

Ronald Reagan Presidential Library Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Scharfen, Jonathan: Files
Folder Title: U.S. vs Durrani, Arif (7)
Box: RAC Box 8

To see more digitized collections visit:

<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:

<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>



U.S. Department of Justice

*United States Attorney
District of Connecticut*

915 Lafayette Boulevard
Bridgeport, Connecticut 06604

203/579-5596
FTS/643-4596

December 8, 1987

Mr. Jonathan Scharfen
National Security Council
Old Executive Office Building
Room 381
Washington, D. C. 20530

Re: United States v. Arif Durrani
Criminal No. B-86-59(TFGD)
Second Circuit No. 87-1256

Dear Jock:

Enclosed is a copy of the decision of the United States Court of Appeals for the Second Circuit affirming the conviction of Arif Durrani

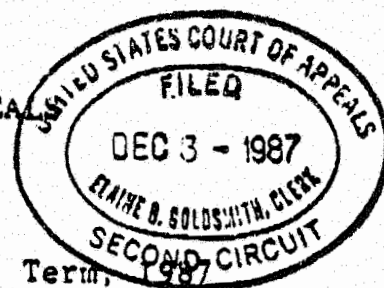
Very truly yours,

STANLEY A. TWARDY, JR.
UNITED STATES ATTORNEY

HOLLY B. FITZSIMMONS
ASSISTANT UNITED STATES ATTORNEY

HBf:lad
Enclosure

1
2 UNITED STATES COURT OF APPEALS
3 Second Circuit



4 No. 395

August Term, 1987

5 (Argued November 5, 1987

Decided December 3, 1987)

6 Docket No. 87-1256

7 -----x
8 UNITED STATES OF AMERICA,

9 Appellee,

10 -against-

11 ARIF DURRANI,

12 Defendant-Appellant.

13 -----x
14 Before: KAUFMAN, PIERCE, and MINER, Circuit Judges.

15
16 Appeal from a judgment of conviction entered after
17 a jury trial in the United States District Court for the
18 District of Connecticut (Daly, C.J.). Appellant was convicted
19 of attempting to export and exporting arms without a license
20 and failing to register with the Office of Munitions Control
21 of the Department of State, in violation of the Arms Export
22 Control Act, 22 U.S.C. § 2778 et seq. (1982).
23

24 Affirmed.
25
26

1 HOLLY B. FITZSIMMONS, Assistant United
2 States Attorney, District of
3 Connecticut (Stanley A. Twardy, Jr.,
4 United States Attorney), for
5 Appellee.

6 ALAN M. DERSHOWITZ, Cambridge,
7 Massachusetts (Nathan Z. Dershowitz,
8 Victoria B. Eiger, Dershowitz &
9 Eiger, P.C., New York, New York, on
10 the brief, Jane Simkin Smith, of
11 counsel), for Defendant-Appellant.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BACKGROUND

KAUFMAN, Circuit Judge:

1 The still simmering national scandal of high
2 government officials engaged in the covert shipment of arms to
3 Iran has brought to the fore intriguing questions in our
4 criminal law. The defendant here, Arif Durrani, accused of
5 shipping Hawk missile parts to Iran without a license, seeks
6 refuge under the aegis of official authority. Durrani candidly
7 admits that he sold arms to Iran, but claims to have been a
8 cog in the wheel turned by Lt. Colonel Oliver North and Vice
9 Admiral John Poindexter.

10 Durrani appeals from a judgment of conviction
11 entered on May 13, 1987 by Chief Judge Daly of the United
12 States District Court for the District of Connecticut. On
13 April 2, 1987, a jury found Durrani guilty on three counts of
14 violating the Arms Export Control Act, 22 U.S.C. § 2778(c)
15 (1982), for: 1) exporting arms without a license on August 30,
16 1986; 2) attempting to export arms without a license on
17 October 3, 1986; and 3) failing to register as an arms
18 exporter with the State Department's Office of Munitions
19 Control. He received an aggregate sentence of 10 years
20 imprisonment and was fined \$3 million.

BACKGROUND

1 In early May 1986, Durrani embarked upon a series
2 of elusive dealings with Radio Research Instrument, Inc., a
3 supplier of surplus radar equipment headquartered in Danbury,
4 Connecticut. Specifically, Durrani supplied Edmund Doyle, a
5 Radio Research vice president, with a list of Hawk missile
6 parts^{1/} that he hoped to purchase for export to Jordan.

7 By July, Durrani had placed a down payment on those
8 parts that Radio Research could obtain for him. Unknown to
9 Durrani, however, Radio Research harbored suspicions about his
10 activities and notified the United States Customs Service.
11 The Customs Service, in turn, placed Durrani under close
12 surveillance, recording his numerous phone conversations with
13 Doyle and videotaping his visits to the company.

14 On August 11th and 12th, Durrani sent Radio
15 Research four purchase orders, requesting Hawk missile parts
16 valued at \$347,000. He instructed that the parts be labeled
17 "RJAF, Amman, Jordan." Upon Doyle's request, Durrani
18 captioned the purchase orders "State Department license will
19 be obtained by the end user/buyer and will be their
20 responsibility." Despite this written commitment, however,
21 Durrani still had not produced the necessary licenses when,
22 two weeks later, the first shipment was ready for delivery.

23 On August 22nd, Durrani visited Radio Research to
24 press for release of the goods. But Doyle adamantly refused to
25
26

1 ship them without first seeing the export licenses. To
2 resolve this impasse, Durrani took personal responsibility for
3 obtaining the licenses and offered to sign any document Doyle
4 wished attesting to his obligation. In addition, he offered
5 to show Doyle the original purchase orders issued by the
6 Jordanian government and a copy of a so-called "master
7 license" that authorized the transaction. When Doyle expressed
8 concern that this would be an irregular procedure, Durrani
9 insisted that the transaction was "101 percent clean" because
10 "I do everything by the book. I know exactly what is what and
11 what has to be done." In a compromise, Doyle agreed to
12 release the parts only if Durrani certified in writing that he
13 was responsible for obtaining the export licenses.

14 The following day, Durrani arranged for Doyle to
15 telefax a license certification form directly to Jet Stream
16 Freight Services, a New York freight forwarder Durrani had
17 hired to handle the shipment of the missile parts. Two Jet
18 Stream employees, Henk Spreeuwenberg and Mohammed Moosa, met
19 Durrani and Manuel Pires, an international arms merchant, at
20 Kennedy Airport on August 26th. In their presence, Durrani
21 signed the following statement:

22 The export of Hawk Missile parts being sold to you by
23 Radio Research require a U.S. State Department Export
24 License prior to their export. I certify that the
25 appropriate State Department export licenses will be
26 obtained prior to the exportation of Hawk Missile Parts
from the U.S.

1 He also verbally assured Spreeuwenberg that he would resolve
2 any licensing difficulties, and alluded to "orders from
3 Washington." Finally, Durrani produced a document which Moosa
4 erroneously took to be an export license.

