**The original documents are located in Box 9, folder "Discrimination - Arab Boycott (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.**

# THE ADMINISTRATOR OF NATIONAL BANKS

WASHINGTON, D.C. 20219

Banking Bulletin 75-3

TO: Presidents of All National Banks

SUBJECT: Discriminatory Practices February 24, 1975

This Office has recently learned that some national banks may have been offered large deposits and loans by agents of foreign investors, one of the conditions for which is that no member of the Jewish faith sit on the bank's board of directors or control any significant amount of the bank's outstanding stock. While we are not presently aware of any such deposits or loans, so conditioned, having been accepted by any of the banks under the jurisdiction of this Office, we are concerned that all national banks scrupulously avoid any practices or policies that are based upon considerations of the race, or religious belief of any customer, stockholder, officer or director of the bank.

One of the major responsibilities of this Office is to insure that each national bank meets the needs of the community it was chartered to serve. While observing those credit and risk factors inherent to the banking business, all the activities of all national banks, indeed of all banks regardless of the origin of their charters, must be performed with this overriding principle of service to the public in mind. Discrimination based on religious affiliation or racial heritage is incompatible with the public service function of a banking institution in this country.

By means of its regular examination function, this Office will assure the adherence of national banks to a nondiscriminatory policy in the circumstances mentioned, as well as in any other respect where racial or religious background might similarly be placed in issue. This Office is confident that it has the full understanding and cooperation in this effort of the banks in the national system.

Very truly yours,

James E. Smith
Comptroller of the Currency

MAR 28 1975

MEMORANDUM FOR RODERICK M. HILLS
Consultant to the President

Re: Arab Boycott

You asked me to set forth briefly what I view as the conceptual framework within which Administration action concerning the above matter must be considered.

At the outset, it seems to me that the various activities on the part of the Arab countries which have been alleged must be divided into two basic categories: Those involving discrimination against Jews as such; and those involving discrimination against persons aiding Israel.

As to the first category, racial or religious discrimination, it seems to me the Administration's stand must be unqualified. As the President indicated in his Florida press conference on February 26, this simply has no place within our national system. No matter by whom it is practiced, or for what purpose, the government will move against it by all means at its disposal. As I pointed out in my legal memorandum on this subject, these means are not unlimited. Most discrimination by private companies in contracting, or in selecting their customers, is not covered by Federal laws as currently interpreted. Nonetheless, most industries in which such practices are likely to appear as a result of Arab pressure are subject to a substantial degree of Federal regulation, which either includes explicit provision prohibiting such discrimination*/ or confers upon

*/ See the SEC example cited in my memorandum at p. 20.

the Federal supervisory agency powers which can effectively be used to prevent it.**/

The second category of activities involves discrimination against particular individuals or companies not because of race or religion but because of particular economic benefits which they have conferred upon the State of Israel, with which the Arab nations are in a state of hostility. As a philosophical matter, such activity is not inherently repugnant to our national beliefs; we have at times employed secondary boycotts ourselves. It seems to me exceedingly ill advised to adopt any Administration position which would declare all aspects of such politically motivated secondary boycotts to be unlawful, thereby projecting us into international confrontations whenever they are employed. (For example, I believe that some of the "Third World" nations refuse to do business with companies that have provided substantial economic benefits to South Africa.)

Nonetheless, there comes a point at which the application of a foreign-imposed secondary boycott within our own economy becomes unacceptable--and at which our legitimate national interests outweigh any conceivable justification on the part of the boycotting foreign countries. I would identify the principal levels of effect as follows:

1. The "core" boycott itself--that is the refusal of Arab countries and companies, even when doing business in this country, to deal with companies that have provided substantial economic benefit to Israel. Unless we wish to exclude Arab investment from this country, and to run the risk of repeated international confrontations in the future, it seems to me we must permit this.

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**/ See the attached letter from the Comptroller of the Currency, which forbids national banks from discriminating in contracting or the selection of customers, without citing any express provision of law prohibiting such discrimination. It is of course inconceivable that this direction by the Comptroller would either be ignored by the banks or challenged in the courts.

2. Unilateral abstention on the part of an American firm from doing business with Israel in order to obtain more lucrative Arab business. If one agrees with the analysis under No. 1 above, one is almost compelled to permit this type of American "involvement" in the boycott.

3. Agreement by an American company, in order to obtain Arab business, not to do business with Israel in the future. At this point the American company's involvement in the boycott becomes less passive; the American company is ceding some of its freedom of action. Moreover, it is possible to prohibit this type of American "participation" without in effect excluding Arab investment. It is at this level that I feel the interests of the United States begin to outweigh whatever justifiable interests the Arabs may have.

4. Agreement by an American company, in order to obtain Arab business, not to deal with another American company. At this point the American company's involvement in the Arab boycott has a direct and immediate effect upon our own economy, and only an indirect impact upon the object of the Arabs' disfavor. Here there is no doubt that our interests predominate, and that no considerations of international comity should induce us to permit the activity.

