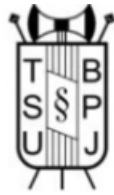


## “...BUILDING A PLANE WHILE FLYING...”

*An interview with Eric Hirschhorn*



Eric Hirschhorn graduated from the University of Chicago and from the Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He has been a lawyer for four decades. His main areas of expertise encompass international law, professional responsibility as well as litigation involving cases with several foreign governments and regulatory matters before the departments of Commerce, Treasury, State, Defense, and Homeland Security.

As deputy assistant secretary for export administration at the U.S. Department of Commerce (1980-81), Mr. Hirschhorn headed the organization now known as the Bureau of Industry and Security, dealing with anti-boycott compliance and export controls. During Jimmy Carter's presidency he also worked on reorganizing the U.S. Government's international trade, public diplomacy, and foreign assistance functions. Since 1986, he has served as executive secretary of the Industry Coalition on Technology Transfer.

Mr. Hirschhorn has been deeply involved also in the ethical aspects of practicing law. He formerly served as a member, vice chair, and chair of the D.C. Bar Legal Ethics Committee and, at present, is chair of the D.C. Bar Rules of Professional Conduct Review Committee, which recommends changes in the D.C. Rules of Professional Conduct.

He is the author of *The Export Control and Embargo Handbook*. His other publications include "Controls on Exports." in *Law and Practice of United States Regulation of International Trade* and "Advance Waivers of Conflicts of Interest." in *The Washington Lawyer*.

Mr. Hirschhorn agreed to an interview for the American Law School Program during his short stay in Cracow in July 2008. We talked about law, US elections, budget management, trade restrictions and attorney-client relationship. I found it surprising to discover that

nuclear power and lobbying doesn't seem so black and white if one looks at them from a slightly different perspective. My talker's accurate reflections on practical matters would constitute a tremendous input to the learning schedule of every law school in Poland.

**Joanna Śliwa:** *For a start, let's talk about your experience with learning the law. Did you, yourself, have many types of practical classes like moot courts or law clinics?*

**Eric Hirschhorn:** Actually, no, although it's been quite a while since I went to law school – I graduated almost forty years ago. I say sometimes that the only thing I've been taught there was to argue and brief cases in the appellate court which is something you'd probably do once a year. While I was in law school, I worked for Legal Aid, the public system providing legal help to poor people but this was just an additional job I did part-time. It was a great experience but there was not much teaching going on, you just did what the lawyers needed to have done. Therefore, it's been great to see the rise of the clinics in the last twenty years. I enjoyed law school very much – as opposed to some people – but the truth is that you really learn law in practice.

**JŚ:** *There are some critical voices, indicating that the clinic programs, successful as they are, do not have much impact because they are not compulsory and, thus, it is actually possible to graduate from law school without any practical experience. Would you make those kinds of courses, or at least some of them, obligatory if you had the chance to change something in the US legal education?*

**EH:** I think that would be a good idea. Practical classes are just as important as regular, analytical courses. Perhaps not everybody would have to take the same class – it would be better to have a choice among the clinic programs, but they should definitely constitute at least a quarter of the legal education. The first client I ever had was Puerto Rican and didn't speak English at all. Nevertheless, she knew more about what was going to happen in her case than I did and that's a sad summary to make about three years spent in a fancy law school.

**JŚ:** *I think this is exactly the problem with the Polish teaching system. As far as law goes, you may never say that you've learned it all and it's no use trying to. It's better to see how the problems are solved than to learn the solutions by heart. Law students sometimes wait with starting practice until they are in their fourth or even fifth year in order to be sure they have the right amount of knowledge. At that time, it's just too late to make full use of the experience they're getting.*

**EH:** Still, once you start practicing, you learn very quickly and, as you said, you never learn it all, even while working. I practice law in several different areas and every day I need to look things up, even though I know the respective areas pretty well by now.