5 Upon receiving the signed statement and payment of
6 the outstanding balance due on the parts, Doyle released the
7 goods for delivery to Jet Stream. Before shipment, however,
8 at Durrani's express instruction, Jet Stream employees
9 obliterated the markings on the packing crates, and redirected
10 them to Comexas Airfreight Division in Zaventem, Belgium. The
11 shipment was accompanied by a false invoice from CAD
12 Transportation, an instrumentality of Durrani's, to KRAM,
13 Ltd., a Belgian company controlled by Pires. Moreover, the
14 invoice valued the goods at under \$500, rather than the
15 \$347,000 Durrani had paid for them. This permitted Durrani not
16 to file a "Shippers Export Declaration" with the Customs
17 Service, as required for shipments in excess of \$1000. The
18 shipment was placed on a People Express flight to Brussels,
19 Belgium on August 30th.

20 Throughout September, Durrani remained in close
21 contact with Doyle, making frequent inquiries about the price
22 and availability of various equipment. They discussed
23 delivery of the remaining items from Durrani's first order and
24 the possibility of additional orders being placed. On October
25
26

1st, Durrani telephoned Doyle from London, and arranged for a second shipment of Hawk parts.

Two days later, Durrani visited Radio Research to inspect the goods before they were shipped. As he did in August, Durrani signed a statement acknowledging responsibility for obtaining the required export licenses, marked the crates for delivery to Jordan, and instructed that they be forwarded to Jet Stream for transshipment. This shipment, however, never left Radio Research. Durrani was arrested as he left the company, and the crates were seized.

Shortly thereafter, a woman identifying herself as "Mrs. Durrani" called Jet Stream and ordered that the shipment be diverted to California instead of sent to Jordan. She also requested that Jet Stream destroy all files relating to Durrani and that they deny knowledge of him or his activities. Somewhat later, Durrani himself called with similar instructions. When Spreeuwenberg informed him that Customs agents already had seized the files, Durrani responded, "I have a lot of troubles."

On October 8, 1986, Durrani was indicted for the August 30th shipment. Within a month, the first allegations of covert arms sales rocked the nation. On November 14th, he moved to dismiss the charges against him, claiming that the government was selectively prosecuting violators of the licensing provision. Durrani, however, took no action with

1 respect to his dismissal motion until February 4, 1987, when
2 he filed an affidavit in support of the motion. The same day,
3 Durrani moved to disqualify Chief Judge Daly from further
4 consideration of his case, alleging the judge was prejudiced
5 against him. On February 18th, a superseding indictment was
6 returned based on the October 3rd shipment and Durrani's
7 failure to register with the State Department's Office of
8 Munitions Control. A week later, on February 24th, Judge Daly
9 denied Durrani's disqualification motion, finding no
10 impropriety.

11 On February 27th, with jury selection scheduled to
12 begin on March 3rd, appellant served the Director of the
13 Central Intelligence Agency (CIA) with a subpoena duces tecum
14 returnable on March 4th. He sought a broad range of documents
15 including all those connecting him to arms exports and all
16 those relating to CIA involvement in Iranian arms sales from
17 1982 to 1987. Similar subpoenas were served on the National
18 Security Council (NSC) and the State Department on March 2nd.
19 The government moved to quash the subpoenas. Hearings on the
20 motion to quash were held on March 9th and 10th; on March
21 11th, the trial judge made a preliminary ruling quashing the
22 subpoenas. The trial began on March 16th.

THE TRIAL

We summarize here those aspects of the trial that resulted in issues raised on appeal.

The Government's Case

Durrani was charged with violating the Arms Export Control Act, 22 U.S.C. §2778 (1979), and the accompanying International Traffic in Arms Regulations, 22 C.F.R. § 120 et seq. (1987), which require the licensing of all defense material before export. Under the Act, the State Department's Office of Munitions Control compiles the United States Munitions List and issues export licenses for goods and services contained on it.

To demonstrate that the exported items appeared on the Munitions List, and thus fell within the purview of the Act, the government introduced the testimonies of Billy Boland, an electronic technician equipment specialist at the Hawk project office, U.S. Missile Command, Redstone Arsenal, and Brenda Carnahan, from the Office of Munitions Control.

Boland, an expert on Hawk missiles, testified without objection. He stated that several of the items sent to Brussels on August 29th were "specifically designed" for the Hawk system, that one was "specifically used" in the Hawk system, and that another, a relay switch, was a repair part commonly but not exclusively used in the Hawk system. He added that each of the parts from the aborted October 3 shipment were "specifically designed" for the Hawk missile. On

1 cross-examination, however, Boland conceded he did not know
2 whether the parts could be used for purposes unrelated to the
3 Hawk system.

4 Carnahan followed Boland to the stand, and
5 testified that the Office of Munitions Control had placed
6 various Hawk parts on the Munitions List. She identified the
7 parts at issue here as among those included on the list,
8 although on cross-examination, she conceded that her testimony
9 was predicated on a telephone conversation with officials at
10 Redstone Arsenal. Carnahan also outlined the procedure for
11 determining whether an item one contemplates exporting appears
12 on the list. Carnahan read into evidence a letter from the
13 director of the Office of Munitions Control, who denied the
14 existence of "any registration application by, any application
15 for export license by, or any export license issued to"
16 Durrani, his corporate alter egos or his alleged associates.
17 regarding the Hawk missile parts purchased from Radio
18 Research.

19 Durrani's Defense

20 During the months immediately preceding trial, the
21 now infamous Iran-contra scandal gained national prominence.
22 Allegations of covert U.S. government arms sales to Iran
23 became widespread, following revelations in a Beirut newspaper
24 that high ranking American officials had held secret
25 negotiations with their Iranian counterparts regarding
26

1 American hostages held in Lebanon by Iranian sympathizers.
2 NSC staff member Lt. Col. Oliver North, retired Air Force
3 General Richard Secord and Secord's business partner Albert
4 Hakim were identified as participants in the operation.^{2/}

5 Durrani contends that his activities derived from
6 this officially-sanctioned covert operation, and thus were
7 exempt from any licensing requirements. This was not always
8 his claim. Durrani's story regarding the ultimate destination
9 of the goods changed drastically over time. To Doyle, he
10 claimed that the parts were intended for Jordan. His counsel
11 maintained this position when appealing the lower court's
12 denial of bail. In fact, Durrani first pressed his claims of
13 government involvement on the eve of trial in his February 4,
14 1987 affidavit in support of his motion to dismiss the
15 indictment. Durrani then repeated these claims in his trial
16 testimony, although the details of his testimony often
17 diverged from those in his affidavit.

18 At the trial, Durrani chronicled his involvement in
19 the shadowy world of Iranian arms sales. This involvement, he
20 claimed, stemmed from a 1985 encounter with Rahim Malekzadeh,
21 the procurement chief for the Iranian Revolutionary Guard.
22 That autumn, Malekzadeh informed Durrani about Israeli arms
23 shipments and American overtures to Iran. He also told Durrani
24 that Iran was dealing with a number of Americans and Israelis.