5. Agreement among several American companies to refrain from doing business with another American company, or to exclude another American company from participation with them in a joint venture, in order to obtain Arab business. Here the international aspects of the matter are even more remote. The boycotting agreement is not merely an agreement with the Arabs, but an agreement among American companies themselves. It is the strongest case for prohibitive action by our government.

In the testimony which I gave before the Subcommittee on International Trade and Commerce of the House Committee on Foreign Affairs, I implied that the antitrust laws would

prohibit Nos. 4 and 5 above, would probably prohibit No. 3, and would probably not prohibit Nos. 1 and 2. It is no accident that this legal analysis tends to parallel my conclusions as to what types of activity it is desirable to prohibit and not--for the Sherman Act only prohibits those restraints of trade that are "unreasonable." It may be of some relevance to your decisions on these matters that my testimony concerning the scope of the antitrust laws did not arouse any criticism from Jewish groups.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

WASHINGTON, D. C. OFFICE
ANTI-DEFAMATION LEAGUE
*Of B'nai B'rith*
1640 Rhode Island Avenue, N.W. • Washington, D. C. 20036 • [202] 393-5284



DAVID A. BRODY
*Director*

March 31, 1975

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

I thought you would want to see a copy of the letter I sent to Antonin Scalia, Assistant Attorney General in Charge of the Office of Legal Counsel commenting on one phase of his testimony before the House Internal Relations Subcommittee on International Trade and Commerce on the applicability of the civil rights laws to the Arab boycott.

To suggest that the bona fide occupational qualification provision may cover the fact situation described in Mr. Scalia's testimony is to misread the intent of Congress in enacting the very limited job qualification exception.

With every good wish,

Sincerely,

David A. Brody

DAB:ebo

ANTI-DEFAMATION LEAGUE
*Of B'nai B'rith*
1640 Rhode Island Avenue, N.W. • Washington, D. C. 20036 • [202] 393-5284



DAVID A. BRODY
*Director*

March 25, 1975

Antonin Scalia, Esq.
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

Dear Mr. Scalia:

We have reviewed your testimony of March 13 before the House Foreign Affairs Subcommittee on International Trade and Commerce in which you discussed the applicability of the civil rights and anti-trust laws to the Arab boycott, and while we generally agree with your analysis, there is one aspect of your testimony which may give rise to a possible misconception of the law and therefore needs, we believe, enlargement and clarification. On pages 3 and 4 of your prepared testimony you state:

> "With respect to Title VII's restrictions on employment practices of private individuals, one provision deserves special mention within the present context: Section 703(e) provides, in part, that discrimination in hiring or employment 'on the basis of . . . religion, sex, or national origin' (note that 'color' and 'race' are significantly omitted) shall not be unlawful in circumstances where such factor 'is a bona fide occupational qualification reasonably necessary to the normal operation of /the/ particular business or enterprise.' There is no Federal case law on the point whether this provision would, for example, justify the refusal to hire a Jewish applicant for a job to be performed in a country which does not issue visas to Jews. A New York State trial court found that a comparable exemption under that State's anti-discrimination legislation would not justify such refusal."

This brief statement leaves the impression that the bona fide occupational qualification exception may cover the case you describe in your testimony and except from the prohibitions of Title VII conduct which otherwise would clearly constitute an unlawful employment practice. This is unfortunate because the legislative history of the statute makes plain that Sec. 703(e) is wholly inapposite in this context.

As the House Judiciary Committee stated in its Report, Sec. 703(e)[1/] was intended to provide for "a very limited exception" to the provisions of Title VII. H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963), at 27. The purpose of the exception as pointed out in the subsequent floor debates was to enable a French restaurant, for example, to give preference in employment to a French chef or a bookstore selling religious articles relating to a certain faith to give preference to a salesperson of that faith. 110 Cong. Rec. 2549, 7213, 13170 (1964).

Sec. 703(e) was never intended to make religion a job-related qualification where it is an irrelevant factor and not one of the normal requirements for the job. To interpret Sec. 703(e) to apply to the fact situation set out in your testimony would attribute to Congress an intent inconsistent with the objectives of the statute, to accommodate the discriminatory practices of a foreign country and to convert what would normally be an illegal act of employment discrimination into a lawful one. To so construe the job qualification exception is to stand the statute on its head and empower a foreign country to nullify its prohibitions. It would subvert and make a mockery of a statute whose purpose is to outlaw the evils of employment discrimination in this country to interpret this limited exception to authorize the importation to our shores of the discriminatory practices of a foreign country which are in conflict with our domestic laws and alien to our principles.

I am sending a copy of this letter to the Subcommittee for inclusion in the hearing record. I would think that you would want to supplement your statement for the record as well so that there may be no misunderstanding of the Department's position.

Sincerely yours,

David A. Brody



1/ Sec. 704(e) of the House bill

5-21

# United States Senate

WASHINGTON, D.C. 20510

May 21, 1975

Dear Mr. President:

You will recall that last December a substantial majority of the Senate wrote you urging a reiteration of our nation's long-standing commitment to Israel's security "by a policy of continued military supplies and diplomatic and economic support".

