

# THE DEPARTMENT OF DEFENSE'S ROLE IN FREE-WORLD EXPORT LICENSING UNDER THE EXPORT ADMINISTRATION ACT

## INTRODUCTION

Recent events have intensified the battle between those who fear "selling the Russians the rope they will hang us with"<sup>1</sup> and those who accuse the Reagan administration of waging "economic warfare" against the Soviet Union.<sup>2</sup> For much of 1987 and 1988, government officials and commentators have been debating how to withhold sensitive technology from potential foes of the U.S. while allowing U.S. exporters to succeed in world markets. Some have stressed that the West's qualitative edge in defense technology is slipping<sup>3</sup> and have pointed angrily to recent spectacular failures in the enforcement of multilateral export controls<sup>4</sup> as examples of what export control "reform" will achieve. Others have emphasized our deteriorating balance of trade, especially in high-technology products,<sup>5</sup> and have blamed autarkic and capricious export licensing

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1. See Gershman, *Selling Them the Rope: Business & the Soviets*, COMMENTARY, Apr. 1979, at 35, 35. As Aleksandr Solzhenitsyn describes, the saying comes from Lenin's belief that the Western Capitalists would do anything to strengthen the economy of the USSR. They will compete with each other to sell [the USSR] goods cheaper and sell them quicker, so that the Soviets will buy from one rather than the other. . . . [I]n a difficult moment, at a party meeting in Moscow, he said: "Comrades, don't panic, when things go very hard for us, we will give a rope to the bourgeoisie, and the bourgeoisie will hang itself."

Then, Karl Radek, . . . who was a very resourceful wit, said: "Vladimir Ilyich, but where are we going to get enough rope to hang the whole bourgeoisie?" Lenin effortlessly replied: "They'll supply us with it."

Speech by Aleksandr Solzhenitsyn to AFL-CIO (June 30, 1975), *quoted in* Gershman, *supra*, at 35. See generally Kirkwood, *Inside the Red-Trade Lobby*, NAT'L REV., Apr. 29, 1988, at 35 (warning that increased U.S.-USSR trade would allow USSR to undermine U.S. military expenditures).

2. See Bonker *Outlines Plans Following EAA Bill, Suggests Court Suit Over DoD Review Move*, 2 Int'l Trade Rep. (BNA) 952, 952 (July 24, 1985) (quoting D. Bonker, Remarks to U.S. Chamber of Commerce).

3. See, e.g., Perle, *Technology Security, National Security, and U.S. Competitiveness*, 3 ISSUES SCI. & TECH. 106, 107-09 (1986) (The Soviets have narrowed the U.S. military technology advantage, in part by using "Western technology to subsidize their military R&D program.").

4. See *infra* notes 164-67 and accompanying text.

5. See, e.g., Bonker, *Protecting Economic Interests*, 3 ISSUES SCI. & TECH. 96, 96 (1986) (noting in prologue that U.S. high-technology trade surplus dropped from \$26 billion to \$7 billion between 1980 and 1985); see also PANEL ON THE IMPACT OF NAT'L SEC. CONTROLS ON INT'L TECHNOLOGY TRANSFER, COMM. ON SCIENCE, ENG'G, AND PUB. POLICY, NAT'L ACADEMY OF SCIENCES, NAT'L ACADEMY OF ENG'G, INST. OF MEDICINE, BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION 123-24 (1987) [hereinafter NATIONA L ACADEMY OF SCIENCES] (discussing how U.S. export controls

practices under the Export Administration Act (EAA)<sup>6</sup> for stifling U.S. exporters' competitiveness. In subtitle II(D) of the Omnibus Trade and Competitiveness Act of 1988 (1988 OTCA),<sup>7</sup> the two sides have reached a settlement, albeit an uneasy and possibly short-lived one.<sup>8</sup>

The balance that U.S. export controls should strike between trade competitiveness and national security<sup>9</sup> is not a new issue; indeed, widespread dissatisfaction with the executive branch's version of that balance<sup>10</sup> led Congress to amend the federal export control laws in 1979<sup>11</sup> and 1985.<sup>12</sup> In the period leading up to the Export Administration

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disadvantage U.S. firms and help their competitors in CoCom and non-CoCom countries); *infra* note 34 and accompanying text (describing CoCom).

6. 50 U.S.C. app. §§ 2401-2419 (1982 & Supp. III 1985) [cited hereinafter as EAA].

7. Pub. L. No. 100-418, §§ 2401-2447, 102 Stat. 1107, 1347-70 (to be codified in scattered sections of 50 U.S.C. app. and at 19 U.S.C. § 1864) [cited hereinafter as 1988 OTCA]; *see infra* note 180 (citing bills that gave rise to 1988 OTCA); *see also infra* notes 199-205 and accompanying text (discussing history of 1988 OTCA).

8. *See infra* notes 199-205, 222, and accompanying text.

9. The EAA actually implements three kinds of controls, not all of which deal explicitly with national security:

- (1) foreign policy controls, which seek "to further significantly the foreign policy of the United States or to fulfill its declared international obligations," EAA § 3(2)(B), 50 U.S.C. app. § 2402(2)(B) (1982); *see also id.* § 6, 50 U.S.C. app. § 2405 (Supp. III 1985) (prescribing foreign policy controls);
- (2) short supply controls, which seek "to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand," *id.* § 3(2)(C), 50 U.S.C. app. § 2402(2)(C) (1982); *see also id.* § 7, 50 U.S.C. app. § 2406 (1982 & Supp. III 1985) (prescribing short supply controls); and
- (3) national security controls, which seek "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States," *id.* § 3(2)(A), 50 U.S.C. app. § 2402(2)(A) (1982); *see also id.* § 5, 50 U.S.C. app. § 2404 (1982 & Supp. III 1985) (prescribing national security controls).

However, the genesis of U.S. export controls at the outset of the cold war, *see* A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS §§ 1.1, 2.1 (1977), and their application to such foreign policy purposes as protesting the Soviet-directed crackdown in Poland and averting European dependence on Soviet natural gas, *see* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, TECHNOLOGY AND EAST-WEST TRADE: AN UPDATE 8 (1983), reflect the fact that a broad conception of national security underlies the *entire* EAA. This Note, in contrast, focuses on national security export controls in the narrow sense defined by EAA § 5, 50 U.S.C. app. § 2404 (1982 & Supp. III 1985).

10. *See, e.g.*, GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, EXPORT CONTROL REGULATION COULD BE REDUCED WITHOUT AFFECTING NATIONAL SECURITY 13, 22 (1982) (report, issued at request of Sens. Garn and Byrd, recommended eliminating licensing requirements for low-technology items, as well as changing export licensing review process).

11. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985)) [cited hereinafter as 1979 EAA].

12. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (codified in scattered sections of 50 U.S.C. app. §§ 2401-2420 (Supp. III 1985)) [cited hereinafter as 1985 EAAA]. For a brief discussion of the events that led up to the 1979 and 1985 enactments, *see* Gonzalez, *How to Increase Technology Exports Without Risking National Security—An In-Depth*

Amendments Act of 1985 (1985 EAAA),<sup>13</sup> Congress explicitly balanced trade promotion and national security objectives by weighing the roles of the trade-oriented Department of Commerce (Commerce) and the security-oriented Department of Defense (DoD) in the national security export control process. The EAA had lapsed in 1983,<sup>14</sup> and the House and Senate bills to renew it differed on one important point: whether DoD should have power to review and veto requests to export high-technology items to "non-controlled" (i.e., free-world)<sup>15</sup> countries. The Senate bill explicitly authorized such DoD review,<sup>16</sup> but the House refused to insert a like provision into its bill.<sup>17</sup> The controversy ended in an unstable compromise when the President directed that DoD undertake review. Congress, satisfied that some decision had been made, left the 1985 EAAA silent on the matter.<sup>18</sup>

Two years later, the 100th Congress, still struggling to balance policy objectives in export controls, decided to take action before the EAA's scheduled expiration in September 1989.<sup>19</sup> The House and Senate again differed on whether DoD should review applications for free-world high-technology exports,<sup>20</sup> but this time the House took the offensive, seeking to legislate away the DoD review ordered by the President in 1985.<sup>21</sup> In the end, the House failed to secure inclusion of its provision in the 1988 OTCA. Instead, the OTCA blends Congress's continued refusal to amend the key statutory provision on DoD free-world export license re-

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*Look at the Export Administration Amendments Act of 1985*, 8 LOY. L.A. INT'L & COMP. L.J. 399, 411-14 (1986).

13. Pub. L. No. 99-64, 99 Stat. at 120.

14. See 50 U.S.C. app. § 2419 (1982) (superseded 1985).

15. Cf. EAA §§ 16(6), 5(b), 50 U.S.C. app. §§ 2415(6), 2404(b) (Supp. III 1985) (defining "controlled countries"). "Free-world," "non-controlled-country," and "West-West" denote exports to countries other than those that the EAA defines as "controlled."

16. See S. 979, 98th Cong., 2d Sess. § 8(5)-(7), 130 CONG. REC. S2255 (daily ed. Mar. 2, 1984) [hereinafter S. 979] (proposing to amend 50 U.S.C. § 2409(g) (1982)). S. 979 was passed on March 1, 1984, the day before it was reprinted. See 130 CONG. REC. S2143 (daily ed. Mar. 1, 1984).

17. See H.R. 3231, 98th Cong., 1st Sess., reprinted in *Extension and Revision of the Export Administration Act of 1979: Hearings and Markup on H.R. 3231 Before the House Comm. on Foreign Affairs and Its Subcomm. on International Economic Policy and Trade*, 98th Cong., 1st Sess. 1459-525 (1983) [hereinafter Hearings on H.R. 3231]; see *infra* notes 77-78 and accompanying text; see also Gonzalez, *supra* note 12, at 411-13.

18. See Pub. L. No. 99-64, 99 Stat. at 120; *infra* note 85 and accompanying text.

19. See EAA § 20, 50 U.S.C. app. § 2419 (Supp. III 1985).

20. Compare *infra* notes 186-92 and accompanying text (discussing House's position) with *infra* notes 193-98 and accompanying text (discussing Senate's position). See generally White, *Negotiating and the Congressional Conference Process: A Case Study of the Export Administration Act & the Omnibus Trade Bill*, 13 N.C.J. INT'L L. & COM. REG. 333, 336-37 (1988) (explaining House's and Senate's negotiating positions on EAA reform in general).

21. See *infra* notes 186-90 and accompanying text.

view, EAA section 10(g),<sup>22</sup> with legislative history that acknowledges, without resolving, the question of how much DoD license review the EAA really authorizes. The answer to that question affects the legality of the President's 1985 order.<sup>23</sup>

This Note<sup>24</sup> addresses DoD's role in national security export controls<sup>25</sup> on "dual-use" goods,<sup>26</sup> technologies, and data.<sup>27</sup> Focusing on the

22. EAA § 10(g), 50 U.S.C. app. § 2409(g) (1982 & Supp. III 1985) (amended 1988) (1979 version reprinted *infra* note 55); see *infra* note 201 and accompanying text (explaining the 100th Congress's failure to materially amend the section).

23. See *infra* notes 122-30, 220-21, and accompanying text. The advent of limited judicial review under the EAA, see 1988 OTCA, Pub. L. No. 100-418, § 2428(a), 102 Stat. 1107, 1361-62 (to be codified at 50 U.S.C. § 2412(c)-(d)), may allow the courts to decide the constitutionality of the 1985 directive. See also *infra* note 95 and accompanying text (discussing suggestion that aggrieved exporters challenge directive).

24. The period since 1979 has seen a flood of scholarly and practical writing on export controls, much of which has concerned the U.S.'s extraterritorial application of foreign policy controls, a policy that has irritated the U.S.'s European allies and that commentators frequently say violates international law. See, e.g., Marcuss & Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?*, 2 INT'L TAX & BUS. LAW. 1, 17-28 (1984) (arguing that the U.S. lacks extraterritorial jurisdiction to impose export controls).

In contrast, most books and articles published since the 1985 EAAA's enactment focus on national security controls; many of them mention the section 10(g) issue analyzed here. For authorities, not cited elsewhere in this Note, that discuss U.S. export controls since the 1985 EAAA, see generally BUSINESS-HIGHER EDUC. FORUM, EXPORT CONTROLS: THE NEED TO BALANCE NATIONAL OBJECTIVES 43 (1986); THE EXPORT ADMINISTRATION ACT OF 1985 AND ITS RAMIFICATIONS (1985); PRACTISING LAW INST., COPING WITH U.S. EXPORT CONTROLS (1986); Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, LAW & CONTEMP. PROBS., Summer 1987, at 117; Blair, *Export Controls on Nonmilitary Goods and Technology: Are We Penalizing the Soviets or Ourselves?*, 21 TEX. INT'L L.J. 363 (1986); Levine, *Technology Transfer: Export Controls Versus Free Trade*, 21 TEX. INT'L L.J. 373 (1986); Nollen, *Business Costs and Business Policy for Export Controls*, J. INT'L BUS. STUD., Spring 1987, at 1; Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663 (1986); Recent Development, *Export Controls—Export Administration Amendments Act of 1985*, 27 HARV. INT'L L.J. 259 (1986).

25. "National security" export controls are those created by EAA §§ 3(2)(A), 5, 50 U.S.C. app. §§ 2402(2)(A), 2404 (1982 & Supp. III 1985).

