state; residents and businesses were quite poor, and city government was all but bankrupt. In 1997, the City of Benton Historical District Ordinance established the Historical District. In the years that have followed, the city has experienced a remarkable turnaround, attracting many visitors, including many quite affluent, to its crafts shops, antique stores, art galleries, artisanal bakeries and creameries, and inns and restaurants.

I further noted that outdoor advertising of even the common variety might negatively affect aesthetic values and traffic flow in the Historical District. Moreover, outdoor advertising of a controversial character might offend some visitors or at least cause some discomfort. To avoid any such problems, City Council Member Sonia Hemphill asked us to

draft a proposed ordinance. We have done so. Although we are of the view that an ordinance may lawfully prohibit all outdoor advertising in the Historical District, we have not taken that approach. Rather, the proposed ordinance would allow on-site/commercial billboards, which promote the goods or services on sale at the location in question, and certain off-site/commercial-or-noncommercial billboards. We think that this approach is a reasonable one, permitting steady economic growth for our residents and businesses and, consequently, financial stability for city government itself.

Let me observe, in conclusion, that the City Council will soon schedule a hearing on the proposed ordinance. You and your client are, of course, welcome to participate.

Should you wish to communicate with me in advance of the hearing, I remain available, as always, to consider any and all constructive suggestions.

Very truly yours,

Theodore J. Stroll
City Attorney

TUESDAY AFTERNOON
JULY 30, 2002

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Performance Test A
LIBRARY

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City of Benton Historical District Ordinance……...…1

Metromedia, Inc. v. City of San Diego (U.S. Supreme Ct. 1981)……2

City Council v. Taxpayers for Vincent (U.S. Supreme Ct. 1984)……6

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City of Benton

HISTORICAL DISTRICT ORDINANCE

Section 1. Legislative Findings.

A. The area of the city bounded by Lincoln Avenue, Bliss Street, Flushing Avenue, and Lowery Street, hereinafter the "Historical District," has in recent years been so adversely affected by blight as to diminish the economic base of the city.

B. A master plan for the rehabilitation of the Historical District was recently adopted.

C. It is essential to the preservation of the aesthetic integrity of all buildings in the Historical District, and to the preservation of the ambience of the Historical District itself, that all such buildings be regulated to ensure consistency with surroundings in size, shape, color, and placement.

Section 2. Regulation.

* * * * *

C. Before erecting, modifying, or removing any building in the Historical District of whatever sort, all owners of real property, tenants, contractors, and others shall submit plans to the Director of Public Works for design review and approval for consistency with surroundings in size, shape, color, and placement.

* * * * *

F. Only pedestrian traffic shall be allowed in the Historical District, except as indicated in subsection G, below.

G. With the exception of police, fire, and similar governmental services, vehicular traffic shall be allowed in the Historical District only between the hours of 2:00 a.m. and 7:00 a.m., and then only as necessary for mercantile pick-ups and deliveries. Vehicular traffic for police, fire, and similar governmental services shall be allowed in the Historical District at all times.

* * * * *

ENACTED JULY 14, 1997

Metromedia, Inc. v. City of San Diego

United States Supreme Court (1981)

The City of San Diego enacted an ordinance that imposes substantial prohibitions on the erection of outdoor advertising displays in the form of billboards. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting displays" and "to preserve and improve" the city's "appearance." The ordinance permits on-site commercial billboards, which generally advertise goods or services available on the property on which they are located, but forbids off-site billboards, which generally advertise or otherwise relate to goods or services or activities available or conducted elsewhere, unless permitted by one of several exceptions specified, such as for commemorative historical signs, service club signs, for-sale and for-lease signs, signs depicting time, temperature, and news, and temporary political campaign signs.

Metromedia, a company that was engaged in the outdoor advertising business in San Diego when the ordinance was passed, obtained an injunction in a state trial court, which concluded that the ordinance was facially invalid under the First Amendment's free speech clause as applied to the states and their cities through the Fourteenth Amendment's due process clause.

The state Supreme Court, however, set aside the injunction, holding that the ordinance was not facially invalid.

Holding to the contrary, we shall reverse and remand.

As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First Amendment forecloses similar interests in controlling their communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression.

Insofar as it regulates commercial speech — that is, speech that does no more than propose a commercial transaction, or at least relates solely to the economic interests of the speaker and his audience — the ordinance is not facially unconstitutional. It meets the requirements articulated in our cases, which consider whether the regulation of such speech (1) serves a substantial governmental interest, (2) directly advances such interest, and (3) is no more extensive than necessary.

First, the ordinance's stated purpose to improve traffic safety and the beauty of the surroundings comprises substantial governmental interests. It is far too late to contend otherwise with respect to either objective.

Second, the ordinance directly serves the substantial governmental interests in traffic safety and beauty. We hesitate to disagree with the accumulated, common sense judgments of local lawmakers that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. Nor do we find it speculative to recognize that billboards by their very nature, wherever located, can be perceived as an aesthetic harm. San Diego, like many other cities, has chosen to minimize the presence of such signs. Aesthetic judgments of this sort are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive of the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Metromedia nevertheless argues that San Diego denigrates its interests in traffic safety and beauty and defeats its own case by permitting on-site commercial billboards. The ordinance permits the occupant of property to use billboards located thereon, even if distracting and unattractive, to advertise goods and services there offered; similar billboards, even if attractive and not distracting, that advertise goods or services available elsewhere are prohibited. But, whether on-site commercial billboards are permitted or not, the prohibition of off-site billboards is directly related to the stated objectives of traffic safety and beauty. This is not altered by the fact that the ordinance is underinclusive because it permits on-site commercial billboards. In addition, the city has obviously chosen to value one kind of commercial speech — that one on-site billboards — more highly than another kind of commercial speech — that on off-site billboards. It has evidently decided that the private interest in on-site commercial speech, but not the private interest in off-site commercial speech, is stronger than its own interests in traffic safety and beauty. Hence, it has effectively decided that in a limited instance — on-site commercial billboards — its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its interests in this context

that it must give similar weight to all other commercial interests. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.

Third, the ordinance is no broader than necessary to accomplish the substantial governmental interests in traffic safety and beauty. Since San Diego has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously its most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of full accomplishment: It has not prohibited all billboards, but allows on-site commercial billboards and some others specifically excepted.

But, insofar as it bans noncommercial speech — including political speech, which deals with governmental affairs, and ideological speech, which concerns itself with philosophical, social, artistic, economic, literary, ethical, and similar matters — the ordinance is indeed facially unconstitutional.

The fact that San Diego may value commercial speech relating to on-site goods and services more highly than it values such speech relating to off-site goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. The First Amendment affords noncommercial speech a greater degree of protection than commercial speech. San Diego would effectively invert this state of affairs. The ordinance allows on-site commercial speech, but not noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why billboards with noncommercial messages would be more threatening to safe driving or would detract more from the beauty of the surroundings than billboards with commercial messages. Insofar as it tolerates billboards at all, it cannot choose to limit their content to commercial messages; it may not conclude that the communication of commercial messages concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Furthermore, because under the ordinance's specified exceptions San Diego allows some noncommercial messages on billboards, it must allow others. Although it may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech. With respect to noncommercial speech, it simply may not choose the appropriate subjects for public discourse. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for truth.

San Diego argues that the ordinance can be characterized as a time, place, and manner restriction that is reasonable and hence does not run afoul of the First Amendment. We disagree. The ordinance does not generally ban the use of billboards as an unacceptable "manner" of communicating information; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. Time, place, and manner restrictions are reasonable if they (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. Here, it cannot be assumed that alternative channels are available. Although, in theory, advertisers remain free to employ various alternatives, in practice they might find each such alternative either too costly or too ineffective or both.

Government restrictions on noncommercial speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all such speech carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since San Diego has concluded that its own interests are not as strong as private interests in the use of on-site commercial billboards, it may not claim that those same interests outweigh private interests in the use of noncommercial billboards.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

City Council v. Taxpayers for Vincent

United States Supreme Court (1984)

An ordinance of the City of Los Angeles prohibits the posting of signs on public property. Taxpayers for Vincent (Taxpayers), a group of supporters of Roland Vincent, a candidate for election to the Los Angeles City Council, entered into a contract with Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs bearing Vincent's name. COGS produced such signs and attached them to utility poles at various locations. Acting under the ordinance, city employees routinely removed all signs, including COGS' for Vincent, attached to utility poles and similar objects covered by the ordinance.

Taxpayers and COGS then filed suit in Federal District Court against the City of Los Angeles, alleging that the ordinance abridged their freedom of speech within the meaning of the First Amendment, and seeking damages and injunctive relief.

The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted a motion for summary judgment submitted by Los Angeles.

The Court of Appeals reversed, reasoning that the ordinance was presumptively unconstitutional on its face because significant First Amendment interests were involved, and that Los Angeles had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.

After careful consideration, we are of the opinion that the ordinance is not unconstitutional on its face. We are likewise of the opinion that it is not unconstitutional as applied to Taxpayers and COGS.

The First Amendment forbids the government to regulate speech in order to punish the speaker. This principle, however, is not applicable here, for there is not even a hint of punitiveness.

In sum and substance, the ordinance is a time, place, and manner restriction. A time, place, and manner restriction is reasonable under the First Amendment if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication.

It is plain to us that the ordinance is indeed reasonable.

First, the ordinance is justified without reference to the content of the regulated speech. It has nothing to do with the content of any speech on any sign. It has everything

to do with an attempt by Los Angeles to improve its appearance. Taxpayers and COGS concede as much.

Second, the ordinance is narrowly tailored to serve a significant governmental interest. Los Angeles has a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression. Its interest, as Taxpayers and COGS again concede, is basically unrelated to the suppression of ideas. The problem addressed by the ordinance — the visual assault on residents presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the city's power to prohibit. Indeed, we so held in *Metromedia, Inc. v. City of San Diego* with respect to billboards on private property. The validity of Los Angeles' aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. There is no basis for any conclusion that the prohibition against the posting of the signs of Taxpayers and COGS fails to advance the city's aesthetic interest. The ordinance curtails no more expressive activity than is necessary to accomplish its purpose of eliminating visual clutter. By banning posted signs, the city did no more than eliminate the exact source of the evil it sought to remedy.

Third, the ordinance leaves open ample alternative channels for communication. Indeed, the District Court so found, with substantial evidence in support. While a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate, the ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.

Although plausible policy arguments might well be made in support of the suggestion by Taxpayers and COGS that Los Angeles could have enacted an ordinance that would have had a less severe effect on expressive activity like theirs — such as by providing an exception for political campaign signs — it does not follow that such an exception is constitutionally mandated. Nor is it clear that such an exception would even be constitutionally permissible. To except political speech like that of Taxpayers and COGS and not other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. The city may properly decide that the aesthetic interest in avoiding visual clutter justifies a removal of all signs creating or increasing that clutter.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

National Advertising Company v. City of Orange

United States Court of Appeals for the Ninth Circuit (1988)

Aiming at traffic safety and aesthetics, an ordinance of the City of Orange, California, bars off-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises upon which such sign is located*." (Italics added.) It excepts certain governmental signs, memorial signs, recreational signs, and temporary political, real estate, construction, and advertising signs. By contrast, it permits on-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *on the premises upon which such sign is located*." (Italics added.)

National Advertising ("National") applied for a permit to erect off-site billboards in Orange. Under compulsion of the ordinance, the city denied its application.

National filed suit in district court against Orange alleging that the ordinance was unconstitutional on its face and seeking declaratory and injunctive relief. It moved for summary judgment. The district court granted its motion. It declared the ordinance unconstitutional, and ordered the city to process National's application without regard thereto. The city appeals.

Orange interprets the ordinance to prohibit only off-site billboards relating to commercial activity. The plain language of the ordinance precludes this interpretation. The ordinance bans off-site billboards relating to a "business, commodity, industry *or other activity* which is sold, offered or conducted elsewhere than on the premises . . . ." The city interprets "activity" to mean only *commercial* activity. It is settled, however, that, in ordinances of this sort, "activity" is not so limited. The exceptions to the ban allowed in the ordinance reveal the lack of such a limitation. Indeed, many involve noncommercial activity. They would be rendered meaningless by the city's interpretation. We construe the ordinance as prohibiting *all* off-site billboards relating to activity not on the premises on which the sign is located, with the exceptions specified, and permitting *all* on-site billboards relating to activity on the premises. Whether the message on the billboards is commercial or noncommercial is irrelevant: both commercial and noncommercial messages are permitted if they relate to activity on the premises and prohibited if they do not.

Standards for assessing the constitutionality of billboard restrictions are found in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego* and *City Council v. Taxpayers for Vincent*.

Under these standards, Orange's ordinance is valid as applied to billboards with commercial messages. The city may prohibit such billboards entirely in the interest of traffic safety and aesthetics, *Metromedia, Inc. v. City of San Diego*; *City Council v. Taxpayers for Vincent*; and may also prohibit them except where they relate to activity on the premises on which they are located, *Metromedia, Inc. v. City of San Diego*.

Stricter standards apply to the restriction of billboards with noncommercial messages. Under *Metromedia, Inc. v. City of San Diego*, an ordinance is invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages, or if it regulates billboards with noncommercial messages based on their content. We need not decide whether the ordinance passes the first test, because it clearly fails the second.

Merely treating billboards with noncommercial messages and billboards with commercial messages equally is not constitutionally sufficient. The First Amendment affords greater protection to noncommercial speech than to commercial, *Metromedia, Inc. v. City of San Diego*. Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Ibid*.

Thus, under *Metromedia, Inc. v. City of San Diego*, although Orange may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. The ordinance breaches this basic principle.

The exceptions to the ordinance's restrictions, like those before the *Metromedia* Court, require examination of the content of noncommercial messages. In most instances, whether off-site billboards with noncommercial messages are allowed turns on whether they convey messages approved by the ordinance.

The First Amendment forbids the regulation of noncommercial speech based on its content. Because the exceptions to the ordinance's restriction on noncommercial speech are based on content, the restriction itself is based on content.