Since 1967 it has been American policy that the Arab-Israel conflict should be settled on the basis of secure and recognized boundaries that are defensible, and direct negotiations between the nations involved. We believe that this approach continues to offer the best hope for a just and lasting peace.

While the suspension of the second-stage negotiations is regrettable, the history of the Arab-Israel conflict demonstrates that any Israeli withdrawal must be accompanied by meaningful steps toward peace by its Arab neighbors.

Recent events underscore America's need for reliable allies and the desirability of greater participation by the Congress in the formulation of American foreign policy. Cooperation between the Congress and the President is essential for America's effectiveness in the world. During this time of uncertainty over the future direction of our policy, we support you in strengthening our ties with nations which share our democratic traditions and help to safeguard our national interests. We believe that the special relationship between our country and Israel does not prejudice improved relations with other nations in the region.

We believe that a strong Israel constitutes a most reliable barrier to domination of the area by outside parties. Given the recent heavy flow of Soviet weaponry to Arab states, it is imperative that we not permit the military balance to shift against Israel.

We believe that preserving the peace requires that Israel obtain a level of military and economic support adequate to deter a renewal of war by Israel's neighbors. Withholding military equipment from Israel would be dangerous, discouraging accommodation by Israel's neighbors and encouraging a resort to force.

Within the next several weeks, the Congress expects to receive your foreign aid requests for fiscal year 1976. We trust that your recommendations will be responsive to Israel's urgent military and economic needs. We urge you to make it clear, as we do, that the United States acting in its own national interests stands firmly with Israel in the search for peace in future negotiations, and that this premise is the basis of the current reassessment of U.S. policy in the Middle East.

Respectfully yours,

Birch Bayh

Lloyd Bentsen

Bill Brock

Edward W. Brooke

Clifford P. Case

Frank Church

Robert Dole

Hubert H. Humphrey

Henry M. Jackson

Jacob K. Javits

Gale W. McGee

Walter F. Mondale

Edmund S. Muskie

Bob Packwood

Abraham Ribicoff

Richard S. Schweiker

Richard Stone

Stuart Symington

Herman E. Talmadge

J. Glenn Beall, Jr.

William V. Roth, Jr.

John O. Pastore

Hugh Scott

Barry Goldwater

Robert T. Stafford

Roman L. Hruska

Harrison A. Williams

Charles McC. Mathias, Jr.

Thomas F. Eagleton

William Proxmire

James B. Allen

Thomas J. McIntyre

Vance Hartke

George S. McGovern

Robert Taft, Jr.

John V. Tunney

Adlai E. Stevenson

Joseph M. Montoya

Lowell P. Weicker, Jr.

Patrick J. Leahy

Edward M. Kennedy

Frank E. Moss

Gaylord Nelson

Jake Garn

Lawton Chiles

Ted Stevens

James B. Pearson

James L. Buckley

Howard W. Cannon

Alan Cranston

Hiram L. Fong

John Tower

Wendell H. Ford

Robert Morgan

Gary Hart

Philip A. Hart

Warren G. Magnuson

Clairborne Pell

Mike Gravel

Paul Laxalt

Sam Nunn

Daniel K. Inouye

Robert C. Byrd

John Glenn

Floyd K. Haskell

Dale Bumpers

Dick Clark

John C. Culver

Walter D. Huddleston

Lee Metcalf

William D. Hathaway

J. Jennings Randolph

Joseph R. Biden, Jr.

Strom Thurmond

Pete V. Domenici

CHARLES H. PERCY
ILLINOIS

Advance copy to Mr. Buchen for info.

# United States Senate

WASHINGTON, D.C. 20510

May 22, 1975

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D. C. 20500

Dear Mr. President:

In view of the letter on the Middle East circulated in the Senate by a number of my distinguished colleagues, I wish to directly express to you my own position.

MF

I concur with the co-signers in their profound support for the security and survival of the State of Israel; however, I do not believe that an expression of concern for the interests of only one party to the conflict is adequate at a time when American good will toward all the parties is required in order to facilitate a fair and equitable settlement.

I am interested that the Administration has chosen to reassess its policies, and I am heartened that Secretary Kissinger has agreed to consult with the Congress as part of the reassessment. Since the goal of all of us is to promote a just and equitable peace in the region, it is important that these consultations take place in an atmosphere of mutual confidence and with candor. The originators of the above-mentioned letter, who are so knowledgeable about the problems of the Middle East, will have much to contribute to such consultations.

In regard to Israel, I believe strongly and without equivocation of any sort, that the United States has an absolute moral obligation to provide diplomatic, political and appropriate levels of economic and military assistance support during the difficult time of negotiation and during the rearrangements following negotiation. With such continuing American support, and with determined efforts by the Government of Israel to achieve a successful negotiation, I believe that Israel can finally achieve the peace, security and the essential recognition of her neighbors which she has long sought and deserved.

In regard to the Arab States, I believe strongly and without equivocation that the United States, by continuing diplomatic effort, can build on what has already been accomplished in improving our relations with Arab leaders on the basis of understanding and trust. The progress which has already been achieved gives hope that the Arab

States will realize that our approach to peace in the area rests on a basis of concern for all the parties, just as we seek peace and security for all the parties. I have outlined in my recent report to the Senate Foreign Relations Committee the steps that Arab States in my opinion can take to demonstrate their desire for a peaceful and lasting settlement of the Mideast conflict.