Another reflection based on my own legal studies would be that you graduate with a sense that the law is what governs; if you know what the law is, you just fit in the facts and you get a ready, clear-cut solution. That's not really how it works. It's usually the facts that really matter! If they speak for you, most courts will find a way to rule in your favor. Frankly speaking, this is the key to winning a case but no one in law school ever taught me that, I had to figure it out myself.

One more thing which could be changed is the attitude that, if you find "the law," there it is. In Washington, at least, we spend a lot of time trying to get the agencies and then the Congress to change the law, if it's contrary to our clients' interests. The rigid approach of "Oh, that's the law, let's just abide by it." does a lot of damage.

**JŚ:** *Sometimes it may even be easier to change a bad law than to try to comply with it.*

**EH:** Correct. Of course, the law didn't get that way by accident. Every now and then you come across some obvious cases where you notice that this simply doesn't make sense and the agency, after taking a look at it, would say: "We know what you mean." but mostly you will hear: "It makes sense, you just don't get it." In those situations, there might have been some other forces, which wanted the law this way, at work.

**JŚ:** *Speaking of those forces, I'm curious about your opinion on lobbying. I've read two contradicting statements about this specific topic. One said that lobbying has a huge potential for corruption and the other that it is a natural and healthy way in which a group of people is becoming more aware of its own interests than the rest of the society. Which opinion do you consider closer to truth?*

**EH:** I think they're both true. If you step back and look at law in any country as an overall, you'll come to a conclusion that it is designed, more or less, to protect the status quo. In order to change it, you have to go and convince somebody. We have a clause in the First Amendment that protects lobbying – the right to petition for redress of grievances. The question is, what's the difference between you as a citizen, writing a letter to a Congressman saying that a particular law is bad and doing that by US steel company, which makes contributions to political campaigns and which knows the Congressmen and Senators. In a sense, this is the same thing. What may be corrupt about it is that people with money have more advantage than the rest but, on the other hand, that's just how it works in a society: the rich ones have big cars and houses and play golf with the judges. It's not exactly fair but, still, it may also be viewed as a way of bringing about change.

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Of course, it also can get utterly corrupt just as our presidential campaigns. You get elected through raising money and who has the money? Those who already are very influential and powerful and who want to reduce taxes and get rid of social programs which they deem unnecessary. There's this old song that goes like this: "The rich get richer and the poor get poorer..." and the lobbying system often reflects that. However, since the distinction between the rich and the poor will always exist, I don't think you can do much about it.

**JŚ:** *Often, lobbying is invoked not with respect to its moral assessment but in order to make the political opponents look bad in the eyes of the society.*

**EH:** Barack Obama says that he will never take money from lobbyists and he won't even let lobbyists raise money for him because, he maintains, there's corruption connected with lobbying. In truth, lobbying is not really inherently corrupt. The American Civil Liberties Union has lobbyists – does it automatically mean they're doing a nasty job? I am a great fan of Obama, and my wife and I have been supporting him for a long time, but I find it a little hypocritical not to take money from lobbyists but perhaps take it from the lobbyists' wives or grown up children. As you said, it's more of a political slogan to say that there won't be any lobbyists in his administration. There's going to be plenty of them, just as they were in all the other administrations.

**JŚ:** *Do you think that this slogan helped Obama defeat Hillary Clinton?*

**EH:** In my opinion Obama is much more inspiring than Hillary Clinton although they're both extremely smart. He is just a better politician than she is.

**JŚ:** *Who do you think will win the elections?*

**EH:** If you're asking about my personal preferences, I hope it's Obama. However, there's still the racism issue, whose level is hard to judge. I think that the people who won't vote for him because he's black mostly won't be Democratic voters anyway. The war in Iraq and generally the very bad job that Bush has done is something that McCain has to carry on with himself and that's a heavy load. Also, age is an important factor – some people might not vote for McCain simply because he's old. Apart from that, I don't think he is so good on his feet either. Nevertheless, a lot can happen in four months and some external factors could play a big role. If another terrorists' attack took place, people might want McCain to protect them, instead of having a young, less experienced guy in charge.

