Reforming the Procedures of the Export Administration Act: A Call for Openness and Administrative Due Process†

HOWARD N. FENTON, III††

SUMMARY

† This Article draws from a study I prepared for the Administrative Conference of the United States. That report was based in part on my extensive interviews with current and former personnel of the Bureau of Export Administration, United States Department of Commerce, and with private attorneys and corporate officials specializing in export control matters. The conclusions and recommendations are solely my own except to the extent they have been adopted by the Conference. I would like to thank my very valuable student research assistants, Mr. Todd Kitchen and Mr. Michael Anderson, for their help on this project. Ms. Candace Fowler, staff attorney for the Administrative Conference and Professor Peter Strauss, chair of the Judicial Review Committee, provided substantial guidance and assistance to me in preparing the report and recommendations on which this article is based.

†† Associate Dean and Professor of Law, Ohio Northern University College of Law; J.D. 1975; B.S. 1971, University of Texas. From 1979-84, the author was an official with what is now the Bureau of Export Administration in the Department of Commerce.

I. INTRODUCTION

Within the past two years the United States has begun to radically redefine its concept of "national security." The demise of the Soviet Union/Warsaw Pact as the principal adversary in a politically bi-polar world and the emergence of regional antagonists such as Iraq, compel a review of many of the assumptions this country has made about protecting itself from foreign threats. Nowhere is this need more apparent than in the changing views of Congress and the executive branch about political controls over international trade. No longer can the United States concentrate its efforts simply on depriving the communist bloc of its newest technology. The threats the United States is most likely to face

in the future are from new enemies wielding technology that is no longer the exclusive domain of the Western allies.

The United States needs to reassess both the broad substance of its restrictions on foreign trade and the severe administrative due process limitations imposed upon its foreign traders. A comprehensive reassessment of national security and foreign policy export controls and recommendations for fundamental change was recently issued by a multidisciplinary study group, the Committee of Science, Engineering, and Public Policy (COSEPUP).[1] The Bush administration, however, has adopted expansive new export controls on material that could be used for chemical or biological weapons or missile technology, greatly expanding the transactions subject to controls.[2] The Administrative Conference of the United States commissioned the study, which forms the framework for this Article, to assess the need for procedural changes in the existing export control regime, a system now characterized by arbitrariness and the absence of recourse. The goal of reform for both the substance and procedure of United States export controls must be the creation of a system of regulation that meets legitimate national security or foreign policy concerns, while not unnecessarily depriving United States firms of commercial opportunities or of administrative due process and fairness. While taking United States foreign policy concerns into consideration, this Article recommends reforms in the procedures of the current export control system that bring it much closer to the standards of procedural fairness and due process typically associated within the general United States system of administrative law and regulation.

The principal vehicle for regulating United States civilian exports is the Export Administration Act (EAA).[3] This law applies primarily to

1. *See* COMMITTEE OF SCIENCE, ENGINEERING, AND PUBLIC POLICY (COSEPUP), FINDING COMMON GROUND: U.S. EXPORT CONTROLS IN A CHANGED GLOBAL ENVIRONMENT (1991) [hereinafter COSEPUP STUDY] (COSEPUP consists of representatives from the National Academy of Sciences, National Academy of Engineering, and the Institute of Medicine. The study is published by the National Academy of Sciences).

2. 56 Fed. Reg. 10,760 (1991) (to be codified at 15 C.F.R. pts. 770, 776, 778, and 799) (interim rule Mar. 13, 1991). *See U.S. Announces New Controls on Exports of CBW-Related Goods, Missile Technology*, 8 Int'l Trade Rep. (BNA) No. 11, at 376 (March 13, 1991). *See also* Marynell De Vaughn, *Summary of United States Non-Proliferation Controls, in* COPING WITH U.S. EXPORT CONTROLS 1991, at 321 (Evan R. Berlack et al. eds., 1991) (PLI Commercial Law and Practice Series 1991). to get Series # from library

3. 50 U.S.C. app. §§ 2401-2420 (1988). There are a variety of other, lesser control schemes scattered across the government. *See* Cecil Hunt, *The Export Licensing System, in* COPING WITH U.S. EXPORT CONTROLS 1990, at 13-15 (Berlack et al., eds. 1990) (PLI Commercial Law and Practice Series No. 530, 1990).