Obviously, the search for peace will succeed only when the parties directly involved are prepared to make the concessions necessary to a settlement. I deeply believe that the process of accommodation, which is so long in coming, could be accelerated if direct talks would be undertaken.

It is my hope that the Executive and Legislative branches will reach substantial consensus on Middle East policy, as a result of consultation within the context of the reassessment, and that Israel and the Arab States will reach agreement soon on positive steps toward peace in their own mutual interest.

Sincerely,

Charles H. Percy

Charles H. Percy
United States Senator

CHP:sar

[6/75?]

Miss Vanderbye in Dr. Kissinger's office called to ask 2255
if we had received a lawyer-to-lawyer memo from
Kissinger's office at State on the Arb boycott -- outlining their views.
(told her Dudley Chapman had our whole file and I wasn't aware
of anything that came in --- sometimes papers are given directly
to Mr. Hills on this subject) She is to call Dudley.

THE WHITE HOUSE

WASHINGTON

June 18, 1975

MEMORANDUM TO: PHILIP BUCHEN & RODERICK HILLS

FROM: ROBERT GOLDWIN

I met last Friday, June 13, with Rabbi Arthur Hertzberg, the President of the American Jewish Congress, and he gave to me the three enclosed pieces concerning two lawsuits that his staff is now working on in reaction to the Arab boycott.

Although he said it might seem strange that he was informing me in advance of intended legal actions against the government, his intention was to make it clear that he understands and appreciates the Administration's strong position in opposition to the Arab boycott and he wants to make it plain that he does not consider the White House as an adversary that needs to be prodded.

When I told him that I thought the best procedure would be for me to pass these materials on to you, he agreed and requested that I explain in a covering memorandum the spirit in which they were proceeding.

Encls.

THE WHITE HOUSE

WASHINGTON

June 18, 1975

File in "Arab Boycott"

MEMORANDUM TO: PHILIP BUCHEN & RODERICK HILLS

FROM: ROBERT GOLDWIN

I met last Friday, June 13, with Rabbi Arthur Hertzberg, the President of the American Jewish Congress, and he gave to me the three enclosed pieces concerning two lawsuits that his staff is now working on in reaction to the Arab boycott.

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When I told him that I thought the best procedure would be for me to pass these materials on to you, he agreed and requested that I explain in a covering memorandum the spirit in which they were proceeding.

Encls.

May 28, 1975

Mr. Ernest Kohn,
Acting Superintendent
New York State Banking Department
2 World Trade Center
New York, N.Y. 10047

Dear Mr. Kohn:

We have seen newspaper accounts indicating that the Bankers Trust Company of New York, the First National Bank of Chicago, the Security Pacific Bank of California and Texas Commerce Bancshares are applying to the New York State Banking Commission for permission to establish a new banking entity to be known as the United Bank, Arab and French, New York.

We understand that their associates in this new venture will include more than 20 Arab banks from various Middle Eastern countries, as well as several European banks. According to our information the initial capital of the new institution will amount to $25 million of which 40% will be derived from Arab sources, 40% from French sources and the remaining 20% divided among the four American participants.

Many Arab commercial interests, especially those within the financial community, have publicly announced their intention to carry out the boycott objectives of the Arab league. We believe it appropriate therefore that your Commission, as a pre-condition to the issuance of a charter, receive assurances that the business affairs of this new banking institution will be conducted fully in conformity with the letter and spirit of our laws and with the national policy of this country as expressed both in the statements of our Government and the enactments of our Legislature.

Accordingly, we respectfully request that you require specific assurances that the operations of the proposed bank will be divorced from non-commercial, political considerations and that it will in no way discriminate in any facet of its operations because of race or religion or because of the alleged or real connections any potential business associate may have with any country friendly to the U.S., including the State of Israel.

We know that you are aware of the many statements of the President, repeated as recently as May 13, declaring participation in boycotts to be inimical to the interests of the American people and contrary to national policy. We know also that you are aware that this view is embodied in the United States Code in the Export Administration Act of 1965 which holds:

> "It is the policy of the United States (a) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States..."

Banks occupy a unique and crucial position in our economic life. They are central to the financial operation of our system and exercise a vital influence over a wide and ramified sector of American enterprise. We were therefore especially gratified by the position taken by your Department earlier this month directing the attention of banks to the requirements of our own State laws forbidding discriminatory practices or policies by banking institutions in New York. We fully share your conviction that "discriminatory practices...are incompatible with public service functions of banking institutions in this state." In consonance with this view we urge that you demand appropriate commitments from the prospective organizers of the new United Bank, Arab and French, New York.

As Americans we endorse the proposition that Arab banking interests must be accorded the same right to participate in American financial and commercial arrangements as are allowed investors and bankers from all other countries. They must not, however, be permitted to use that privilege to disrupt or distort American banking commercial operations in order to satisfy extraneous political objectives, especially those which are so manifestly contradictory to our own country's traditions and policies.