1 including North, CIA agent George Cave and Israeli official
2 Amiram Nir. Durrani insists, however, that although
3 Malekzedehe knew he sold arms internationally, they never
4 discussed the possibility of Durrani selling arms to Iran.

5 While in Portugal in April 1986, Durrani allegedly
6 met with George Hassan, a former high official of the Iranian
7 secret service with ties to Israel. Hassan explained that he
8 was working with Secord and Hakim on the American shipment of
9 parts to Iran. Apparently, Hassan hoped Durrani would vouch
10 for Secord and Hakim with Malekzedehe, and thus facilitate
11 their sales to Iran. Durrani claims that Hassan established
12 his credibility by showing him three aircraft loaded with
13 "Sidewinder" missiles at air bases in Lisbon. Also, an Israeli
14 air force officer told Durrani that Pires was looking for Hawk
15 parts. Since Hassan had told Durrani that Pires was supplying
16 Secord, Durrani deduced that the United States was shipping
17 goods to Iran through Pires.

18 After repeated attempts, Durrani finally arranged
19 to meet Pires in Geneva on April 23rd. Pires was accompanied
20 by his associate Willy de Greef and an Iranian official named
21 Hussein. There, Durrani claims he consented to locate Hawk
22 parts for the Iranians as a favor to Pires. The government
23 presented rebuttal evidence that Pires paid Durrani in excess
24 of \$800,000 between June and October 1986. Durrani also claims
25 he was told that, upon his return to the United
26

1 States, he would be provided with a list of items to be
2 procured. An individual named "Jack Koser" would meet him at
3 National Airport in Washington, D.C., and provide this
4 information. Only after he received the list, Durrani
5 contends, did he contact Radio Research in an effort to locate
6 the needed items.

7 Appellant argues that the parts list he was given
8 matched the one the Iranians gave CIA agent Cave in Paris on
9 March 7, 1986, thus demonstrating his involvement in a
10 government-sponsored operation.^{3/} The government
11 responds that the similarity reveals only that the Iranians
12 were desperately seeking parts from any source in preparation
13 for a September offensive.

14 By the end of August, Durrani's testimony
15 continues, he came under substantial pressure from Pires and
16 de Greef to expedite delivery of the desired parts. Because it
17 was his understanding that Pires would obtain the export
18 licenses, he consented to sign any statement Doyle wished at
19 the August 26th airport meeting.

20 In September, Pires summoned Durrani to Lisbon,
21 where he met an unidentified "staff member of the NSC," who
22 stressed the urgency of obtaining the parts and expressly
23 related the parts to a deal to free American hostages in
24 Lebanon. Durrani also described an alleged October 1st meeting
25 in London with North, other unnamed American officials, and a
26

1 representative of the Anglican Church. At this meeting. North
2 assured him "not to worry about the paperwork," because
3 President Reagan would shortly authorize arms shipments to
4 Iran. That same day, Durrani called Doyle of Radio Research
5 and made the final arrangements for the second shipment of
6 Hawk parts.

7 Durrani returned from London on October 2nd, and
8 proceeded on the following day to the headquarters of Radio
9 Research to inspect the parts pending shipment. His arrest
10 and the seizure of the parts ensued.

11 Durrani sought to support his contentions at trial
12 by introducing evidence that private individuals participated
13 in officially-sanctioned covert arms sales to Iran.
14 Specifically, he proffered the Report of the President's
15 Special Review Board [hereafter "Tower report"], the product
16 of a blue-ribbon commission appointed by President Reagan in
17 November 1986 to analyze the NSC's role in the operation, and
18 two memoranda contained therein. The trial judge, however,
19 found these documents hearsay, and refused to admit them into
20 evidence.

21 Durrani also sought a jury instruction that he
22 should be acquitted if he reasonably believed he had official
23 sanction for his actions and was therefore excused from
24 obtaining licenses. The court gave this charge on counts 2 and
25
26

1 3, which stemmed from the October 3rd shipment, but not on the
2 first count, which arose out of the August 30th shipment.

3 The Government's Rebuttal Case

4 Two government witnesses challenged Durrani's
5 account, disputing that North visited London at the time of
6 their alleged meeting. Michael Sneddon of the NSC testified
7 that the NSC's travel records failed to indicate that North
8 was travelling at all in September 1986. Similarly, Adrian
9 Owen of Her Majesty's Customs and Excise confirmed that his
10 search of London hotel records disclosed no trace of North
11 either under his own name or any known alias.

12 A third government witness challenged Durrani's
13 entire story. Charles Moyer of the CIA testified that all
14 parts procurements for North were handled by the CIA, not by
15 private parties.
16
17
18
19
20
21
22
23
24
25
26

DISCUSSION

1
2 Durrani raises numerous issues on appeal. First, he
3 challenges the district court's decision not to charge the
4 jury on one of two statutory exceptions to the license
5 requirement of the Arms Export Control Act. Second, Durrani
6 questions the judge's determination that the statutory
7 exceptions constituted affirmative defenses rather than
8 elements of the crime. Third, he contends that the judge erred
9 in refusing to charge the jury, on the second count, that his
10 "reasonable belief" he was working for the government should
11 lead to his acquittal even if he failed to come within one of
12 the exceptions. Fourth, he charges that both the jury
13 instruction on the burden of persuasion for the license
14 requirement and the prosecutor's summation unfairly shifted
15 the burden of proof. Fifth, he challenges the lower court's
16 exclusion of evidence intended to demonstrate private
17 participation in the covert arms sales to Iran, namely
18 portions of the Tower report and two North memoranda. Sixth,
19 he asserts that the government's proof that the exported parts
20 appeared on the Munitions List was inadmissible hearsay.
21 Finally, he appeals the denial of his motion to disqualify the
22 trial judge.

23 Appellant presents an interesting dilemma.
24 Forced on the one hand to produce evidence of his connection
25
26

1 with the Iran-contra scandal, but forbidden by the judge from
2 presenting the first fruits of the investigation, appellant
3 contends he was denied fundamental fairness. Nonetheless, we
4 find Durrani's trial to have been fair, and thus affirm his
conviction on all counts.

5 The Statutory Framework

6 The Arms Export Control Act, 22 U.S.C. § 2778
7 (1982), establishes a comprehensive framework for regulating
8 transfers of defense-related goods and services. The
9 President, authorized by the statute to control such exports,
10 has delegated his power to the State Department's Office of
11 Munitions Control. The State Department, in turn, registers
12 arms exporters, compiles the United States Munitions List of
13 articles covered by the Act, and considers applications to
14 export those items from the United States.

15 The export of arms requires a State Department
16 license except in narrowly-defined circumstances detailed in
17 the Act itself. No license is necessary for "... exports made
18 by or for an agency of the United States Government (A) for
19 official use by a department or agency of the United States
20 Government, or (B) for carrying out any foreign assistance or
21 sales program authorized by law and subject to the control of
22 the President by other means." 22 U.S.C. § 2778(b)(2) (1982)
23 [hereafter respectively the "official use" and "foreign
24 assistance" exceptions.]