National security controls aim only to stop potential enemies from receiving or easily diverting legal exports of sensitive items. The Soviet bloc's other main—and arguably most important—technology acquisition method, espionage, is not the target of the Export Administration Act. Cf. DoD, SOVIET ACQUISITION OF MILITARILY SIGNIFICANT WESTERN TECHNOLOGY: AN UPDATE 11-27 (1985) (discussing Soviet acquisition methods and their relative importance).

26. "Dual-use" items are commercial goods, technologies, and data that could make a significant, but indirect, contribution to a potential foe's military capabilities. These items are the focus of the EAA, and hence of this Note. See NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 80-82 (explaining characteristics and regulation of dual-use items). Items with direct military application are controlled by the Arms Export Control Act, 22 U.S.C.A. §§ 2778-2780 (West Supp. 1988), which is implemented by the International Traffic in Arms Regulations, 22 C.F.R. §§ 120.1-130.17 (1988).

27. This Note does not discuss recent initiatives to restrict the Soviet bloc's access to U.S. financing. See, e.g., S. 786, 100th Cong., 1st Sess., 133 CONG. REC. S3522-23 (daily ed. Mar. 19, 1987); S. 812, 99th Cong., 1st Sess., 131 CONG. REC. S3686 (daily ed. Mar. 28, 1985) (proposing to restrict transfers of capital to "the Soviet Union and its allies"); see also *Omnibus Trade Legislation*

policy aspects, legislative history, and constitutionality of the "section 10(g) issue," the Note:

- (1) sketches the history of the EAA and the export licensing process that it implements;
- (2) reviews the events and debate that led to the 1985 EAAA's position on DoD review of free-world export license applications;
- (3) evaluates the uneasy compromise wrought by executive action and congressional silence in 1985, and the constitutional status of DoD's export license review program since then (leaving the 1988 OTCA aside);
- (4) considers how the DoD/Commerce export license review process is working, as evidenced by two government-sponsored studies, recent developments in export control enforcement, and testimony before the 99th and 100th Congresses; and
- (5) examines the development of the 1988 OTCA's provisions on EAA section 10(g), and what those provisions reveal about the state of congressional intent regarding DoD free-world license review.

This Note stresses the costs and confusion produced by the ambiguity of EAA section 10(g), and tries to resolve the confusion by clarifying the statutory and constitutional authority for DoD review.

## I. HISTORY OF NATIONAL SECURITY EXPORT CONTROLS

U.S. peacetime export controls on dual-use items emerged in the late 1940s, when the U.S. and its NATO allies were beginning to rely on superior military technology to offset the Soviet Union's quantitative strengths.<sup>28</sup> The controls found expression in the Export Control Act of 1949,<sup>29</sup> which reflected a policy of "economic containment."<sup>30</sup> At the

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*on National Security Export Controls (Vol. II): Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 99th Cong., 2d Sess. 3-9 (1986) [hereinafter April 1986 Hearings] (statement of Roger W. Robinson, Jr., Senior Director from 1982 to 1985 for International Economic Affairs, National Security Council).*

28. See NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 72-73 (discussing historical background of Export Control Act of 1949); Perle, *supra* note 3, at 107:

Because we are democracies and consumer-oriented societies, we cannot match our Soviet adversaries numerically—soldier for soldier, tank for tank, or aircraft for aircraft. But in scores of programs—weapons systems, communications, intelligence, and warning—we can use the technological edge provided by the brains and organizing ability of Western scientists, engineers and businessmen to offset their large numbers.

29. Export Control Act of 1949, ch. 11, 63 Stat. 7; see also Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 792 (1967) (discussing the history of the enactment of the Act).

30. Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 258 (1981). "Economic containment" denotes a policy of husbanding strategically important items to maintain a technological advantage over the Soviet bloc. Cf. Perle, *supra* note 3, at 107-09

time, the U.S. enjoyed a near-monopoly on advanced technology<sup>31</sup> and thus was able to maintain the kinds of broad controls imposed during World War II.<sup>32</sup> Those controls imposed unilateral checks on goods and technologies that the U.S. alone had, and vigorously restricted the reexport of such goods.<sup>33</sup> Realizing that its allies could undermine U.S. export controls by freely exporting their own sensitive goods, the U.S. secured the allies' cooperation through the informal Coordinating Committee for Multilateral Export Controls (CoCom), formed in 1949.<sup>34</sup> In addition, under the Mutual Defense Assistance Control Act of 1951 (the Battle Act),<sup>35</sup> Congress promised to cut off all economic aid to any country that leaked controlled items.<sup>36</sup>

Two decades later, after multiple extensions of the Export Control Act,<sup>37</sup> Congress liberalized export controls under the Export *Administration* Act of 1969 (1969 EAA).<sup>38</sup> The Act's name change, as well as its new provisions, indicating that "trade with all countries, Communist included, [is] beneficial to the U.S."<sup>39</sup> and recognizing the costs of excessive controls,<sup>40</sup> reflected hopes for détente and expanded West-East trade. This step coincided with the end of complete U.S. dominance in dual-use technologies.<sup>41</sup>

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(explaining role of technological strength in Western defense and expressing concern that West is losing high-technology edge).

31. Murphy & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of United States Export Controls*, 30 INT'L & COMP. L.Q. 791, 792 (1981); see also NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 68 n.4, 59-68 (defining high-technology trade and discussing scope of and reasons for U.S.'s decline as high-technology leader).

32. NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 73. The wartime export control laws allowed an embargo of almost anything that the President declared to be military-related. See *id.* at 72-73.

33. NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 73.

34. Comment, *COCOM: Limitations on the Effectiveness of Multilateral Export Controls*, 1983 WIS. INT'L L.J. 106, 108-109. CoCom includes Japan and all NATO countries except Iceland. *Id.* See generally Bertsch, *U.S. Export Controls*, in NATIONAL SECURITY AND TECHNOLOGY TRANSFER: THE STRATEGIC DIMENSIONS OF EAST-WEST TRADE 127-31 (G. Bertsch & J. McIntyre eds. 1983).

35. Mutual Defense Assistance Control Act of 1951, ch. 575, 65 Stat. 644 (codified at 22 U.S.C. §§ 1611-1613d (1976)) (superseded 1979).

36. See Comment, *supra* note 34, at 109 n.14.

37. See Joint Resolution of May 16, 1951, ch. 83, 65 Stat. 43; Act of June 16, 1953, ch. 116, 67 Stat. 62; Act of June 29, 1956, ch. 473, § 1, 70 Stat. 407; Act of June 25, 1958, Pub. L. No. 85-466, 72 Stat. 220; Act of May 13, 1960, Pub. L. No. 86-464, 74 Stat. 130; Act of July 1, 1962, Pub. L. No. 87-515, § 1, 76 Stat. 127; Act of June 30, 1965, Pub. L. No. 89-63, § 1, 79 Stat. 209.

38. Pub. L. No. 91-184, 83 Stat. 841 (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985)) (emphasis added).

39. Gonzalez, *supra* note 12, at 408.

40. See NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 75.

41. See *id.* In fact, a 1977 amendment required decontrol of items that foreign suppliers could provide in "significant quantities and comparable . . . quality." Export Administration Amendments of 1977, Pub. L. No. 95-52, sec. 103(a)(3), § 4(b)(2)(B), 91 Stat. 235, 236; cf. EAA § 4(c), 50 U.S.C.

In the late 1970s, recognizing that the hortatory 1969 EAA had accomplished little permanent decontrol,<sup>42</sup> U.S. exporters importuned Congress for further changes.<sup>43</sup> A sweeping amendment in 1979 addressed their concerns.<sup>44</sup> The Export Administration Act of 1979 (1979 EAA) made both symbolic changes, such as a "Declaration of Policy" that put a priority on exporters' needs<sup>45</sup> and new provisions for exporters to make their opinions known,<sup>46</sup> and substantive changes, including limits on the scope of goods<sup>47</sup> and technologies<sup>48</sup> controlled.

Despite these liberalizations, neither the 1969 or 1979 amendments, nor the 1985 EAAA, changed certain prominent features of the national security export control scheme. These features include:

- (1) exemption of the rulemaking and enforcement process from the judicial review requirements of the Administrative Procedure Act,<sup>49</sup>
- (2) short duration of each EAA reenactment, which gives Congress frequent opportunities to rethink its earlier policy judgments;<sup>50</sup> and
- (3) broad delegation to the President of authority to shape, administer, and enforce an export licensing regime.<sup>51</sup> The President, in turn, has delegated nearly all of this authority to Commerce.<sup>52</sup>

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app. § 2403(c) (1982) (foreign availability decontrol provision of 1979 EAA, later amended in 1985 EAAA, Pub. L. No. 99-64, § 104(c), 99 Stat. at 123).

42. See NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 74-75.

43. See Gonzalez, *supra* note 12, at 409-10. The exporters' concerns extended to foreign policy controls as well, in the wake of President Carter's controversial initiatives. *Id.* at 409 & n.25.

44. 1979 EAA, Pub. L. No. 96-72, 93 Stat. 503.

45. *Id.* § 3(10), 93 Stat. at 505.

46. *Id.* § 5(h), 93 Stat. at 510 (facilitating creation of "Technical Advisory Committees").

47. *Id.* § 5(c), 93 Stat. at 507 (defining goods constituting "Control List").

48. *Id.* § 5(d), 93 Stat. at 508 (limiting export controls on technologies to "Militarily Critical Technologies").

49. EAA § 13(a)-(b), (e), 50 U.S.C. app. § 2412(a)-(b), (e) (1982 & Supp. III 1985) (amended 1988) (prescribing exemption from Administrative Procedure Act, 5 U.S.C.A. §§ 551, 553-559, 701-706 (West 1977 & Supp. 1988), and imposing substitute appeal provisions). The lack of judicial review has helped to prevent resolution of the Executive's and Congress's dispute over section 10(g). The advent of judicial review under the 1988 OTCA, Pub. L. No. 100-418, § 2428, 102 Stat. 1107, 1361-62 (to be codified at 50 U.S.C. app. § 2412(c)-(d)), may allow the kind of definitive resolution discussed *infra* notes 122-40 and accompanying text.

50. EAA § 20, 50 U.S.C. app. § 2419 (Supp. III 1985) (prescribing four-year validity period for current statute) (extended by one year in 1988 OTCA, Pub. L. No. 100-418, § 2431, 102 Stat. at 1362); *cf. supra* note 37 (showing frequency of congressional reauthorization of export controls between 1949 and 1969).

51. See Berman & Garson, *supra* note 29, at 792 ("Probably no single piece of legislation gives more power to the President to control American commerce."). See generally NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 72-73.

52. See, e.g., Exec. Order No. 12,214, 3 C.F.R. 256 (1981), reprinted in 50 U.S.C. app. § 2403 (1982). Commerce exercises its delegated authority through the Export Administration Regulations, 15 C.F.R. §§ 368-399 (1988) [cited hereinafter as EAR].

Moreover, the mechanics of U.S. national security export controls<sup>53</sup> have remained stable since the inception of "economic containment" in the 1940s.<sup>54</sup>

## II. EVENTS LEADING TO THE 1985 EAAA'S POSITION ON DoD REVIEW

### A. *Early Developments Under the 1979 EAA.*

At the beginning of the Reagan administration, EAA section 10(g)<sup>55</sup>

53. See Woodward, *Commerce Simplifies Export Licensing*, BUS. AM., June 8, 1987, at 2, 3-8. See generally NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 75-97 & figs. 4-1, 4-2, 4-4 (flowcharts and description of license submission and review process). In general terms, the EAR require federal export licenses for all exports of goods and technical data to every country except Canada. See EAR, 15 C.F.R. § 370 *supp.* 1; NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 82. The few exceptions to the no-controls policy for Canada appear in EAR, 15 C.F.R. §§ 379.4(c), 379.5(e), 385.6.

Most U.S. exports receive "general licenses," which authorize shipment of less-sensitive goods to less-sensitive destinations. *Id.* § 371.1; CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, U.S. CONGRESS, MAJOR ISSUES SYSTEM ISSUE BRIEF: EXPORT CONTROLS 2 (1987). General licenses require no prior application and involve no license document. EAR, 15 C.F.R. § 371.1. More sensitive exports and many reexports of U.S.-origin items require advance government approval in the form of a "validated license." See *id.* §§ 372.1-376.16. Validated licenses, *id.* § 372.2(a), include both Individual Validated Licenses (IVLs), which authorize single transactions, *id.* § 372.2(b)(1), and the "multiple export" or bulk licenses that the 1985 EAAA authorizes, Pub. L. No. 99-64, § 104(a), 99 Stat. 120, 122-23. The most commonly used bulk license is the "distribution license," which covers multiple shipments to a pre-approved foreign consignee or distributor. See EAR, 15 C.F.R. § 373.3.

For either type of validated license, a potential exporter must give Commerce's Office of Export Licensing detailed information on the nature, value, recipient, and use of the proposed export. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, U.S. CONGRESS, *supra*, at 2. Applications for bulk licenses require especially detailed information. See EAR, 15 C.F.R. § 373. An exporter can make no shipments until Commerce, consulting other government agencies as required, evaluates and approves her application. See NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 78-79 & fig. 4-2 (detailed flowchart of IVL review process, including DoD review chain (where authorized or required)).