Sincerely,

Arthur Hertzberg

JUN 7 1975

Dear Mr. Hertzberg:

Thank you for your letters of April 9 and May 13 concerning the U.S.-Saudi Arabian Joint Commission on Economic Cooperation.

In your April 9 letter, you refer to the section of the Summary Minutes of the February 26-27 meeting of the Joint Commission which says that Joint Commission manpower development and vocational training programs will be sensitive to the social, cultural, political and religious context of Saudi Arabia. You suggest that this section might contain an implicit understanding that the Saudi Arabian Government might not be obliged to deal with, accept, or recognize American citizens whom it finds objectionable on any of these grounds.

No part of the Summary Minutes, nor for that matter any Joint Commission documents, deal implicitly or explicitly with the selection of Americans to participate in technical assistance programs in Saudi Arabia and there has been no instance in which the Saudis have requested us to restrict or curtail any Joint Commission activities involving Jewish personnel.

The statement you refer to simply means that U.S. and Saudi Arabian counterparts must work closely together to ensure that mutually agreed to vocational training programs will operate within the cultural context of Saudi Arabia. Prevailing Saudi Arabian attitudes toward manual labor, scheduling to accommodate daily prayer times, weekly religious holidays and the currently fragmented Saudi manpower training organizational structure are but a few examples of the "social, cultural, political and religious" factors which must be taken into consideration when designing an effective vocational training program in Saudi Arabia.

The article you discussed in your May 13 letter refers to MIT contract negotiations which began before the Joint Commission was created in June of last year and are not related to Joint Commission programs. These were private contract negotiations and I am not privy to all of the facts of this dispute. Therefore, I do not believe it appropriate for me to comment publicly on this particular contract.

Please rest assured that the Department does not and will not condone religious or ethnic discrimination in any of our Joint Commission programs and does not and will not screen personnel sent to Saudi Arabia with respect to their religion or ethnic origin. We will continue to ensure that this non-discriminatory policy is adhered to by all parties. If you wish, I would be happy to discuss this matter with you again personally.

Sincerely yours,

William E. Simon

Mr. Arthur Hertzberg
American Jewish Congress
15 East 84th Street
New York, N.Y. 10028

AMERICAN JEWISH CONGRESS
15 East 84th St., New York, N. Y. 10028 • TR 9-45

June 2, 1975

To: Naomi Levine

cc: Phil Baum
Richard Cohen
Will Maslow
Leo Pfeffer
Lois Waldman

From: Joseph B. Robison

Subject: Action Under Freedom of Information Act on Arab Boycott Reports

This memorandum reports the results of my initial research on the law applicable to a possible application by AJCongress, under the Freedom of Information Act, to obtain access to information on the Arab boycott in the files of the Office of Export Administration. What we are trying to get is (1) the reports that are filed under the Export Administration Act and (2) whatever files they may have on the failure of companies to file reports. Our information on the latter is still rather sketchy but we should be able to fill it in. At the least, we would ask specifically for the files on the 49 cases referred to in the N. Y. Times story of May 22 on Commerce Department action against companies that are in default.

The Freedom of Information (FOI) Act is embodied in 5 U.S.C. 552, as amended by Public Law 93-502, adopted November 21, 1974. (The amendment is not yet in the pocket part of Title 5. I have prepared a paste-up which presents Section 552 as amended.)

Section 552(a)(3) directs agencies to make their "records ... promptly available to any person," upon receipt of a request which reasonably describes the records and which is made in accordance with published rules regarding such matters as time, place, fees and procedures.

Section 552(b) lists a number of exceptions, of which only the fourth is likely to be invoked against our application. It makes the FOI Act inapplicable to:

> Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

On no theory can the information we are trying to get come under the heading of "trade secrets." It is also doubtful that it constitutes "commercial or financial information." But, even if it is, it is only exempted if it is

also "privileged or confidential." It is possible that an assertion that it is confidential will be made under the terms of the Export Administration Act (15 App. U.S.C. 2401-2413).

50 App. U.S.C. 2402(5) of that Act contains the statement of U. S. policy against boycotts with which we are all familiar. Section 2403(b)(1) contains a grant of power to issue rules and regulations. It specifies that the rules shall implement Section 2402(5) and that they:

> shall require that all domestic concerns receiving requests for the furnishing of information or the signing of agreements as specified in that section must report this fact to the Secretary of Commerce for such action as he may deem appropriate to carry out the purposes of that section.

Note that this makes the filing of reports mandatory under the statute.

Section 2405(a) is the penalty section of the Export Act. It provides that any person who "knowingly violates" any provision of the Act "or any regulation, order, or license issued thereunder" is subject to fine and/or imprisonment. Failure to file a report may constitute such a criminal violation. The N. Y. Times story of May 22 suggests that it does. At any rate, that is not what we are concerned with now.

Section 2405(c) reads as follows:

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

This section, together with subsection (b)(4) of the FOI Act, makes the availability of the reports we want turn on whether or not the material in question is "confidential." (It seems clear that the material does constitute "commercial or financial information," as that term is used in the FOI Act exception.) The provision applies to material "which is deemed confidential" or as to which a request for confidential treatment has been made.