1 Illuminating these exemptions are the International
2 Traffic in Arms Regulations (ITAR). 22 C.F.R. §§ 126.4, 126.6
3 (1986).^{4/} The regulations do not refer specifically to
4 the statutory exceptions. Nonetheless, they substantially
5 mirror the language found in the statute, and may provide
6 guidance in interpreting the Act. As can be gleaned from a
7 quick perusal of the regulations, the two sections are hardly
8 so clear as a mountain lake in spring. In any event, section
9 126.4 expressly discusses the exemptions. It states that
10 "[t]his exemption applies only when all aspects of a
11 transaction (export, carriage, and delivery abroad) are
12 effected by a United States Government agency, or when the
13 export is covered by a United States Government Bill of
14 Lading." Because we read this requirement to encompass both
15 exceptions, there is serious doubt whether either exemption
16 ever applies to a private individual like Durrani who has not
17 obtained a government bill of lading. Judge Daly, however,
18 charged on the "official use" exception, finding that only the
19 "foreign assistance" provision was inapplicable as a matter of
20 law.

21 Foreign Assistance Exception

22 Appellant contends that the "foreign assistance"
23 exemption is not only applicable to his case, but is, in fact,
24 more appropriate than the "official use" provision. We reject
25 this claim. Although the regulations are unclear, the only
26 place where such sales are discussed is section 126.6, which

in fact explicitly refers to the Arms Export Control Act. That provision articulates rigorous standards for coming within the exemption. Specifically, it mandates that parts be sold to a foreign government representative in the United States and picked up by a foreign vessel. Unquestionably, Durrani cannot come within this interpretation of the exemption.

Section 126.6 might not be the only way to fall within the "foreign assistance" exception, but it is clearly indicative of the kinds of transactions for which the statutory exception was designed. Thus, the statutory language, by using a word like "programs" contemplates formalized dealings between official entities of the respective governments. Appellant has presented no basis for us to extend the "foreign assistance" exemption so far afield that it covers his case. The evidence at trial demonstrated that all transactions were conducted between private parties. Hawk parts were never delivered to any foreign government's representative in the United States, and they were exported commercially aboard a People Express airlines flight without the filing of any documents whatsoever. While Durrani claimed, during his negotiations with Radio Research, to be acting on behalf of the Jordanian government, he abandoned that posture after his arrest, and his testimony, as well as the government's evidence, was entirely to the contrary. A judge is required to charge on a defense theory only if the evidence

provides some foundation for it. United States v. Pedroza, 750
1 F.2d 187, 205 (2d Cir. 1984), cert. denied, 107 S. Ct. 151
2 (1986). Thus we turn to an analysis of the applicability of
3 the "official use" exception.

4 Official Use Exception

5 The "official use" exemption appears to be somewhat
6 broader than the "foreign assistance" section. The regulations
7 are silent as to this exemption except when both are
8 discussed. The government contends that section 126.4(c)
9 spells out the requirements to come under the "official use"
10 exception. The more persuasive reading is that this paragraph
11 is unrelated to either exemption. In sum, the regulations
12 provide no basis for interpreting the "official use"
13 exception.

14 Substantial uncertainty thus remains whether this
15 exception was applicable to Durrani's case. We need not
16 resolve this question, however, because Judge Daly cautiously
17 instructed the jury to consider this contention, reasoning
18 that it remained conceivably within the ambit of Durrani's
19 elastic story.

20 Appellant contends that the judge erred in this
21 regard, however, because the exception should have been an
22 element of the crime rather than an affirmative defense. The
23 government maintains that the trial judge properly found the
24 exception to be an affirmative defense. After a full
25 consideration of the issues, we find the "official use"
26

exception to be an affirmative defense. In reaching this conclusion, we have considered the text of the statute, its legislative history, the parties' relative abilities to present evidence on the issue and the structure of the statute generally.

An affirmative defense requires a defendant to produce "some evidence" placing the exception in issue; if he does so, the government would be required to prove its inapplicability beyond a reasonable doubt. United States v. Mayo, 705 F.2d 62, 74 (2d Cir. 1983). The minimal burden placed on the defendant does not impinge upon his constitutional rights because the government ultimately bears the burden of disproving the applicability of the exception once it is properly raised. See Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 508 (1975); United States v. Oba, 448 F.2d 892, 894 (9th Cir. 1971), cert. denied, 405 U.S. 935 (1972).

In Mayo, this court considered whether an analogous exception to a licensing requirement constituted an affirmative defense or an element of the crime. The defendants challenged their convictions for dealing in firearms in violation of 18 U.S.C. § 921(a)(16)(B) (1982). Judge Meskill observed that affirmative defenses arise where "the legislature has manifested its judgment that the activity proscribed by the general prohibition can best be justified or

explained by the defendant Exceptions to a general prohibition are a legitimate means to implement a legislative design and often serve to define the scope of the prohibition." Mayo, 705 F.2d at 74 (citation omitted). Judge Meskill then concluded that the exception regarding "antique" firearms constituted an affirmative defense rather than an element of the crime. In reaching this conclusion, Mayo relied upon the text and legislative history of the statute as well as the relative abilities of the parties to produce evidence on the question.

The legislative history of the Arms Export Control Act is sparse. Passed in 1976, the Act provided for "increased congressional supervision and review of all aspects of the foreign military sales program." H.R.Rep. No. 329, 2d Sess. 8 reprinted in 1976 U.S. Cong. & Ad. News 1378, 1385. Specifically, Congress replaced the Mutual Security Act of 1954, then the basic authority for control of military related exports and imports, and imposed strict requirements on "exports and imports of all defense articles and defense services." Id. at 1411. The House Report warned that "arms transfers cannot become an automatic, unregulated process." Id. at 1388. In sum, Congress manifested a clear intent to prevent unlicensed exports of defense articles, but it provided no guidance on the specific question before us.

Following Judge Meskill's thoughtful analysis, we now consider the text of the Arms Export Control Act. Section

2778(b)(2) states broadly that "... no defense articles or
1 defense services designated by the President under subsection
2 (a)(1) of this section may be exported or imported without a
3 license." This same section, however, carves out a narrow
4 exception for export made by or for a department or agency of
5 the United States Government for official use or for carrying
6 out any foreign assistance or sales program. Thus the basic
7 rule provides that unlicensed exports are illegal, except in
8 precise and limited circumstances. This phrasing is not itself
9 determinative. Where, however, as here, a statutory
10 prohibition is broad and an exception is quite narrow, it is
11 more probable that the exception constitutes an affirmative
12 defense and that the defendant bears the burden of
13 demonstrating that his actions conformed to the limited
14 exception.