"dual use" exports—those that are neither weapons nor munitions, but that could be used to promote the military potential of a politically hostile state.[4] (Exports of munitions are subject to an alternative regulatory regime administered by the State Department.)[5] This Article focuses on the Commerce Department's administration of the EAA, the most intrusive and pervasive export control system in the United States. The primary focus of the problems and recommendations suggested below involve the EAA's exemption from the Administrative Procedure Act (APA).[6] The effect of the APA exemption has been that for more than forty years, the Commerce Department has been left to its own devices in developing administrative procedures, free from the requirements of the APA or of judicial oversight and subject only to sporadic congressional comment during its occasional renewals of the statute.[7]

Because of the sweeping nature of the APA exemption, there has been no occasion to explore which aspects of the administration of export controls under the EAA could properly be reviewed, or which elements could be administered consistent with APA standards, notwithstanding the national security and/or foreign policy implications of those elements. However, in a definitive 1967 *Columbia Law Review* article on the history and future of export controls, Harold Berman and John Garson ar-

---

4. The statute provides:

> (2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—
>
> > (A) 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*;
> >
> > (B) to restrict the export of goods and technology *where necessary to further significantly the foreign policy of the United States* or to fulfill its declared international obligations.

50 U.S.C. app. § 2402(2) (1988) (emphasis added). *See also* Hunt, *supra* note 3, at 13 (detailing jurisdictional scheme of agencies responsible for export controls).

5. *See infra* notes 62-67 and accompanying text. International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C.A. § 2778 (West Supp. 1990) (implementing rules in International Traffic in Arms Regulations (ITAR) 22 C.F.R. § 120.4 (1990)). In February 1990, the Center for Defense Trade was created at the State Department with responsibility for munitions controls, replacing the Office of Munitions Control that had administered the ITAR for years.

6. Administrative Procedure Act, ch. 324, § 2(a), 79 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559 (1988)).

7. *See* MICHAEL MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 38-78 (1990) (providing detailed legislative history of EAA revisions).

gued for repeal of the APA exemption when the EAA was to be renewed in 1969.[8] In 1986, the American Bar Association passed a resolution recommending the repeal of the exemption from judicial review contained in the EAA.[9] A 1990 House of Representatives bill extending the EAA included repeal of the judicial review exemption,[10] although the House-Senate conference bill dramatically weakened the House bill provision;[11] but the bill was pocket-vetoed by the President.[12] The 1991

8. Harold J. Berman & John R. Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791, 884-87 (1967). The authors were reluctant to recommend opening up individual licensing decisions to judicial review, however, a step this proposal recommends.

9. "BE IT RESOLVED that the American Bar Association recommends that the U.S. Congress amend section 13(a) of the Export Administration Act of 1979, 50 U.S.C. app. § 2412(A) (1988), as amended, to eliminate the exemption of agency action under the Act from judicial review, except as to foreign policy or national security policy judgments." *Summary of Action of the House of Delegates*, A.B.A. SEC. PUB. UTIL. L. REP. 113B (ABA Annual Meeting Aug. 11-13, 1986).

10. The bill provided specifically:

> Sec. 18. JUDICIAL REVIEW.
>
> (a) JUDICIAL REVIEW.—(1) 13(a) (50 U.S.C. App. § 2412(a)) is amended to read as follows:
>
> (A) APPLICABILITY.—
>
> (1) EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE.—Except as provided in section 11(c)(2) and subsection (C) of this section, sections 551 and 553 through 559 of title 5, United States Code, do not apply to the functions exercised under this Act.(2) JUDICIAL REVIEW.—(A) Subject to subparagraphs (B) and (C) and to subsection (c), judicial review of actions under this Act shall be pursuant to chapter 7 of title 5, United States Code.
>
> (B) Any discretionary determination of whether an item should or should not be on the control list shall not be subject to judicial review.
>
> (C) An action to obtain judicial review under this subsection may be brought in the appropriate United States district court.

H.R. 4653, 101st Cong., 2d Sess. 136 (1990). The exemption from review of the decision whether an item should or should not be on the control test is ambiguous. At its narrowest reading it would properly have the courts defer to the Commerce Department's decision as to what level of technology to control. At its broadest, it could render all classification decisions by Commerce unreviewable (as individual decisions about whether the item should be controlled). The provision would also place review in the federal district courts without any guidance as to the standard for review. Presumably these courts would have to engage in de novo review of the agency action.