As to the first test, it is certainly unclear what the words "which is deemed confidential" mean. Deemed by whom? If it is by the agency involved, we would then have problems under the Regulations that have been issued by the Department of Commerce under the anti-boycott provisions of the Export Administration Act, which appear in 15 C.F.R., Part 369.

Rule 369.2(b) contains the following sentence:

> The information contained in these reports is subject to the provisions of Section 7(c) of the Export Administration Act regarding confidentiality of information.

At first blush, this seems to say that the reports are confidential. But if the words "subject to" are given their normal meaning, the provision adds nothing to the statute. It applies only to what is already confidential under the statute. Although it would have been easy enough to say that the reports to be filed are confidential, the Regulation does not say that. So it is still not clear what the Department "deems" confidential.

The second test in Section 2406(c), whether a request for confidential treatment has been made, creates another ambiguity. Obviously no such request is made by exporters who file reports. On the other hand, it can be argued that no request is necessary because an assurance of confidentiality has been given by the agency in Rule 369.2(b). While, as I have indicated, this is not clear, an exporter could claim that he is entitled to the benefit of the doubt.

I think we can cut through both of these ambiguities by taking the position that, as noted above, filing of the reports in question is required by statute (Section 2403(b)(1)) and that neither the Office of Export Administration nor the Department of Commerce, of which it is a part, can "deem" them, or make them, confidential. What Section 552(b)(4) exempts is material that <u>is</u> confidential. Material cannot be made confidential merely by being so described in an agency regulation. If an agency had power to do that, it could block application of the FOI Act to large parts of its operations just by declaring files, records, etc., confidential.

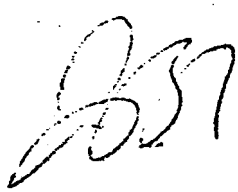
Furthermore, there is nothing inherently confidential about these reports. What they cover is primarily the action of a foreign agency which is contrary to U. S. policy. There is no reason to keep this confidential. At the least, we could urge that the head of the agency should make a determination, under Section 2406(c) quoted above, that withholding of this information "is contrary to the national interest."

Of course, it might be argued that a company's response as to whether it complied with a boycott request is confidential. At the worst, this would mean that we would be denied that part of the information contained in the reports. The 1974 amendments to the FOI Act inserted after the exceptions listed in Subsection (b) a provision that: "Any reasonably segregable portion of a record shall be provided ... after deletion of the portions which are exempt under this subsection."

Note that the procedure under the FOI starts with an application to the agency involved requesting access to the records. This must conform to the regulations adopted by the agency concerning such requests. I have a copy of those regulations. They do not appear to present any significant problems.

The application must be quite specific about the materials requested. Obviously we can meet that requirement as to the filed reports. As to the material on unfiled reports, a reference to the N. Y. Times story of May 22 may be sufficient. That story is based on information supplied by the Commerce Department. (It starts: "The Commerce Department said today...") They can hardly deny that they know what we are asking for.

Once a request has been filed, the agency is required to act within a limited time. If the request is refused, an appeal must be taken within the agency before court action can be initiated. The agency's action on that appeal must also be taken within a limited time.



Memorandum from...

AMERICAN JEWISH CONGRESS
15 East 84th St., New York, N. Y. 10028 • TR 9-45

June 3, 1975

To: Theodore Mann
Paul Berger

From: Naomi Levine

cc: Arthur Hertzberg, Howard Squadron, Stanley Lowell, Shad Polier, Murray Gordc Will Maslow, Phil Baum, Richard Cohen, Joseph Robison.

Enclosed are two preliminary memoranda involving the two law suits that staff is now working on re the Arab boycott. As you know from conversations with me -- one law suit would be against the Department of Commerce -- under the Freedom of Information Act -- demanding that the Department of Commerce reveal the names of those corporations that are complying with the boycott. The second suit would involve an action against Secretary Simon challenging the constitutionality of the agreement signed by the United States with Saudi Arabia which contains the sentence, "in implementing these programs the United States will be sensitive to the religious, social, economic, etc., contexts of Saudi Arabia."

Joseph Robison has prepared the preliminary memo on possible action under the Freedom of Information Act. Leo Pfeffer has prepared a preliminary memo on the suit against Simon. Both of these, I repeat, are "preliminary thoughts" on these law suits. I would deeply appreciate it if you would study the memoranda and get back to us with your comments and suggestions.

Lois Waldman has been in the library this week on the Simon suit and will have her own memorandum to present shortly. But I wanted you to have these memoranda in the meantime -- for whatever suggestions you can give us.

NL

15 East 84th St., New York, N. Y. 10028 • TR 9-45

May 28, 1975

To: Naomi Levine

From: Leo Pfeffer

Subject: AJC v. Simon

I have been thinking about this case over the weekend, and have decided to put my thoughts in writing without waiting for Phil Baum's memorandum on the conference you had with Lou Henkin, even though some of the suggestions I am making may have been covered in the conference. As you will see, I suggest research on some matters, and I assume you want to start the suit as soon as possible. The research should therefore be undertaken without further delay.