The section 10(g) issue that this Note examines concerns whether DoD's participation is, or should be, required for proposed exports to "non-controlled" countries. See *supra* note 15. The EAA's list of "controlled" countries comes from the Foreign Assistance Act of 1961 § 620(f), 22 U.S.C. § 2370(f) (1982 & *Supp.* III 1985), and includes Czechoslovakia, North Korea, Estonia, East Germany, Hungary, Latvia, Lithuania, Outer Mongolia, Albania, Bulgaria, the PRC, Poland, Cuba, Yugoslavia, Romania, Vietnam, Tibet, and the USSR. *Id.*; EAA §§ 16(b), 5(b)(1), 50 U.S.C. app. §§ 2415(6), 2404(b)(1) (*Supp.* III 1985); EAR, 15 C.F.R. § 370.2. This Note does not discuss the legality or wisdom of terminating DoD's role in all export licensing, although such a move has been proposed. See *infra* note 174 (reporting discussions in unpublished hearings).

54. NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 75; see also *supra* note 30 (defining "economic containment").

55. 1979 EAA, Pub. L. No. 96-72, § 10(g), 93 Stat. 503, 527-28 (codified as amended at 50 U.S.C. § 2409(g) (1982 & *Supp.* III 1985)) (further amended 1988). The section provides:

(g) Special Procedures for Secretary of Defense

(1) Notwithstanding any other provision of this section, the Secretary of Defense is authorized to review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes and, whenever the Secretary of

authorized DoD to review export license applications for "any country to which exports are controlled for national security purposes."<sup>56</sup> In practice, DoD reviewed export licenses for Soviet bloc destinations only; this practice reflected Commerce and DoD's shared belief that section 10(g)'s language had the same meaning as the phrase "controlled country" used elsewhere in the EAA.<sup>57</sup>

In mid-1981, however, as part of a broad crackdown in the administration and enforcement of export controls,<sup>58</sup> DoD began to claim that section 10(g) authorized it to review applications for free-world export licenses. In making this claim, it sought to check applications for risks of diversion (i.e., unauthorized reexport).<sup>59</sup> Commerce protested. The agencies reached a compromise in September 1981, under a Memorandum of Understanding (M.O.U.): Commerce began sending DoD certain high-technology, computer-related Individual Validated License

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Defense determines that the export of such goods or technology will make a significant contribution, which would prove detrimental to the national security of the United States, to the military potential of any such country, to recommend to the President that such export be disapproved.

(2) . . . Whenever a license or other authority is requested for [an] export to any country to which exports are controlled for national security purposes . . . , the Secretary [of Commerce] shall notify the Secretary of Defense of such request, and the Secretary may not issue any license or other authority pursuant to such request before the expiration of the period within which the President may disapprove such export. The Secretary of Defense . . . , not later than 30 days after notification of the request, shall—

(A) recommend to the President that he disapprove any request for the export of the goods or technology involved to the particular country . . . ;

(B) notify the Secretary [of Commerce] that he would recommend approval subject to specified conditions; or

(C) recommend to the Secretary that the export of goods or technology be approved.

If the President notifies the Secretary [of Commerce], within 30 days after receiving a recommendation from the Secretary of Defense, that he disapproves such export, no license or other authority may be issued for the export of such goods or technology to such country.

. . . . .  
(4) Whenever the President exercises his authority under this subsection to modify or overrule a recommendation made by the Secretary of Defense . . . , the President shall promptly transmit to the Congress a statement indicating his decision, together with the recommendation of the Secretary of Defense.

*Id.* (emphasis added). The text will refer to this provision as "section 10(g)."

56. *Id.* § 10(g)(1), (2), 93 Stat. at 527.

57. See *infra* notes 96-98 and accompanying text; see also *supra* note 15 and accompanying text (describing "controlled countries").

58. See, e.g., *Export Controls: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs, on the Current System of U.S. and Multilateral National Security Export Controls and to Seek Strategies to Regulate International Technology Transfer in Such a Manner as to Achieve a Desirable Balance Among the National Objectives of Military Security, Economic Vitality, and Scientific and Technological Advance*, 100th Cong., 1st Sess. 73 (1987) [hereinafter *1987 Senate Hearings*] (statement of Richard Perle); Gonzalez, *supra* note 12, at 476-78 (describing Operation Exodus, the Customs Department's controversial program of border searches for illegal shipments of high-technology exports).

59. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, EXPORT LICENSING: COMMERCE-DEFENSE REVIEW OF APPLICATIONS TO CERTAIN FREE WORLD NATIONS 9 (1986).

(IVL)<sup>60</sup> applications for most free-world destinations. This arrangement changed slightly in March 1984, when the President "affirmed" it<sup>61</sup> and also gave DoD "authority in principle" to review distribution licenses for the same products and destinations.<sup>62</sup>

Under the M.O.U.,<sup>63</sup> Commerce initially notifies DoD that it has received an application in one of the agreed-upon categories and provides an abstract of the application's contents. DoD has one week to request that Commerce send it the license application (with supporting documentation). After Commerce sends the application, DoD must make a recommendation within twenty-two days, or it loses the right to comment on the application. The twenty-two-day "clock" stops, however, if DoD requests further documentation from Commerce. If DoD recommends license disapproval, it must tell Commerce its reasons "with specificity." Commerce simultaneously reviews applications sent to DoD. If Commerce and DoD disagree, they must refer the application within ten days to a Technology Transfer Steering Group (TTSG) that comprises the Assistant Secretary of Commerce for Trade Administration (probably the Under Secretary of Commerce for Export Administration after October 1, 1987),<sup>64</sup> the Assistant Secretary of Defense for International Security Policy, and the Deputy National Security Advisor. If deadlocked itself, the TTSG can refer the matter to the President.<sup>65</sup>

Two government reports that influenced the 1983-1985 debates on the EAA's reauthorization and amendment<sup>66</sup> explored DoD's expanding role in export license review. A 1984 General Accounting Office (GAO) report<sup>67</sup> found Commerce's initial review to be a frequent source of needless delay and excess staffing<sup>68</sup> and recommended that DoD's review precede Commerce's in order to increase the focus on DoD's recommendations.<sup>69</sup> The GAO regarded DoD's review as an indispensable part of the process.<sup>70</sup> An Office of Technology Assessment (OTA)

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60. See *supra* note 53 (defining IVL).

61. Announcement Concerning Licensing and Enforcement Procedures Under the Export Administration Act, 1984 PUB. PAPERS 411 (Mar. 23, 1984) [hereinafter President's Announcement].

62. *Id.*

63. The procedure established under the M.O.U. continued under the 1985 presidential directive discussed below. See *infra* notes 83-84 and accompanying text; see also Liebman, *West-West Export Licensing*, in THE EXPORT ADMINISTRATION ACT OF 1985 AND ITS RAMIFICATIONS 75, 77 (1985).

64. See *infra* note 168.

65. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 59, at 10.

66. See *infra* notes 75-86 and accompanying text.

67. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 10.

68. *Id.* at 15, 17.

69. *Id.* at vi-vii, 22.

70. The GAO thought DoD review vital because it considered DoD—and not Commerce—best able to evaluate national security questions. *Id.* at 16, 22-23.

study in 1983<sup>71</sup> took a different view in its discussion of the policy options facing the 98th Congress.<sup>72</sup> Though the OTA mentioned making DoD the primary licensing authority as one option, it noted that such a move would serve national security ends only, and not the goals of export licensing efficiency, foreign policy, or trade promotion.<sup>73</sup> In sum, the OTA said, Congress faced a choice: to change export control policy radically, or to equivocate.<sup>74</sup>

#### B. *Developments During the Ninety-Eighth and Ninety-Ninth Congresses.*

The 1979 EAA's expiration in 1983<sup>75</sup> gave the 98th Congress an opportunity to change the state of affairs under section 10(g), sparking a battle over what change was desirable. In his EAA reauthorization bill (S. 979), which the Senate passed in March 1984,<sup>76</sup> Senator Jake Garn (R-Utah) proposed amending EAA section 10(g) to make DoD's power to review free-world export license applications explicit.<sup>77</sup> The House's already-passed reauthorization bill (H.R. 3231) contained no such amendment, and throughout the 1984 conference committee discussions the House maintained that "continued Commerce responsibility for decisions on free-world license applications . . . is preferable to formal review by other Departments over free-world licenses."<sup>78</sup> Fearing that licensing

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71. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *supra* note 9.

72. *Id.* at 12-14.

73. *Id.* at 12 tbl. 1.

74. *Id.* at 98.

75. The 1979 EAA's authority ended on September 30, 1983, under 50 U.S.C. app. § 2419 (1982) (reauthorized and amended 1985). Between that date and the enactment of the 1985 EAAA, Congress extended the statutory authority for export controls three times. *See* Act of Feb. 29, 1984, Pub. L. No. 98-222, 98 Stat. 36; Act of Dec. 5, 1983, Pub. L. No. 98-207, 97 Stat. 1391; Act of Oct. 1, 1983, Pub. L. No. 98-108, § 1, 97 Stat. 744. The President filled the gaps between Congress's temporary reauthorizations with two Executive Orders, both of which he revoked when Congress extended the EAA's expiration date. These Executive Orders were originally issued under the International Emergency Economic Powers Act, 50 U.S.C. § 1702 (1982). *See* Exec. Order No. 12,470, 3 C.F.R. 168 (1985), *revoked*, Exec. Order No. 12,525, 3 C.F.R. 377 (1986), *reprinted in* 50 U.S.C. § 1701 note (Supp. III 1985); Exec. Order No. 12,444, 3 C.F.R. 214 (1984), *revoked*, Exec. Order No. 12,451, 3 C.F.R. 223 (1984), *reprinted in* 50 U.S.C. § 1701 note (Supp. III 1985).

76. S. 979, *supra* note 16, § 8(5)-(7), 130 CONG. REC. at S2255 (authorizing Secretary of Defense to review applications whenever Secretary "determines . . . that [controlled] goods or technology . . . are likely to be diverted to proscribed destinations"). S. 979 actually passed on the day before it appeared in the *Congressional Record*. *See* 130 CONG. REC. S2143 (daily ed. Mar. 1, 1984).

77. S. 979, *supra* note 16, § 8(5)-(7), 130 CONG. REC. at S2255; *see also* Overman, *Reauthorization of the Export Administration Act: Balancing Trade Policy with National Security*, 17 LAW & POL'Y INT'L BUS. 325, 372 (1985) (discussing Sen. Garn's role in promoting change); *cf.* S. REP. NO. 170, 98th Cong., 1st Sess. 17 (1983) [hereinafter S. REP. NO. 98-170] (treating proposed change as mere clarification of section 10(g)'s language).

78. H.R. REP. NO. 257, 98th Cong., 1st Sess., pt. 1, at 9 (1983) [hereinafter H.R. REP. NO. 98-257]; *see* White, *supra* note 20, at 337-38.

delays would harm U.S. exporters, the House decried the idea of giving DoD a "veto" over free-world exports.<sup>79</sup> This disagreement, along with disputes over a House provision banning bank loans to South Africa,<sup>80</sup> prevented the 98th Congress from reauthorizing the EAA.

Within six months after first convening, the 99th Congress side-stepped these controversies and enacted the 1985 EAAA.<sup>81</sup> Two actions made enactment possible. First, the House decoupled its proposed South Africa sanctions from the EAA reauthorization.<sup>82</sup> Second, on January 4, 1985, the President issued a classified directive on DoD's license review powers under section 10(g).<sup>83</sup> The directive formalized the DoD review taking place under the recently "affirmed" M.O.U. and authorized DoD to review validated licenses for high-technology exports to fifteen free-world destinations of its choice.<sup>84</sup> The House and Senate seized the opportunity to dodge the section 10(g) issue: the successful EAA reauthorization bill (S. 883) proposed no material changes to section 10(g).<sup>85</sup> The two-year debate over DoD's role in free-world license review thus ended with a whimper.<sup>86</sup>

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79. H.R. REP. NO. 98-257, *supra* note 78, pt. 1, at 9. The administration, too, opposed the Garn proposal, saying that it encroached on the Executive's power to control the agencies. See Feldman, *The Restructuring of National Security Controls under the 1985 Amendments to the Export Administration Act: Multilateral Diplomacy and the Extraterritorial Application of United States Law*, 21 STAN. J. INT'L L. 235, 245 (1985). The administration also claimed that the existing section 10(g) language authorized DoD review of free-world export license applications. President's Announcement, *supra* note 71, at 412.

80. H.R. 3231, 98th Cong., 1st Sess. § 321, *reprinted in Hearings on H.R. 3231, supra* note 17, at 1519-20; *see also* White, *supra* note 20, at 339-40 (discussing the last-minute failure of a proposed compromise).

81. Pub. L. No. 99-64, 99 Stat. 120 (passed both Houses June 27, 1985; signed into law July 12, 1985). Working out problematic new sections in the reauthorization bills took most of the six months. See Gonzalez, *supra* note 12, at 413-14 & nn.55-56.

82. 131 CONG. REC. H2004 (daily ed. Apr. 16, 1985) (statement of Rep. Bonker).