11. Omnibus Export Amendments Act of 1990, H.R. 944, 101st Cong., 2d Sess. (1990).

12. *Memorandum of Disapproval*, Nov. 16, 1990, *in* COPING WITH U.S. EXPORT CONTROLS 1991, *supra* note 2, at 529.

COSEPUP recommendations call expressly for the repeal of the broad exemption from the APA, not just the judicial review exemption.[13] Still, as appealing as the above approaches may be, sorting out those administrative functions that are in need of reform, or those issues that courts could usefully review, is a somewhat more complicated task, and thus, this Article concludes with somewhat more complex recommendations.

This Article examines the specific functions of the Bureau of Export Administration (BXA) at the United States Department of Commerce in administering the EAA, and isolates, to the extent possible, those functions that involve national security or foreign policy considerations from those which are more purely administrative in nature. This Article explores the application to BXA of traditional forms of controlling the regulatory process—including judicial review—identifying those that are consistent with the national security and foreign policy components of the BXA. This Article concludes with a series of relatively detailed recommendations designed to conform the procedures to contemporary concepts of fairness and administrative due process in the regulation of United States business.

II. BRIEF HISTORY OF UNITED STATES EXPORT CONTROL LAWS

A. *The Right to Export: The Constitutional Framework*

Procedural and substantive rights have been sacrificed in a number of different contexts because of the national security concerns raised by the Cold War. The right or ability to travel,[14] to hold a government job,[15]

13. COSEPUP STUDY, *supra* note 1, at 193.

14. *See, e.g.*, Regan v. Wald, 468 U.S. 222 (1984); Zemel v. Rusk, 381 U.S. 1 (1965). These cases both involved applications for passports to Cuba and restrictions under the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-4 (1988). The application of travel restrictions requires at least minimal due process, because the right to travel has been accorded constitutional status. Kent v. Dulles, 357 U.S. 116 (1958). *See* Leonard B. Boudin, *Economic Sanctions and Individual Rights*, 19 N.Y.U. J. INT'L L. & POL. 803 (1987).

15. Department of the Navy v. Egan, 484 U.S. 518 (1988); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961). Both decisions involved loss of employment based on denial of a security clearance. *See generally* Emilio Jaksetic, *Security Clearance Determinations and Due Process*, 12 GEO. MASON U. L. REV. 171, 188-206 (1990).

to come into[16] or stay in[17] this country, and to obtain access to government records[18] have been summarily restricted in the name of national security. Perhaps most anomalous in the United States market-oriented economic system are the broad restrictions placed on United States exporters, through various export control systems, and the meager protection these regimes offer exporters from arbitrary governmental actions involving such controls. Under the national security justification, the legal regimes governing exports from the United States has remained the most durable bastion of the privilege-versus-right distinction in the regulation of commerce today.[19]

There is neither a constitutional right nor a statutory right to engage in the trade of exporting goods from the United States. The Constitution does contain an explicit reference to federal government restrictions on exports: "No tax or duty shall be laid on articles exported from any state."[20] While there is language in Supreme Court decisions that seems to support a broad interpretation of this clause as prohibiting any restrictions on exports,[21] or creating a right to export,[22] these are exclusively economic regulation cases. There is some evidence that the drafters of the Constitution meant to preclude export restrictions promulgated under the federal government's war powers from this ban.[23] There is little doubt that, between the authority of the Congress to regulate commerce

16. *See* 8 U.S.C. § 1182(a)(27)-(29) (1988); *see also* Rafeedie v. Immigration and Naturalization Serv., 688 F. Supp. 729, 749-51 (D.D.C. 1988), *aff'd in part, rev'd in part and remanded*, 880 F.2d 506, 523-29 (D.C. Cir. 1989). Notwithstanding the summary authority of the Immigration and Nationalization Service, permanent resident aliens receive significantly greater due process in exclusionary proceedings than export license applications.

17. *See, e.g.*, Jay v. Boyd, 351 U.S. 345 (1956); Azzouka v. Meese, 820 F.2d. 585 (2d Cir. 1987); *see also* 8 U.S.C. §§ 1252-1253 (1988).

18. 5 U.S.C. § 552(b)(1)(A) (1988) (Freedom of Information Act national security exemption); *see also* Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982); National Fed'n of Fed. Employees v. United States, 688 F.Supp. 671 (D.D.C. 1988), *vacated sub nom.*, American Foreign Serv. Ass'n. v. Garfinkel, 490 U.S. 153 (1989) (challenging federal employee agreements limiting disclosure of national security information).