Accordingly, I attach hereto my preliminary thoughts on the suit.

(This memorandum was prepared in my summer home in the Catskills where I do not have ready access to library resources. The decisions referred to herein are based on memory which may be faulty. Also, of course, I was unable to include the volume and page citations.)

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American Jewish Congress v. Simon

I. The Parties Plaintiff

A. American Jewish Congress. I presume that the AJC should be the lead-off plaintiff, so that the suit will be known as AJC v. Simon. If AJC members have standing to sue, then so does the AJC. The most recent statement of this appears in Meek v. Pittenger, where the Court went out of its way (since the point was not raised on appeal) to hold that the ACLU, NAACP, Pennsylvania JCRC and Americans United had standing to challenge use of tax funds in violation of the First Amendment, even though they themselves were not taxpayers.

B. AJC Members. I assume we would want to have some prominent AJC members, such as Hertzberg, Squadron, Polier, etc. as parties plaintiff. Although the matter is not certain, I think the standing of American Jews to bring the suit can be upheld. Since Flast v. Cohen, the Supreme Court, with one or two exceptions, has been quite liberal in upholding standing. In Jones v. Butz, the three-judge District Court held, after the issue was raised by the defendants, that organizations and individuals concerned with the humane treatment of animals had standing to challenge the constitutionality of the Humane Slaughter Law. The Supreme Court affirmed without opinion a decision for defendants on the merits. I think Jones v. Butz supports standing of American Jewish citizens in the present case. (One of the plaintiffs should be an AJC staff member for convenience in getting a plaintiff's signature, affidavit, verification, etc.)

C. Non-Jewish Plaintiffs. It might be tactically beneficial to have some prominent non-Jews join as plaintiffs. While their standing to sue may be less clear, there is some precedent to support it. The Supreme Court has held that blacks who have been excluded from jury duty may sue,

although in the usual case it is a black convicted by an all-white jury who raised the question. The Court has also ruled that a white convicted by an all-white jury has standing to raise the question. The point is that all Americans have a judicially-cognizable interest in the fundamentals of our constitutional democracy.

D. Potential Jewish Personnel. Jewish doctors, teachers, engineers, etc. who have an interest in working in Saudi Arabia have a better chance than any of the above to withstand a challenge to standing. Before Flast v. Cohen, the Court might have insisted on an actual application and rejection as necessary for standing, but in its present climate of opinion it is probable that it will be satisfied with an allegation of interest.

E. A Rejected Jewish Applicant. This would almost certainly dispose of the standing problem. Therefore, every effort should be made to get at least one.

II. The Parties Defendant

Suit cannot be brought against the President for an injunction. (Mississippi v. Johnson. U. S. v. Nixon is not contra.) Such suits against cabinet members are permissible (Georgia v. Stanton), and indeed are common; Flast v. Cohen (Secretary of HEW) and Jones v. Butz are examples.

I assume Simon is the cabinet member in charge of the program. Perhaps this should be checked. Also, if any lesser officials are more directly responsible for it, they should be made parties defendant, for deposition purposes.

Is Kissinger in any way involved? If he is, would it be politic or impolitic to join him as a defendant?

III. Class Action

For a variety of reasons, including lessening the danger of mootness, the suit should be brought in the form of a class action.

IV. Venue

This may present a serious logistical problem. If we can sue in New York, we can sue out of 15 East 84th Street; many of our church-state cases (Flast, Levitt, Nyquist) were prosecuted from this address. While there are administrative difficulties, since we are not a litigatory law office, they are manageable. If, however, the suit has to be brought in Washington, I do not think we can practicably sue out of 15 East 84th Street. The pre-trial proceedings (motions, discovery, depositions, etc.) and even the trial itself would require a Washington law office and attorney or attorneys. Unless we are prepared to pay a high fee, I do not think we can expect the suit to be prosecuted as expeditiously and as thoroughly as we would like. Even in that event, we would not have complete control of strategy and tactics.

I think the suit can be brought in New York. Flast v. Cohen and Jones v. Butz were brought in New York and in neither case was the question of venue raised. Before I brought Flast v. Cohen, I believe I researched the question; if so, we may have something on it in the file. In any event, I suggest that in view of the importance of the matter, fresh and thorough research should be undertaken.

V. One-Judge or Three-Judge Court. A three-judge court is obviously preferable, if for no other reason than the right of immediate appeal to the Supreme Court. The Court today does not particularly favor three-judge courts; Chief Justice Burger would abolish them altogether. Nor am I certain that we have a statutory right to it in this case. This question should be researched.

VI. The Relief Sought

We should, of course, ask for declaratory and injunctive relief. Whether monetary relief and/or counsel fees are available should be researched, assuming that as a tactical or strategic matter we want to ask for it.