The First Amendment might tolerate the regulation of noncommercial speech based on its content if the government were to establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. Orange cannot do so. Its allowance of some off-site billboards with noncommercial messages is evidence that its interests in traffic safety and aesthetics, while substantial, fall shy of compelling.

Orange is not powerless to regulate off-site billboards with noncommercial messages. It remains free to redraft its ordinance to conform to the First Amendment by avoiding content-based distinctions in its treatment thereof.

The judgment is affirmed.

Desert Outdoor Advertising, Inc. v. City of Moreno Valley

United States Court of Appeals for the Ninth Circuit (1996)

The City of Moreno Valley has enacted an ordinance regulating billboards. The ordinance regulates both "off-site" and "on-site" billboards. Off-site billboards may include commercial or noncommercial messages. On-site billboards may contain only commercial messages. The ordinance imposes different restrictions on off-site and on-site billboards. As a general matter, an off-site billboard may be erected and maintained only if the Director of Public Works issues a permit after finding that the billboard will not have a harmful effect upon the health or welfare of the general public, will not be detrimental to the welfare of the general public, and will not be detrimental to the aesthetic quality of the community or the surrounding land uses. By way of exception, an off-site billboard may be erected and maintained without such a permit for official notices, directions, and signs for civic or fraternal organizations. An on-site billboard can always be erected and maintained without such a permit.

Threatened with administrative proceedings to compel the removal of off-site billboards that they erected and maintained without permits, Desert Outdoor Advertising, Inc. ("Desert") and Outdoor Media Group, Inc. ("OMG") filed this action against Moreno Valley in United States District Court, challenging the constitutionality of the ordinance under the First Amendment. The city moved for summary judgment. The district court granted the motion, and rendered judgment accordingly. Desert and OMG now appeal.

Desert and OMG contend that the ordinance violates the First Amendment in its permit requirement because it gives unbridled discretion to Moreno Valley's Director of Public Works.

Under the ordinance, a person must generally obtain a permit from the Director of Public Works before erecting an off-site billboard. The Director has discretion to deny a permit on the basis of ambiguous and subjective reasons — for example, that the billboard will have a harmful effect upon the health or welfare of the general public *or* will be

detrimental to the welfare of the general public *or* will be detrimental to the aesthetic quality of the community or the surrounding land uses.

But any law — including the ordinance here challenged — that subjects the exercise of First Amendment freedoms to the prior restraint of a permit, without narrow, objective, and definite standards to guide the permitting authority, is violative of that amendment.

The ordinance contains no limits on the authority of Moreno Valley's Director of Public Works to deny a permit for an off-site billboard. The Director has unbridled discretion in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Moreover, the Director can deny a permit without offering any evidence to support the conclusion that a particular billboard is detrimental to the community. Moreno Valley claims that the Director's discretion in this regard is no more problematic than that of all such officials who must review and approve a billboard's design in order to determine whether it is consistent with its surroundings in size, shape, color, and placement. We disagree. Over the years, design review and approval has given rise, in practice, to standards that have become known to both regulating and regulated parties, and that have generally been applied without substantial controversy. The fact is proved by the presence in many ordinances of provisions simply subjecting billboards to design review and approval for "consistency with their surroundings in size, shape, color, and placement," without more — and by the absence of any significant litigation challenging the lawfulness of such review and approval. There are no such standards, however, to guide the Director in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Thus, we conclude that the ordinance violates the First Amendment in its permit requirement.

Desert and OMG next contend that the ordinance violates the First Amendment as an undue regulation of commercial speech.

To be valid under the First Amendment, as *Metromedia, Inc. v. City of San Diego* holds, an ordinance that regulates commercial speech must (1) serve a substantial

governmental interest, (2) directly advance such interest, and (3) be no more extensive than necessary.

As the party seeking to regulate commercial speech, Moreno Valley has the burden of establishing that the ordinance meets each of these three elements.

Desert and OMG argue that Moreno Valley has failed to carry its burden as to the existence of a substantial governmental interest. We agree.

Although aesthetics and safety represent substantial governmental interests, as the court in *Metromedia, Inc. v. City of San Diego* made plain, in this case, Moreno Valley has not established that it enacted the ordinance to further any such interests. It did not incorporate any statement of purpose concerning either interest in the ordinance. Furthermore, it did not provide any evidence that the ordinance actually promotes either one.

Desert and OMG also contend that the ordinance violates the First Amendment because it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages.

Under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages. We find the ordinance wanting in this respect.

Under the ordinance, off-site billboards, which alone may include noncommercial messages, generally need a permit by the Director of Public Works, whereas on-site billboards, which may include only commercial messages, do not.

Desert and OMG then contend that the ordinance violates the First Amendment because it regulates billboards with noncommercial messages based on their content.

Here too, under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it regulates billboards with noncommercial messages based on their content. We find the ordinance wanting in this respect as well.

Under the ordinance, an off-site billboard, which alone may include noncommercial messages, cannot be erected and maintained without a permit by the Director of Public Works — except for official notices, directions, and signs for civic or fraternal organizations. Because the ordinance effectively requires the Director to examine the content of the billboard to determine whether or not it is excepted, its regulation of any noncommercial speech is content-based.

The ordinance might be saved in spite of its content-based regulation if Moreno Valley could establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. The city cannot do so. It failed to present any evidence that the ordinance promoted a substantial governmental interest, much less a compelling one.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

ANSWER 1 TO PERFORMANCE TEST - A

MEMO

TO: Judith M. Schelly
FROM: Applicant
DATE: July 30, 2002
RE: In re Thomas Outdoor Advertising

You have asked me to prepare a memorandum analyzing the constitutionality of the proposed ordinance and identifying some specific modifications that can be made. I hope the following helps in your meeting with the City Attorney. We should talk after the meeting about what further steps to take in this matter.

The Constitutionality of the Proposed Ordinance

You have asked me to identify and evaluate the arguments that can be made in support of the position that the ordinance is unconstitutional. The following are the strongest arguments against the constitutionality of the proposed ordinance, although I also note places in which the ordinance appears to conform with constitutional requirements.

A. The Proposed Ordinance Constitutes an Unconstitutional Regulation of Commercial Speech.

The Supreme Court in Metromedia confronted the unconstitutionality of an ordinance much like this one and provided the operative framework for analysis. The ordinance in Metromedia, like the proposed ordinance in Benton, permitted on-site commercial

billboards, while it forbade off-site billboards of both a commercial and non-commercial nature (with specified exceptions).

The Court first noted that the ordinance, although directed at non-communicative aspects of the billboards, also impinged upon communicative aspects. Therefore, it had to comply with First Amendment restrictions on the regulation of commercial speech. The same is true here.

With respect to the regulation of commercial speech, the Metromedia Court followed a 3-part test to determine whether the regulation was unconstitutional. The 3-part analysis will form the decision here as well.

1). The Regulation Must Serve a Substantial Governmental Interest:

The first principle that applies is the "substantial governmental interest test." The Court has generally found that traffic safety and aesthetics constitute substantial government interests. See Metromedia, Vincent. However, courts have required that the government do more than mer[e]ly state such interests – the government should include a statement of propose to that effect and provide evidence that the ordinance actually promotes these interests. See Desert.

In this case, no such substantial government interest can be shown – at least with regard to traffic safety. The Historical District Ordinance clearly provides that there is to be no vehicular or motorized traffic in the Historical District, except during specified hours and for governmental servic[e]s. In these limited cases, it is unlikely that the presence of these billboards would pose a serious traffic hazard.

Although the Court has been fairly deferential with respect to the government's interest in traffic safety and aesthetics, you should point out to the City Attorney that hazards to pedestrian traffic are unlikely. Moreover, you could take some wind out of their "unsightliness" sail by pointing out that our client's billboards will blend in with the exterior of the buildings – all of which have been approved under the Historic[al] District Ordinance.

2). The Ordinance Must Directly Advance Such Legitimate Government Interest.

The Metromedia Court easily found that a prohibition on certain commercial billboards served an interest to traffic safety and aesthetics. It noted, however, that in that case there was no claim of any ulterior motive of the suppression of speech. You should point out to the City Attorney "that [t]he First Amendment forbids the government to regulate speech in order to punish the speaker." Vincent. In this case, unlike both Metromedia and Vincent, there is plenty of evidence to suggest that Council Member Hemphill is merely trying to suppress the speech of Patrick Curtan.

Thus, a court might well find that the ordinance is actually directed at an ulterior motive – suppressing Curtan – which would take this case outside the protection of Metromedia and Vincent. The City Attorney is likely well-aware of the public impression, as expressed in D'Orazio's article, that Hemphill is just waging a very public feud with Curtan.

3). The Ordinance Must Not Be Moe Extensive Then Necessary.

The City will likely be able to argue that because it presumptively could ban all commercial messages, it is able to ban some "off-site" commercial messages, and that it is no more extensive then necessary.

You should again remind the City Attorney that this traffic safety rationale may not get them very far – pedestrians are unlikely to be harmed by the presence of the billboards and, if so, perhaps minimum light restrictions would do the job.

Moreover, there has been no showing of unsightliness or aesthetic need. Although this is not our strongest point of the argument, the earlier précis should convince the City Attorney that they have some major problems.

B. The Proposed Ordinance Constitutes an Unconditional Regulation of Noncommercial Speech.

This ordinance falls squarely within Metromedia and its progeny to the extent that it bans noncommercial speech, including political and ideological speech. The City may try to argue, as did the proponents in National Advertising, that the ordinance applies only to off-site commercial billboards, but this argument is clearly rebutted by the plain language of the statute (Sections 2 (C) and 3 (B)).

It is a well-settled principle that the First Amendment affords non-commercial speech a greater degree of protection than commercial speech. Metromedia . When a statute attempts to regulate non-commercial speech, as here, it is subject to challenge or invalidation on 2 bases. Thus, an ordinance is invalid if it imposes greater restrictions on billboards with non-commercial messages than on billboards with commercial messages or if it regulates billboards with non-commercial messages based on their content. The Benton ordinance does both and is invalid on either ground.

1). The Ordinance Imposes Greater Restitution On Non-Commercial Speech.

The ordinance allows for certain commercial speech – on-site commercial billboards – while restricting almost all non-commercial speech. This was precisely the fact submitted in Metromedia and the Court declared such content-restriction impermissible. Indeed, if the on-site commercial billboards are not a threat to either aesthetics or traffic safety, why would non-commercial on-site billboards pose such a threat? Because the ordinance only allows for on-site commercial messages, without allowing for on-site non-commercial messages, it runs afoul of Metromedia.

2). The Ordinance Regulates Billboards with Non-Commercial Messages Based On Their Content.

Content-based restriction of non-commercial speech is subject to the strictest of scrutiny and stands little chance of survival. Indeed, the government simply "may not choose the appropriate subjects for public discourse." See Metromedia; Orange.

The Benton ordinance allows exceptions from the ban for certain non-commercial speech-billboards with commemorative historical signs, etc. However, such choice among the appropriate subjects for public speech is impossible. The exceptions allowed in the ordinance are similar to those that were allowed – the ordinance that the Court struck down – Metromedia. The City Attorney should be made aware of such a glaring precedent that is directly opposed to the constitutionality of this ordinance.

C. The Ordinance Is Not a Valid Time, Place and Manner Regulation.

The City Attorney is likely to argue, as he did in your phone conversation, that this is merely a regulation of the time, place and manner of speech in the Historical District. You will be armed with a lot of case law to suggest the contrary.

A 3-part test applies in order to determine whether an ordinance can be qualified as a time, place and manner restriction, which are [sic] generally upheld under the First Amendment. Again, this 3-part framework will guide my analysis.

1). The Ordinance Must be Justified Without Reference to the Content of the Regulated Speech

The City Attorney will try to argue that this case falls within Vincent, perhaps the most famous time, place and manner case. In Vincent, however, the ordinance at issue banned the posting of any and all signs on public property. No signs were excepted – not for political speech or any other reason. The Court in that case easily [found] that the ordinance had nothing to do with the content of the speech in the sign.

Without being too redundant, the ordinance clearly chooses to allow some billboards – i.e., on-site commercial billboards – but not others, based upon the content of the billboard. This case, therefore, is more like Metromedia, in which the Court rejected a time, place and manner regulation. Because it chooses to allow some speech and not others, based on content, the ordinance fills the first privy.

2). The Ordinance Must Be Manually Tailored to Give A Significant Governmental Interest.

As discussed above, it is questionable as to whether the City's given reasons will qualify as "substantial" general interests. However, Vincent does stand as good precedent for the City's argument that aesthetics and traffic safety are substantial governmental interests. However, Vincent again noted that the ordinance at issue there was not related to suppress[ion] ideas and clearly served to reduce visual clutter by prohibiting all signage.

You should point out to the City Attorney that the connection in this case is more tenuous. Some billboards clearly will remain – although the Court has rejected arguments based on "underinclusiveness". You should still argue to him that the government's interest may not be found to be "substantial." Moreover, we can show a pretty clear interest on their part – suppressing ideas, so the link may be fairly weak. They might satisfy this privy, but it's a risk on their part.

3). The Ordinance Leaves Open Alternative Channels for Communication.

Here the City Attorney will point out hat there currently are not many billboards in Historic District and so people do have other means of communication. However, the Court has held that a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. Vincent. Indeed, the Court in Metromedia, faced with a very similar statute, found that other alternatives might be too costly or too ineffective (or both), so there were not adequate alternative modes of communication.

You should take with you the Columbia Outdoor Advertising Fact Sheet to show the substantial benefits and effectiveness of billboard advertising. Moreover, as the Historical District begins to grow and renew itself, business arriving need a cheap and effective way of attracting business – thereby serving both the City's and the businessmen's interests. A Court could well find that there not other adequate means of communication – given that

walking pedestrian traffic is the primary means of exposure to Historic District businesses. Thomas is doing his part to rejuvenate the District – in an aesthetically pleasing manner, and should be portrayed as a benefit to the City.

1). Strict Scrutiny Has Not Been Met Because The Ordinance is Not Necessary to Serve A Compelling Government Interest and is Not Narrowly Drawn.