19. *See generally infra* notes 34-58 and accompanying text.

20. U.S. CONST. art. I, § 9.

21. "The requirement of the Constitution is that exports should be free from any governmental burden." Fairbank v. United States, 181 U.S. 283, 290 (1901).

22. *See* Armour Packing Co. v. United States, 209 U.S. 56, 79 (1908); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 119 (1824) (argument of Mr. Emmet, attorney for Ogden).

23. *See* Bruce A. Ackerman, Note, *Constitutionality of Export Controls*, 76 YALE L.J. 200, 208 (1966).

with foreign nations[24] and the President's authority to conduct military and foreign affairs,[25] export controls for military or foreign policy objectives are constitutional exercises of power.

This was plainly stated by the Supreme Court, in *United States v. Curtiss-Wright Export Corp.*[26] In *Curtiss-Wright*, the Court was faced with the issue of whether Congress's delegation of legislative authority to the President, which permitted the President to ban arms exports to nations involved in a South American dispute, was unconstitutional. Writing for the Court, Justice Sutherland declared that the delegation was permissible because the power to conduct foreign affairs is external to the Constitution.[27] Justice Sutherland grounded this holding on the historical notion that the Constitution allocated powers, which had been held by the sovereign states, between the states and newly formed federal government.[28] Consequently, he concluded that the federal government (read the executive, legislative, and judicial branches), acquired the sole right to conduct foreign affairs—both the rights within the Constitution and those without.[29] While not without its detractors,[30] this view has provided a powerful argument for courts deferring to executive exercises of authority in the area of foreign affairs, especially exercises under color of even the vaguest Congressional grant.[31]

The executive's extra-constitutional authority espoused in *Curtiss-Wright* has provided the basis for the current regulation of United States exports destined for foreign consumers. For example, the provision of the Export Administration Act—the current export control regime—entitled "Right of Export,"[32] actually *qualifies* the ability of United States citizens to export. This proviso incorporates no less than fifteen separate policy statements *justifying* the controls that preface the Act.[33]

---

24. U.S. CONST. art. I, § 8.

25. U.S. CONST. art. II, § 2.

26. 299 U.S. 304 (1936).

27. *Id.* at 327-29.

28. *Id.* at 319.

29. *Id.*

30. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 44-54 (1972). *See generally* Charles A. Lofgren, U.S. v. Curtiss-Wright Export Corp.*: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

31. *See* MALLOY, *supra* note 7, at 537-38.

32. 50 U.S.C. app. § 2403(d) (1988).

33. 50 U.S.C. app. § 2402(1)-(15) (1988). Those policies that appear most contradictory to any statutory right of export are:

B. The Evolution of the Export Administration Act (EAA)

The United States government historically has embraced restrictions on the free flow of commerce during times of war,[34] imposing embar-

---

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) 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;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments or common strategic objectives.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

****

(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the Untied States. In effecting this policy, the President shall make reasonable and prompt efforts to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before imposing export controls. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective the president shall make reasonable and prompt efforts to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before imposing export controls.

34. *See* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 8-10 (1988); *see also* MALLOY, *supra* note 7, at 186-194.

goes and boycotts during the American Revolution, the War of 1812, and the Civil War (in conjunction with a blockade).[35] Export controls, as a tool of foreign diplomacy, first appeared during the Spanish-American War of 1898. Several days prior to declaring war on Spain, Congress passed a joint resolution that stated:

> [T]he President is hereby authorized, in his discretion, and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered by the President or Congress.[36]

The Senate amended this joint resolution in 1912 to expand the President's authority to bar exports of "arms or munitions of war" to any nation in the Western Hemisphere in which such exports might be used to promote "domestic violence."[37] Two years later, Congress amended the resolution again, adding criminal penalties of fines up to $10,000 and two years of imprisonment for transgressions.[38]

The first codification of authority for promulgating export controls, the Trading with the Enemy Act,[39] emerged during World War I. This Act prohibited any person subject to the jurisdiction of the United States, except those holding a license issued by the President, from trading with deemed enemies of the United States.[40] Today, this statute still significantly restricts some foreign trade.[41] In addition to the Trading with the Enemy Act, the United States promulgated other export control laws. In 1925, Congress issued a restriction on helium exports (out of concern over a "blimp gap")[42] and, in 1935, it passed a resolution banning arms exports to European "belligerents."[43] With the onset of the Second World War, Congress, with a new sense of urgency, enacted a number

35. *See* GARY C. HUFBAUER & JEFFREY J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 4-8, 22-24 (1985).