83. See, e.g., *Classified Directive Sets Out Procedures on Pentagon Review of West-West Licenses*, 2 Int'l Trade Rep. (BNA) 90 (Jan. 16, 1985) (National Security Advisor Robert C. McFarlane signed "confidential" directive).

84. See *id.* at 90; *supra* note 61 and accompanying text. Under the directive, DoD reviews license applications for exports to Austria, Finland, Hong Kong, India, Iran, Iraq, Libya, Lichtenstein, Malaysia, Singapore, South Africa, Spain, Sweden, Switzerland, and Syria. See Feldman, *supra* note 79, at 245 n.57 (listing the fifteen countries).

85. H.R. CONF. REP. NO. 180, 99th Cong., 1st Sess. 62, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 108, 124 (statement of managers). S. 883's conference report attributed this silence to the presidential directive:

In the end, the need for the amendment was removed by the decision of the President on his own initiative . . . . As a result, the President's action obviates the need for the legislative change originally proposed by the Senate . . . . This matter may be raised again should the need arise . . . .

*Id.*, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS at 124.

86. For a full description of the changes made by the 1985 EAAA, see generally Gonzalez, *supra* note 12, at 427-502. The 1985 EAAA did include some changes in Commerce's and DoD's respective export administration roles. First, in a move designed to "raise the priority and visibility"

### III. THE 1985 EAAA'S UNEASY COMPROMISE ON SECTION 10(G)

#### A. Congressional Post-Mortems.

Even as they were passing the 1985 EAAA, Congressmen and Senators struggled to explain their decision to leave section 10(g) unchanged "as a result" of the President's January 1985 directive.<sup>87</sup> Senator Garn, who favored DoD free-world license review, was quick to stress two sources of authority for such review: (1) the unchanged language of section 10(g), which, he said, "preserved" DoD's authority to review export licenses<sup>88</sup> for "any country to which exports are controlled for national security purposes,"<sup>89</sup> and (2) the President's independent authority to order such review, as exercised in his directive.<sup>90</sup> Senator John Heinz (R-Pa.) highlighted Senator Garn's implicit legal conclusion:

I would simply say that the Senate was willing to drop its insistence on the [section 10(g)] amendment since the President effectively pre-empted the question with his decision of last January . . . . The statement of managers [quoted above,<sup>91</sup>] however, does make clear that the President had the legal authority to take the action he took last January, unpopular though it may have been in some quarters.<sup>92</sup>

Congressmen Don Bonker (D-Wash.) and Ed Zschau (D-Cal.), long-time supporters of the interests of Commerce and the export community, took a different view of what the 1985 EAAA achieved. Congressman Zschau opined:

On [the section 10(g)] issue, the House position prevailed and, as a result, the [conference] bill . . . contains no amendment to section 10(g).

I would like to remind my colleagues that in the debate on the House floor on April 16, 1985, . . . it was made clear that the House

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of export control at Commerce, S. REP. NO. 98-170, *supra* note 77, at 22, the 1985 EAAA replaced Commerce's Assistant Secretary for Trade Administration with an Under Secretary for Export Administration and two Assistant Secretaries. 1985 EAAA, Pub. L. No. 99-64, § 116(a), 99 Stat. 120, 152 (codified at 50 U.S.C. app. § 2414(a) (Supp. III 1985)). The 1985 EAAA also created a "National Security Control Office" within DoD, Pub. L. No. 99-64, § 105(j), 99 Stat. at 128 (codified at 50 U.S.C. app. § 2404(p) (Supp. III 1985)), that some Senators hoped would ensure "a broad and direct policy role for the Defense Department . . . to counter balance [sic] that natural pro-trade bias inherent at the Commerce Department," 131 CONG. REC. S8923 (daily ed. June 27, 1985) (statement of Sen. Garn). That DoD office is now called the Defense Technology Security Administration (DTSA). See GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 59, at 13. Finally, the 1985 EAAA, Pub. L. No. 99-64, § 111(c), 99 Stat. at 143 (codified at 50 U.S.C. app. § 2409(f)(2) (Supp. III 1985)), gave applicants the right to respond to negative recommendations on their license requests.

87. See *supra* note 85.

88. 131 CONG. REC. S8922 (daily ed. June 27, 1985).

89. EAA § 10(g)(1), (2), 50 U.S.C. app. § 2409(g)(1), (2) (1982 & Supp. III 1985).

90. See 131 CONG. REC. at S8922.

91. See *supra* note 85.

92. 131 CONG. REC. at S8922.

interprets section 10(g) of the Export Administration Act as amended by [S. 883] as providing no authority to the Secretary of Defense for reviewing proposed exports to countries other than controlled countries. In other words, the Department of Defense review of proposed exports of goods and technology to countries other than controlled countries would be illegal under the Export Administration Act of 1985.<sup>93</sup>

Angered by DoD's continuing review of licenses for free-world exports and the resulting delays suffered by exporters,<sup>94</sup> Congresswoman Bonker has even suggested that exporters sue the executive branch for its non-compliance with the EAA.<sup>95</sup>

The following two sections evaluate Congressmen Bonker and Zschau's claim that the 1985 EAAA precludes DoD review of free-world export licenses, as well as their implicit claim that continued execution of the January 1985 presidential directive violates the Constitution.

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93. *Id.* at H5061. In the April 16 debate that Rep. Zschau mentions, he asked Rep. Bonker how the 1985 EAAA affected DoD's authority to review free-world license applications. Bonker replied: "The law is explicit, and this legislation is explicit in that DoD has review authority only on shipments to controlled countries. It does not possess statutory authority to review license shipments to free world or COCOM countries, and no such authority is contained in this legislation." *Id.* at H2012 (daily ed. Apr. 16, 1985); see also *Implementation of the Export Administration Amendments Act of 1985: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 98, 100 (1985) [hereinafter *Fall 1985 Hearings*] (Rep. Bonker reiterates this position in hearings held shortly after 1985 EAAA's enactment); *infra* note 217 and accompanying text (Rep. Bonker reiterates this position during debate on 1988 OTCA).

94. See, e.g., *April 1986 Hearings*, *supra* note 27, at 64-66 (American Electronics Association representative reports members' licensing experiences since 1985 EAAA), 201 (Assistant Secretary of Commerce for Trade Administration Paul Freedenberg estimates that DoD review adds average of fourteen days to each affected application's processing time).

95. See, e.g., *id.* at 146 (statement of Rep. Bonker) ("[I]f the . . . executive branch [ ] is not carrying out the law as Congress intended, then somebody ought to be able to bring it to court."); see also *Bonker Outlines Plans Following EAA Bill, Suggests Court Suit Over DoD Review Move*, 2 Int'l Trade Rep. (BNA) 952 (July 24, 1985) (discussing Rep. Bonker's proposal that someone sue executive branch). Congressman Bonker has not elaborated the theory that might underlie such a suit, but he would probably claim both that continued DoD free-world license review violates section 10(g) as clarified by 1983-1985 legislative history, see *supra* notes 82-86 and accompanying text, and that the presidential directive is unconstitutional under the separation of powers doctrine, see *infra* notes 121, 123-24, and accompanying text. Apparently, no exporters have followed Congressman Bonker's suggestion. See *April 1986 Hearings*, *supra* note 27, at 146 (statement of Rep. Bonker) ("Unfortunately I can't find anybody in the private sector who is willing to take on the executive branch . . ."). The recent introduction of judicial review of civil sanctions, 1988 OTCA, Pub. L. No. 100-418, § 2428(a), 102 Stat. 1107, 1361-62 (to be codified at 50 U.S.C. app. § 2412(c)-(d)), may make a meaningful court challenge possible.

B. *Statutory Authority for DoD Free-World License Review Under the EAA as Amended Through 1985.*

Congressman Bonker's argument against DoD's current role premises that section 10(g)'s phrase "country to which exports are controlled for national security purposes"<sup>96</sup> has always meant the same thing as "controlled country."<sup>97</sup> Bonker cites the lack of any material amendment in 1985 as proof that DoD's review authority is still limited to controlled-country exports.<sup>98</sup> Senators Garn and Heinz, on the other hand, believe that the 1979 EAA's section 10(g)<sup>99</sup> empowered DoD to review export license requests for all destinations subject to *any* national security controls.<sup>100</sup> In their view, the fact that the Senate proposed an amendment to correct the House's errant reading of the section, but dropped the amendment when the President solved the problem, detracts nothing from the 1979 language's meaning.<sup>101</sup> As shown below, the 1979 EAA's legislative history supports Congressman Bonker's position, but subsequent events in Congress undermine it.<sup>102</sup>

DoD first received the power to review export license requests under a 1974 amendment to the EAA.<sup>103</sup> As both the language<sup>104</sup> and legisla-

96. EAA § 10(g)(1), (2), 50 U.S.C. app. § 2409(g)(1), (2) (1982 & Supp. III 1985).

97. See EAA § 16(6), 5(b)(1), 50 U.S.C. app. §§ 2415(6), 2404(b)(1) (Supp. III 1985); *supra* note 53. If true, this means that DoD's free-world license review program lacks statutory authority. Cf. *infra* notes 104-05 and accompanying text (original mandate for DoD license review extended to "controlled countries" only). But cf. *infra* note 120 (discussing another possible source of statutory authority).

98. See H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 3, at 101 (1987) [hereinafter H.R. REP. NO. 100-40] (The limitation of DoD review to controlled-country license requests "is confirmed in prior legislative history, and reaffirmed by the failure of the conference committee on the Export Administration Amendments Act of 1985 to expand the Defense Department's review authority.").

99. 1979 EAA, Pub. L. No. 96-72, § 10(g), 93 Stat. 503, 527-28 (reprinted *supra* note 55).

100. This group of destinations includes all countries except Canada. See *supra* note 53.

101. See *supra* notes 88-92 and accompanying text.

102. See *infra* notes 106-19 and accompanying text.

103. Export Administration Amendments of 1974, Pub. L. No. 93-500, sec. 9, § 4(h), 88 Stat. 1552, 1555-56 (codified at 50 U.S.C. app. § 2403(h) (1976)) (superseded 1979).

104. *Id.*

(1) The Congress finds that the defense posture of the United States may be seriously compromised if the Nation's goods and technology are exported to a controlled country without an adequate and knowledgeable assessment being made to determine whether export of such goods and technology will significantly increase the military capability of such country. . . .

(2) . . . Whenever a license or other authority is requested for the export of such goods or technology to any controlled country, the appropriate export control office or agency to whom such request is made shall [forward the request to the Secretary of Defense for his recommendation].

. . . .

(4) As used in this subsection—

. . . .

tive history of that amendment<sup>105</sup> make clear, the amendment authorized DoD to review *controlled-country export licenses only*. In 1979, the 96th Congress altered the 1974 language that confined DoD's review to controlled-country exports.<sup>106</sup> Some passages in the legislative history accommodate the view that this revision indicated a shift in congressional intent.<sup>107</sup> The committee report<sup>108</sup> on the Senate bill that formed the basis of the 1979 EAA,<sup>109</sup> however, stressed that the 96th Congress intended to make no substantive change to the 1974 provision.<sup>110</sup> Despite the mystery surrounding Congress's rationale for overhauling section 10(g), the relevant House Report<sup>111</sup> and the floor debates<sup>112</sup> confirm that the 1979 EAA continued to limit DoD's review authority to controlled-country exports.

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(C) the term "controlled country" means any Communist country as defined under section 620(f) of the Foreign Assistance Act of 1961.

*Id.*

105. S. REP. NO. 1024, 93d Cong., 2d Sess. 8-9, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 6241.

Section 9 [of the bill that became Pub. L. No. 93-500] would add a new subsection 4(h)(1) [to] the Act to establish review procedures for exports of goods and technology to "controlled countries" (defined to mean Communist countries as specified in section 620(f) of the Foreign Assistance Act) . . . . The purpose is to insure that the Department of Defense has an adequate opportunity to consider the military and national security implications of exports to Communist Countries . . . .

*Id.*, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 6241.

106. *Compare supra* note 104 (1974 version) *with supra* note 55 (1979 version).

107. *See* S. REP. NO. 169, 96th Cong., 1st Sess. 10, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1147, 1157 (Senate Committee on Banking, Housing and Urban Affairs report on 1979 EAA's legislative history, describing Senate's EAA reauthorization bill, S. 737, § 4(h), as providing for "review by the Secretary of Defense of export licenses required for national security purposes"). Note that the phrase "export licenses" in the Senate Report is not preceded by "all". *See also* H.R. REP. NO. 200, 96th Cong., 1st Sess. 6 (1979) (House's counterpart provision, H.R. 4034, sec. 104(c), § 10(i), "[as was] the case in present law, . . . specifically authorized [DoD] to appeal to the President any export license decisions which the Department of Defense considers inconsistent with U.S. national security" (emphasis added)). If the House Report's drafters intended "any export license decisions" to extend beyond decisions on controlled-country export licenses, they erred in describing the House bill as consistent with pre-1979 law. *See supra* note 105.

108. S. REP. NO. 169, 96th Cong., 2d Sess. [hereinafter S. REP. NO. 96-169], *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1147.

109. *See* H.R. CONF. REP. NO. 482, 96th Cong., 1st Sess. 50, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1180, 1187 (reporting adoption of key Senate provisions); 1979 U.S. CODE CONG. & ADMIN. NEWS 1147 (editors' sketch of 1979 EAA's legislative history).