15 The third Mayo factor considers the parties'
16 relative ability to adduce evidence that an export falls
17 within the exception. In the case of antique firearms,
18 defendants were certainly better able than the government to
19 provide documents authenticating the firearm's antiquity.
20 Appellant seizes upon this aspect of the Mayo analysis to
21 distinguish it from the situation at hand. He notes that the
22 government itself retains all the records for exports shipped
23 under the "official use" or "foreign military sales"
24 exceptions. Thus, he contends the government is in a better
25
26

1 position to produce evidence that the exemptions did not
2 apply. Even if a shipment comes under one of these exceptions,
3 however, and therefore does not require licensing, the ITAR
4 regulations mandate an ample paper trail that is readily
5 accessible to defendants. For example, at a minimum, both
6 exemptions require a private intermediary to obtain a
7 government bill of lading. 22 C.F.R. § 126.4 (1986).

8 Durrani protests that the paper trail that exists
9 in most cases provides him with little comfort given the
10 extraordinary backdrop to this prosecution. Specifically, he
11 argues that the unprecedented scenario of high government
12 officials shipping arms to Iran made access to probative
13 evidence impossible. We need not address this issue, however,
14 because Durrani has failed to press his challenge to the lower
15 court's quashing of his February 27, 1987 subpoena duces tecum
16 which requested all documents from the government regarding
17 the Iran-contra scandal. We sympathize with Durrani's
18 difficulties of proof. Nevertheless, we are constrained to
19 interpret the statute in a reasonable fashion, consistent with
20 the text and congressional intent.

21 Accordingly, the applicability of the "official
22 use" exception was an affirmative defense.
23
24
25
26

Thus, Durrani bore the burden of producing some
1 evidence that the statutory exception was applicable. Mayo,
2 705 F.2d at 76. He produced no such evidence except his own
3 testimony. While a defendant's credible testimony standing
4 alone should suffice to raise a defense, Durrani's statements
5 were so inconsistent they failed to create even a colorable
6 inference that he came within one of the exceptions.

7 Discrepancies punctuate Durrani's statements about
8 these events and raise serious doubts about his credibility.
9 Durrani's insistence that Pires had complete responsibility
10 for licensing directly contradicts his frequent assurances to
11 Doyle that he would personally obtain them. It also
12 contradicts his statement to Special Agent Steven Arruda,
13 shortly after being taken into custody, that "I don't know why
14 I'm arrested, I have all the licenses in California."

15 Moreover, doubt surrounds each of Durrani's alleged
16 meetings with officials of the U.S. government. In his
17 affidavit, Durrani claimed he initially suspected and later
18 confirmed that Jack Koser worked for the NSC. At trial,
19 however, he retreated from this assertion, admitting that he
20 lacked any basis for believing that Koser was affiliated with
21 the government. Indeed, Durrani went so far as to admit that
22 when he met Koser he "had no reason to believe he was anything
23 [other] than [an] employee of Mr. Pires." Although Durrani
24 testified he was to contact Koser when the October 3rd
25
26

1 shipment reached Jet Stream, he could not explain the method
2 by which he was to do so. Finally, Michael Sneddon of the NSC
3 testified that the council had no employee named Jack Koser.

4 Discrepancies also arose regarding Durrani's
5 purported relationship with Col. North, and their alleged
6 meeting in London prior to the October 3d shipment. During
7 trial, Durrani described three meetings with North over a
8 period of five days. His affidavit describes only one
9 meeting. At trial, Durrani testified that when North summoned
10 him to the meeting at the London Hilton, he recognized North's
11 voice from a previous conversation. He added that North used
12 the code name "Mr. White," but that he considered it a joke
13 and called North by his real name. In his affidavit, however,
14 Durrani states that he has "come to believe" that Mr. White
15 was actually North -- not that he knew this all along.

16 Moreover, Durrani testified that he met North
17 alone, except for two people seated near them in the lobby of
18 the London Hilton, neither of whom spoke to him. But before
19 trial, Durrani claimed he and North were joined by American
20 officials and an Anglican Church representative. Finally,
21 Durrani testified that North instructed him to obtain the
22 missile parts for Iran, and not to worry about the paperwork.
23 In his affidavit, Durrani attributed this instruction to the
24 unnamed "American officials." Thus, Durrani's defense
25
26

1 crumbles, and the government did not have an obligation to
2 negate the statutory exception. Although Judge Daly correctly
3 stated the law of affirmative defense in his charge to the
4 jury, we conclude that this charge was unnecessary.

5 In addition, upon a review of the entire record, we
6 are satisfied that appellant has not met his "heavy burden,"
7 on appeal, to question the sufficiency of the government's
8 case negating the statutory exception. United States v.
9 Losada, 674 F.2d 167, 173 (2d Cir.), cert. denied, 457 U.S.
10 1125 (1982). Appellant contends that Charles Moyer's and
11 Michael Sneddon's testimony were inadmissible because they
12 relied on records which were not "regularly reported" as Fed.
13 R. Evid. 803(10) requires. For example, Sneddon testified that
14 there was no evidence North was in London when Durrani claimed
15 to meet him, but, on cross-examination, admitted he had no
16 record of North's now notorious visit to Teheran in May of
17 1986. Moyer stated that only the CIA procured parts for North,
18 despite evidence currently indicating private parties were
19 involved in aspects of the scandal. Although in other
20 circumstances these contentions might have merit, any error
21 here is harmless because the government was not required to
22 negate the statutory exception.

23 "Reasonable Belief" Charge

24 Appellant next contends that the judge erred in
25 refusing to charge on the first count, the completed shipment,
26 that "even if the government was not involved in the
shipments, the jury should acquit if defendant reasonably

believed the government was involved." The court did give this instruction on the second count, the attempted export accusation. This argument implicitly raises two theories: a mistake of law defense, premised on the theory that North or Pires told Durrani that the statutory requirement would not apply to this transaction, and a contention that Durrani lacked specific intent to violate the law.

It is well settled that ignorance of the law or mistake as to the law's requirements is no defense to criminal conduct. United States v. International Minerals and Chemical Corp., 402 U.S. 558, 563, 91 S. Ct. 1697, 1700, 29 L. Ed. 2d 178 (1971). An exception has been carved out for legitimate reliance on an official interpretation of law. Cox v. Louisiana, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965). See also People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938)(exception for responding to a police officer's call for assistance in making unlawful arrest). In United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976), Judge Wilkey recognized an exemption, under which one escapes liability for following instructions by someone with "apparent authority" to approve the conduct, who turns out not to have such power. The only case we have decided on this issue adopts a stricter standard, requiring that government officials have actual authority. United States v. Duggan, 743 F.2d 59 (2d Cir. 1984). Even if we adopted the Barker view, appellant's argument fails because, as he candidly admits in his brief, he never testified he believed government involvement made licenses

unnecessary for the first shipment. Without such evidence, the trial judge acted within his discretion in holding that the defense had not raised a sufficient issue to require the "reasonable belief" defense to be put to the jury on the first count.

We also find no error in the trial judge's handling of Durrani's claim that he lacked specific intent to violate the law. The question of intent was put squarely to the jury and resolved against Durrani. The jury charge explicitly required that:

the Government must prove beyond a reasonable doubt each of the following essential elements
Four, the defendant knowingly and willfully caused the defense articles to be exported.