36. S. Con. Res. 25, 55th Cong., 2d Sess., 30 Stat. 739 (1898); *see also* Berman & Garson, *supra* note 8, at n.1.

37. S. Res. 89, 62nd Cong., 1st Sess. 37 Stat. 630 (1912).

38. S.J. Res. 89, 57th Cong., 2d Sess. (1912). Note that the *Curtiss-Wright* case discussed *supra*, involved the violation of regulations promulgated under this resolution. *See supra* text accompanying notes 26-33.

39. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917), *as amended*, 50 U.S.C. app. § 5(b) (1988) (amending the President's powers to times of war); *see also* MALLOY, *supra* note 7, at 136-44.

40. MALLOY, *supra* note 7, at 136-44.

41. 50 U.S.C. app. §§ 1-44 (1988).

42. Act of Mar. 3, 1925, Pub. L. No. 68-544, ch. 426, 43 Stat. 1110 (1925).

43. Neutrality Act of 1935, Pub. L. No. 67, ch. 837, 49 Stat. 1081.

of export controls restricting the export of weapons and the tools for their manufacture.[44] Such legislative actions continued for the duration of the war. The end of hostilities did not, however, see the end of export controls.

In the immediate post-war period, with the waning need for export controls to restrict the flow of goods into "enemy hands," export restrictions were recast as necessary implements to conserve United States resources and to aid in the rebuilding of Western Europe under the Marshall Plan.[45] By 1949, however, these motivations were supplanted by growing concerns about the threat to national security from the Soviet Union and the other Warsaw Pact nations.[46] This culminated in the promulgation of the comprehensive Export Control Act of 1949.[47]

Congress renewed the Act in 1951. According to some commentators, the Export Control Act would have lapsed in 1951, but for the Korean War.[48] However, despite the end of the Korean conflict in 1953, the Act was renewed five times thereafter, spanning a period of fourteen years.[49] The Export Control Act armed the President with a mighty sword: "Probably no single piece of legislation gives more power to the President to control American commerce."[50] The Act vested the President with the power, which was delegated, as it is currently, to the Secretary of the Commerce Department, to restrict "the exportation from the United States . . . of any articles, materials, or supplies, including technical data, except under such rules and regulations as he shall prescribe."[51] Because the success of this restricting policy was dependent upon the cooperation of the United States allies, the Western allies

---

44. An Act to Expedite the Strengthening of the National Defense, ch. 508, § 6, 54 Stat. 12 (1940) (prohibiting the exportation "of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing or operation thereof"); *see also* Berman & Garson, *supra* note 8, at 791 nn.1 & 2.

45. *See* Donald T. Cowles, Note, *Export Controls—A National Security Standard*, 12 VA. J. INT'L L. 92, 95.

46. *See* Matthew W. Sawchak, Note, *The Department of Defense's Role in Free-World Export Licensing Under the Export Administration Act*, 1988 DUKE L.J. 785, 789 (1988).

47. Export Control Act of 1949, Pub. L. No. 81-11, 63 Stat. 7 (superseded by the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (codified as amended in scattered sections of 50 U.S.C. app. (1988)).

48. *See* Berman & Garson, *supra* note 8, at 792.

49. *Id.*

50. *Id.*

51. Export Control Act, *supra* note 47, § 3(a).

formed, in 1949, the Coordinating Committee on Multilateral Export Controls (CoCom).[52] This committee maintains a list of items that should not be exported to Eastern-bloc countries.[53]

In 1969, with the thawing of the Cold War and the globalization of the world economy, Congress liberalized the restrictions under the Export Control Act. The Export Administration Act of 1969 (EAA) reflected this liberalization.[54] The EAA was extensively amended in 1979,[55] 1981,[56] 1985,[57] and 1988.[58] Despite the name changes and the various amendments, the Export Control Act of 1949 is the framework of the current export control regime.