The ordinance would be subjected to strict scrutiny as a content-based regulation of non-commercial speech and without the protection of a time, place and manner characterization.

Here you should simply stress to the City Attorney – as I'm sure he is aware – how difficult it is to meet strict scrutiny test in the area of the First Amendment Freedom of speech. For all the reasons given above, strict scrutiny clearly is not met in this case.

E. .... The Ordinance Gives Unbridled Discretion to the Director of Public Works.

Any law that subjects the exercise of First Amended freedoms to a prior restraint without narrow, objective and definite standards is violative of the 1st Amendment. Desert. This ordinance does not require that one gain a permit in order to post a billboard; however, compliance with the ordinance is determined by the Director of Public Works, who can declare a billboard to be a public nuisance and have it removed. This, the ordinance falls within the Desert standard.

There does not appear to be any restriction in the Director's decision, except that he must determine whether the billboard falls with the bounds of the ordinance. The City Attorney will likely be able to argue that the ordinance itself provides the narrow, objective and definite standards required under Desert. Nonetheless, you should point out that vesting

such authority in one public official, without allowing for a hearing or prudent review or other determination of the validity of his assessment may run afoul of the Constitution.

Conclusion

I have tried to outline our strongest arguments against the constitutionality of the ordinance -- and they are strong indeed. While the City will be able to gain some "points" in some minor areas, the analysis suggests that the ordinance does not pass muster as currently written. You should press this point hard in arguing for some of the modifications I suggest, which will serve Thomas' goals as well.

II. Specific Modifications That Can Be Made to the Ordinance

You have asked me to identify and discuss some modifications that will both serve Thomas' and the City's goals, while passing Constitutional muster. I will first identify those goals as I see them and then some ways to serve these goals.

A. Thomas' Goals

Our client has invested a substantial sum of money into his billboard business and wants to get the maximum return possible in that investment. He has leased a substantial amount of space in the Historical District, which he'd like to be able to use for some revenue – generating purpose and he has manufactured the long-lasting billboard structures at substantial cost. Thomas' goal is to get the most use out of the leased space and the manufactured billboard structure as possible, while still providing jobs for his employees and, of course, trying to make some profit for himself.

I think Thomas also has a more general goal of rejuvenating business in the Historic District, which should coincide with the City's goals to some degree. His emphasis on having a local "niche," along with his aesthetically–pleasing plans suggest that he wants to keep the Historical District clean and pleasing to the eye as much as the City does. This should help his business, as well as the businesses he promotes.

B. The City's Goals

The City's stated goals are to reduce or eliminate aesthetic blight in the Historical District caused by visual clutter, while also reducing traffic safety hazards because of visual destruction clutter, while also reducing traffic safety hazards because of visual distraction. I think it is safe to surmise that the City also has some interest in reducing the number of Curtan-owned and operated billboards in the Historical District. He seems to be quite a controversial and flamboyant character, which the City feels will be off-putting to the shoppers and visitors they hope to attract. Thus, we can also suppose that the City has a goal – along with Thomas – of rejuvenating the Business District, attracting revenue, tourism and commercial business to this area. All of this must be done tastefully, while meeting the aesthetic integrity established in the earlier Historical District Ordinance.

C. Proposed Modifications

1). Design and Review Board

Perhaps the most obvious, affective and acceptable modification for all parties would be to establish a "design & review procedure for the issuance of billboard permits. Because this would raise the issue of prior restraints of speech, it would have to comply with strict requirements as set forth in Desert Outdoor Advertising.

Something like the design and review procedure that applies for buildings in the Historical District should work. The ordinance provides for regulation according to such measures as size, shape and color. The same could constitutionally be done with respect to billboards. As the Court in Desert noted, many ordinances contain provisions subjecting billboards to design and review approval – and such provisions have gone unchallenged. That would provide the required narrow, objective and definite standard so as to guide the decision maker's process – there would be no need of "unbridled discretion."

Although Mr. Curtan might not pass such a design & review inspection, that is his problem – not ours. Thomas' billboards have been specifically manufactured so as to pass any such review. His goals would be met and the City would have little room to complain – they would be aesthically pleasing, pose little risk to passers-by, and would attract business and help establish business districts.

2). A less acceptable proposal would be to have the ordinance simply eliminate all commercial speech, but allow all non-commercial speech. As discussed above, the government has greater freedom to regulate commercial speech and likely could prohibit all such billboards. The government runs into problems, however, when it places greater restrictions on non-commercial speech than on commercial speech, as well as when it allows some but not all non-commercial speech.

Although constitutionally permissible, this modification doesn't serve anyone's goals as fully as the first proposal. The City would like to attract businesses and would not want to

increase the Curtan-type expression. Although Thomas is likely neutral as to who buys his billboard space, he might lose out to the wealthy and freewheeling Curtan in the area of non-commercial billboards. Thus, this is not a happy solution.

3). Another proposal would be to limit the number of billboards owned by any one individual. It's a bit tough to see how this would work, but there is a chance. First, as part of a general "design and review" scheme, The City could limit the total number of billboards on any one building, or within any certain square–feet distance. This could generally be constitutional either as a valid time, place or manner restriction or as a design and review qualification.

Thus, the City could impose a restriction and how many billboards any one individual could own. Thomas would "sell" the space to others, such as concerned business owners, so they would be the owners. Most would likely own only one or two spaces. However, Curtan would be limited to his personal advertising space – thereby serving a significant goal of the City. His type of obnoxious advertising as personal propaganda would be held to a minimum.

4). The final proposal, that the City prohibit all outdoor advertising, is the worst of all and should not even be discussed. It would devastate our client, who has valid constructional obligations and business interests at stake, and it is simply not an acceptable solution. Nor would or should the City endorse such an idea, given their interest in attracting business activity and shoppers to the District.

ANSWER 2 TO PERFORMANCE TEST - A

TASK ONE

INTRODUCTION

You have asked me to prepare a memo discussing the constitutionality of the proposed ordinance relating to outdoor advertising drafted by the City of Benton. The proposed ordinance regulates the use of billboards in the Benton historical district. Section 3 of the proposed ordinance allows any person to erect or maintain an on-site commercial billboard but prohibits any off-site commercial or non-commercial billboard with several exceptions including historical signs, service club signs or time, temperature, and news signs. On-site billboards are those whose message relates to business conducted on the parcel on which the billboard is located. Off-site billboards are those which have messages relating to business or any other activity that is not conducted on the property where the billboard is located.

CONSTITUTIONAL REGULATION OF COMMERICAL SPEECH

The proposed ordinance attempts to regulate commercial speech in the historical district. According to the Supreme Court in *Metromedia v. City of San Diego* commercial speech may be regulated if it (1) serves a substantial government interest, (2) directly advances such interest and (3) is no more extensive than necessary. In *Metromedia* the Court considered an ordinance that sought to eliminate hazards to pedestrians and motorists brought about by distracting displays and to preserve and improve the City's appearance. The ordinance permitted on-site commercial billboards advertising goods or services available on the property but prohibited off-site billboards unless they fell into one of several exceptions such as time, temperature and historical signs, among others. The Court noted

that the City had a substantial interest in traffic safety and the aesthetics of the City. Also the Court recognized that the ordinance directly served the interests of safety and beauty because there was no evidence that the City had a motive to suppress speech. The Court stated that it would defer to interests of local lawmakers as to what constitutes a traffic hazard or aesthetic harm. Finally, the Court ruled that the law was no broader than necessary to achieve the government interest in safety and beauty. Thus, the Supreme Court held the ordinance to be a valid restriction on commercial speech in *Metromedia.*

In the instant case, the ordinance is very similar to the one before the Supreme Court in *Metromedia.* On-site commercial billboards are allowed while off-site billboards are prohibited, with a few exceptions such as historical signs or time and temperature signs. Although the *Metromedia* court recognized traffic safety and aesthetics are substantial government interests there is some question as to whether those interests apply. The proposed ordinance states in Section 1 that lack or regulation of billboards poses traffic safety hazards and is necessary to prevent those hazards. However, the City of Benton passed a[n] historical district ordinance and in Section 1 its legislative findings did not mention that traffic safety was a concern. In Section 2 of that ordinance subsections F and G limit traffic to pedestrians and emergency vehicles except between 2:00 a.m. and 7:00 a.m. for deliveries. It doesn't appear that traffic is at all a concern in the historical district so it is not likely that billboards would create any safety hazards. The proposed ordinance also mentions that aesthetics are a big concern of the City Council. In the legislative findings of the historical district ordinance there is a statement that preservation [of] the aesthetic integrity is essential for the historical district.

Most likely the Court would hold that the proposed ordinance is a valid commercial speech regulation because there is at least one substantial State interest implicated. Even though traffic safety is not a legitimate concern here the aesthetic standards are still a substantial interest for purposes of commercial speech.

REGULATION OF NON-COMMERCIAL SPEECH

In *Metromedia* the Court held that even though the ordinance was a valid commercial speech regulation that it was facially unconstitutional insofar as it banned non-commercial speech. The Court was quick to point out that the First Amendment affords non-commercial speech a greater degree of protection than commercial speech. In *Metromedia* the ordinance at issue allowed on-site commercial speech but not non-commercial speech. The Court declared that the ordinance was unconstitutional because the City failed to explain how or why billboards with non-commerical messages would be a bigger threat to safe driving or aesthetics. Another reason that the Court struck down the ordinance was that it allowed specific exceptions for some off-site non-commercial speech. The Court held that the First Amendment prohibits such content-based restrictions, stating that "to allow a goverernment the choice of permissible subjects for public debate would be to allow that government control over the search for truth."

In *Metromedia* the City tried to argue that the ordinance was a valid time, place, and manner restriction that did not violate the First Amendment. The Court disagreed because such restrictions are reasonable only if (1) they are justified without reference t[o] the content of the regulated speech, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication. According to the *Metromedia* Court the ordinance failed to leave alternative channels open because advertisers might find the alternatives too costly or too ineffective or both. In addition, as mentioned above, the exceptions for off-site billboards required the government to discriminate on the basis of content.

The Regulation of Non-Commercial Speech Is Facially Invalid

The proposed ordinance will most likely be an unconstitutional regulation on non-commercial speech. Just as in *Metromedia*, Benton does not explain why on-site billboards

with non-commercial messages would be a threat to aesthetics while commercial billboards will not. This is probably an impermissible content-based regulation of non-commercial speech. Furthermore, as was the case in *Metromedia*, Benton's proposed ordinance allows some non-commercial messages on off-site billboards. In Section 3 sub-section B, it limits the non-commercial messages to commemorative historical signs, service club signs, or signs depicting time, temperature, and news. Clearly, the exceptions would require the City to choose the content of the non-commercial messages which would be unconstitutional.

The Ordinance Discriminates On The Basis Of Content And Is Unconstitutional

In rare cases it is permissible to regulate non-commercial speech based upon its content. In *National Advertising Company v. City of Orange,* the Ninth Circuit struck down a law which permitted on-site billboards but prohibited off-site billboards with exceptions for government signs, recreational signs, political signs and a few other types of signs. The plaintiff, an advertising company, applied for a permit to erect off-site billboards and was denied, and brought suit challenging the statute. Essentially, the ordinance allowed commercial speech and non-commercial messages on on-site billboards but restricted non-commercial speech on off-site billboards. In *Orange* the Court declared that because stricter standards apply to the restriction of non-commercial speech an ordinance is invalid if it imposes greater restrictions on non-commercial speech than commercial speech or if it discriminates based on content with regard to non-commercial speech. Ultimately the Court held that the City's ordinance was invalid because the exceptions to the restrictions on non-commercial messages necessarily required examination of the content of the messages. Such content-based restrictions will almost always violate the First Amendment.

In *Orange* the Court stated that "the First Amendment might tolerate the regulation of non-commercial speech based on its content if the government were to establish that it is necessary to compelling governmental interest and that it is narrowly drawn to achieve that

end." Finally, the Court concluded that State interest in traffic safety and aesthetics are not compelling.

Our situation presents similar issues to those resolved in *Orange.* The proposed ordinance clearly allows for commercial speech in on-site billboards and prohibits non-commercial speech on both on-site and off-site billboards. The proposed ordinance places greater restrictions on non-commercial speech as well as discriminating based on content against non-commercial speech. The only interest implicated in Benton's proposed ordinance is aesthetics, and as the Court in *Orange* noted, this is not a compelling State interest. Hence, the law would not survive strict scrutiny as a content-based regulation.

Benton's proposed ordinance could not be characterized as a valid time, place, and matter regulation. As discussed above, the ordinance requires reference to the content of the speech, so it would fail the first part of the test. In addition, it is not clear that the proposed ordinance will leave open ample alternative channels for communication. According to the Columbia Outdoor Advertising Association Fact Sheet, billboards are more affordable than other media as judged by the cost of reaching their audience. In addition, they quickly build awareness, create continuity of a brand or message, are adaptable, and provide geographic and demographic flexibility. In other words, it is highly unlikely that advertisers will be able to find a medium as effective for communication of their messages in that the proposed ordinance would deprive both the public and the advertisers of an irreplaceable forum.

DISCRETION OF OFFICIALS ENFORCING THE ORDINANCE

Ordinances that regulate speech may be unconstitutional if they allow public officials too much discretion in enforcing them. In *Desert Outdoor Advertising v. City of Moreno Valley,* the Ninth Circuit considered an ordinance regulating off-site and on-site billboards. Off-site billboards could include commercial or non-commercial messages while on-site billboards

could only contain commercial speech. The ordinance also required the Director of Public Works to issue a permit for any off-site billboard after the finding that the billboard will not be detrimental to the public health or welfare and aesthetic quality of the community. Off-site billboards could be erected without a permit if they qualified for an exception for official notice, directions, and signs for civic organizations. On-site billboards could always be erected without a permit.