....
The fourth element ... requires that the Government prove that he had the specific intent to commit that particular offense That term, specific intent, as it applies here, means that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires purposely intending to violate the law Therefore, if the defendant, Mr. Durrani, knew he was required to obtain an export license before causing defense articles to be exported, and if you find that he did cause such an exportation, and intentionally failed to do so with the purpose of evading the arms exportation laws and regulations that are charged here, then he would have willfully failed to obtain the appropriate export license.

This explanation of specific intent more than adequately justifies the charge. A charge in the specific language defendant proposed was not required. United States v. Dyman,

739 F.2d 762, 771 (2d Cir. 1984), cert. denied, 469 U.S. 1193 (1985).

Burden Of Proof

Durrani also challenges the jury instruction relating to the burden of persuasion on the license requirement. Appellant contends that the charge shifted the burden to the defendant. In fact, the judge placed the burden of proof squarely on the government as to each element of the offense:

I charge you that in all criminal cases the burden is on the government to prove a defendant's guilt by what is called proof beyond a reasonable doubt. And the burden of proof remains on the government and never shifts to the defendant.... Remember also that the Government has the burden of proof on each and every element of each of the offenses charged....

Now, in order to establish the defendant's guilt under Count 1 of the indictment, the Government must prove beyond a reasonable doubt each of the following essential elements....

Appellant's core concern revolves around the judge's charge that defendant believed he was acting in connection with the government. The judge instructed the jury:

[i]f you find and accept as true the evidence in support of these contentions and theories and believe the defendant's defense theory, and this belief leaves you with a reasonable doubt as to whether the Government has proved beyond a reasonable doubt each and every element of the crimes charged in either of or both Counts 1 and 2, then you must find the defendant not guilty.... (emphasis added).

Durrani seizes upon the wording, "believe the defendant's defense theory," in characterizing the charge as requiring the

jury to credit Durrani's testimony if it desired to acquit.
1 This ignores the context of that phrase. For immediately
2 thereafter, the judge emphasized the proper inquiry, whether
3 "this belief leaves you with a reasonable doubt." As such, he
4 clearly instructed the jury that a reasonable doubt regarding
5 the truth of defendant's theory should lead to acquittal.
6 Thus, in light of the totality of the jury instructions, we
7 find no error. See United States v. Gengo, 808 F.2d 1, 4 (2d
8 Cir. 1986).

9 We are also unconvinced by Durrani's related
10 argument that the portion of the charge dealing with his
11 credibility shifted the burden of proof. His credibility
12 became a matter for the jury when he took the witness stand.
13 The court did not single out the defendant in its instruction
14 on weighing the credibility of witnesses, except for a
15 discussion on false exculpatory statements. On that question,
16 the trial judge commented that, "[o]rdinarily, it is
17 reasonable to infer that an innocent person does not usually
18 find it necessary to invent or fabricate an explanation or
19 statement th[at] tends to establish the person's innocence."
20 Although this instruction might well have been clarified, it
21 correctly stated the law in this circuit. False exculpatory
22 statements made to law enforcement officials are
23 circumstantial evidence and have independent probative force.
24
25
26

1 United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974),
2 cert. denied, 419 U.S. 1105 (1975); United States v. Lacey,
3 459 F.2d 86, 89, cert. denied, 409 U.S. 860 (1972).

4 In sum, the trial judge gave the jury accurate
5 instructions on the government's burden of proof, which
6 required it to prove beyond a reasonable doubt Durrani's
7 specific intent to violate the licensing requirement, and
8 on Durrani's contention that no license was required because
9 he was acting on behalf of the government. Considered as a
10 whole, the charge "adequately apprised the jury of the
11 elements of the crime charged and [the] defense." United
12 States v. Durham, 825 F.2d 716, 719 (2d Cir. 1987)(citation
omitted).

13 Appellant also challenges the prosecutor's
14 summation as denying him a fair trial by shifting the burden
15 of proof. The closing, however, simply emphasized the
16 "implausibility of Mr. Durrani's story," by calling attention
17 to his prior inconsistent statements. Moreover, the
18 prosecutor's argument repeatedly acknowledged that the
19 government bore the burden of proof. This was not error.
20 Durrani also maintains that comments by the prosecutor forced
21 the jury to choose between believing either Durrani or the
22 government witnesses. The prosecutor said,

23 And in deciding whether you believe him,
24 you're going to have to come back to this
25 testimony and look at it and throw the
26 Government's whole case, the hard facts, the
physical evidence, the testimony of all the
Government's witnesses out the window. Because
if Mr. Durrani is telling you the truth in

1 his most recent statement from the witness
2 stand, Mr. Doyle is lying, Mr. Spreeuwenberg is
3 lying, Mr. Moosa is lying, the bank records are
4 lying, Mr. Arruda is lying about the statement,
5 C.I.A. is lying to you, the National Security
6 Council is lying to you, Mr. Newborn is lying to
7 you

8 But the prosecutor was again focused on the important question
9 of Durrani's credibility. Recently, this court has reprimanded
10 prosecutors engaging in a pattern of behavior which forces the
11 jury to choose between believing government agents or criminal
12 defendants. United States v. Richter, 826 F.2d 206 (2d Cir.
13 1987). In Richter, however, the prosecutor not only stated in
14 closing that the jury had to so choose, but, more importantly,
15 asked the defendant on cross-examination whether the police
16 officers were telling the truth. Determinations of credibility
17 are for the jury, not for witnesses. Richter, 826 F.2d at 208
18 (citations omitted). Here, on the other hand, the prosecutor's
19 closing placed in stark relief for the jury one of the crucial
20 issues in the case: whether Durrani's testimony satisfied his
21 burden of coming forward with some evidence that he was acting
22 for the United States government. As such, these comments were
23 proper.

24 Tower Report and North Memoranda

25 The trial judge's rulings on questions of law
26 reflect his awareness of the unique context for this
prosecution -- the saga of high government officials engaged
in a covert operation to sell arms to Iran. The

1 investigations into those events are only now providing
2 glimpses of the activities of North and his cohorts. We may
3 never know all the details of their operations. This
4 necessarily heightened Durrani's difficulties in presenting
5 his defense and prompted several close evidentiary rulings.
6 Appellant challenges both the trial court's refusal to admit
7 evidence he proffered and its willingness to admit certain
8 prosecution evidence.

9 Durrani initially filed a subpoena duces tecum
10 requesting a broad range of documents relating to the
11 Iran-contra scandal from the government. As these demands came
12 on the eve of trial, the judge quashed them on March 11, 1987,
13 after a hearing and an ex parte review of the disputed
14 evidence. The judge found none of the classified documents
15 disclosable to the defense. Durrani does not challenge this
16 determination. Nevertheless, one of the requested documents, a
17 list of Hawk missile parts given to George Cave of the CIA by
18 the Iranians in March 1986, was provided to the defendant and
19 was ultimately introduced into evidence.