C. *Judicial Review of Export Administration Act Decisions*

The Export Control Act of 1949 included no provision for any form of judicial review until it was amended in 1965.[59] The exemption in this statute from the APA eliminated any external procedures or review. In enforcement actions, criminal convictions were appealable through the traditional criminal justice process, while denials of export privileges were considered part of the Commerce Department's executive authority to control exports.[60]

In 1965, Congress gave the Commerce Department the authority to impose civil penalties. In conjunction with this new grant of authority,

52. The members of CoCom are: Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States. The organization is relatively informal with a very small staff operation located in Paris. For background and history on CoCom, see Cecil Hunt, *Multilateral Cooperation in Export Controls—the Role of CoCom*, 14 TOLEDO L. REV. 1285 (1983).

53. *Id.*

54. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (superceded by the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503; codified as amended in scattered sections of 50 U.S.C. app. (1988)).

55. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503.

56. Export Administration Amendments Act of 1981, Pub. L. No. 97-145, 95 Stat. 1727.

57. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120.

58. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

59. Export Control Act of 1965, Pub. L. No. 89-63, § 2, 79 Stat. 209, 209-10 (codified at 50 U.S.C. app. § 2032 (1988)).

60. *See* SENATE COMM. ON BANKING AND CURRENCY, REP. ON EXPORT CONTROL ACT of 1949, S. REP. NO. 31, 81st Cong., 1st Sess. 6 (1949), *reprinted in* 2 U.S.C.C.A.N. 1094.

Congress created the first avenue for judicial review under the EAA. The Commerce Department had to sue the exporter in district court to collect the fine, and at that point all elements of the exporter's liability could be litigated de novo.[61] Congress also provided that the Commerce Department could suspend export privileges for up to one year if the exporter refused to pay the fine.[62] No export control fine has ever been litigated through this process.[63]

In 1977, Congress added a new section to the EAA prohibiting United States companies from participating in economic boycotts conducted by other countries.[64] This was designed to blunt the impact on United States businesses of the Arab boycott of Israel. Congress wanted to ensure that the Commerce Department followed strict procedures in finding violations of these rules because of the negative publicity that would attach to the United States from being identified as a participant in the Arab boycott.[65] Thus, Congress required that hearings for violations of the antiboycott rules be held pursuant to the adjudication provisions of the APA.[66]

In 1979, Congress added a provision that permitted exporters to go to court if the Commerce Department had not acted on export license applications within the statutory deadlines.[67] This was not judicial review because all the court can do is force the Commerce Department to make a licensing decision. Only one company has used this provision.[68] To be sure, the Commerce Department can easily say "no" if pressed to meet a time deadline, so this avenue of judicial intervention is not very promising.

---

61. *See* Export Control Act, *supra* note 47.

62. 50 U.S.C. app. § 2410(d) (1988).

63. It was not until 1981, when Core Laboratories, Inc. was found in violation of the 1977 antiboycott provisions of the EAA and refused to pay the fine, that this provision was ever used.

64. 50 U.S.C. app. § 2407(a) (1988).

65. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, REPORT TO ACCOMPANY S. 69 EXPORT ADMINISTRATION AMENDMENTS OF 1977, S. DOC. No. 104, 95th Cong., 1st Sess. 22 (1977).

66. *Id.*; *see also* 50 U.S.C. app. § 2410(c)(2)(B) (1988).

67. Export Administration Act of 1979, Pub. L. No. 96-72, § 10(j)(3), 93 Stat. 503, 528-29 (codified at 50 U.S.C. app. § 2409 (1988)).

68. *See* Daedalus Enters., Inc. v. Baldrige, 563 F. Supp. 1345 (D.D.C. 1983). Although the company obtained an order instructing the Commerce Department to make a decision, the Department denied the license. *See* Cecil Hunt & Pamela Breed, *Export Administration Act: Penalties and Enforcement Process*, *in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 385-86.

In 1985, Congress told the Commerce Department that it had to use APA proceedings for its adjudications of violations of the export control provisions, as well as the antiboycott provisions.[69] Because the Commerce Department already had the procedures in place, the implementation of this change was relatively simple. The 1985 revision of the EAA also provided for appeals of license denials to an administrative law judge.[70] The grounds for appeal were very narrow, however,[71] and the judge's decision was only a recommendation to the assistant secretary in charge of the program.[72] As with earlier procedural reforms, this one has never been used.