The Court was concerned because the Director of Public Works had discretion to deny a permit for off-site billboards based on ambiguous and subjective reasons such as a harmful effect upon the health or welfare of the public. The Court stated that any law that subjects the exercise of First Amendment freedoms to the prior restraint of a permit must have narrow, objective, and definite standards to guide the permitting authority. In *Moreno Valley* the Director of Public Works had unbridled discretion in determining whether a billboard would violate the community's health, welfare, or aesthetic quality. There were no standards to guide the Director in making a determination whether a billboard would harm a community's health, welfare or safety. The Court held that the ordinance violated the First Amendment in its permit requirement.

The Ordinance Gives The Director Of Public Works Too Much Discretion

We have a very similar situation to that addressed by the Court in *Moreno Valley.* Here, the proposed ordinance in Section 4 entitled Declaration of Public Nuisance and Removal declares as a public nuisance any billboard erected in violation of the provisions of the ordinance. Furthermore, Section 4 also authorizes the Director of Public Works to immediately remove any billboard found to be a public nuisance. Unlike the situation in *Moreno Valley,* here the Director does not have completely unlimited discretion to strike down a billboard. Rather, the standards with which the Director must comply are set forth in the proposed ordinance Section 2. However, the Director has almost unlimited discretion to

determine whether a billboard is off-site or on-site, which will substantially determine whether it is permissible or not. In other words, it appears that the Director has very broad authority to declare something an off-site billboard to keep it from being erected. Thus, there is a good argument that this violates the First Amendment because it gives the Director too much discretion to regulate the billboards that may be erected in the historical district.

PUNITIVE NATURE OF PROPOSED ORDINANCE

Where an ordinance regulates speech in order to punish the speaker the ordinance will violate the First Amendment. In *City Council v. Taxpayers for Vincent,* the Supreme Court ruled that an ordinance prohibiting the posting of signs on public property in the City of Los Angeles did not violate the First Amendment. In *Vincent*, supporters of a candidate for election to the City Council posted signs bearing the candidate's name and the City removed the signs pursuant to the ordinance. The Supreme Court ultimately held that the ordinance was not unconstitutional on its face or as applied. In *Vincent* the Court warned that the First Amendment forbids the government to restrict speech for the purpose of punishing the speaker. There was no hint of punitiveness in the law the Court considered in *Vincent.*

The Court held that the ordinance was a reasonable time, place, and manner restriction. The Court decided that the ordinance was justified without reference to content because it prohibited all signs for aesthetic reasons. Second, the Court reasoned that the ordinance was narrowly tailored to serve a significant government interest because Los Angeles had a weighty aesthetic interest in preventing intrusive and unpleasant formats for expression. The City's interest was unrelated to the suppression of expression and the City accomplished that interest by banning posted signs. Finally the Court stated that the ordinance left open ample alternative channels of communication because it did not affect

any individual's freedom to speak and to distribute literature where the signs were prohibited. The Court was careful to note that complete bans of signs on public property such as the one in *Vincent* were constitutional but ordinances that provide exceptions for political campaign signs or other categories of speech would likely be unconstitutional because they are content-based restrictions.

Proposed Ordinance Is Punitive In Nature And Unconstitutional

The proposed ordinance is not a valid time, place and manner restriction. First, there are punitive aspects to the City Council's proposed statute. In Section 5 of the proposed ordinance, subsection A declares that every person responsible for erecting and/or maintaining any billboard declared a public nuisance is liable for any and all expenses incurred in removal. Subsection B states that every person responsible for putting up a billboard later declared a public nuisance is subject to a fine not exceeding $10,000. These two subsections are largely punitive in nature and give the Director of Public Works discretion to impose a fine of up to $10,000. There does not seem to be any purpose for these provisions except to penalize and punish someone who violates the statue. In addition, in the July 15th *Benton Express* an article about the billboards reports that City Council member Sonia Hemphill urged the City Attorney to draft legislation to prevent Patrick Curtan from posting billboards in the historical district. Thus, the underlying purpose of the proposed ordinance seems to be to punish Curtan for his idiosyncratic billboard messages. Because of the hefty fines and the desire to keep Curtan from posting his public interest messages the statute probably violates the First Amendment because it is punitive. It would also fail as a time, place and manner regulation as discussed above.

CONCLUSION

The City of Benton's proposed ordinance will most likely be declared unconstitutional on several grounds. First, it is facially unconstitutional because it places greater restrictions on non-commercial versus commercial speech. Second, the exceptions to the ordinance for off-site billboards require discrimination based on the content of the non-commercial speech. Content-based restrictions must pass strict scrutiny, which the law undoubtedly could not. Third, the ordinance seems to be punitive in nature, to prevent Curtan from expressing himself on billboards as well as imposing large fines on any violators. Finally, the statute gives the Director of Public Works too much discretion in deciding what billboards will pass muster. As a result, without modification the statute will be struck down on First Amendment grounds.

TASK TWO

STEPHEN THOMAS' STATED GOALS

Thomas owns an outdoor advertising agency and has leased many of the best sites in the historical district of Benton to use for billboard space. The leases he entered were long term leases, generally for 25 years, and he guaranteed the lessors fixed minimum payment with increased payments as revenues increased. Thomas also manufactures billboard structures that are durable and will last for at least 25 years. Furthermore, he came up with unique designs that will conform to their surroundings. He also intends his billboards to be seasonal, in that spirit of the local festivities such as Halloween and Thanksgiving. Thomas also would like to advertise groups of stores to create districts similar to the ones in midtown Manhattan. In other words, he would like to create sub-districts within the historical district such as antiques, gourmet, arts and other types of sub-districts to enable the area to flourish. Thomas points out that when you have districts of stores that [sic] each business will get more customers despite the increased competition than it would have otherwise gotten. Thomas realizes that there are aesthetic and traffic concerns. He would not object

to regulation of the appearance of the billboards because appearance is exactly what he is selling.

BENTON'S CONCERNS AND PROBLEMS

For many years the City of Benton and its businesses were in decline. Following the establishment of the historical district, the City experienced a remarkable turnaround, attracting many visitors to craft stores, antique stores, art galleries, inns and restaurants. The City is particularly concerned that any outdoor advertising might negatively affect aesthetic values and traffic flow in the historical district. In addition, the City Council is worried that controversial advertising might offend or upset some visitors. The City Council wants to permit steady economic growth for Benton's residences and businesses and financial stability for the government itself.

PROPOSED MODIFICATIONS TO ORDINANCE

Design Review And Approval For Consistency With Surroundings

In *City of Moreno Valley,* the Ninth Circuit suggested that design review and approval of billboards does not violate the First Amendment where there are objective and definite standards to guide the regulatory bodies. The Court referred to the presence in many ordinances of provisions subjecting billboards to design review and approval for "consistency with their surroundings, size, shape, and placement." Such restrictions will most likely be lawful because they provide reasonable standards.

In Benton's historical district ordinance Section 2, subsection C contains a provision that requires design, review and approval for consistency with surroundings, size, shape, color, and placement for any modification or construction of buildings in the historical district. These types of design and approval measures are not unconstitutional because they are not aimed at suppressing any type of speech. If the proposed legislation were modified to require any billboards in the historical district to meet with the standards of size, shape, color and placement, that would be constitutional. In addition, the modification would satisfy both the City's and Thomas' needs and desires. For instance, this modification would ensure that the billboards are aesthetically pleasing and match their surroundings, which would alleviate the City's concerns about preserving the aesthetic character. Furthermore, Thomas indicated that his billboards were designed to blend in with their surroundings and he would welcome such an approach that requires approval based on the surrounding buildings.

If Curtan were to put up any billboards in the historical district he would have to conform to the aesthetics of the buildings surrounding him. This would eliminate a lot of the beauty concerns that the City Council has because his billboards would have to blend in regardless of what he wanted to do. Design review and approval would also further Thomas's goals of seasonal advertising. His displays would match the surroundings as well as promoting local festivities such as Halloween or harvest time. This would attract more people to the historical district in accordance with the City Council's desires.

Eliminate Content-Based Restrictions

To comply with the Constitution, the statute will have to eliminate any content-based restrictions. The proposed ordinance contains exceptions for certain types of non-commercial speech on off-site billboards. Rather than restricting the speech based on content, the ordinance could restrict it based on its appearance as noted above.

Eliminate The Restriction On Off-Site Commercial Advertising

Currently, the proposed legislation forbids any off-site commercial advertising, which means that the billboard must have a message that relates to business conducted on the parcel on which it is located. Thomas wants to create sub-districts by advertising groups of stores together, such as antique stores. If the ordinance were modified to allow him to do so, that would enable him to further his own interests as well as benefit the historical district. Thomas has indicated that when districts of stores are created each store will get more customers and it will promote economic growth for the whole area. This would also further the City's interest in the financial well being of its businesses and the growth of the historical district. According to the Columbia Outdoor Advertising Association, billboards provide significant economic contributions in wages and benefits to employees, and payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies especially in small cities. Thus, rather than restricting billboards too much the City Council should try to promote them because they will provide direct economic benefits to the historical district. The billboards will also quickly build awareness, according to the association. All of these are reasons that the City Council should encourage billboards rather than discourage them.

Modify The Penalty And Fine Clauses

As proposed, the law would seem to be punitive in nature. Laws that prohibit speech in order to punish the speaker violate the First Amendment. Section 5 of the statute provides that anyone violating it may be fined up to $10,000 and can be liable for all expenses incurred in the removal of a prohibited billboard. If the fine were modified so it would be a fixed fee, rather than allowing so much discretion, it would be much less like a penalty and more like a fine.

THURSDAY AFTERNOON
AUGUST 1, 2002

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

U.S. v. ALEJANDRO CRUZ

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U.S. v. ALEJANDRO CRUZ

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general

background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

Law Offices of
Miles, Read and Paulete
605 Crawford Street
Carpenter, Columbia

M E M O R A N D U M

To: Applicant

From: Matt Mato

Re: U.S. v. Alejandro Cruz

Date: August 1, 2002

Our client, Alejandro Cruz, is threatened with criminal prosecution by the United States Department of the Treasury's Office of Foreign Assets Control (OFAC) following a trip to Cuba. OFAC has sent Mr. Cruz a letter requesting information concerning a possible criminal violation of Section 515.201 of the Trading With the Enemy Act.

1. Prepare a memorandum for me that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading With the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government may constitutionally use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

2. Prepare a memorandum for me on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will also see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

TRANSCRIPT OF
ALEJANDRO CRUZ INTERVIEW

Matt Mato: OK, Alejandro, it was good to catch up on what you've been doing since we were in the Peace Corps in Nepal.

Alejandro Cruz: Indeed it was, Matt.

MATO: Well, let's get to work. We've covered the basics, costs, retainer, and information that you and I will need to keep in touch. So, as I told you, I've turned on the tape recorder to get the full story. Do you have any questions before we start?

CRUZ: I don't think so. This whole thing is overwhelming. I don't feel that I'm on familiar or solid ground. I went on a tropical vacation and now I'm facing fines of six figures and even prison.

MATO: I'm sure it is a shock. Thanks for the documents you've brought. We'll go over them in a minute. Let's go back to what's happened and start at the beginning.

CRUZ: Certainly. About a year ago, I began looking at a trip to Cuba. I was reading a lot of news stories about Cuba. There was the Pope's visit in 1998, the 40th anniversary of Castro's revolution the next year, and then all the news coverage on the little boy, Elían González, who was the center of the controversy involving Cuban-Americans in Miami. For a couple of years, it's seemed as though there was a news story every week about Cuba. I was curious about Cuba, and frankly I wanted to learn for myself what was left of communism in the 21st century. I'm not of Cuban extraction myself, but I was interested.

MATO: Would it be fair to say that as a result of the news coverage you were aware of the U.S. embargo?

CRUZ: Yes. For example, in 2000 there were many stories about the possibility of the U.S. easing the embargo against the sale of food and medicine to Cuba, even though it didn't actually succeed. I definitely recall reading those with interest. Running my

own business, I couldn't believe that the United States Congress would prohibit U.S. farmers from selling their agricultural commodities to Cubans.

MATO: So you knew about the legal problems of going to Cuba before you went?

CRUZ: Let me think about that. There was extensive coverage on doing business with Cuba, for example, comparing the conflicting U.S. policies toward China and Vietnam and toward Cuba, but I can't recall ever reading about the travel restrictions. I don't think that many people in America realize that a trip to Cuba could land them in federal prison for 10 years.

MATO: So you knew about the trade embargo, but perhaps not about the travel restrictions?

CRUZ: I think that I discovered those only after I decided to go, and began doing research on traveling there.

MATO: What did you do?

CRUZ: I went to a bookstore and checked out the Internet. All the major guidebook publishers have guides to Cuba. I scanned many of them, and finally chose the Freedom one, probably because I've liked using their guides on trips to Latin America.

MATO: That's the guidebook you've shown me?

CRUZ: Yes.

MATO: So, before going, how would you describe your understanding of the legality of traveling to Cuba?

CRUZ: That it was illegal, but that the travel restrictions were a relic of the long dead and buried Cold War, that thousands of Americans were going, and there was no punishment, not even a slap on the wrist. Everyone seemed to be going. I had received announcements of organized tours from my university alumni association.

MATO: Did you keep any of them?

CRUZ: I don't think so. No, I didn't. I preferred to go on my own, traveling independently rather than on a packaged tour. Perhaps that was a mistake. Are the tours legal?

MATO: I really don't know. So would it be fair to say that you understood that without some kind of permission, a license I think it says, it was illegal to go?

CRUZ: Yes.

MATO: You knew the rules, you just did not think that there would be any consequences?

CRUZ: Yes, and, I guess, that it was so commonplace, that I would not be caught.

MATO: So how did you go?

CRUZ: I followed the guide's instructions. I booked flights to Montego Bay and then to Havana. It's very easy to do on the Internet, except that you can't pay for the flight to Havana with a U.S. credit card. Only cash is accepted, but it's easy. It's the same in Cuba. You cannot use your American credit card, but the dollar is the common currency. There's no need to change any money for Cuban pesos.

MATO: How long were you there?

CRUZ: Two weeks.

MATO: Any idea what you spent?

CRUZ: Less than $2,000, including airfare.