**JŚ:** *Do you think racism is still such an influential problem in the USA?*

**EH:** Certainly, the issue has decreased greatly over the last thirty years... How old are you?

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**JŚ:** *Twenty three.*

**EH:** My children are about the same age and they see no color, it's not part of their generation's consciousness, although it is a part of mine. I hope those young people will be out there voting more than usual this time and that the black voters will do the same. I also think that people are just sick of the Republicans and are willing to take their chances but you can never really be sure until it actually happens<sup>1</sup>.

**JŚ:** *I know it's not only the politicians that are elected by way of a campaign involving fund-raising but it's also the same with judges in some states. What do you think of that?*

**EH:** I'm not crazy about it. Still, a judge is going to be political one way or another, you cannot quite avoid it. If he is not elected in a campaign then a governor or a senator will appoint him. Isn't that political? Therefore, I'm not sure if the elections are such bad a choice. At least it's still democracy.

**JŚ:** *Are there any better options?*

**EH:** The thing is that, once elected, the judges are usually not bothered and don't encounter many problems with re-election. In some states you have retention elections, meaning that at the end of the term a judge doesn't have to run against another candidate as the first vote is to assess if the judge should stay in. More often than not he would be retained. Another solution would be simply to have them for life, whether appointed or elected – just like federal judges.

One thing is sure, if there's corruption, it's much more visible in a judge's campaign than in any other. Promising to lock up anybody who breaks the law is still a very popular move with the candidates.

**JŚ:** *Coming back to the main topic, what is now the scope of the term "lobbyists"? I read that in 2004 there was a proposition to widen it so that it would encompass every petition, also that from a private party, to any member of the Congress. Eventually, however, the term became less broad.*

**EH:** "Lobbying" comes from standing in queues outside Congressmen's offices in order to be able to talk to them. The definition has been changed a couple of times but this didn't really influence the phenomenon itself. It's really a very old profession and an old problem. There is some correspondence of Daniel Webster, a famous

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<sup>1</sup> For comparison, see: discussion on the elections' outcome with Jay Wexler (*Free exercise, expensive gas. An interview with Jay Wexler*, p. 91).

XIX century Senator and a lawyer, to his bank saying: "Your retainer is late." Nowadays, it would be unthinkable for such a politician to get a retainer from a bank. Of course, it can get corrupt when the lobbyists go behind closed doors and write the legislation together with the members of the Congress but, theoretically, anybody could do that. It's the financial system where the Congressmen and Senators have to raise money to run for office that's at the core of the corruption issue. A person who donated one hundred thousand dollars for your campaign and wants to have the law changed might get different treatment than someone that comes in from the street.

**JŚ:** *Can you think of any solution to that?*

**EH:** There are a couple of available solutions, such as a shorter campaign or public financing. I just don't know how effective and practical they would prove. The First Amendment has been ruled to enable you to spend as much of your private money on your own campaign as you want so, without a change in the Constitution or a definite shift in the views of the Supreme Court, I don't think that much could be done. The sole shortening of the campaign would be very problematic. The First Amendment, again, doesn't allow stopping Obama from saying in January 2007 that he's going to run for President in November 2008. Respectively, the campaign has been going on for seventeen months now and there are still four more months to go. It's terrible! I saw Obama some time ago: he looked completely exhausted and I told him so. He answered: "Well, what am I supposed to do?!" I just hope that, being so tired, he won't make any mistake.

**JŚ:** *Could you explain what "grass-root lobbying" means?*

**EH:** Instead of hiring Washington lawyers to do the job you convince local people to write letters and, e.g. go to see their Congressmen.

**JŚ:** *What are the legal conditions that the lobbyists need to comply with?*

**EH:** They have to register and state who they represent. They also need to report their contacts with the Congressmen and Senators and, theoretically, set forth what they have been talking about, but this last one can be kept pretty general. And, of course, the money! It should be disclosed how much money the lobbyists get for their lobbying. All this information may be found in the public records, free for everybody to check. If you don't work for anybody and don't get paid, you needn't register as a lobbyist or file lobbying reports. Representing yourself is not subject to any conditions.