The 1988 amendments to the EAA were a breakthrough in the area of judicial review. Congress made Commerce Department decisions, which denied export privileges, reviewable by the United States Court of Appeals for the D.C. Circuit.[73] This included decisions to deny privileges temporarily because a violation was imminent. This also permitted judicial review of denials imposed after hearings for violations had been completed.[74] This reform, when coupled with the 1985 requirement for APA procedures in export control violation actions, brought enforcement of most export law into conformity with contemporary standards of administrative due process. Much still needs to be done, however, as is discussed below.

D. Other United States Export Control Regimes

The EAA and the Export Administration Regulations promulgated thereunder by the Secretary of Commerce are the primary rules that govern the exportation of non-military goods. They are the body of rules that apply to virtually every civilian export transaction between United States businesses and their foreign customers. However, other executive branch departments also have regulatory powers over certain exports. The State Department regulates the extensive United States trade in munitions,[75] and the Treasury Department controls United States imports

69. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 114, 99 Stat. 120, 150-52.

70. *Id.* § 114(e).

71. *Id.*

72. *Id.*

73. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2428, 102 Stat. 1325, 1361-62 (codified in scattered sections of 15 U.S.C.).

74. *Id.* at 1362.

75. International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2778-2796 (1988).

and exports with nations subject to near-total embargoes.[76] There are other export controls scattered throughout the executive branch; however, the State Department's regime and the Treasury Department's regime are the most significant after the Commerce Department's program implementing the EAA.[77]

The State Department controls the exportation of all munitions from the United States under the authority specified in the Arms Export Control Act[78] and International Traffic in Arms Regulations.[79] Accordingly, exporters are required, prior to exporting any munitions, to register such exportations with the State Department.[80] If an item appears on the State Department's "Munitions List," the exporter must obtain a license from the Center for Defense Trade prior to the exportation.[81] One recent figure suggests that the Center for Defense Trade handles approximately sixty thousand licenses per year.[82] The requirement for a written license varies neither with the country of destination nor with the sophistication of the technology involved. Most end-users of exported munitions are foreign governments or their political subdivisions. Consequently, licensing decisions are based on national security and foreign policy concerns relating to foreign access to weaponry.[83]

Once the exporter determines that a product is on the Munitions List, the exporter knows that a license is required prior to exportation. If an item is not on the Munitions List, the exporter must, nevertheless, check the applicability of other export control regimes, viz., the EAA.

The Treasury Department administers controls over United States foreign trade through its Office of Foreign Assets Control, which implements provisions of the Trading with the Enemy Act[84] and the International Emergency Economic Powers Act.[85] Export and import

76. Foreign Assets Control Regulations, 31 C.F.R. §§ 500-565 (1990).
77. *See* 15 C.F.R. § 770.10 (1990).
78. 22 U.S.C. §§ 2778-2796 (1988).
79. *See* 22 C.F.R. §§ 120-130 (1990).
80. *See* 22 U.S.C. § 2778(b)(1)(A) (1988).
81. 22 C.F.R. §§ 120-130 (1990). In February 1990, the Center for Defense Trade was created at the State Department with responsibility for munitions control, replacing the Office of Munitions Control.
82. *See* U.S. DEP'T. OF STATE, *The Bottom Line: Fast Licensing*, Defense Trade News, at 4 (Sept. 1990) (multiplying the total number of applications received by the Office of Defense Trade Controls over a two-month period [10,000 received from April 1 through May 31, 1990] by six for an estimated annual total of 60,000).
83. 22 U.S.C. § 2778 (1988).
84. 50 U.S.C. app. §§ 1-44 (1988).
85. 50 U.S.C. §§ 1701-1706 (1988).

restrictions administered by the Office of Foreign Assets Control are country-specific and categoric, which has the effect of barrring virtually all trade with target countries.[86] Such target countries include Cuba, Vietnam, and South Africa. Notwithstanding these countries' target-country label, exporters may seek licenses for exportations that fall within recognized exceptions, such as humanitarian needs or similar compelling circumstances.[87] The Treasury is required to impose the export controls in direct response to actions by target countries that adversely affect United States interests. In theory, the export controls should only be short-term restrictions aimed at achieving a particular foreign policy objective.

Administration of Treasury controls is straightforward in comparison to the Commerce Department's controls under the EAA. Because Treasury rules are country restrictions, questions of their applicability are easily resolved. The need for a license depends neither on the nature of the transaction nor on the product; *all* commercial intercourse with a target country is subject to licensure.