MATO: What was that for?

CRUZ: Hotel rooms, meals, and transportation basically.

MATO: Again, is it fair to say that those were the kinds of expenditures that you believed were prohibited?

CRUZ: Pretty much. I just did not think it mattered to anyone.

MATO: Any records of your expenditures?

CRUZ: I can't recall any that I retained.

MATO: So, when you came back to the U.S., what happened?

CRUZ: I was not even thinking that there would be a problem. I took a few precautions, and then forgot about it until I was suddenly searched and given the "third degree" by Customs.

MATO: What precautions?

CRUZ: I stashed the Cuban cigars and rum I'd bought. And I removed the baggage tags from the flights to and from Havana.

MATO: But they found the cigars and rum?

CRUZ: Just bad luck to be the one they picked out to search. As I said, I was not prepared for it. I tried to think of an explanation, but I did not do it very well. The Customs guy could tell I wasn't being straight.

MATO: That comes through in his report.

CRUZ: I felt that he could see right through me. I finally decided to tell him the truth: I had been to Cuba. And then not say anything else. At least I had the presence of mind to remember that from the guidebook.

MATO: I don't know how this is going to turn out, Alejandro, but I think that you made the right decisions on both counts. Is the inspector's report accurate?

CRUZ: It embarrasses me to say that it is. He probably could have put in some more shuddering and stammering while I tried to think of something to say. I don't think that I raised my voice as he claims, but I did go through a phase of being angered that I was caught, because I recalled reading of Little Leaguers being able to get away with going to Cuba. I guess I thought of myself as an experienced world traveler, and I felt very foolish.

MATO: Then what?

CRUZ: I thought that giving up 70 or 80 dollars worth of cigars and rum at the airport was the end of it. That's ironic: I bought them on the black market, so the money did not go to the Cuban government, but to some Cuban undercutting the government stores.

MATO: Then what? You received the letter from OFAC?

CRUZ: Yes, the "Request to Furnish Information" from a "Sanctions Coordinator." That is when I decided that this was getting out of control and called you.

MATO: This is obvious, but I assume that you don't have one of the licenses mentioned in the OFAC request?

CRUZ: No. I do not know who gets them or how. Although I guess the tour companies have that figured out.

MATO: Probably. I notice that OFAC has to ask if you have a license. But I guess that's what they're stuck with. They can't send the FBI to Cuba to prove that you committed a crime. Are these then the only documents you have?

CRUZ: Yes. It's my entire Cuba file, guidebook and all.

MATO: I'll look them over. As I said, the Trading With the Enemy Act is not something I'm familiar with, so I'll probably ask one of our associates to look into it. We will probably want to respond in some way to the request, since criminal sanctions are being threatened. We'll draft something and be in touch.

CRUZ: Thank you.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

* * * * * * *

CHAPTER 4

The Choice For Americans: Licensed or Unlicensed Travel

Travel to Cuba itself is not difficult, but it is very difficult to understand or reconcile the technicalities and the realities of travel to Cuba. For those not interested in tackling the details of the grotesquely named Trading With the Enemy Act or licenses to qualify for legal travel to Cuba, these key facts may be sufficient:

- Thousands of Americans, perhaps 200,000, are illegally traveling to Cuba annually through Canada, Mexico, and the Caribbean.
- Many other Americans are going legally on tours for apparent educational, religious, and cultural purposes.
- Despite the flow of travelers, prosecution by U.S. authorities for violating the travel ban is rare.

Although there is a travel ban, it is flouted with impunity by thousands, and unevenly and inconsistently applied by the United States.

To begin with, what is legal or permitted involves TWO governments: the U.S. and Cuba. So, when one asks, "What is allowed?" The answer may be, "According to whom, the U.S. or Cuba?"

On the Cuban side, the situation is much clearer. Cuba welcomes tourists, including those from the United States. (An exception is returning Cuban-Americans whose right to return is tightly regulated.) The Cuban government wants tourists to come and spend money. Cuban airport immigration officials facilitate U.S. tourism and usually will not stamp American passports. In general, travel to and within Cuba is not restricted, although there are many harsh, incomprehensible restrictions on the Cubans with whom tourists may travel, stay, and eat.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

In terms of U.S. law, travel to Cuba is either (1) legal, more accurately "licensed," or (2) illegal, that is, "unlicensed." From this point on, the rules get complicated and arbitrary, and even simple rules are inconsistently and sometimes inexplicably applied.

Contrary to popular belief, U.S. law does not technically prohibit U.S. citizens from visiting Cuba. However, tourism is effectively banned by the U.S. embargo, which prohibits U.S. citizens or residents from spending any money there to rent a room, buy a meal, or use transportation, or buying anything from or selling anything to Cuba, and threatens those who do so with 10 years imprisonment and fines of $100,000 for individuals and $1,000,000 for businesses. The law does not allow minimal travel-related transactions or minor purchases. Any amount is unlawful. Do not try to tell Customs that you stayed in a cheap hotel or bought only one box of cigars. You will only be getting yourself into more trouble.

The trade embargo and travel restrictions are rooted in the Trading With the Enemy Act, which, in effect, puts Cuba in the category of Iraq, Libya, and North Korea. It authorizes the President to prohibit or regulate trade with hostile countries **in time of war**. According to a 1998 Pentagon report, Cuba poses no national security threat, and its military capabilities are only defensive. The State Department says that Cuba no longer actively supports armed struggle in Latin America or elsewhere. Nevertheless, U.S. Presidents, both Democrats and Republicans, annually sign declarations putting Cuba in the official and legal category of an enemy. There was a brief opening of travel to Cuba in the 1970s, but ever since President Reagan reimposed the prohibition on travel-related transactions in Cuba, it has been practically illegal to travel to Cuba.

The legal prohibition is about controlling dollars; thus, enforcement and applications for licenses to travel to Cuba are handled by the U.S. Treasury Department, not the State Department. Specifically, it is the Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, Washington, D.C., telephone (202) 622-2520.

The U.S. sanctions for unlicensed travel to Cuba **are not limited** to U.S. citizens. Any person subject to U.S. jurisdiction who engages in any travel-related transaction in Cuba violates the law. Thus, foreign nationals who are U.S. residents should also not risk a Cuban entry stamp in their foreign passports.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

Although it is possible to travel to Cuba through a third country, such as Canada or Mexico, the circuitous route is not legal. However, if a traveler can prove that she or he did not spend any money in Cuba, then travel there may be legal. One of the categories of legal travel has been "fully-hosted travel"; that is, trips where the Cuban government or some non-U.S. organization picks up all travel expenses in Cuba. "Venceremos Brigades" used to go (and perhaps still do) to help the Revolution cut sugar cane. The Cuban government continues to operate fully-hosted trips, which reportedly are long on indoctrination and short on food and amenities. The U.S. government will not just take your word that you were "fully-hosted." You will be asked to provide a day-to-day explanation of who paid for your meals, lodging, transportation, and even gratuities.

Other than a "fully-hosted" visit, U.S. law permits only a few categories of "licensed" travel, such as to gather news or attend professional conferences and athletic competitions. "General" licenses are available to diplomats, full-time journalists, and full-time academic researchers. Everyone else must apply for and obtain a "specific license." These include religious organizations, human rights groups, and projects to directly benefit the Cuban people.

The largest category of licensed travel comprises Cubans in the U.S. who are permitted, once a year, to visit close relatives in "humanitarian need." One of the ironies of the Elían González saga is that if Congress had succeeded in making Elían a U.S. citizen or resident, he could have visited his own father only once a year and only if there was a humanitarian need.

The U.S. travel restrictions state repeatedly that all tourism or recreational travel is prohibited. However, in fact and in law, it is not so. A fully-hosted trip can be totally recreational; a Cuban who legally visits family in Cuba is free to engage in recreation.

Furthermore, in the last few years, there has been a steady flow of celebrities, tour groups, and just plain tourists going to Cuba. For example, newspapers and the Web have reported that visitors to Cuba have included:

- 60 Baltimore Little Leaguers;
- Basketball coach Bobby Knight, to fly fish and conduct basketball clinics;

- Delegations from the U.S. Chamber of Commerce (even though U.S. businesses cannot do business there).

U.S. travel companies advertise apparently legal trips for cigar aficionados, photo enthusiasts, and music and dance fanatics. The National Geographic Society and many cultural, alumni, senior, and even veteran's groups run cultural trips to Cuba; yet U.S. law does not include an exception for cultural travel. One U.S. company advertises trips to Cuba's nightlife and beaches. These licensed trips would seem to be recreational.

In total, somewhere between 160,000 to 300,000 U.S. citizens visit Cuba annually; only about 100,000 do so legally, while the rest slip in through third countries. Going through Canada, Mexico, or the Bahamas is not legal, of course, but thousands of Americans do it annually.

Prosecutions are rare, although they do occur. If you are caught, do not lie, but do not admit that you bought anything in Cuba or that you spent any money in Cuba.

DEPARTMENT OF THE TREASURY
Office of Foreign Assets Control
WASHINGTON, D.C.

OFAC No. 02-53-0798

July 26, 2002

Alejandro Cruz
463 Cespedes
San Cabo, Columbia 60001

Request to Furnish Information Regarding Possible Criminal Violation of Section 515.201 of Trading With the Enemy Act

Dear Mr. Cruz:

This is in reference to your entry into the United States on July 2, 2002 at San Cabo International Airport, State of Columbia. At that time, you acknowledged to a Customs Service Inspector that you had been to Cuba. The Customs Report is enclosed.

Section 515.201 of the Trading With the Enemy Act, administered by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury, prohibits all persons subject to the jurisdiction of the United States from travel-related transactions in Cuba, unless authorized under a license.

The Trading With the Enemy Act provides that, unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in prohibited travel-related transactions. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that (1) no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States, or (2) the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States, and payments made on the traveler's behalf were not in exchange for services provided to Cuba or any national thereof.

Accordingly, would you provide to this Office a signed statement under oath explaining whether you engaged in travel-related transactions in Cuba pursuant to a license? If you claim to have traveled pursuant to a license, provide documentation of the purpose and activities of your travel to Cuba; provide the number, date, and name of the bearer of the license; and, if still in your possession, provide a copy of the license itself.

If you claim not to have engaged in travel-related transactions in Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities.

If you claim to have been a fully-hosted traveler to Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. The statement should also state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. It must be accompanied by an original signed statement from the host, confirming that the travel was fully-hosted and the reasons for the travel.

Since there is no question that you traveled to Cuba, the failure to establish that your travel was pursuant to a license, or that there were no travel-related transactions in Cuba, or that you were a fully-hosted traveler, could result in a criminal prosecution for violation of the Trading With the Enemy Act.

Your response should be mailed within 10 days to: Sanctions Coordinator, OFAC, U.S. Department of the Treasury, Washington, D.C.

OFFICE OF FOREIGN ASSETS CONTROL

Clara Charles
Washington Sanctions Coordinator

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

Report (Customs Form 110 A)

Case No. CS: 02-53-0798
Report Type: Seizure/Forfeiture of Cuban-origin commodities
Officer's Name Badge: Customs Inspector Paul Nardella, #26262
Office/Location: San Cabo International Airport, State of Columbia
Report Date/Time: July 2, 2002, 3 p.m.
Suspect/Victim/Reporting Party: Alejandro Cruz, U.S. Passport #0534123132.
Address: 463 Cespedes, San Cabo, Columbia 60001 Telephone: (301) 703-6034
DOB: 3/30/66, Falls Church, Columbia. M. Cauc, 5-9, 160, Brn eyes
Seized or Forfeited Property: 2 boxes, 25 cigars each of Cohiba Esplendidos. 1 box, 25 cigars of Cohiba Habanos. Total 75 cigars. 2 bottles Havana Club Anejo Reserva Rum. 5 "Che" key chains. One Cuban 3-peso coin.
Action Taken: Forfeiture of Cuban-origin commodities and referral to OFAC, Washington Office.
Narrative: On date of report, Customs Inspector (CI) Nardella was assigned to an Inspector's secondary examination station, San Cabo Customs. Alejandro Cruz was selected for a random inspection by a roving inspector and referred to CI's inspection station. Passport in order. Entry and exit stamps from Jamaica, Montego Bay, in accord with Customs Declaration (Form 6059B), listing arrival on Air Jamaica # 666. No entry or exit stamps indicating travel to Cuba. Passport not retained. No commodities declared. CI asked Cruz if he had anything to declare. Cruz responded no. "No tobacco or alcohol products?" CI asked. Cruz again responded no. CI performed hand search of luggage. Discovered Cuban-origin commodities listed above wrapped in dirty clothing and stuffed inside an empty camera bag. CI asked Cruz why he had not listed the commodities on Customs Declaration. Cruz said that he estimated that they were within $400 duty-free exemption and it was not necessary to write in. CI responded that that is correct if items are orally declared. Cruz responded, "That's been done now, right?" CI responded that was correct but these are Cuban-origin commodities. Cruz volunteered that he had bought the Cuban-origin commodities in Jamaica, so he did not believe that they "were a problem with

the Cuba embargo." CI responded, "So you did not buy these commodities in Cuba?" Cruz said, "No. I bought them in the duty-free store leaving Montego Bay, Jamaica." (This Customs Officer has observed the same items carried by passengers coming from Montego Bay.) CI informed Cruz that it did not matter where he bought them, as U.S. law does not permit the importation of Cuban-origin commodities even if purchased in another country. CI informed Cruz that Cuban-origin commodities would have to be seized and that unless he was licensed to import or transport Cuban-origin commodities, he would be required to forfeit the Cuban-origin commodities. CI informed Cruz that he would have to wait while CI filled out a Seizure Report identifying the Cuban-origin commodities. Cruz was observed to be agitated and nervous. Cruz volunteered that he "misspoke." He had not bought the items. They were gifts. He said several times, "I did not pay for them." Cruz said he had read that the U.S. embargo of Cuba was "over." CI asked Cruz where he'd read that, and Cruz said, "Right here," waving a copy of the Freedom's Caribbean he was carrying. Cruz said that he read that no one had ever been prosecuted for violating the embargo. "Why did you single me out?" Cruz said in a raised voice. CI responded by asking Cruz to calm down. CI said that he thought that Cruz said he had not been to Cuba. Cruz responded, "I did not spend any U.S. dollars" on the Cuban-origin commodities. CI responded OK, that he would put on the seizure form that the commodities had not been purchased in Cuba and that Cruz had not been in Cuba. Cruz responded the CI had "misunderstood me. I was in Cuba. I received the cigars as gifts in Cuba." CI inquired what Cruz was doing in Cuba. Cruz responded that he thought he "better not say anything else." Thereafter Cruz refused to respond and repeated that he "better not say anything else." CI explained to Cruz that not all travel to Cuba was prohibited, that if he was in a category that qualified for a general license he could travel there and bring into the U.S. up to $100 worth of Cuban-origin commodities. CI explained that if he had family members in Cuba or was a journalist or a professor working in Cuba he could bring in the Cuban-origin commodities. CI asked Cruz whether he had traveled to Cuba as part of a specific license held in the name of another, such as an educational or professional tour. Cruz's response to each of these suggestions was that he "better not say anything else." CI offered Cruz the opportunity to talk to a Custom Service supervisor-on-duty if he wanted to explain his presence in Cuba. Cruz declined. CI explained process to reclaim property or accept forfeiture. Cruz said, "Keep it. You and your buddies can enjoy the cigars." CI informed Cruz that the contraband would be smoked — in the Customs Service incinerators.