VII. The Gravamen of our Suit

I can think of five separate causes of action upon which we can sue, and suggest that each should be set forth as a separate count:

A. Ban on Religious Tests (Const. Art. VI). I cannot think of any case in which the Supreme Court interpreted this clause. (It was raised in Torcaso v. Watkins, but the Court did not find it necessary to pass on it.) The discussions in the Constitutional Convention and in the State ratification conventions show that it was intended to have a broad scope. I am reasonably confident that the Court would hold it applicable to our case. The ban, it is important to note, is not limited to an "office" under the United States, but expressly includes a "public trust." It seems reasonable to me that the government manifests a "public trust" in a physician, engineer or teacher it recommends to the Saudi Arabian government.

B. Establishment of Religion. While the First Amendment expressly forbids only Congress from making laws respecting an establishment of religion, there is no doubt that this clause (as other guaranties in the First Amendment) applies to the Executive as well. (See Allen v. Morton -- creche on Elipse -- and Laird v. Anderson -- compulsory chapel attendance at military academies.)

If the Establishment Clause means anything it means that the government may not involve itself in theological questions. (Watson v. Jones; Kedroff v. St. Nicholas Cathedral.) As any Israeli can tell you, the

question, "who is a Jew", is chock-full of theology. To answer the question to the satisfaction of the Saudi Arabian government would entangle our own in religious affairs to an extent far beyond that held impermissible in Lemon v. Kurtzman, Johnson v. DiCenso, and Meek v. Pittenger. (This was one of the reasons we successfully opposed the inclusion of a question on religion in the U. S. census.)

C. Free Exercise. The Virginia Statute for Religious Freedom, which the Supreme Court has stated to be the foundation of the Free Exercise Clause, provides that the people's religious beliefs "shall in nowise diminish, enlarge, or affect their civil capacities." The government's actions in the present situation clearly violates that provision. It may be assumed that a doctor, teacher or engineer is no less so because he or she is Jewish. (See Torcaso v. Watkins.)

D. Equal Protection of the Laws. There is, of course, no express mandate of equal protection in the Fifth Amendment, but it is now well-settled that the amendment does implicitly encompass equal protection. (Bolling v. Sharpe; Schneider v. Rusk; Shapiro v. Thompson, et al.) Nor can there be any doubt that in the present case the government is sufficiently implicated in the discriminatory practices of Saudi Arabia to make it subject to that clause (Burton v. Wilmington Parking Authority).

E. Civil Rights Act of 1964. I am not certain that this Act applies to the Federal Government. (I know it applies to the States.); this should be checked. If it does, there is a clear cause of action under Title VII (employment), even if the government's role is no more than that of a recruiting agency.

But for the last-minute amendment of Title VI, which deleted the word "religion" from the ban on discrimination in Federally-funded programs, a count could have been included under that title. My own opinion is that such discrimination or at least such funding is constitutionally impermissible even in the absence of any statutory bar. (See Simkins v. Moses H. Cone Hospital, and the last footnote in Justice White's concurring-dissenting opinion in Tilton-Lemon-DiCenso.) In view of the fact that the AJC has not yet taken a policy position on this, I assume we would not want to include this count in our complaint.

VIII. The Factual Allegations

Can we allege as a matter of fact that there is a boycott against Jews? If not, do we have enough to allege it on information and belief? Suppose the answer denies a boycott of Jews but only of those Jews who are pro-Israel. Or, to make it harder, of all who are pro-Israel, Jews or non-Jews. This could knock out all our counts with the possible exception of the Equal Protection count. (The Civil Rights Act of 1964 does not ban discrimination on political grounds.) We might have a freedom of speech claim or perhaps a procedural due process claim, but these would be considerably weaker than claims based on religion.

If we have enough to allege religious discrimination on information and belief, we can engage in extensive (and expensive) discovery proceedings, which could disclose at least an administrative presumption that all Jews are Zionists. Do we want to challenge that?

Some hard thinking is called for here.



IX. Executive Discretion in International and Foreign Affairs

In Missouri v. Holland, the Supreme Court held that limitations of constitutional federalism do not restrict the treaty-making power. That

decision, however, does not hold that a treaty is superior to the Constitution. If, for example, the United States made a treaty with the Vatican providing (as concordats frequently do) that insulting the pope or the Catholic religion shall constitute a Federal crime, I am reasonably certain that the Supreme Court would declare it unconstitutional. By the same token, I believe a treaty provision that no person should be appointed ambassador to the Vatican unless he is of the Catholic faith, would likewise be ruled invalid.

We do not, of course, have a treaty basis for the discrimination we challenge; at most we have an executive agreement and therefore the case is even stronger. Nevertheless, the President has a prime responsibility for the conduct of foreign affairs and his discretion here is very great. (U. S. v. Curtis Wright) Yet, I do not believe it can be exercised in direct violation of the Bill of Rights. Theodore Roosevelt's refusal to accede to Austria's rejection of a Jewish ambassador comes to mind as a precedent.

Whether there are any judicial precedents analogous to this I do not know. Here is where Lou Henkin can be of the greatest help. I'm sure he has all the precedents, executive, judicial, and other, at his fingertips and he can therefore save us a lot of work. All I can say is that it may be assumed that executive discretion in foreign affairs is likely to be the government's major defense, and we must be fully prepared to meet it.

Leo Pfeffer