110. S. REP. NO. 96-169, *supra* note 108, at 10, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 1157.

111. *See* H.R. REP. NO. 200, 96th Cong., 1st Sess. 6 (1979) ("H.R. 4034 preserves and strengthens the current sharing of responsibility among the Departments of Commerce, Defense and State . . . ."), 21 (emphasizing that "section 10 does not alter the role of any agency in the licensing process").

112. *See* 125 CONG. REC. 20,110 (1979) (statement of Rep. Bingham that DoD "has a veto over exports to Communist countries"); *id.* at 20,111-12 (quoting letter from Deputy Secretary of Defense Duncan to Sen. Stevenson that stated DoD's satisfaction with its pre-1979 review authority); *id.* at 19,959 (statement of Sen. Stevenson, quoting same letter).

This state of affairs prevailed until the 1983-1985 reauthorization battle, which obscured the congressional intent regarding section 10(g). That the Senate's policy choice prevailed in 1985 by virtue of the President's directive<sup>113</sup> weakens Congressman Bonker's argument that the EAA means today what it meant in 1974 and 1979. Bonker must also explain why "controlled country"<sup>114</sup> and "country to which exports are controlled for national security purposes"<sup>115</sup>—phrases juxtaposed in one Export Administration Act—should mean the same thing.<sup>116</sup> Senators Garn and Heinz, in contrast, must respond to the argument that if "country to which exports are controlled for national security purposes" already had a congressionally ordained meaning different from that of "controlled country," the Senate in 1984 would not have pressed for a change that appeared more like a substantive amendment than a mere "clarification."<sup>117</sup>

Neither side's legislative history argument gains much from the fact that executive action finally persuaded the 99th Congress to leave section 10(g) alone.<sup>118</sup> Pressured to reauthorize the EAA and seeing no prospect of agreement on a change to section 10(g), Congress used the 1985 directive as a welcome invitation to drop the subject. Statements in the *Congressional Record* reflect no consensus on the existing statutory basis for DoD free-world license review,<sup>119</sup> or on the wisdom of broadening DoD's review authority. The statutory authority for DoD free-world license review thus remains uncertain.<sup>120</sup>

113. See Harris & Bialos, *Congressional Balancing Act Benefits Exporters*, Legal Times, Aug. 5, 1985, at 17, col. 1, 20, col. 1.

114. EAA §§ 16(6), 5(b)(1), 50 U.S.C. app. §§ 2415(6), 2404(b)(1) (Supp. III 1985); see *supra* note 53.

115. *Id.* § 10(g)(1), (2), 50 U.S.C. app. § 2409(g)(1), (2) (1982 & Supp. III 1985).

116. See 2A SUTHERLAND STATUTORY CONSTRUCTION §§ 46.05 (each element of statute should be construed in connection with other elements, to produce a harmonious whole), 46.06 (a statute should be construed such that no part will be void or insignificant) (C. Sands 4th ed. 1984). In the 1985 EAAA, Pub. L. No. 99-64, § 106(a)(1)(D), 99 Stat. 120, 128, the 99th Congress showed that it knew how to narrow an EAA section's meaning by amendment. Congress constricted the "foreign availability" exclusion from the militarily critical technologies list, see EAA § 5(d), 50 U.S.C. app. § 2404(d) (1982 & Supp. III 1985), from "possessed by countries to which exports are controlled under this section," *id.* § 5(d)(2), 50 U.S.C. app. § 2404(d)(2) (1982) (emphasis added), to "possessed by, or available in fact from sources outside the United States to, controlled countries," *id.*, 50 U.S.C. app. § 2404(d)(2) (Supp. III 1985) (emphasis added).

117. See S. REP. NO. 98-170, *supra* note 77, at 17.

118. See *supra* note 85 and accompanying text.

119. See *supra* notes 87-93 and accompanying text.

120. *But cf.* Hentzen, *United States Export Restrictions for Foreign Policy and National Security Purposes: The 1985 Amendments to the Export Administration Act and Beyond*, 26 COLUM. J. TRANSNAT'L L. 103, 122 (1987).

The legality of the President's action would have been highly doubtful under the 1979 Act, which granted the Defense Department only a very limited role in the export control process. The action, however, was justified by the President's sweeping [IEEPA] powers in a

### C. *Constitutionality of the Presidential Directive.*

The President's January 1985 directive broke a two-year congressional deadlock and formalized DoD's practice of free-world license review. In view of the 1985 EAAA's ambiguity, however, the directive may not provide sufficient authority for DoD's current role. Congressman Bonker thinks that the directive is clearly insufficient authority for such a role.<sup>121</sup> His claim that DoD's free-world license review program is illegal raises the issue whether the President has authority to control exports when Congress is indifferent or opposed.

If pressed, the Attorney General most likely would defend the directive as an exercise of the President's independent power as "the sole organ of the federal government in the field of international relations."<sup>122</sup> Opponents of the directive would stress Congress's power to regulate foreign commerce.<sup>123</sup> They would contend that the subordinate character of the President's foreign affairs power<sup>124</sup> prevents him from ordering a controversial change in export administration without congressional approval.

In determining the validity of independent presidential action, the Supreme Court has found Justice Jackson's 1952 concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (the *Steel Seizure Case*)<sup>125</sup> "analytically useful."<sup>126</sup> Assessing the constitutionality of President Truman's effort

national state of emergency, which President Reagan had declared in order to extend controls under the EAA when it lapsed in 1983.

*Id.* (footnotes omitted).

If the IEEPA ever supported DoD free-world license review, it does not now. The order that terminated the President's last EAA extension, Exec. Order No. 12,525, 3 C.F.R. 377 (1986), reprinted in 50 U.S.C. § 1701 note (Supp. III 1985); see *supra* note 75, purports to preserve the effectiveness of all administrative actions taken during the extension. Even if the January 1985 directive is considered an administrative action, however, it lacks statutory support from the IEEPA: as Mr. Hentzen notes, any state of emergency that supported an IEEPA-based extension ended when Congress enacted the 1985 EAAA. Hentzen, *supra*, at 116; see also *id.* at 126-27 n.161 (noting definition of "unusual or extraordinary threat" under IEEPA, 50 U.S.C. § 1701(a) (1982), and how the President has stretched it to suit his purposes). For a full treatment of IEEPA issues, see Harris & Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71 (1985).

121. See *supra* note 93 and accompanying text.

122. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Its discussion of the Executive's foreign affairs power aside, *Curtiss-Wright* supports congressional delegations to the Executive in the international relations area. See, e.g., *United States v. Bruinage*, 377 F. Supp. 144, 149-50, 150 n.11 (E.D.N.Y. 1974) (presuming part of 1969 EAA valid in view of *Curtiss-Wright*).

123. See U.S. CONST. art. I, § 8, cl. 3.

124. See *Curtiss-Wright*, 299 U.S. at 320 (The President's independent power "does not require as a basis for its exercise an act of Congress, but . . . , of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

125. 343 U.S. 579, 634 (1952) [hereinafter *Steel Seizure Case*] (Jackson, J., concurring).

126. E.g., *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (in case involving President's suspension of claims against Iran, assertedly justified under IEEPA, Court endorses Justice Jack-

to impound steel mills during a nationwide strike, the *Steel Seizure Case* majority noted that “[t]he President’s power, if any, . . . must stem either from an act of Congress or from the Constitution itself.”<sup>127</sup> In a concurring opinion intended to draw the borders between executive and legislative power,<sup>128</sup> Justice Jackson proposed to judge presidential assertions of residual power by “their disjunction or conjunction with [the will] of Congress.”<sup>129</sup> He split the conceivable situations into three groups:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, . . . [and is] supported by the strongest of presumptions and the widest latitude of judicial interpretation . . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority . . . . Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . .<sup>130</sup>

Although each side would claim that section 10(g)’s wording reflects an “express or implied” congressional endorsement of its position,<sup>131</sup> most courts<sup>132</sup> and commentators would note Congress’s “inertia,” or its “quiescence,” on the section 10(g) issue.<sup>133</sup> The courts therefore would analyze the 1985 presidential directive under Justice Jackson’s second category: the directive’s validity would depend “on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action,”<sup>134</sup> including Congress’s withdrawal from the section 10(g) issue in 1985.

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son’s analysis, but notes his warning that “his three categories represent ‘a somewhat over-simplified grouping,’ 343 U.S. at 635 . . .”).

127. 343 U.S. at 585.

128. *Id.* at 634 (Jackson, J., concurring).

129. *Id.* at 635.

130. *Id.* at 635-37 (citations omitted); see also *Dames & Moore*, 453 U.S. at 668-69 (describing Justice Jackson’s three-category approach as “a spectrum running from explicit congressional authorization to explicit congressional prohibition”).

131. See *supra* notes 87-93 and accompanying text.

132. See *supra* note 95 (discussing a possible role for courts in reviewing this issue).

133. *Supra* text accompanying note 130; see *supra* text accompanying notes 118-19.

134. *Dames & Moore*, 453 U.S. at 668 (citing *Steel Seizure Case*, 343 U.S. at 637 (Jackson, J., concurring)).

Although the 98th and 99th Congresses failed to amend section 10(g) as the Senate wanted, a *Steel Seizure Case* review of legislative history from 1974 to 1985 would probably shore up the presidential directive.<sup>135</sup> Were it not for the President's action, the Senate and House might still be deadlocked over a bill like Senator Garn's in the 98th Congress.<sup>136</sup> Both the House conference report on the 1985 EAAA<sup>137</sup> and statements on the Senate floor<sup>138</sup> credit the directive with ending the debate over section 10(g). Furthermore, despite Congressmen Bonker and Zschau's belief in the directive's illegality,<sup>139</sup> the House passed the 1985 EAAA,<sup>140</sup> which at least indirectly legitimated President Reagan's order. That order is the clearest existing authority for DoD's controversial free-world license review program.

#### IV. POLICY ANALYSES OF DoD FREE-WORLD EXPORT LICENSE REVIEW SINCE 1985

Partly because of its questionable legal pedigree,<sup>141</sup> DoD's free-world export license review program has attracted sharp criticism since 1985. Furthermore, several authorities have cited long delays in licensing, lost sales, and recent export control lapses as symptoms of a more general problem with interagency license review under the EAA. Some of these broader critiques place blame on DoD.<sup>142</sup> This section will review evidence suggesting that DoD's current role in the export licensing regime is a failure—evidence that spurred the 100th Congress to consider amending EAA section 10(g).<sup>143</sup>

##### A. *The GAO Study on Interagency Review.*

In September 1986, the GAO published a detailed study of DoD's

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135. Not all standards for determining residual presidential power support President Reagan's injection of DoD into the West-West export licensing process. For example, Justice Jackson proposed to test presidential initiatives against "the imperatives of events and contemporary imponderables," *Steel Seizure Case*, 343 U.S. at 637—i.e., with public policy analysis. See Comment, *The Intent, Effectiveness, and Constitutionality of the Legislative Veto of Export Controls*, 1983 WIS. INT'L L.J. 59, 98. DoD's free-world export licensing role arguably reflects an imbalance between the policy objectives of national security and trade promotion. See *infra* notes 144-63, 169-79, and accompanying text; see also EAA, 50 U.S.C. app. § 2402 (1982 & Supp. III 1985) (setting forth statute's policy goals). This imbalance might influence a court's constitutional analysis under the *Steel Seizure Case*.

136. See *supra* notes 76-77 and accompanying text.

137. See *supra* note 85.

138. See *supra* notes 87-92 and accompanying text.

139. See *supra* note 93 and accompanying text.

140. Pub. L. No. 99-64, 99 Stat. 120.

141. See *supra* notes 96-139 and accompanying text.

142. See *infra* notes 159-63, 169-70, and accompanying text.

143. See *infra* notes 182-98 and accompanying text.

involvement in the free-world export licensing process.<sup>144</sup> The study revealed that, over the twelve-day period studied, Commerce disagreed with, and ultimately overrode, approximately two-thirds of DoD's license denial recommendations,<sup>145</sup> apparently claiming that the DoD recommendations lacked specificity.<sup>146</sup> In other cases, Commerce and DoD resolved their differences by making licenses "conditional" on reductions in the size or technical sophistication of the shipments. Even these conditional licenses were often slow in coming.<sup>147</sup> Other applications received a "returned without action" status—a kind of "soft rejection."<sup>148</sup>

The GAO report faulted both agencies for not sharing information.<sup>149</sup> It implied that Commerce, which looks for specific problems with a shipment before disapproving it,<sup>150</sup> presumes approval, whereas DoD, which recommends against all shipments having certain general characteristics,<sup>151</sup> presumes disapproval.<sup>152</sup> The GAO concluded that efforts to improve the agencies' cooperation "should lead to greater consistency between Defense's licensing recommendations and Commerce's licensing actions. [This consistency] will raise the question of whether Defense review of individual free world license applications should be continued in its present form."<sup>153</sup>

#### B. *The NAS Panel's View.*

In January 1987, the National Academy of Sciences (NAS) issued an analysis and critique of national security export controls under the EAA.<sup>154</sup> The NAS panel<sup>155</sup> found that current law provides sufficient

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144. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 59.

145. *Id.* at 2, 3.