20 On March 26 and 27, 1987, Durrani sought the
21 admission of a section of the Tower report on the Iran-contra
22 scandal. He also proffered two documents which were contained
23 in the Tower report. The first was a "PROF" note ^{5/} by
24 North to Vice Admiral John Poindexter, the President's
25
26

1 National Security Advisor, dated April 16, 1986. The second
2 document was a September 8, 1986 update of North's paper "Next
3 Steps with Iran," also prepared for Poindexter. Appellant
4 claims that these documents were offered as evidence of the
5 critical factual issue in the case: whether Durrani's
6 activities were connected with the government's arms deals
7 with Iran. Durrani asserts that the Tower report excerpts
8 identify private individuals -- not the CIA -- as the primary
9 purchasers of parts to be shipped to Iran. The April 16th
10 memo, he claims, reports a shortage of Hawk missile parts,
11 which presumably corroborates his assertion that North had
12 asked him to procure the missing parts. The September 8th memo
13 reportedly assured Poindexter that the missing parts had been
14 found, impliedly through the efforts of Durrani.

15 The court found both the report and the North
16 memoranda to be hearsay and not within an exception.
17 Specifically, the judge determined that the documents "lacked
18 sufficient indicia of trustworthiness so as to be admissible
19 under either Rule 803(8)(c) or Rule 803(24)." He concluded
20 that the Tower report was inherently unsound for several
21 reasons: the two-year interval between some of the events and
22 the investigations, the repeated failures of recollection by
23 major policymakers, the particular mandate of the board to
24 emphasize policy reforms for the NSC over resolving factual
25
26

1 conflicts, the limitations on the board's ability to gather
2 evidence, and the possible motivation of the underlying
3 sources of information to mislead the board. Thus, the report
4 was inadmissible. The court similarly questioned the
5 trustworthiness of the two North memoranda.

6 Petitioner advances three grounds for the
7 admissibility of the Tower report and the North memos: first,
8 as an admission of a party opponent, Fed. R. Evid.
9 801(d)(2)(D); second, as a public record, Fed. R. Evid.
10 803(8); and, third, pursuant to the "catch-all" exception of
11 Fed. R. Evid. 803(24). All are inadequate to disturb the
12 decision below.

13 The lower court's decision, although thoughtful,
14 was perhaps ill-advised, given the extremely sparse evidence
15 otherwise available to defendant. Nonetheless, it was well
16 within the wide discretion afforded the trial judge in
17 determining "whether the hearsay document offered in evidence
18 has sufficient independent indicia of reliability to justify
19 its admission." City of New York v. Pullman, Inc., 662 F.2d
20 910, 914 (2d Cir. 1981), cert. denied, 454 U.S. 1164 (1982).

21 If any error occurred, moreover, it was harmless.
22 We have no hesitation concluding, beyond a reasonable doubt,
23 that the outcome would have been the same if the proffered
24 evidence had been admitted. Chapman v. California, 386 U.S.
25 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In light of his
26

1 implausible trial testimony, Durrani's assertion of official
2 sanction for his action lacks any credibility.

3 Durrani's February 4, 1987 affidavit, first raising
4 this claim, followed closely after the first complete public
5 disclosure on the Iran-contra scandal, and thus provokes great
6 suspicion. The Senate Intelligence report on the affair was
7 released in January of 1987. Discrepancies between Durrani's
8 affidavit and his testimony concerning whom he met, how many
9 meetings took place, where they occurred, what the
10 participants said, and when information was conveyed further
11 undermined his claim. Durrani even retracted statements that
12 he had been able to confirm the relationship of certain named
13 individuals with the NSC or CIA.

14 We must consider, as well, his post-arrest
15 statement that he had all the licenses; his claim at the bond
16 hearing that the licensing requirement was unclear; his
17 assertion to this court in the detention review that he
18 understood that KRAM and/or Risenvest was going to forward the
19 parts to Jordan and, his contention that KRAM purchase orders
20 which Durrani "has been able to retrieve from his files" put
21 the responsibility for getting the licenses on Jet Stream.
22 Together these demonstrate that his story was inherently
23 untrustworthy.

24 In light of the overwhelming bases for the jury to
25 reject Durrani's testimony, we are convinced that the
26

documents he proffered could not have affected in the least the destruction of his credibility.

Munitions List

Durrani now attacks as hearsay the government's evidence whether his parts were on the Munitions List. At trial, however, defense counsel conceded that the parts were on the list, stating, "[w]e don't dispute, at least as far as the Hawk missile parts that they're on the list That's not in the dispute concerning the Hawk missile parts. They're clearly listed up. Clearly they would need an export license."

The Munitions List does not identify particularized items, but rather broad categories of parts. The fourth category includes missile systems and "[a]ll specifically designed or modified components, parts, accessories, attachments and associated equipment" for such systems. 22 C.F.R. § 121.1 (1986). The designation of items on the Munitions List is a function committed by law to the State Department with the concurrence of the Defense Department. 22 U.S.C. § 2778(a)(1) (1982); 22 C.F.R. § 120.2 (1986).

The government offered the testimony of Billy Boland of Redstone Arsenal and Brenda Carnahan of the State Department's Office of Munitions Control to prove that the parts Durrani purchased were Hawk missile system parts and that they appeared on the Munitions List.

Boland, an electronic technician equipment specialist at the Hawk Project Office, testified that the parts in question were specifically designed for the Hawk system. Appellant contends this testimony was hearsay because, on cross-examination, Boland admitted he was not involved in the manufacturing process and thus lacked personal knowledge whether the parts had alternative uses. Nevertheless, Boland was qualified without objection as an expert witness on Hawk missile systems, and therefore had sufficient personal knowledge to satisfy the hearsay concern.

Carnahan explained that her office had made a licensing determination that Hawk missile parts were on the Munitions List. Appellant contends, however, that the testimony should have been excluded because the witness conceded that her determination was based on a telephone conversation with an engineer at Redstone Arsenal. The statute empowers the State Department to determine whether Hawk missile parts appears on the Munitions List. Carnahan's testimony apprised the jury that the State Department had made such a determination, and is thus not hearsay.

Disqualification Motion

On February 4, 1987, the defendant filed a motion to disqualify Chief Judge Daly, who had been presiding over this case since shortly after the grand jury returned the indictment on October 9, 1986. Appellant now appeals from the denial of that motion.

The motion charged that random criminal case assignment procedures were "deliberately subverted" in this case, "apparently allowing the government and the Chief Judge in concert to assign him to this case." In support of the motion, defendant's trial counsel submitted two affidavits. The first one described what were believed to be the details of the random assignment procedure then in effect. It also outlined the Assistant United States Attorney's purported request to Magistrate Latimer that this case should be looked at by the Chief Judge before assignment, "because of the national security nature [involved]." The first affidavit also described events which, it alleged, indicated that the prosecutor had informed the Chief Judge that superseding indictments might be expected. The second affidavit asserted that the judge's decision to detain Durrani without bail demonstrated bias.