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**JŚ:** *I know that in your legal practice you also deal with some controversial, ethical issues. What is your opinion on the problem of the attorney-client privilege and the three respective memoranda: Holder's, Thompson's and McNulty's? The last memorandum was supposed to clear the air but actually it is said to have created even more confusion.*

**EH:** We even call it the McNothing memorandum! However, it's not legislation but the Department of Justice's policy which indicates to a company under suspicion that, if it renounces the attorney-client privilege of itself and its workers, if it doesn't pay for the defense lawyers and basically turns the employees down, it will be treated better. Otherwise, it will be deemed to be uncooperative and will be subjected to the most severe penalties. In the KPMG case, Judge Kaplan decided that the kind of situations where the employees are deprived of their right to counsel is unconstitutional, however the particular problem of the attorney-client privilege is not that clear-cut. It may or may not comprise a constitutional privilege, while it is for sure an evidentiary one and, therefore, of a slightly lower rank with a couple of exceptions. It's also not as broad as people tend to think. The privilege does not encompass all the things said between a client and a lawyer. First, there has to be a request for legal advice and the rendering of legal advice. If you're only getting business advice, it's not confidential. By the same token, if the communication concerns an ongoing crime or fraud, the protection doesn't apply either. Still, it is quite strong a right.

Also, one needs to be very careful not to get into a conflict of interests while representing both the employee and the company. It's not as if there's bound to be something wrong with that – the employee may have really nothing to do with the issue at stake and serve just as a witness so that there's no adversity between the parties. Nevertheless, it may suddenly turn out that an employee, who seemed just a bystander, is actually deeply involved in the case. That's the reason why, at our law firm, we try to avoid such ambiguous situations of possible conflict which I describe as having one foot on the boat and one on the dock. It goes without saying that it's a very difficult position.

Yet another important thing is the very broad corporate criminal responsibility in the USA. Just about everything an employee does with the intention of benefit for the company, even if it clearly violates all the company's policies, can constitute the basis for corporate liability. I've been involved in negotiations with prosecutors when I would say: "Look, the guy was a rogue, he was all on his own, the company

had nothing to do with it..." and the prosecutor would ask: "Did the company take the revenue? Yes? Well, then the company will take the blame".

**JŚ:** *Bearing in mind Arthur Andersen's example, are you of the opinion that companies as a whole should be sued?*

**EH:** I think there should be a possibility to go after the corporations. In some of them one can really encounter a culture of corruption that goes all the way to the top. What one hopes will happen in such situations is that the stockholders of the respective business will wake up and sue the management. Consequently, a question arises, how easy should it be for the stockholders to do this? The answer is, I think, that it should be pretty easy. It's the stockholders who are the owners of the company, not the managers, but the latter tend to forget that. We've seen a lot of those corporate corruption cases where the management runs the business into the ground and, in the meantime, gets itself shower curtains for six thousand dollars.<sup>2</sup>

**JŚ:** *Staying in the corporate area, together with Leah Wortham you wrote an article where you describe the outcomes of Sarbanes-Oxley Act and the policy of Corporate Social Initiative with respect to the lawyer-client relationship. Do the two elements pose any threats for those who seek legal counsel?*

**EH:** SOX does tend to put the lawyer in a position of a gatekeeper much more than he used to be and there is a tension between this act and the attorney-client privilege. Indeed, some bars like the D.C. Bar, in which both Leah and I were very active at the time of drafting the new rules, don't go as far as SOX or as far as the Securities and Exchange Commission would like. SOX basically introduces a kind of independent responsibility for the lawyers who can no longer defend themselves by saying that the client told them that two plus two is five and they saw no reason to question that. However, I think that, on the whole, the gatekeeper initiative with respect to financial issues is the one where lawyers have been left out. The Department of Justice and the Department of Treasury are reluctant to burden lawyers with obligations while banks, casinos and all kinds of institutions who might handle suspected transactions have to report them. Lawyers are required to report cash transactions of ten thousand dollars or more, but they needn't say what the nature of their representation is. Thus, their duty is ver when such restrictive

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<sup>2</sup> For comparison, see: discussion on confidentiality with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 45-48) and with Sarah Duggin ("*We ought to let companies be socially liable!*" *An interview with Sarah Duggin.*, p. 30-32).



regulations might be applied to lawyers and his answer was: "Not before I retire". The tradition and the Bar in the US is simply too strong for that.