146. *Id.* at 4. DoD relies heavily on end-user information purchased from Dun & Bradstreet and data gathered from other government agencies. *Id.* at 13-14. The GAO also reported that the Technology Transfer Steering Group (TTSG), which the directive intended to settle all intended licensing disputes between DoD and Commerce, *see supra* text accompanying notes 64-65, was moribund at the time of the study. *See* GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 59, at 10. In his formal response to the study, DoD Under Secretary for Trade Security Policy Stephen Bryen protested Commerce's overrides of DoD. *Id.* at 42.

147. The study showed that the conditional licenses often took from six to ten weeks to process. *See* GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, *supra* note 59, at 28-31.

148. *See id.* at 15 tbl. 2.1.

149. *Id.* at 13, 18, 33.

150. *Id.* at 3.

151. *Id.* One such characteristic would be an end user who deals regularly with the PRC. *See id.* at 18.

152. *See, e.g., id.* at 21-23 (describing agencies' dispute whether resale is an objectionable end use).

153. *Id.* at 24.

154. NATIONAL ACADEMY OF SCIENCES, *supra* note 5.

155. The NAS report was written by a special panel of experts from the government, the military, and industry, *id.* at iii-iv, who were "charged to examine the current system of U.S. and multi-

authority for a wholly "balanced" system, but that "the executive branch has failed to implement the existing provisions of law in a coherent and effective manner."<sup>156</sup> Its report proposed a host of corrective measures,<sup>157</sup> some of which influenced the 100th Congress.<sup>158</sup>

The NAS report criticized DoD's general approach to export controls, and specifically attacked DoD's role in export license review.<sup>159</sup> Because of "[t]he exclusive DoD focus on tightening export controls without balanced input from other agencies concerning the possible economic and long-term national security consequences," it stated, "conflicts have arisen among the responsible agencies . . . , industry has been confused and alarmed . . . , and allies have become annoyed . . . ."<sup>160</sup> The report noted that five percent of all applications take 100 days or more to process, causing huge losses to U.S. exporters.<sup>161</sup> The NAS suggested two reforms that bear on the section 10(g) problem: (1) firm policy guidance and mediation by the National Security Council,<sup>162</sup> and (2) a reduction in DoD's role in detailed license review, coupled with an increase in Commerce's responsibilities.<sup>163</sup>

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lateral national security export controls and to seek strategies . . . to achieve a desirable balance among the national objectives of military security, economic vitality, and scientific and technological advance." *Id.* at 1.

156. *Id.* at 177. The panel estimated the annual direct costs of national security export controls at \$9 billion, which translates into a GNP reduction of approximately \$17 billion. *Id.* at 121.

157. *See id.* at 167-77 (recommendations of panel).

158. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, U.S. CONGRESS, *supra* note 53, at 5. In particular, the House's omnibus trade bill accepted the NAS panel's recommendation that Congress reduce DoD's role in detailed license review, *see infra* notes 163, 188-92, and accompanying text, although the recommendation did not survive in the 1988 OTCA, *see infra* note 201 and accompanying text.

159. *See, e.g.*, NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 131, 175 (noting an "imbalance in the policy process" stemming from dominance of DoD's trade security policy organization).

160. *Id.* at 161.

161. *Id.* at 112-14.

162. *Id.* at 173-74. The panel stressed the need for the secretaries of all affected agencies, not just DoD, to attend NSC meetings involving export control matters. It also recommended that a senior NSC staff member be given responsibility for bringing together representatives of conflicting agencies to resolve their policy differences. *Id.* at 175.

163. *Id.* In this connection, the panel suggested that DoD's proper role should be limited to helping Commerce identify strategic technologies, and that DoD's "policy side" has arrogated Commerce's powers. *See id.*

For a cogent criticism of the NAS study, see Fedorowycz, *Preventing the Transfer of Militarily Critical Technology to the Soviet Bloc: The Case for Strong National Security Export Controls*, 26 COLUM. J. TRANSNAT'L L. 53, 81-86 (1987). Citing a number of DoD sources, Mr. Fedorowycz attacks the NAS's "decidedly pro-export approach," *id.* at 81, along these lines:

While the panel's points regarding U.S. economic interests may be true, they obscure the more significant implications of the fact that at least the Soviets view the acquisition of Western technology as critical to their military capabilities. The Soviet technology collec-

### C. *Export Control Failures Reported in the Press.*

In September 1987, DoD's and Commerce's "intense competition for hegemony over the export-control process" came into public view when the press reported a battle over a computer shipment to Transnautic, a partly Soviet-owned company in West Germany.<sup>164</sup> The dispute, while not directly related to EAA section 10(g),<sup>165</sup> exemplifies the possible consequences of uncertain export control laws. Because of miscommunication and silence between Commerce and DoD, an American manufacturer had difficulty getting an export license and lost its customer to a U.S. exporter of similar, Japanese-made hardware. That exporter's license request had sailed through Commerce without DoD review.<sup>166</sup>

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tion effort can only be facilitated by a pro-exporting environment of "global competitiveness" in the West . . . .

*Id.* at 85 (footnote omitted). He concludes that any export control reform should preserve or increase DoD's role. *Id.* at 100. Yet, as even Mr. Fedorowycz agrees, export controls that "penalize U.S. commercial interests while contributing little or nothing to Western security should be abolished," *id.* at 85; Mr. Fedorowycz presents little evidence to rebut the NAS's conclusion, *see* NATIONAL ACADEMY OF SCIENCES, *supra* note 5, at 112-14, that the current DoD free-world license review program falls into that category.

164. *Pentagon Faults Commerce for Licensing Shipments to Communist-Backed Firms*, Wall St. J., Sept. 30, 1987, at 24, cols. 1, 2. Transnautic monitors cargo passing through German ports. The Soviet state entity Sovfracht owns 51 percent of Transnautic's stock. *U.S. Split Over Computer Sale to a Soviet-Owned Company*, N.Y. Times, Sept. 29, 1987, at A1, col. 1, D6, col. 2. Transnautic had legally bought IBM computers for years. *Id.* at D6, col. 2.

165. Under regulations released in January 1986, Commerce treats computer-related exports to Soviet-bloc-controlled firms in Western countries like shipments to the Soviet bloc countries themselves. EAR, 15 C.F.R. § 376.10 (1988); *see* Department of Commerce, Office of Export Admin., Fact Sheet: Forty-nine Approved Export License Cases Discussed by DoD 1 (Oct. 2, 1987) (available from Department of Commerce Public Information Office); *cf.* 1988 OTCA, Pnb. L. No. 100-418, § 2413, 102 Stat. 1107, 1347 (amending 50 U.S.C. app. § 2404(a)(1) (Supp. III 1985)) (codifying this practice). At its discretion, Commerce consults DoD on such applications. *See Pentagon Faults Commerce for Licensing Shipments to Communist-Backed Firms*, Wall St. J., Sept. 30, 1987, at 24, cols. 1-2.

166. In September 1986, IBM's West German subsidiary proposed to sell a mainframe containing five-year-old technology to Transnautic and applied for a U.S. export license. N.Y. Times, Sept. 29, 1987, at D6, col. 2. Commerce forwarded IBM's application to DoD, which recommended disapproval. *See id.* at D6, col. 4. When, in February 1987, Commerce warned IBM of likely disapproval, IBM protested, but DoD refused to change its position. IBM and the West German government explained to Commerce, however, that extraterritorial application of U.S. export controls would amount to the U.S. deciding that one German company could not sell a computer to another German company. The explanation, in addition to IBM's agreement to perform special monitoring to prevent diversion, prompted Commerce to grant a license on June 10, 1987—without notifying DoD. *See id.* at D6, cols. 4-5.

As it turned out, the licensing delay had cost IBM the sale. Transnautic had already ordered an equivalent, Japanese-made computer from a U.S. subsidiary of the National Semiconductor Corporation. *Id.* at D6, cols. 5-6. Because of an error, Commerce had not identified National's export license application (required because the computer contained U.S. parts) as targeted for a Soviet-bloc-owned entity, and had approved it without DoD review. *Id.* at D6, col. 6.

When the Transnautic blunder came to light, DoD publicly attacked Commerce, accusing it of hiding the successful license request.<sup>167</sup> These charges demonstrate DoD's fierce determination to review, and perhaps to disapprove, as many arguably "divertible" shipments as possible—an attitude characteristic of its free-world license review under EAA section 10(g).<sup>168</sup>

#### D. *Hearings in the Ninety-Ninth and One Hundredth Congresses.*

Congress began to hear complaints about DoD free-world license review soon after it enacted the 1985 EAAA. In October 1985, a House subcommittee learned that DoD had convinced Commerce to disapprove

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167. DoD Under Secretary Stephen Bryen accused Commerce of hiding National Semiconductor's application, *id.*, even though had National Semiconductor filed an identical application three days later, Commerce would have issued a general license under a change in the EAR. See 15 C.F.R. § 376.12 (establishing "de minimis" exception to export licensing requirements for foreign goods containing 10% U.S. parts or less, subject to \$10,000 maximum value per shipment). In a press briefing, DoD spokesman Fred Hoffman called Commerce's handling of the whole Transnautic case

a lapse in responsibility in the control of technology vital to the national security . . . [which] can only lead to a lessening of our technological lead over the Eastern Bloc and . . . also serve[s] to discredit all the U.S. Government's efforts and those of our allies to revitalize the technical transfer control mechanism in the wake of the Toshiba/Kongsberg episode.

F. Hoffman, Transcript of News Briefing 3 (Sept. 29, 1987) (available from DoD Public Information Office).

The Toshiba/Kongsberg episode involved an illegal sale to the Soviets of numerically controlled (NC) milling machines by Japan's Toshiba Machine Company, and an associated sale of software by the Norwegian government-owned arms manufacturer Kongsberg Trading Company. The milling technology has enabled the Soviets to make significant gains in antisubmarine warfare. See *Toshiba Details Trail of Crime in Sale of Machinery to Soviet*, N.Y. Times, Sept. 10, 1987, at A1, col. 2. Toshiba and Kongsberg have responded that they were only two of a multitude of illegal competitors for Soviet business. See *Norway Finds Allies Violated Cocom Controls*, Wall St. J., Oct. 22, 1987, at 34, col. 1 (identifying other illegal competitors).

Although Toshiba Machine's and Kongsberg's illegal sales violate only CoCom, and not U.S. controls, the 1988 OTCA levies severe import sanctions against the violators. See Pub. L. No. 100-418, § 2443, 102 Stat. at 1365-66 (imposing three-year general import ban against Toshiba Machine and Kongsberg Trading, plus three-year U.S. government procurement ban against violators' parent companies, Toshiba Corporation and Kongsberg Vaapenfabrikk; both bans subject to limited exceptions); see also *infra* note 199 and accompanying text (reporting how debate over Toshiba/Kongsberg sanctions slowed trade bill's progress).

168. The press did not widely report one other recent development that affects the DoD/Commerce relationship in export licensing: a one-year delay in the appointment of an Under Secretary of Commerce for Export Administration, required to occur on October 1, 1986 under the 1985 EAAA, Pub. L. No. 99-64, § 116(d), 99 Stat. at 153. Late Secretary of Commerce Malcolm Baldrige clearly opposed this change, see *1987 Senate Hearings, supra* note 58, at 17-18, and managed to secure a one-year extension through an appropriations rider, see Defense Production Act Amendments of 1986, Pub. L. No. 99-441, § 5, 100 Stat. 1117, 1118. Paul Freedenberg became the Acting Under Secretary on October 1, 1987. See BUS. AM., Oct. 12, 1987, at inside front cover (reporting transfer of responsibilities to Under Secretary and staff); *id.*, Oct. 26, 1987, at inside front cover (quoting Freedenberg as Acting Under Secretary for Export Administration).

an application in only one case and that DoD was responding by imposing onerous approval conditions.<sup>169</sup> Moreover, a Commerce official reported, DoD review adds an average of twenty days to free-world license processing times.<sup>170</sup> Nonetheless, a trade bill that proposed detailed study of DoD's free-world license review program<sup>171</sup> died in committee at the end of the 99th Congress.<sup>172</sup>

The House introduced a new trade bill in the first days of the 100th Congress,<sup>173</sup> and in March 1987, subcommittees of both chambers began hearings on export controls.<sup>174</sup> They heard a flood of testimony urging a cutback in DoD free-world license review.<sup>175</sup> They also heard an articulate defense of DoD's role from Richard Perle, then Assistant Secretary

169. *Fall 1985 Hearings, supra* note 93, at 55-56 (statement of Assistant Secretary of Commerce for Trade Administration William Archey); *see also supra* note 147 and accompanying text (discussing "conditional" license process).

170. *Fall 1985 Hearings, supra* note 93, at 5 (statement of Assistant Secretary Archey); *see also Note, Failures in the Interagency Administration of National Security Export Controls*, 19 *LAW & POL'Y INT'L BUS.* 537, 567-68 (1987) (discussing DoD's tactics for delaying licenses and evading its deadlines for making recommendations: requesting additional information from Commerce and then studying cases further at leisurely pace). It remains to be seen whether the shorter DoD review period that the 1988 OTCA mandates, Pub. L. No. 100-418, § 2425(a)(3), 102 Stat. at 1360 (amending 50 U.S.C. § 2409(g)(2) (1982 & Supp. III 1985)), will improve this situation.