On February 24th, the trial judge denied the disqualification motion as untimely. He also found it procedurally defective because it was not accompanied by a certificate of good faith by counsel. Moreover, he rejected the claim as a matter of law, noting that "[c]ommunications between the Chief Judge and the Supervising Assistant United States Attorney in the same ... court as th[e] judge, and the position of the judge with regard to the defendant's bail, are insufficient as a matter of law to support a motion to

1 disqualify." (citation omitted) Counsel for defendant then
2 filed a motion for reconsideration on March 6th which
3 incorporated a certificate of good faith. The judge promptly
4 denied this as well, remarking that it seemed primarily aimed
5 at delaying the trial.

6 Charges of impropriety or bias are serious, as
7 "justice must satisfy the appearance of justice." Aetna Life
8 Ins. Co. v. Lavoie, ___ U.S. ___, 106 S. Ct. 1580, 1587, 89
9 L. Ed. 2d 823, 835 (1986) (citation omitted). Nevertheless,
10 motions to dismiss must be timely and contain certificates of
11 good faith to safeguard both the judiciary from frivolous
12 attacks upon its dignity and the court system from last-minute
13 dilatory tactics. Town of East Haven v. Eastern Airlines,
14 Inc., 304 F. Supp. 1223 (D. Conn. 1969). In In re
15 Martin-Trigona, 573 F. Supp. 1237, 1244 (D. Conn. 1983),
16 appeal dismissed, 770 F.2d 157 (2d Cir. 1985), cert. denied,
17 106 S. Ct. 1285 (1986), the trial judge found untimely a lapse
18 of twelve days. Here four months passed between the events of
19 which appellant complains and the filing of the motion to
20 disqualify. That the motion was made on the eve of trial
21 buttresses the trial judge's conclusion that it was intended
22 primarily to delay proceedings. The district court, thus,
23 correctly rejected the motion.
24
25
26

CONCLUSION

1 For the foregoing reasons, we affirm the conviction
2 in all respects.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FOOTNOTES

1/ The Hawk missile system is a ground-based anti-aircraft system of immense ability. A typical firing section consists of three to four underground launchers, each of which contains three conventional missiles. The system is operated from three vans: an "information control center," a "platoon command post," and a "battery control center." Four radars track incoming planes and aim the missiles.

2/ See The Iran-Contra Investigation: Joint Hearings Before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Cong., 1st Sess. (1987) (co-chaired by Senator Daniel K. Inouye and Congressman Lee Hamilton).

3/ Although all the evidence available to date indicates that the items were procured by the CIA from Department of Defense stockpiles, the extensive involvement of private intermediaries in all stages of the covert operation makes it impossible to assert with absolute certainty that no private arms dealers furnished the U.S. government with the needed parts. See Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. 327-72 (1987).

4/ 22 C.F.R. § 126.4 (1986) reads:

Shipments by or for United States Government agencies.

(a) A license is not required for the export of any defense article or technical data by or for any agency of the U.S. Government (1) for official use by such an agency, or (2) for carrying out any foreign assistance, cooperative or sales program subject to control by the President by other means. This exemption applies only when all aspects of a transaction (export, carriage, and delivery abroad) are effected by a United States Government agency, or when the export is covered by a United States Government Bill of Lading. This exemption, however, does not apply when a U.S. Government agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements. The approval of the Office of Munitions Control must be obtained before defense articles exported pursuant to this exemption are permanently transferred to a foreign person (e.g., property disposal of surplus defense articles overseas) unless (i) the transfer is pursuant to a sale, lease, or loan under the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, or (ii) the defense articles have been rendered useless for military purposes beyond the possibility of restoration.

(b) This section does not authorize any department or agency of the U.S. Government to make any export which is otherwise prohibited by virtue of other administrative provisions or by any statute.

(c) A license is not required for the export of any defense article or technical data for end-use by a U.S. Government Agency under the following circumstances:

(1) The export is pursuant to a contract with, or written direction by, an agency of the U.S. Government; and

(2) The end-user is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and

(3) The urgency of the U.S. Government requirement is such that the appropriate export license or U.S. Government Bill of Lading could not have been obtained in a timely manner. A written statement certifying that these requirements have been met will be presented at the time of export to the appropriate district director of customs or Department of Defense transmittal authority, and shall be provided to the Office of Munitions Control.

ii.

22 C.F.R. § 126.6 (1986) reads.

Foreign military aircraft and naval vessels, and the Foreign Military Sales program.

(a) General. A license is not required for the export of any defense article if:

(1) The article was sold, leased, or loaned by the Department of Defense to a foreign country or international organization pursuant to the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, and

(2) The article was delivered to representatives of such a country or organization in the United States; and

(3) The article is to be exported from the United States on a military aircraft or naval vessel of that government or organization.

(b) Foreign military aircraft and naval vessels. A license is not required for the entry into the United States of military aircraft of any foreign state if no overhaul, repair, or modification of the aircraft is to be performed. Department of State approval for overflight (pursuant to the 49 U.S.C. 1508) and naval visits must, however, be obtained.

(c) Procedures for the Foreign Military Sales program. --

(1) General. District directors of customs are authorized to permit the export of unclassified defense articles, defense services, and technical data without a license if they were sold by the U.S. Department of Defense to foreign governments or international organizations under the Foreign Military Sales (FMS) program of the Arms Export Control Act. This procedure may be used only if a proposed export is:

(i) Pursuant to an executed U.S. Department of Defense Letter of Offer and Acceptance (DD Form 1513); and

(ii) Accompanied by a properly executed DSP-94; and

(iii) Made by the relevant foreign diplomatic mission of the purchasing country or its authorizing freight forwarder, provided that the freight forwarder is registered with the Office of Munitions Control pursuant to Part 122 of this subchapter.

(2) Filing of documents.

(i) the original copy of completed Form DSP-94, together with one copy of the corresponding authenticated DD Form 1513 and a shipper's export declaration, must be filed with the District director of customs at the port of exit prior to actual shipment. An executed DD Form 1513 is one which has been signed by (A) an authorized Department of Defense representative and countersigned by the Comptroller, Defense Security Assistance Agency (DSAA), and (B) by an authorized representative of the foreign government.

(ii) SED. The shipper's export declaration must be annotated as follows: "This shipment is being exported under the authority of Department of State Form DSP-94. It covers

iii.

FMS Case (case identification), expiration date -----, 22
CFR 126.6 applicable."

(iii) Notification to the Office of Munitions Control. Copy number two of the completed Form DSP-94 should be removed by the exporter and sent immediately, together with a copy of the applicable authenticated DD Form 1513 and the Shipper's export declaration, to the Office of Munitions Control. Form DSP-94 shall be valid for two years from the date on which it is executed.

5/ The "PROF" system is an interoffice mail system run through an IBM main frame computer and managed by the White House Communications Agency for the NSC. All NSC officers have personal passwords which enable them to send and receive messages to each other from terminals.

iv.