THURSDAY AFTERNOON
AUGUST 1, 2002

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U.S. v. ALEJANDRO CRUZ

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Selected Provisions of the Trading With the Enemy Act _____ 1

Selected Columbia Rules of Professional Conduct _____ 3

Sandstrom v. Montana (U.S. Supreme Ct. 1979) _____ 5

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United States v. Frade (11th Cir. 1985) _____ 9

United States v. Macko (11th Cir. 1999) _____ 13

SELECTED PROVISIONS OF THE TRADING WITH THE ENEMY ACT

* * *

Section 515.201. Transactions involving designated foreign countries or their nationals.

(a) All of the following transactions are prohibited, except as authorized by the Secretary of the Treasury by means of licenses, if such transactions involve money or property in which any foreign country designated under this section, or any national thereof, has any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any money, property, or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any money, property, or property interest subject to the jurisdiction of the United States.

(b) For the purposes of this section, and subject to the President's declaration, the term "foreign country designated under this section" includes . . . Cuba . . . .

(c) Any person subject to the jurisdiction of the United States who engages in any of the foregoing transactions is in violation of this section and is subject to civil action and remedies and, if such person engages in any such transaction willfully, to criminal prosecution and sanction.

* * *

Section 515.420. Fully-hosted travel to Cuba.

A person subject to the jurisdiction of the United States who is not authorized to engage in travel-related transactions in which Cuba has an interest will not be considered to violate the prohibitions of Section 515.201 when a person not subject to the jurisdiction of the United States covers the cost of all transactions related to the travel of the person subject to the jurisdiction of the United States.

Section 515.421. Presumption of travel-related transactions.

Unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in travel-related transactions prohibited by Section 515.201. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States or showing that the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States and that payments made on the traveler's behalf were not in exchange for services provided to Cuba or any national thereof. The statement should address the circumstances of the travel and explain how it was possible for the traveler to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. If applicable, the statement should state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. Travelers fully-hosted by a person or persons not subject to the jurisdiction of the United States must also provide an original signed statement from their sponsor or host, specific to that traveler, confirming that the travel was fully-hosted and the reasons for the travel.

* * *

SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

* * *

Rule 3.21. Meritorious claims and contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding may nevertheless so defend the proceeding as to require that every element of the case be established. A lawyer for a person who may become subject to a criminal proceeding may decline to aid in the investigation of the case.

* * *

Rule 4.1. Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a contemporaneous or future criminal act by a client, unless disclosure would reveal confidential information obtained from the client and the criminal act in question is not likely to result in imminent death or substantial bodily harm.

COMMENT

Misrepresentation. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Confidential Information. A lawyer is generally under a duty to preserve client confidences. A lawyer is also generally required to be truthful to others. Rule 4.1(b) effects an accommodation between the general requirement of truthfulness to others and the general duty to preserve client confidences.

* * *

SANDSTROM v. MONTANA
Supreme Court of the United States, 1979

Defendant had confessed to the slaying of Annie Jessen. In a Montana state court prosecution for deliberate homicide, defendant's attorney informed the jury that, although defendant client admitted killing Jessen, he did not do so "purposely or knowingly," and was therefore not guilty of "deliberate homicide" but of a lesser crime. Defendant presented no evidence. At the prosecution's request, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The jury found defendant guilty of deliberate homicide. Defendant, who was 18 at the time, was sentenced to 100 years in prison. The Montana Supreme Court affirmed, and certiorari was granted.

The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the requirement of the Fifth and Fourteenth Amendments' due process clauses that the prosecution prove every element of a criminal offense beyond a reasonable doubt. We hold that it does and reverse.

The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. Defendant's jurors were told that "the law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory, as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of defendant's voluntary actions (and their "ordinary" consequences), unless defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence — thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. Although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome

only "by a preponderance of evidence contrary to the presumption." Such a requirement shifts the ultimate burden of persuasion on the issue of intent.

In In re Winship (U.S. Supreme Ct. 1979), we stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clauses of the Fifth and Fourteenth Amendments protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that defendant's jurors actually did proceed upon one or the other of these latter interpretations.

Thus, the question is whether the challenged instruction had the effect of relieving the prosecution of the burden of proof enunciated in Winship on the critical question of defendant's state of mind.

We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error, which on the facts presented must be deemed prejudicial.

Reversed.

BUSTOS v. IMMIGRATION AND NATURALIZATION SERVICE
United States Court of Appeals, Fifth Circuit, 1990

Pedro Bustos appeals from the Board of Immigration Appeals' final order of deportation. Because the immigration judge did not err in admitting an Immigration and Naturalization Service (INS) Form I-213, Record of Deportable Alien, and because Bustos did not refute any of the statements in the form which were sufficient for a prima facie showing of deportability, we affirm.

At the deportation hearing, Bustos identified himself, but refused to plead to the order to show cause and refused to answer the immigration judge's questions. The INS submitted a Form I-213 Record of Deportable Alien relating to a Pedro Bustos, which stated that he is a native and citizen of Mexico who had been in the United States since 1981. Attached to the form is an attestation by the INS's trial attorney that it is authentic and a true and correct copy of the original document taken from the INS's files. No further evidence was presented, and the judge found Bustos deportable.

We must decide whether the information in Form I-213 is by itself sufficient to make a prima facie showing of deportability, requiring the alien to produce evidence of legal presence in this country.

First, it is well established that a deportation hearing is a purely civil proceeding and that the alien is not entitled to all the constitutional safeguards of a criminal defendant.

Nonetheless, due process standards of fundamental fairness extend to the conduct of deportation proceedings. The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair. The affidavit of the examining officer shows that the information in the Form I-213 is based upon statements of Bustos, and Bustos does not contest their validity.

Although the government has the ultimate burden of proving deportability by clear and convincing evidence, in a deportation case charging deportability of an alien who entered the country without inspection, the government need only show alienage.

8 U.S.C. §1361 provides in pertinent part:

> In any deportation proceeding, the burden of proof shall be upon such person to show the time, place, and

> manner of his entry into the United States . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

Thus, 8 U.S.C. §1361 imposes a statutory presumption that the alien is in the country illegally, and that the burden shifts to the alien to prove that he is here legally.

Once the form was properly admitted, the INS's prima facie case of deportability was made. The burden of proof then shifted to Bustos. No abridgement of his constitutional rights was involved in imposing that burden on him.

Affirmed.

UNITED STATES v. FRADE
United States Court of Appeals, Eleventh Circuit, 1985

Father Joe Morris Doss, Rector of Grace Episcopal Church in New Orleans, and Father Leopold Frade, Curate of Grace Episcopal Church and Chairman of the National Commission for Hispanic Ministry, appeal their convictions for criminal violation of Section 515.415 of the Trading With the Enemy Act (TWEA). This provision makes unlawful any transaction "when in connection with the transportation of any Cuban national . . . unless otherwise licensed." The prohibited transactions included "transportation by vessel," the "provision of any services to Cuban nationals," and "any other transactions such as payment of port fees and charges in Cuba and payment for fuel, meals, lodging."

The events giving rise to the convictions are those of the now famous Mariel boatlift, or freedom flotilla, of spring 1980, by which some 114,000 Cuban refugees, in nearly 1,800 boats, crossed the 90 miles of ocean and great political divide between Cuba and the United States. In early April 1980, some 10,800 Cuban citizens claiming status as political refugees sought sanctuary in the Peruvian Embassy in Havana. On April 14, 1980, President Carter declared that up to 3,500 of these refugees would be admitted into the United States. An airlift was started, but within three days Castro stopped the flights, announcing that anyone who wanted to leave could do so through the harbor of Mariel. Almost immediately, small boats, funded by the members of the Cuban-American community, began leaving Key West.

Cuban-American parishioners of Grace Church implored Fathers Frade and Doss to help in arranging for a boat to bring their relatives from Cuba. A meeting held by the priests at Grace Church on May 3 to organize the rescue mission was attended by 650 people and met with immediate overwhelming response. Within forty-eight hours, $215,000 was raised.

Fathers Frade and Doss commenced negotiations with the Interest Section of the Cuban Government in Washington to obtain the release of family members and political prisoners. They obtained assurances that they would not be forced to bring back criminals, the mentally ill, or other undesirables that the Cuban government was then forcing into the Mariel boatlift. The Cuban Interest Section insisted that Fathers Frade and Doss turn over the list of the people they proposed to pick up. The priests submitted a list of 366 names which were immediately telexed to Havana. Although Fathers Frade and Doss understood that, in the week following their meeting at the Cuban Interest Section, the Administration's attitude towards the boatlift had changed, they

realized that, once the names had been telexed, they had passed the point of no return. Father Frade had been told by a Cuban official that a "national purge was taking place," those applying for permission to leave Cuba were losing jobs, houses, and ration cards, and sometimes being attacked, beaten and killed. As the district judge observed at sentencing, "Once the list of names had been given over to the Cuban officials . . . it would have been very difficult, a very difficult decision of conscience to stop at that time."

On May 26, 1980, the God's Mercy, a large, safe vessel, equipped with $10,000 in added safety equipment, and manned by an experienced crew, including a doctor and a nurse, set sail for Mariel. After two weeks of intense negotiation, Fathers Frade and Doss succeeded in obtaining commitments to release the persons on their lists. On June 12, 1980, the God's Mercy arrived in Key West, with the priests and 402 refugees including 288 persons from the lists.

The God's Mercy was escorted into Key West by two Coast Guard cutters. Fathers Frade and Doss were arrested immediately, and the indictment under the TWEA was brought. After trial, Fathers Frade and Doss received $431,000 in fines and the God's Mercy was forfeited to the government.

Fathers Frade and Doss contend that the trial court erred in denying their motion for judgment of acquittal on the ground that there was no evidence to establish the requisite mental state for a criminal violation of Section 515.415 of the TWEA.

To be criminal, violation of the TWEA must be "willful." "Willfulness" is expressly required in some provisions of the act, such as Section 515.201, and impliedly required in the rest, including Section 515.415, with which we are concerned here. When used in a criminal statute, the word "willfully" generally connotes a voluntary breach of a known legal duty. Section 515.415, under which the priests were convicted, was enacted into its operative form unexpectedly and with little publicity on May 15, 1980 — after the list of names had been tendered to Cuba. It criminalized behavior (travel to, from, and within Cuba), which previously had been expressly authorized and which, in fact, remained lawful for a time, except when done in connection with the transportation of Cuban nationals, an activity which also is not generally criminal. It penalized the paying of port fees in a foreign harbor and duly incurred hotel, motel and restaurant bills if done to assist the transportation of Cubans to the United States. These are activities which laymen do not consider wrong nor lawyers classify as malum in se.The government argues that the evidence demonstrated the necessary mental state for a criminal

violation of Section 515.415 of the TWEA. The government relies principally on the testimony of government officials who stated that they had warned the priests that the venture might be against the law. The government also relies on the priests' knowledge that they might be liable for repeat trips or boat safety violations; that they might be subject to forfeiture of their vessel under civil statutes; and that the government generally disapproved of the boatlift as dangerous and inadvisable.

However, the finding that a defendant is aware of matters such as those stated above is insufficient to sustain a finding of guilt under a statute requiring a voluntary breach of a known legal duty.

The government also argues that the priests' own behavior, including their fears and expressed concerns, indicated a voluntary breach of a known legal duty. The government relies on the priests' decision to captain the God's Mercy on the return voyage so that any possible onus might fall personally on them, and their own trial testimony that they would have gone ahead with the mission regardless of the law because of their moral commitment to those whose names were on the list submitted to the Cuban government. Their fears and expressed concerns, however, were understandable as normal caution and worry for the welfare of all concerned. They were simply insufficient to sustain a finding of a voluntary breach of a known legal duty. The judgment of the district court must be reversed.

UNITED STATES v. MACKO

United States Court of Appeals, Eleventh Circuit, 1999

Defendant Ralph Macko was accused of selling cigarette-packaging machinery and supplies to Cuba in violation of Section 515.201 of the Trading With the Enemy Act (TWEA). After a jury found Macko guilty, the district court held that the evidence was insufficient to support the guilty verdict. The United States appealed.

The evidence presented during the government's case-in-chief shows that the sales were through freight forwarders in Panama. The invoices did not disclose that Cuba was the ultimate destination. Macko visited Cuba by going through third countries.