171. H.R. 4800, 99th Cong., 2d Sess. § 325, 132 *CONG. REC.* H3053 (daily ed. May 21, 1986) (requiring GAO report within six months).

172. *See* [1985-1986] 2 *Cong. Index (CCH)* 35,087 (status of bill as of 99th Congress's end: Senate Finance Committee had begun "markup"). The bill died because it was too complex and controversial to pass in the last six months of an election year.

173. H.R. 3, 100th Cong., 1st Sess., 133 *CONG. REC.* H2642-747 (daily ed. Apr. 29, 1987) [hereinafter H.R. 3], *introduced*, 133 *CONG. REC.* H101 (daily ed. Jan. 6, 1987).

174. *See 1987 Senate Hearings, supra* note 58 (March 12 and 17, 1987). The International Economic Policy and Trade Subcommittee of the House Foreign Affairs Committee held its hearings on March 11 and 12, 1987, but has not yet released transcripts. Unofficial transcripts, on file in the Subcommittee's office, contain testimony and questions on the wisdom of eliminating DoD review of all licenses, including licenses for controlled-country exports. Congressman AuCoin's (D-Or.) bill, H.R. 1141, 100th Cong., 1st Sess. § 7 (1987), *introduced*, 133 *CONG. REC.* H7333 (daily ed. Feb. 19, 1987), contained just such a provision—a section eliminating EAA section 10(g).

175. *See Fedorowycz, supra* note 163, at 80 (summarizing this testimony, which was consistent with the reports discussed *supra* notes 144-63 and accompanying text). Congressman Bonker, recounting the testimony before his subcommittee, attacked DoD free-world license review:

Testimony before the Subcommittee on International Economic Policy and Trade has revealed only one instance in more than two years and 30,000 license applications that the Defense Department has provided any information which was otherwise unavailable to the Department of Commerce. . . .

The committee did find, however, that such review lengthened the amount of time required to process license applications. . . . Furthermore, the Defense Department has persisted in imposing conditions on license applications beyond the scope of their review mandate. . . . requiring time-consuming negotiations which have added to the overall case-processing times.

H.R. REP. NO. 100-40, *supra* note 98, pt. 3, at 100-02; *see also* S. REP. NO. 85, 100th Cong., 1st Sess. 77 (1987) [hereinafter S. REP. NO. 100-85] (statements of Sens. Cranston and Dodd) ("The chorus of anecdotes we have heard tells a story of lost sales, withdrawn licenses, and an absence of confidence in our present system of controls.").

of Defense for International Security Policy. Mr. Perle defended DoD's single-mindedness in export control, saying that "the trade benefits [of liberal controls] are minuscule in relation to the investment in defense that they force upon us."<sup>176</sup> He saw DoD as a source of independence from foreign and business pressures on the licensing process, and hinted that those pressures were prompting the House to silence DoD's pro-national-security view.<sup>177</sup> In response to a written question from Senator Garn, he criticized the NAS study as "long on proposals for change but short on hard cost/benefit analysis."<sup>178</sup> He stressed the importance of licensing conditions and an "audit trail" for free-world exports, and decried "roller coaster legislation" that would change the status quo under the presidential directive.<sup>179</sup>

The evidence convinced Congress of the need for change, and in mid-1987 each chamber passed a trade bill proposing an amendment to EAA section 10(g).<sup>180</sup> Congress acted despite lurking doubts about the wisdom of reviving the policy debate.<sup>181</sup>

## V. INDECISION IN THE ONE HUNDREDTH CONGRESS

### A. *The Omnibus Trade Bill Provisions.*

The 100th Congress's omnibus trade bill conference faced the task of reconciling a Senate provision that proposed few changes to EAA section 10(g)<sup>182</sup> with a House provision that advocated "reaffirming the primacy of the Department of Commerce in export control matters"<sup>183</sup> through a reduction of DoD's license review authority under the section. The bills reflected the House and Senate's agreement that EAA subsec-

176. *1987 Senate Hearings*, *supra* note 58, at 74. On March 11, 1987, Assistant Secretary Perle gave like testimony before the House Foreign Affairs Committee's Subcommittee on International Economic Policy and Trade. *See supra* note 174.

177. *1987 Senate Hearings*, *supra* note 58, at 86.

178. *Id.* at 177 (written response).

179. *Id.* at 183-84, 84.

180. S. 1420, 100th Cong., 1st Sess. § 1021 (1987) [hereinafter Senate Amendment] (copy on file in offices of *Duke Law Journal*); H.R. 3, *supra* note 173, § 332(n), 133 CONG. REC. at H2685. The Senate Amendment passed, with amendments, on July 21, 1987, as the Senate amendment to H.R. 3. *See* 133 CONG. REC. S10,372 (daily ed. July 21, 1987). The House bill passed, with amendments, on April 30, 1987. *See* 133 CONG. REC. H2981 (daily ed. Apr. 30, 1987).

181. *See 1987 Senate Hearings*, *supra* note 58, at 25, 66 (statements of Sens. Heinz and Garn). *But see id.* at 46 (General Lew Allen, chairman of NAS panel, claiming that current EAA provides adequate authority, but congressional initiative may guide administrative reform).

182. *See* Senate Amendment, *supra* note 180, § 1021. For a list of participants in the export controls subconference and a comparison of the two chambers' proposed EAA amendments, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 100TH CONG., 1ST SESS., H.R. 3, OMNIBUS TRADE AND COMPETITIVENESS LEGISLATION: COMPARISON OF HOUSE AND SENATE PROVISIONS 236-62 (Comm. Print 1987).

183. H.R. REP. NO. 100-40, *supra* note 98, pt. 3, at 67.

tion 10(g)(4),<sup>184</sup> which required the President to defend himself before Congress whenever he picked DoD's recommendation over Commerce's, should be deleted.<sup>185</sup> That agreement nearly ended the bills' similarities.

Section 332(n) of the House bill (H.R. 3) proposed replacing the troublesome phrase "country to which exports are controlled for national security purposes" with the defined phrase "controlled country"<sup>186</sup> throughout section 10(g).<sup>187</sup> The bill went on to limit DoD's review powers to those expressly stated in the EAA.<sup>188</sup> These two changes would have revoked any existing statutory authority for DoD's free-world license review program<sup>189</sup> and would have removed any congressional imprimatur from the January 1985 presidential directive.<sup>190</sup> In addition, the House bill stiffened DoD's twenty-day deadline for handling licenses still within its review authority.<sup>191</sup> Subsection 332(n)(2)(b) of the bill proposed eliminating one other source of discord and licensing delays: DoD's power to demand licensing conditions under EAA subsection 10(g)(2)(B).<sup>192</sup>

Section 1021 of the Senate amendment, in contrast, recommended leaving section 10(g)'s language intact,<sup>193</sup> disregarding the NAS panel's and the GAO's recommendations.<sup>194</sup> The section also preserved DoD's

184. See EAA § 10(g)(4), 50 U.S.C. app. § 2409(g)(4) (1982) (repealed 1988).

185. See Senate Amendment, *supra* note 180, § 1021(2); H.R. 3, *supra* note 173, § 332(n)(3), 133 CONG. REC. at H2685; see also S. REP. NO. 100-85, *supra* note 175, at 16 (proposing to delete the requirement because it "was too intrusive on a Presidential prerogative, gave excessive influence to DOD, and had the effect of delaying timely decisions"). The 1988 OTCA, Pub. L. No. 100-418, § 2425(a)(4), 102 Stat. 1107, 1360, reflects the House and Senate's agreement on this point. See also H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 824 (1988) [hereinafter H.R. CONF. REP. NO. 100-576] (explaining deletion of EAA § 10(g)(4), 50 U.S.C. app. § 2409(g)(4) (1982)), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1857; 1988 OTCA, Pub. L. No. 100-418, § 2, 102 Stat. at 1119 (designating H.R. CONF. REP. NO. 100-576, *supra*, as legislative history of 1988 OTCA, with exceptions not relevant to this Note).

186. EAA §§ 5(b)(1), 16(6), 50 U.S.C. app. §§ 2404(b)(1), 2415(6) (Supp. III 1985).

187. See H.R. 3, *supra* note 173, § 332(n)(1), (2)(A), 133 CONG. REC. at H2685 (proposing to amend EAA § 10(g)(1), (2), 50 U.S.C. app. § 2409(g)(1), (2) (1982 & Supp. III 1985)).

188. *Id.* § 332(n)(3), 133 CONG. REC. at H2685 (proposing replacement of EAA § 10(g)(4), 50 U.S.C. app. § 2409(g)(4) (1982), with provision limiting DoD review powers to those "provided in this subsection").

189. See *supra* notes 96-120 and accompanying text; see also H.R. REP. NO. 100-40, *supra* note 98, pt. 3, at 101 (presenting House's rationale for cutting back DoD's role).

190. See *supra* notes 135-40 and accompanying text; cf. *supra* note 120 (discussing theory that IEEPA provides statutory authority for DoD free-world license review).

191. See H.R. 3, *supra* note 173, § 332(n)(2)(D), 133 CONG. REC. at H2685; see also EAA § 10(g)(2), 50 U.S.C. app. § 2409(g)(2) (1982 & Supp. III 1985) (establishing twenty-day deadline that House bill fortified).

192. EAA § 10(g)(2)(B), 50 U.S.C. app. § 2409(g)(2)(B) (1982); see *supra* notes 147, 169, and accompanying text.

193. See Senate Amendment, *supra* note 180, § 1021.

194. See *supra* notes 149-63 and accompanying text.

power to impose conditions on export license approvals.<sup>195</sup> Like H.R. 3, however, the Senate amendment limited DoD's license review time to twenty days,<sup>196</sup> and it exhorted DoD to "carefully consider" each application that it reviews.<sup>197</sup> Finally, section 1021 contained a provision to ensure that the President has both agencies' recommendations when he resolves a licensing dispute under EAA section 10(g)(2).<sup>198</sup>

### B. *Agreement on the 1988 OTCA.*

The House and Senate's disagreement over DoD free-world license review contributed to the slow progress of the conference committee's export controls subconference, but a heated debate over retroactive sanctions against Toshiba Corporation and Kongsberg Vaapenfabrikk soon stole section 10(g)'s limelight.<sup>199</sup> Six months after its formation, the subconference finally arrived at a compromise on Toshiba/Kongsberg sanctions, raising hopes that the unwieldy task of resolving the differences between the two omnibus bills was nearing completion.<sup>200</sup> At about the same time, the House conferees abandoned their position on section 10(g)'s crucial phrase, in exchange for Senate acceptance of a provision requiring the mandatory elimination of unilateral export controls.<sup>201</sup>

The conference's agreement nearly came to naught in the spring of 1988. President Reagan vetoed the trade bill, focusing on the bill's controversial requirement that management warn workers sixty days before plant closings or long-term layoffs;<sup>202</sup> shortly thereafter, an override at-

195. Senate Amendment, *supra* note 180, § 1021.

196. *Id.* § 1021(1).<sup>4</sup>

197. *Id.*

198. *Id.*; see EAA § 10(g)(2), 50 U.S.C. app. § 2409(g)(2) (1982 & Supp. III 1985); see also 1988 OTCA, Pub. L. No. 100-418, § 2425(a)(2), 102 Stat. 1107, 1360 (to be codified at 50 U.S.C. app. § 2409(g)(2)) (incorporating section 1021 of the Senate Amendment).

199. See Cranford, *Trade-Bill Conferees Search for Toshiba-Ban Compromise*, 45 CONG. Q. WEEKLY REP. 2813, 2813-14 (1987) (discussing deadlock over DoD review and Toshiba/Kongsberg sanctions debate's role in it); see also *supra* note 167 (presenting Toshiba/Kongsberg affair).

200. See *Congressional Conferees Clear Majority of Big Trade Bill, but Veto is Possible*, Wall St. J., Apr. 1, 1988, at 3, cols. 2, 4 (reporting conference committee's resolution of Toshiba/Kongsberg matter, now reflected in 1988 OTCA, Pub. L. No. 100-418, § 2443, 102 Stat. at 1365-66).

201. Telephone interview with staff of Subcomm. on International Economic Policy and Trade, House Comm. on Foreign Affairs (Apr. 1988). The unilateral controls provision became subsection 2416(c)(2) of the 1988 OTCA, Pub. L. No. 100-418, § 2416(c)(2), 102 Stat. at 1351, which amends EAA § 5(c), 50 U.S.C. app. § 2404(c) (1982 & Supp. III 1985), to require the elimination, within fixed time limits, of controls that only the U.S. imposes.

The 1988 OTCA also contains a section that extends the EAA's authorization for one year, Pub. L. No. 100-418, § 2431, 102 Stat. at 1362 (amending 50 U.S.C. app. § 2419 (Supp. III 1985)), and a section requiring another NAS report within 20 months of the OTCA's enactment, see *id.* § 2433, 102 Stat. at 1363-64.