**JŚ:** *Moving on to your book, *Export Control and Embargo Handbook*, has the US nuclear policy been significantly modified following changes in the official bodies and basic regulations?*

**EH:** It all started with the 1946 and then the 1954 Acts, which are still the fundamental legislation today, although many changes were introduced in 1978 when the approach was tightened up. Probably the restrictions strongly supported by Senator Glenn from Ohio went too far at that time. The proliferation of nuclear weapons is one thing but it needs to be taken into account that the same technology is used for nuclear power plants, which are basically a bomb going off very slowly with graphite rods to control the chain reaction. Nuclear power is indeed dangerous, thus the respective controversies in the USA, but so is burning coal! The scientists are even assessing that many more people are dying of fossil fuels coming from oil and coal than from nuclear materials.

I think that now people are starting to reconsider the issue despite being still scared of it – partially because radiation is invisible. Of course, it's nicer to get the energy from the waterfalls or sun but not everywhere can you do it and that technology is not so environment-friendly either; building solar panels requires much energy and materials. Everything has its drawback. I think the answer to the problem, at least to some extent, would be to stop wasting so much energy. Senator Obama has spent much time talking about those issues. Natural or, as they call it, renewable energy is not enough to support our industrial society, hence, we have to find some alternative sources. If it's not coal then most probably it would be nuclear power, we just need to figure out the safest way to use it.

**JŚ:** *Your book relates widely also to international security matters. Could you explain the procedure of putting an embargo on a country?*

**EH:** The International Emergency Economic Powers Act, which dates back to the 1970s, entitles the President to declare any emergency he deems necessary. This is a very broad, almost unlimited sort of power. Respectively, when the export control legislation ran out, the President declared an emergency due to the fact that the Congress hadn't yet passed a new law. In case of emergency the President may also put an embargo on a country and even seize its assets in the USA. At present, we have full embargos on Cuba, Sudan and Iran and a partial embargo on Burma. There are also limited embargos on Syria and North Korea, meaning that you need a license to send goods and technology but not services. Those limited embargos are very easy to impose and they cause many problems for

the business. If I have a contract, say, for ten years to supply country X with goods and after two years an embargo is introduced...

**JŚ:** *What do you do in such a situation?*

**EH:** Most of the time you have to accept a loss. What you may try to do, except when it is a case of North Korea, is to establish a subsidiary in e.g. Poland, which will be able to do business with the country X. Such a subsidiary still cannot send US goods to X but it may send French goods. We've adopted this amelioration following a strong push-back from European allies in the 1980s when we had put a ban on doing business with the Soviet Union with respect to the pipeline, because of Afghanistan. Therefore, the embargos instituted after 1982 exclude foreign subsidiaries as long as the parent isn't financing, approving or guaranteeing the transactions. However, what we are speaking about now are mostly "unilateral" embargoes, meaning that other countries' exporters may send their goods to country X without restrictions. This may be well compared to damming half of the river – it makes you feel as if you did something, but in reality, it doesn't have much effect.

**JŚ:** *The next question is more connected with your work at the Office of Management and Budget. Are earmarks, the money that Congress assigns directly to specific projects without the interference of agencies, still a bone of contention in the US economy?*

**EH:** There's always been tension between the Executive and Legislative branch in the USA. The Executive's rationale in connection to this topic is that money should go to projects conducted by the agencies and then they will decide on the assignment of the funds to the particular program employing their best professional knowledge, instead of an influential Senator building a bridge to nowhere for twenty million dollars. However, the Congress has a Constitutional right to legislate and appropriate money, despite the fact that a thousand earmarks might not be a beneficial thing for the State.