In its order explaining the judgment of acquittal, the district court described the government's evidence as "primarily a paper case, made up of letters, faxes, shipping invoices, and other documents." This "paper trail," the court stated, "has too many twists and turns and dead ends to establish more than a tenuous inference that Macko acted with the requisite mental state for a criminal violation of Section 515.201 of the TWEA." The district court observed that the circumstantial evidence against Macko "is susceptible of more than one interpretation." The jury could reasonably infer that Macko knew that his conduct was generally unlawful, the court says, but such a general awareness of illegality is not sufficient to establish guilt here. Only by "mere speculation" could a jury conclude that Macko acted with the mental state required.

According to the government, the evidence against Macko, though circumstantial, established that he was aware of the prohibitions of the Cuban trade embargo and that he acted with the intent to avoid them to his profit.

In Section 515.201, the TWEA prohibits the sale of merchandise to Cuba or Cuban nationals without a license from the Office of Foreign Assets Control. Though a child of the Cold War that ended seven years ago with the Soviet Union's extinction, the Cuban embargo remains very much alive. The TWEA limits transactions with Cuba for many purposes, including both trade and travel, although subject to many exceptions. Its primary purpose is to stop the flow of hard currency from the United States to Cuba.

In United States v. Frade (11th Cir. 1985), we held that "willfulness" under the TWEA entails a voluntary breach of a known legal duty.

To establish that Macko voluntarily breached a known legal duty, the government had to prove that he knew of the prohibition against dealings with Cuba and nevertheless violated it.

In United States v. Frade, the defendants were two Episcopal priests who arranged for a ship to bring 402 Cuban refugees to the United States in 1980 during what became known as the Mariel boatlift. While the priests were laying their plans, President Carter's administration attempted to gain some control over the sudden mass immigration by amending the TWEA to generally criminalize travel to or from Cuba in connection with the transportation of Cuban nationals. We held that the evidence did not establish that the priests voluntarily breached a known legal duty, principally because the government failed to establish that the priests had knowledge of any such duty.

The case against Macko is more convincing than the case against the priests in Frade. Indeed, Frade recites considerable evidence that the priests did not know about the provision of the TWEA at issue there. That provision barred conduct that until then had been expressly authorized by a different provision. Although U.S. officials warned the priests that their boatlift might be illegal, that is all that they did, and that was insufficient. Furthermore, the priests did not attempt to hide their travel to and from Cuba.

In this case, on the other hand, the trade ban in Section 515.201 of the TWEA was promulgated neither quietly nor unexpectedly. It was in effect long before Macko involved himself in the Cuban cigarette plan, and it was widely publicized. The provision does not apply only to certain goods or activities but states a broad prohibition against transactions with Cuba or Cuban nationals. We also find it telling that Macko actively concealed his travel to Cuba as well as the final destination of the cigarette machinery and supplies. He did not attempt to shield his contacts with Panama or Panamanians, nor did he hide the fact that he was acquiring cigarette-packaging machinery and supplies. The one aspect of the operation that he kept secret was the Cuban connection. Macko traveled to Cuba through Panama in a manner that left no reference to Cuba on his passport. Macko initially lied to U.S. Customs agents about traveling and sending equipment to Cuba. Macko's correspondence about the project with other participants scrupulously avoided mentioning Cuba by name. Macko had experience in exporting machinery from the United States and was involved in international sales of various goods.

The inference that Macko acted as though it was illegal to deal directly with Cuba would seem to satisfy the element of voluntary breach of a known legal duty. A jury could reasonably conclude that Macko's secrecy about this single fact resulted from his knowledge of the Cuban embargo. Consequently, the district court erred in granting Macko's motion for a judgment of acquittal on the charge of criminal violation of Section 515.201 of the TWEA.

Reversed.

ANSWER 1 TO PERFORMANCE TEST - B

1) PT-B *(Essay)*

1. Prepare for me a memorandum that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuring criminal trial.

2. Prepare a memorandum for me on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

M E M O R A N D U M

TO: Matt Mato

FROM: Applicant

RE: U.S. v. Alejandro Cruz

DATE: August 1, 2002

You have asked that I prepare a memorandum that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

A. The elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act (TWEA) are as follows:

(1) any person
(2) subject to the jurisdiction of the United States
(3) willfully
(4) engages in a transaction

(5) involving money or property in which Cuba or any national thereof has any interest of any nature whatsoever, direct or indirect,
(6) including (A) transfers, withdrawals, or exportations of any money, property, or evidences of indebtedness of evidences of ownerships of property by any person subject to the jurisdiction of the United States, and (B) transfers outside the United States with regard to any money, property, or property interest subject to the jurisdiction of the United States.

Three exceptions exist:
(I) transactions pursuant to license,
(II) "fully-hosted travel," that is, where a person not subject to the jurisdiction of the United States covers the cost of all transactions related to the travel of the person subject to the jurisdiction of the United States,
(III) "no transactions travel," that is, where a person travels to Cuba and no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States.

In some sense exceptions II and III are not really exceptions; when their terms are true, it means that no prohibited transactions occurred so that element 6 was not met.

B. Evidence the government now possesses to establish each element

"ANY PERSON"

This is not defined in the statute or materials in the file, but it is safe to assume that "any person" includes an individual human being and the government surely can prove Cruz is an individual, through his presence. That is, the fact finder will be able to observe that Mr. Cruz is an individual.

"SUBJECT TO THE JURISDICTION OF THE UNITED STATES"

This important operative phrase similarly is not defined. However, it is safe to assume that it includes a U.S. citizen. I assume that Mr. Cruz is a United States citizen. Although I cannot find a statement to that effect in the file, the Customs Service Report notes that Cruz has a U.S. Passport (#053412313 2). The Customs Report says that Cruz's passport was returned to Cruz, but the government could obtain it from him by a subpoena. The 5th Amendment right against testimonial self-incrimination, which applies to the federal government, which would be the prosecuting government here, does not extend to non-testimonial things like passports. Thus, the government can acquire the passport by subpoena and use it to prove Cruz is a U.S. citizen and subject to the jurisdiction of the United States.

"WILLFULLY"

This is doubtless the most important element in our case. Macko and Frade cases interpreted the meaning of willfully in this context. Technically Frade, a 1985 case, interpreted "willfully" as used in Section 515.415 of the TWEA. However, Macko, a 1999 case, interpreted willfully as used in Section 515.201 and cited Macko. Hence it appears that willfully has the same meaning in both sections so that both cases are relevant in construing willfully as used in 515.201. Note as well that Macko and Frade are 11th Circuit cases, which is understandable as Florida is located in the 11th Circuit and many of these cases would be expected to arise there. I do not know what circuit in which Columbia is located. The US Constitution requires that a federal criminal trial be brought in the district in which the crime allegedly occurred. The crime/alleged crime here occurred in Cuba, and I do not know how the venue would work for that; probably venue would lie in the district in which the defendant resides. Cruz resides in Columbia, so he would be tried in federal district court in the relevant district of the Columbia Federal District Court. Such court would be bound by the decisions of its circuit and not necessarily bound by the decisions of the 11th Circuit (assuming of course that Columbia is not in the 11th Circuit). Nonetheless the Macko and Frade cases are persuasive, if not binding, authority.

Macko, citing Frade, defines willfully as used in Section 515.201 as "the voluntary breach of a known legal duty." To prove that Macko voluntarily breached a known legal duty, the government had to prove that he "knew of the prohibition against Cuba and nevertheless violated it."

Macko is a very problematic case for Cruz. It permitted an inference that the defendant knew of the prohibition against Cuba and nevertheless violated it under facts remarkably similar to ours.

Presently the government has the following evidence to prove that Cruz "knew of the prohibition against Cuba and nevertheless violated it."

First I note that, from the interview, Cruz has said that the customs report is embarrassingly accurate.

One, Cruz actively concealed his travel in two regards: Cruz traveled to Cuba in a manner that left no reference to Cuba in his passport and Cruz did not attempt to hide his dealings with the third country, Jamaica, through which Cruz cleansed his travel. Macko did the exact same two things (his third country was Panama) and the court found this evidence of active concealment, that is, a scheme to make it appear that travel had been only to the third country. The government can prove these two elements from the customs report and Cruz's passport. According to the Customs Report, Cruz virtually admitted to traveling to Cuba [see discussion below] and Cruz's passport did not bear any indicia of having visited Cuba.

[Note that your question to me does not specifically whether [sic] the government's evidence would be admissible in a criminal trial, but I'll briefly address. Although the Customs Report is hearsay, many exceptions exist. In fact, the entire report probably will be admissible under the "business records" exception since the customs service regularly makes such reports, and the reports are made by customs service employees with personal knowledge of the events, and the practice is to accurately record the events. The business records exception has an exception for reports prepared in anticipation of litigation, but it is not clear that customs reports are in anticipation of litigation. Even if they are, the government could call CI Nardella and she [sic] could testify about what Cruz said. Such statements would not be hearsay, as they would be statements of a party.]

Two, Cruz initially lied to US Customs Agents about his transactions involving Cuban items. Macko identified that as relevant evidence as to willfulness. The Customs Report shows that Cruz initially said in answer to the question "So you did not buy these commodities in Cuba?" "No, I bought them in the duty-free store leaving Montego Bay, Jamaica." Later, Cruz said that he had not bought the items, that they were gifts. Still later, "CI said that he thought that Cruz had said he had not been to Cuba." Cruz did not answer that remark except to say that "I did not spend any U.S. dollars." The parsing of this language is intricate. From it, Cruz did not say, "I never have been to Cuba." However, Cruz did not affirmatively deny CI's statement, "I thought that you said you had not been to Cuba." Because Cruz did not deny it, it could be regarded as an admission that Cruz had been to Cuba. However, that affirmation by silence cannot be made if the affirmative statement would be incriminating as it would have been here. Nonetheless, the statements in the Customs Report would be strong circumstantial evidence to allow a fact finder to conclude that Cruz had been to Cuba. Indeed, the government has so concluded. Its letter states, "You admitted going to Cuba; tell us how you did not violate the TWEA." Thus, while we could intricately parse the conversations between CI and Cruz and argue that Cruz never admitted going to Cuba, a fact finder could infer that he had been there. However, the fact finder could find otherwise.

Three, Cruz otherwise lied to and was deceitful with Customs. Cruz specifically denied that he had tobacco or alcohol products, but he had them. As well, Cruz's statement that he thought they were within a $400 allowance is negated by the secretive nature in which he packed them – wrapped in dirty laundry, stuffed inside an empty camera bag. The lying and secretive nature are deadly evidence as they show knowledge of the prohibition and strongly indicate Cruz's willful violation.

Fourth, Cruz is a well-versed traveler. Macko indicated that this was relevant to a conclusion that the defendant knew of the prohibition. As well, in the report Cruz is heard to say that he thought the US embargo of Cuba was over. That was not true, and even as the statement stands, it suggests that Cruz was aware of the embargo. In addition, Cruz waved the Freedom's Caribberan book and if put into evidence it would show that it informed Cruz that what he was doing was illegal and it also gave the roadmap for deceit that Cruz followed.

ENGAGES IN A TRANSACTION

The government has the following evidence, cigars and rum and a Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba. The coin is the most damaging. It gives a strong inference that Cruz engaged in a transaction with a Cuban national.

INVOLVING MONEY OR PROPERTY IN WHICH CUBA OR ANY NATIONAL THEREOF HAS ANY INTEREST WHATSOEVER, DIRECT OR INDIRECT

The government has the cigars, rum and Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba.

INCLUDING (A) TRANSFERS, WITHDRAWALS, OR EXPORTATIONS OF ANY MONEY, PROPERTY, OR EVIDENCES OF INDEBTEDNESS OR EVIDENCES OF OWNERSHIP OF PROPERTY BY ANY PERSON SUBJECT TO THE JURISDICTION OF THE UNITED STATES, AND (B) ALL TRANSFERS OUTSIDE THE UNITED STATES WITH REGARD TO ANY MONEY, PROPERTY OR PROPERTY INTEREST SUBJECT TO THE JURISDICTION OF THE UNITED STATES

The government has the cigars, rum and Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba.

C. Determine whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

The government may not.

Section 515.421 provides that any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in travel-related transactions prohibited by Section 515.201.

The due process clause of Fifth Amendment to the US Constitution requires that the prosecution prove each and every element of a criminal offense beyond a reasonable doubt. (US Sup Ct case of Sandstrom, which technically construed the 14th Amendment due process clause but indicated that for this purpose the clauses are the same, so did In re Winship).

The question of the permissible reach of presumptions in criminal cases is an intricate issue. Certainly a presumption cannot create an irrebuttable or conclusive presumption. That is, upon proof of the primary fact, travel to Cuba, the jury may not be told that it must conclude that the presumed fact, engaging in travel-related transactions, exists. However, the presumption under

515.421 permits the rebuttal of the presumption by evidence to the contrary. But this is still like the presumption in Sandstrom. In Sandstrom the presumption was not irrebuttable, the defendant was permitted to offer evidence against it, but there the presumption could be overcome only if the defendant showed "by a preponderance of evidence contrary to the presumption."

Thus the presumptions in Sandstrom and the TWEA are indistinguishable. Neither was an irrebuttable presumption, as each permitted a rebuttal, but each required the defendant to rebut it by evidence. Although the TWEA does not expressly state that the counter evidence must create a preponderance of the evidence, that can be fairly inferred from the text. Under Sandstrom, the government may not create a presumption in a criminal case in which an element of the offense is proven by a presumption capable of being overcome only if the defendant shows the contrary by a preponderance of the evidence. Such a requirement shifts the ultimate burden of persuasion, and the prosecution must prove each and every element of a criminal offense.

Note that such a presumption is proper in a civil case, even one in which a significant interest like deportation is at issue. Bustos. The TWEA has both civil and criminal sanctions. The presumption in Sec. 515.421 properly could be applied to the civil aspects of the TWEA.

M E M O R A N D U M

TO: Matt Mato

FROM: Applicant

RE: U.S. v. Alejandro Cruz

DATE: August 1, 2002

You have asked that I prepare a memorandum on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

First, given our knowledge from the Cruz interview, we know that Cruz is guilty of violating the TWEA. Cruz "knew of the prohibition against Cuba and nevertheless violated it." Cruz, with knowledge of the prohibition, traveled to Cuba and engaged in prohibited transactions with Cuban nationals. Thus, if the government proceeds against Cruz civilly under the TWEA, we cannot defend because we would know that such a defense is frivolous. We would violate Rule 3.21.