202. Message to the House of Representatives Returning Without Approval the Omnibus Trade and Competitiveness Act of 1988, 24 WEEKLY COMP. PRES. DOC. 655 (May 24, 1988); see H.R. 3

tempt narrowly failed in the Senate.<sup>203</sup> Both chambers swiftly reintroduced the same trade bill, without the plant closing provisions, as H.R. 4848.<sup>204</sup> Late in the summer, the President acquiesced in a separate plant-closing bill, and H.R. 4848 became law.<sup>205</sup>

### C. *The Congressional Intent Behind Section 10(g).*

Since the 1988 OTCA makes no major changes to EAA section 10(g), the OTCA and its legislative history are relevant only insofar as they help to resolve the ambiguities of section 10(g) or shed light on the congressional intent behind DoD free-world license review.<sup>206</sup> On the first score, the OTCA is useless. The conference report on the trade bill describes the Senate's position on section 10(g)(1)'s key phrase, "country to which exports are controlled for national security purposes,"<sup>207</sup> as "no provision" (i.e., continued silence).<sup>208</sup> Moreover, the report explains, the conferees rejected the House's proposed amendment and accepted the Senate's position "without prejudice to different interpretations of the statutory authority for DoD to review exports to countries other than controlled countries."<sup>209</sup> This statement shows that the 100th Congress has recognized section 10(g)(1)'s ambiguity and has admitted its inability to resolve it.<sup>210</sup>

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(conference agreement), 100th Cong., 2d Sess. §§ 6401-6410, 134 CONG. REC. H1998-99 (daily ed. Apr. 20, 1988) (the offending sections).

203. *Byrd Move Keeps Trade Bill Alive*, Wash. Post, June 9, 1988, at A1, col. 5.

204. H.R. 4848, 100th Cong., 1st Sess., 134 CONG. REC. H5547-686 (daily ed. July 13, 1988), introduced, 134 CONG. REC. H4427 (daily ed. June 16, 1988), passed, 134 CONG. REC. H5695 (daily ed. July 13, 1985), placed on calendar, 134 CONG. REC. S9937 (daily ed. July 26, 1988).

205. The OTCA passed the Senate on August 3, 1988, one day after the President announced that he would let the separate plant-closing bill, S. 2527, 100th Cong., 2d Sess., 134 CONG. REC. H5518-19 (daily ed. July 13, 1988), pass without his signature. See 134 CONG. REC. S10,731 (daily ed. Aug. 3, 1988) (Senate passage of H.R. 4848); *Plant-Closing Bill Enacted Without President's Signature*, 46 CONG. Q. WEEKLY REP. 2226 (1988) (text of President's statement to Congress regarding S. 2527). Only a three-line notation appears in *Weekly Compilation of Presidential Documents*. See 24 WEEKLY COMP. PRES. DOC. 1015 (Aug. 8, 1988); see also Wehr, *Reagan Bows to Politics on Plant-Closing Bill*, 46 CONG. Q. WEEKLY REP. 2216 (1988) (explaining that Senate held up trade bill to pressure President to allow S. 2527 to pass). The President signed the 1988 OTCA on August 23, 1988. Remarks on Signing the Omnibus Trade and Competitiveness Act of 1988 in Long Beach, California, 24 WEEKLY COMP. PRES. DOC. 1077 (Aug. 29, 1988).

206. *But cf. Starr, Conference on Statutory Interpretation—Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376-79 (discussing practical shortcomings of legislative history as interpretive tool).

207. EAA § 10(g)(1), (2), 50 U.S.C. app. § 2409(g)(1), (2) (1982).

208. H.R. CONF. REP. NO. 100-576, *supra* note 185, at 823, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 1856; see *supra* note 193 and accompanying text.

209. H.R. CONF. REP. NO. 100-576, *supra* note 185, at 824, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857.

210. Interestingly, the conference report's language on the unilateral controls provision that the Senate accepted in exchange for the House's decision not to amend section 10(g)(1), see *supra* note

On the second score, proponents of DoD free-world license review might argue that the conference report, by reluctantly acknowledging "different interpretations" of section 10(g)'s meaning,<sup>211</sup> implies that the 1988 OTCA ratifies the Garn/Heinz interpretation.<sup>212</sup> A careful reading of *all* the relevant materials on the 1988 OTCA, however, suggests that Congress has not decided whether to authorize the free-world license review that the President ordered in 1985. First, the conference report discusses the President's 1985 directive as a "situation[ ] when other departments [than Commerce] are included in specific licensing decisions."<sup>213</sup> This passage in the report scrupulously avoids mentioning any connection between the Commerce/DoD M.O.U.<sup>214</sup> and EAA section 10(g).

Second, subsection 2425(b) of the 1988 OTCA demands a joint Commerce/DoD study of the "redundancy and effectiveness" of concurrent review, "to provide a factual basis in order to evaluate the effect of such joint review."<sup>215</sup> The language suggests that Congress will do the evaluating and that no such evaluation has yet occurred.<sup>216</sup> Finally, Congressman Bonker's un rebutted remarks during the House debate on the OTCA's conference report reiterate the report's point that Congress has not yet agreed on DoD's role in free-world export license review:

Regrettably, . . . an important provision of the House bill to clarify the role of the Department of Defense in reviewing exports to free world destinations is not part of this conference agreement. . . . [The House wanted] to clarify DOD's review of exports to controlled countries. While the conference agreement does not contain such clarification, the [House] committee reaffirms its strong belief that the statutory role of the Secretary of Defense in reviewing export licenses is limited

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201 and accompanying text, also reflects less than complete agreement between the Chambers. See H.R. CONF. REP. NO. 100-576, *supra* note 185, at 814, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1847 (stating two different "understand[ings]" of maximum extension period for unilateral controls under 1988 OTCA).

211. See *supra* note 209 and accompanying text.

212. See *supra* notes 88-92 and accompanying text (Garn/Heinz interpretation of section 10(g)).

213. H.R. CONF. REP. NO. 100-576, *supra* note 185, at 824, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857.

214. See *supra* notes 60-65 and accompanying text. The conference report gives the date of President Reagan's directive as the date of the M.O.U., and only alludes to the directive as a "subsequent related document[]." H.R. CONF. REP. NO. 100-576, *supra* note 185, at 824, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857.

215. H.R. CONF. REP. NO. 100-576, *supra* note 185, at 824, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857.

216. See *id.*, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857. The inference that Congress will evaluate DoD free-world license review arises implicitly from the conference report's mention (in the sentence that defines Congress's role) of a slightly different role for the administration, see *id.*, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857, and explicitly from Congressman Bonker's explanation of subsection 2425(b), 134 CONG. REC. H2305 (daily ed. Apr. 21, 1988).

to license applications for proposed exports to controlled countries only . . . .<sup>217</sup>

The House has done an admirable job of yielding, while claiming not to yield, on the interpretation of section 10(g). The fact remains, however, that three more years of DoD free-world license review have passed since the House failed to oust the presidential directive in 1985.<sup>218</sup> And despite its disapproval of the Senate's interpretation, the House has just accepted "consideration" (i.e., the provision eliminating unilateral controls) for its continued acquiescence.<sup>219</sup> This acquiescence strengthens the authority for the 1985 presidential directive under a *Steel Seizure Case*<sup>220</sup> analysis, possibly moving DoD free-world license review into Justice Jackson's first category.<sup>221</sup> Thus, as long as the language of section 10(g) and the positions of the executive and legislative branches stay the same, DoD free-world license review has an increasingly secure legal foundation.<sup>222</sup>

### CONCLUSION

Despite the 1988 OTCA's failure to eliminate it, DoD's review of free-world export licenses needs reappraisal. Admittedly, DoD's current

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217. 134 CONG. REC. at H2305; *see also id.* at S4766 (daily ed. Apr. 26, 1988) (statement of Sen. Dixon) ("[T]he Defense Department use [sic] its review to second guess decisions made by the Commerce and State Departments"); *id.* at H2340 (daily ed. Apr. 21, 1988) (statement of Rep. Frenzel) ("I had hoped that duplicative review by the Defense Department could be eliminated on free world license applications."); *id.* at H2311 (statement of Rep. Bilbray) ("I felt that the House position was a strong and fair one . . . .").

The conference report and Senator Dixon (D-Ill.) and Congressman Bonker's statements show that, although the House and Senate have not reached agreement on the actual or desirable statutory role for DoD, they do agree that DoD should not impose its view of foreign policy on the national security export licensing process. *See* H.R. CONF. REP. NO. 100-576, *supra* note 185, at 824, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1857; 134 CONG. REC. at S4765-66 (daily ed. Apr. 26, 1988) (statement of Sen. Dixon); *id.* at H2305 (daily ed. Apr. 21, 1988) (statement of Rep. Bonker). In view of the interplay between foreign policy and national security in export controls, *see supra* note 9, this agreement will probably benefit U.S. exporters very little, but it may stop DoD from applying blatantly foreign-policy-related standards in the future. *See, e.g., supra* note 151 (describing one such standard).

218. *See supra* notes 83-86 and accompanying text.

219. *See supra* note 201 and accompanying text.

220. 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring); *cf. supra* notes 125-34 and accompanying text (analyzing how Congress's attitude toward President's 1985 directive affects its constitutionality).

221. 343 U.S. at 635-37 (presidential action pursuant to Congress's express or implied authorization); *see supra* note 130 and accompanying text.

222. This discussion assumes that the Executive and the Senate will continue to advocate DoD review of free-world export licenses. *Cf.* President's Announcement, *supra* note 61, at 412 (stating President's position in 1984); White, *supra* note 20, at 339 n.11 (noting conflicting views within the Reagan administration). The impending presidential election complicates such an assumption, as does the likelihood of personnel changes in the 101st Congress. *See id.* at 345 (noting that Rep. Bonker is running for the Senate in 1988).

role has some support in EAA section 10(g)'s language and history,<sup>223</sup> and as long as Congress stays ambivalent or deadlocked, it cannot call the President's 1985 directive a usurpation.<sup>224</sup>

Nonetheless, many believe that giving DoD the right to review West-West exports was, and is, bad national security policy. Recent research supports that belief. As the GAO's 1986 study points out, DoD rejects whole categories of proposed exports outright. When Commerce refuses to go along, DoD often demands licensing conditions so onerous that proposed exports disappear while the agencies negotiate.<sup>225</sup> The 1987 NAS report shows how this situation harms U.S. exporters without commensurately promoting national security.<sup>226</sup>

By calling for further study of DoD's role in export license review,<sup>227</sup> the 100th Congress has hinted that a final resolution of the section 10(g) issue lies ahead, possibly in connection with the EAA's reauthorization in 1990.<sup>228</sup> Congress should take that opportunity to heed the policy critics and exclude DoD from the free-world license review process, if the next President has not already done so.<sup>229</sup>

223. See *supra* notes 96-120 and accompanying text.

224. See *supra* notes 121-40, 218-21, and accompanying text.

225. See *supra* notes 147-48 and accompanying text.

226. See *supra* notes 154-63 and accompanying text; see also *supra* notes 5 (citing NAS panel's view of how U.S. export controls aid foreign exporters), 175 (summarizing testimony before congressional committees). But cf. *supra* notes 163, 176-79, and accompanying text (criticisms of NAS study).

227. See 1988 OTCA, Pub. L. No. 100-418, §§ 2425(b), 2433, 102 Stat. 1107, 1360-61, 1363-64.

228. See *id.* § 2431, 102 Stat. at 1362 (amending EAA § 20, 50 U.S.C. § 2419 (Supp. III 1985)) (extending EAA's termination date to September 30, 1990).

229. If, in the face of presidential opposition, Congress limits DoD's license review power to controlled-country exports, the President might simply countermand any statutory bar to DoD free-world license review. See, e.g., H.R. 3, *supra* note 173, § 332(n)(3), 133 CONG. REC. at H2685 (forbidding mandatory referral of non-controlled-country export licenses to DoD); see also *April 1986 Hearings, supra* note 27, at 45 (statement of Rep. Bonker) ("If the executive branch can circulate a memo and . . . choose whatever directives it wants to assume greater responsibility or authority, then why even have an Export Administration Act?"). But see Feldman, *supra* note 79, at 246 ("The President does not need authority from Congress to direct his security advisers to vet the actions of other executive departments, . . . indeed, Congress may lack constitutional power to restrict him from so doing."). Mr. Feldman's theory, however, ignores *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) ("[I]t would be an alarming doctrine, that congress [sic] cannot impose upon any executive officer any duty they may think proper . . ."). See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 117-18 (1972) (discussing *Kendall* and its implications).

When challenged in court, the President may claim that his inherent power over foreign affairs allows him to control exports as he sees fit. See *supra* note 122 and accompanying text. This claim would fail under Justice Jackson's analysis in the *Steel Seizure Case*: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter.*" 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (emphasis added); see also *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (endorsing Justice Jackson's analysis as

Even if Congress disagrees with DoD's critics, it should at least make section 10(g) a clear mandate for DoD free-world export license review. DoD currently reviews free-world license applications based on a classified presidential directive that has survived only because of Congress's indecision. This leaves a highly controversial practice with a less than certain legal foundation. The recent Transnautic fracas illustrates the costs of uncertainty in export controls. These costs will continue to mount until Congress decides how to balance control and competitiveness in West-West trade.

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"useful"). Most would agree that Congress has "plenary" authority to regulate foreign commerce under U.S. CONST. art. I, § 8, cl. 3. *See, e.g., California Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over both interstate and foreign commerce is not open to dispute . . ."). Consequently, the President has no residuum of extraconstitutional power, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."), to uphold an export control directive at odds with statutory language or congressional intent. *Cf. United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953) ("[W]hatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress."), *aff'd on other grounds*, 348 U.S. 296 (1955).