**JŚ:** *So, we have yet one more example of an ongoing battle between the Executive and the Legislative in the US.*

**EH:** Our Constitution was designed to make it difficult to get things done and, in that sense, it works well.

**JŚ:** *What is the supreme point of interest at the Office - management, budget or managing the budget?*

**EH:** It's the management of the budget that's the first and most important function of the Office. Given how many agencies there are in the federal government, you have to have someone who pulls it all together for the President. Subsequently, however, other

functions were added like federal contract compliance and reviewing new regulations so that they are consistent with the others. When Jimmy Carter was elected, he put a reorganization function into OMB – that’s where I worked, in the National Security, Intelligence and Foreign Affairs area. We managed to change some things: we moved part of the duties and foreign commercial service to the Commerce Department, we also tried to reorganize the Intelligence service to make it really strong but without much success – the Defense Department unceremoniously shuffled us out and closed the door.

Additionally, the Office does a very important job by way of rationalizing. If every agency got what they wanted, there wouldn’t be money left for anything else and the budget would be ten times bigger. Therefore, decisions need to be made on the broad financial issues, which are just as crucial as the policy questions.

Yet another big thing which I have already mentioned and which the Office has to handle is to centralize the legislation that comes from the various departments and agencies in order to be able to check whether it is consistent with the President’s policy. Of course, people still “go through the back door” sometimes, but at least their public statements should support the position of the President.

**JŚ:** *Did you like the job?*

**EH:** No. Mine was a new function when I started and it wasn’t given much support even within the Office of Management and Budget itself, which considered it too political for their neutral policy. Also, they didn’t like the additional management-reorganization tasks and wanted to stick to the budget. Nobody knew where we fit so it was a little like building a plane while flying it. It was very frustrating.

**JŚ:** *A job that you perhaps liked more was working for Bella Abzug. According to the information I gathered, she was a successful lawyer, opponent of Nixon and the Vietnam War, she did litigation for civil rights in the South and was one of the founders of the women’s movement. Apart from all that, she is said to be a terrific person. What did your job there looked like?*

**EH:** I was her legislative assistant so the job involved researching various legal issues like those connected with the War but also, e.g. with getting money for the New York subways. Going back to the beginning of our conversation and the role of facts in a lawyer’s job, it was mostly Bella who taught me that, if you’re right, there’s always a way and you should never assume something can’t be done until you’ve tried it. Actually, it’s surprising how true this is. Bella had a volcanic character which, at times, made her difficult to work with but she cared deeply for the really important topics and she was the boss

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that I probably learned most from. Another thing is that this knowledge came at a great cost – I’ve never worked so hard in my life as at that time, not even on Wall Street!

**JŚ:** *In Poland, we seem to have some significant problems with producing good law. Do you have any tips for efficient creation of a legislative framework?*

**EH:** The problem with the parliamentary system is that it’s usually the same people who come up with the proposition of a new regulation and who then work on it. The law-making process is pretty straightforward. In the USA, on the other hand, it takes much time to cook up an act and many different people and committees are required to look at it, except, of course, for the emergency situations. If anything, the law is looked at for too long, but by the time this is finished, you are at least sure that everyone who had something to say about it, already did it. I think that most of the legislation problems are connected with the fact that law-making process takes place in a hurry, which leaves no opportunity for everyone who’s potentially affected by it to improve it or at least comment on it. Nevertheless, it’s not that our regulations are perfect, far from it, but usually instead of amending them or introducing new law, we have the courts or the agencies interpret the existing law and shift it a little one way or the other.

**JŚ:** *So, you find it beneficial that every person can place their comment with respect to the provisions that are being introduced?*

**EH:** I do, but at the same time it immensely slows the process down. Well, everything has its price.