However, under that same rule, "A lawyer for the defendant in a criminal proceeding may nevertheless so defend the proceeding as to require that every element of the case be established.

Is The OFAC Letter a Civil or Criminal Matter?

The letter threatens criminal prosecution. It says that since there is no question that Cruz traveled to Cuba, failure to document one of the three exceptions could result in a criminal prosecution for violating TWEA.

The most appropriate response is for Cruz to decline to answer on the grounds that an answer might incriminate him. The Fifth Amendment to the US Constitution provides that no person can be made

to testify against himself. Ethically we can advise Cruz to take such a position, because under Rule 4.1, a lawyer has no affirmative duty to inform the opposing party, here the federal government, of relevant facts.

We cannot counsel Cruz to answer the letter in any way other than silence. The letter asks Cruz to establish one of the three exceptions to the TWEA travel rule. We know that none are met. Cruz did not have a license; his was not hosted travel; nor did he engage in no transactions (we know he spent about $2000). Thus, if Cruz were to answer and claim any of those exceptions we know that he would be lying and we cannot permit a client to lie. Thus, we have to tell him that he either takes the Fifth or he incriminates himself in a truthful answer. If he wanted to falsely reply, we would have to counsel him against that, and, if he insisted, we would have to withdraw.

In addition, we are in the delicate position of knowing that our client has committed a crime.
We know that all the elements of the offense were met, and although the government may have some difficulty proving them, ethically we can require the government to establish every element of the case.

As well, we are not required to disclose the fact that Cruz has committed a crime. We learned that information through a confidential communication. Under Rule 4.1 we must not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a contemporaneous or future criminal act by a client unless disclosure would reveal confidential information obtained from the client and the criminal act in question is not likely to result in imminent death or substantial bodily harm. That rule does not require us to disclose. First, Cruz's crime was in the past; it is not contemporaneous or future. Second, disclosure would reveal confidential information obtained from the client. Third, the crime did not involve death or substantial bodily harm.

CONCLUSION

"Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons."

Ethically you are required to say to Cruz that he should assert his Fifth Amendment right against self-incrimination and not answer the letter. If Cruz insists on writing a letter that is untruthful (and he might, as his conduct with the Customs Officer indicates that absolute truthfulness with government officials does not come naturally to him), you have to counsel him against making false statements, especially as any response has to be under oath and would subject Cruz to a perjury prosecution, and, if Cruz insists, you have to withdraw from the representation.

On this point, we will want to point out to Cruz that this matter is a big deal. He seems to think that this is a foot fault in tennis and that his claim of selective prosecution has some merit. No matter how many other persons subject to US jurisdiction may have gone to Cuba illegally, Little Leaguers from Baltimore or not, Cruz did violate the statute and do [sic] so knowingly. In fact he had quite good knowledge of the prohibition and went to some lengths to conceal his travel. If the facts come to light, he will be convicted as surely as Macko was convicted.

Other Ethical Issues

Your interview notes that you and Cruz agreed on costs and retainer. However, you will want to ensure that you have a signed retainer agreement. Some jurisdictions like California require signed agreements when fees are expected to exceed $1000 unless there is a prior professional or familial arrangement.

ANSWER 2 TO PERFORMANCE TEST – B

MEMO

To: Matt Mato
From: Applicant
Re: U.S. v. Cruz – Elements of Criminal Violation of §515.201
Date: August 1, 2002

Per your request, this memorandum identified the elements of a criminal violation of Section 515.201 of the Trading With the Enemy Act (TWEA), the facts that the government now possess[es] to establish element, and whether the government may constitutionally use the TWEA presumption at a criminal trial. The first two items are discussed under Section I of this memo. The constitutionality of the presumption is discussed under Section II of this memo.

I. Elements and Evidence of Criminal Violation of Section 515.201

There are four elements to a criminal violation of 515.201:

(1) A person subject to the jurisdiction of the U.S., (2) engages in a prohibited transaction (3) with a designated foreign country, and (4) the person engages in the transaction willfully.

A. Element I: Person Subject to the Jurisdiction of the U.S.

1. Definition:

Although TWEA does not define this specifically, the general understanding from the cases on TWEA suggests that any person who is either a U.S. national or a U.S. resident is a person subject to the jurisdiction of the U.S. (Frade; Macko.)

Also, anyone trying to enter the U.S. may be subject to the jurisdiction of the U.S. (Frade: also "Freedom's Caribbean".)

2. Evidence Gov't. Now Possesses

Cruz tried to enter the United States. Cruz had a United States passport, which shows that Cruz is a U.S. national. (Customs Report.) This is sufficient to establish this element.

B. Element 2: Engaging in Prohibited Transaction

1. Definition

A transaction is prohibited if it involves any exchange or expenditure of money that directly or indirectly interests a foreign country designated by TWEA (§515.201(a).)

Since both direct and indirect interests are implicated, this could include direct purchases or purchases from another locale.

2. Evidence Gov't. Now Has

The government has the seized property of Cuban origin listed in the Customs Report, including cigars, rum, key chains, and a Cuban coin.

The government also has Cruz's statement, later contradicted, that he bought the items in Jamaica at a duty-free shop. Since TWEA covers both direct and indirect purchases or transactions, the government may use this statement to establish a prohibited transaction.

The government also has Cruz's subsequent statement that he got these items as gifts. If uncontroverted and believed, this could show that no prohibited transaction took place because no money exchanged hands.

Also, a transaction is NOT prohibited if Cruz has a license or was fully-hosted, or that his expenses were fully covered by someone not under U.S. jurisdiction. The government does not have any evidence that Cruz does not have a license, or that he was not fully-hosted, since Cruz had declined to answer those questions.

The government also does not have any statements from Cruz that be engaged in any prohibited transactions.

Section 515.421 allows for a presumption that prohibited transactions took place if Cruz traveled to Cuba. Whether the government can employ this presumption at trial will be discussed below. For now, the government has Cruz's statement that he was in Cuba.

C. Element 3: Foreign Country Designated By TWEA

1. Definition

Section 515.201(b) includes Cuba as a country so designated.

2. Evidence Gov't. Now Has

The gov't. has Cruz's statement that he was in Cuba, as well as the item[s] seized that were of Cuban origin.

D. Element 4: Willfulness

1. Definition

The government must show that Cruz willfully engaged the [sic] aforementioned prohibited transactions.

The 11th Circuit Court has defined "willful," as used in Section 515.201, necessary for a criminal conviction, to mean a "voluntary breach of a known legal duty." (Frade, Macko.)

In order to convict, the government must show that Cruz knew of the prohibition beyond suspicion that the activities "might" be illegal, or that the government "generally disapproved" of them. Also, the court considers whether the activities are "malum in se," or whether laymen such as Cruz generally would know or consider to be illegal. (Frade)

The government, however, can establish the requisite knowledge through inference. (Macko.) A jury may reasonably infer willful conduct based on (1) whether the prohibition was widely publicized, (2) whether the defendant actively concealed travel to Cuba, including lying to Customs Agents, and (3) whether the defendant was experienced or involved in international transactions.

2. Evidence the Gov't. Now Posses[es]

The government has Cruz's statement that he did not believe items purchased in Jamaica "were a problem with the Cuba embargo." This statement shows that Cruz did know of the embargo and its prohibitions. But the statement also show[s] that Cruz did not know that his action violated the law.

The government has the Freedom's Caribbean article, which Cruz referred to. The discussions in the article may show that Cruz knew that certain transactions may be illegal. Again, however, it may also show that Cruz did not know his specific actions were illegal, since the article discussed many exceptions, including that certain recreational trips and expenses may not be illegal.

The government also has Cruz's conflicting statements about where be obtained the Cuban items. Cruz fist stated that he bought them in Jamaica, then said he got them as gifts. These may be used to show that Cruz was lying to the Customs Agent and/or trying to actively conceal Cuban connections, which may support in inference that he knew what he was doing was wrong.

The government has Cruz's statement that there is [sic] nothing to declare before items were found. This may be inferred as a lie. But Cruz may have been correct in estimating them to be within the $400 exemption, and an oral declaration was given.

The government did not retain Cruz's passport, but the Customs Agent noted that there was no indication of traveling to Cuba. This may be the basis for an inference that Cruz was trying to cover up his Cuban connections. (Macko.) But, the inference was created in Macko because the defendant in the case traveled extensively and did not conceal his other journeys. Here, the government does not have any evidence of the extent of Cruz's travel plans and experience.

Overall, the government has evidence to suggest that Cruz knew generally of the embargo, but not evidence that he specifically knew that his particular actions were illegal and breaching a known legal duty.

II. The Gov't. Use of the 515.421 Presumption

A. The Presumption

Under §515.421 of TWEA, Cruz is presumed to have engaged in travel-related transactions prohibited by Section 515.201 if he has traveled to Cuba. Since Cruz admitted to being in Cuba to the Customs Agent, 515.421 puts the burden on Cruz to rebut the presumption.

B. Constitutionality of the Presumption

The government may not constitutionally use the presumption at any criminal trial against Cruz.

In Sandstrom, the U.S. Supreme Court held that the government may not use a presumption to shift the burden of proof onto a criminal defendant when the presumption involves an element of the crime charged. Such a presumption would shift the burden of persuasion onto the defendant regarding an element of crime, contrary to the constitution.

As the court pointed out in In re Winship, the due process clause of the 5th and 14th Amendment[s] requires the government prosecution to prove "beyond a reasonable doubt of every fact necessary to constitute the crime" charged.

Here, "prohibited transaction" is an element of a criminal violation of §515.201. The 515.421 presumption alleviates the government of proving such a transaction by presuming that Cruz engaged in them by virtue of his presence in Cuba. Since the transaction is an element of the crime charged, the government's use of the presumption would violate the constitution.

The government may argue that presumptions requiring defendant to carry the burden of proof was permitted by the 5th Circuit in Bustos. Bustos is not applicable here, however, because Bustos involved a deportation hearing, which the court characterized as a "purely civil proceeding." The Bustos court specifically pointed out that criminal defendants are entitled to more procedural safeguards.

Thus, although the government my employ the presumption against Cruz at a civil proceeding under §515.201, the government cannot use the presumption at any criminal trial against Cruz.

MEMO

Re: U.S. v. Cruz – Ethical Considerations

Per your request, below are discussions of the ethical considerations implicated as you draft a response letter on Cruz's behalf. I discussed the general ethical rules on disclosure first, then explain[ed] my reasoning as to why particular pieces of information requested by OFAC should or should not be disclosed.

I. Your Duties

A. To Mr. Cruz

First, the Columbia Rules of Professional Conduct requires you to preserve client confidences.

Here, the information Cruz gave you during the interview was all candidly shared in the course of your attorney-client relationship. Thus, you must preserve the confidentiality.

The only applicable exception is when disclosure is necessary to avoid assisting a contemporaneous or future criminal act that is likely to result in imminent death or substantial bodily harm.

Here, there is clearly no assistance of any crime, and certainly not any that is likely to result in imminent death or bodily harm. This is a routine government inquiry into Cruz's past travel activities. Thus, the exception to confidentiality does not apply, and Cruz's confidence must be strictly preserved.

B. To OFAC

You also have a duty to be truthful when dealing with another party, such as OFAC, or Cruz's behalf.

You cannot make a false statement affirmatively to OFAC in your letter or other dealings with them. You do not, however, have the affirmative duty to inform them of any relevant facts. But you cannot

incorporate or affirm any statements that Cruz has made that you know are false. (Rule 4.1, Comment.)

II. What You Can and Cannot Say

The OFAC letter requests three pieces of information: (1) whether Cruz had a license to travel to Cuba and information regarding any license, (2) how Cruz avoided engaging in travel-related expenses, and (3) details of expense if Cruz was a fully-hosted traveler.

A. Regarding the License

You are not required to, and should not, inform OFAC either [sic] Cruz does or does not have a license.

You are not required to do so because you do not have an affirmative duty to disclose this material fact. As mentioned above, there is no imminent death or harm at risk, so you are not required to disclose.

You should not disclose this information because you obtained it by way of representing Cruz, and you are under a duty to preserve its confidentiality.

Also, Cruz has not made any false statements in this regard that can be affirmed by your silence. He said nothing when asked about a license by the Customs Agent.

Lastly, you are not required to disclose this information, and not doing so would not constitute a frivolous controversy because, as a criminal defense representative, you may defend Cruz by requiring the government to prove the elements of its case.

Here, having a license takes any transaction out of the "prohibited" category. Thus, it is up to the government to prove that Cruz is not licensed.

Travel-Related Expenses

You are not required and should not disclose what Cruz told you concerning his travel expenses.

Cruz has told you that he spent $2,000 on his trip to Cuba, and that he bought cigars and rum. As discussed above, you must preserve his confidentiality, because the exception does not apply here.

Cruz told the Customs Agent that he did not pay for the items. Although that was false, you are not required to disclose what you know, and cannot disclose and breach your duty of confidentiality.

You cannot, however, in any way affirm Cruz's false statement by referring to it or incorporating it into your letter, because you may be adopting his misrepresentation.

Thus, the best thing to do is to decline to answer. As noted above, you are within your professional obligations to require that the government prove this element of the crime.

C. Regarding Fully-Hosted Travel

The considerations here are similar to those discussed under licenses.

If Cruz's travel is fully-hosted then transaction would not be "prohibited" as required by the element of the offense. Thus, you are not required to disclose your knowledge that Cruz's trip was in fact NOT fully-hosted, because you do not have a duty to affirmatively inform OFAC of this fact, and because you are permitted to require the government to meet its burden of proof.

You should not disclose what you know, that Cruz was not fully-hosted, because your duty to preserve his confidence is not excepted by any threat of death of harm.

In sum, you are ethically required to decline OFAC's request for information because you are obligated to preserve Cruz's confidence, and because you are allowed to require the government to meet its burden of proof, as long as you don't give false statements or affirm any that Cruz has made.