Unlike the EAA, neither the State Department's regime nor the Treasury's regime is expressly exempt from the Administrative Procedure Act (APA).[88] Treasury relies heavily on interpretive rules for its implementation of the Trading With the Enemy Act and the International Emergency Economic Powers Act. State Department decisions about which items are military in character are exempt from the APA's rulemaking requirements, because such determinations are characterized as either military decisions or foreign policy decisions.

Both the State Department's regime and the Treasury's regime have received criticism about delays and arbitrariness in their licensing procedures similar to those lodged about the Commerce Department. This is true despite both operations being much smaller and less elaborate than the Commerce Department's export control regime.[89] Although neither the State Department nor the Treasury has internal procedures as well developed as those within the Commerce Department, the three bureaucracies do share one characteristic: each has an informal review process for adverse licensing decisions.

86. 31 C.F.R. § 500.201 (1990). *See generally* MALLOY, *supra* note 7, at 136-48.
87. 50 U.S.C. § 1702(b) (1988).
88. *See infra* notes 183-91 and accompanying text.
89. *See infra* notes 125-74 and accompanying text.

The export control programs at the State Department and the Treasury can also be distinguished from the Commerce Department's regime on policy grounds. Both the State Department and the Treasury regimes involve the implementation of basic military or foreign policy decisions through control of trade. The State Department decides which countries shall have access to which types of United States military know-how. The Treasury determines which transactions will be permitted in the face of United States embargoes of politically "unfriendly" nations. The Commerce Department, however, is charged with controlling *all* exports, reviewing and limiting those with "incidental" national security or foreign policy implications. Companies subject to the Commerce Department's jurisdiction are not dealing in munitions or trading with "enemies." Companies subject to the Commerce Department's EAA regime are engaged in the kind of international, private, commercial activity other parts of the Commerce Department are promoting and facilitating. Their expectations for procedural fairness are attendantly higher. This is one reason why Congress has imposed significant restrictions and directives on the Commerce Department's implementation of the EAA. The following sections will discuss these restrictions in the context of how the EAA is administered and how its decision-making process should be reworked to include more openness.

III. THE REACH OF THE EAA

To effectively illuminate the nature and extent of the discretion wielded by the Commerce Department in administering the regulations promulgated under the EAA, a detailed description of the operation of that system is necessary. At the outset, the EAA's system of national security and foreign policy controls is premised on two policy determinations: it must be determined which countries are subject to the controls and which products are subject to the controls. Recall, the original impetus for the current system—the short supply controls of World War II and the post-World War II channeling of supplies for the reconstruction of Europe—involved decisions less obviously tied to the executive's exercise of military or foreign affairs powers, and more plainly based on factual determinations.[90] With the later shift to national security and foreign policy as the basis for such controls, the decision-making process

90. *See* Berman and Garson, *supra* note 8, at 795-96. The authors suggest that even at that point, the primary purpose of the regulations was to restrict exports for national security reasons.

concerning the targeted countries and targeted products became more political and cloaked in confidentiality.

A. *Targeted Countries*

The EAA spells out criteria for the President to apply in determining whether to place a foreign nation on the list of countries subject to national security export controls.[91] This decision is usually made in conjunction with the other members of CoCom. The reassessment of the status of the nations of Eastern Europe is an excellent example of the effort made by the CoCom members to coordinate their determinations of targeted countries.[92] However, as CoCom's inability to reach a consensus on aspects of decontrol shows, it is difficult to achieve such a consensus.[93] The multilateral characteristic of this decision was virtually guaranteed by the post-World War II definition of national security in terms of two opposing "blocs." As advances in technology spread more rapidly in the West, as compared to the East, the incentive of the Western nations to coordinate their efforts became quite strong. Although that security incentive is dissolving today, competitiveness concerns will probably assure the orderly and collective decontrol of nations (as well as technology) to prevent one nation from securing a decided market advantage over the other participating states. In any event, the determination by the President of which countries are to be the target of national security export controls under the EAA will remain securely within the exclusive purview of the President's foreign affairs authority.

Congress has, however, taken a more active role in the determination of which countries should be subject to foreign policy controls under the EAA,[94] and while this does little to change the discretionary nature of the President's decision, its reviewability by the courts may be enhanced. The President is now obligated to consult with Congress before the imposition of controls,[95] and is strongly urged to consult with private industry as well about the effects and implications of such controls.[96] The

91. Export Administration Act of 1979, Pub. L. No. 96-72, § 5(3)(b), 93 Stat. 503, 507 (1979)

92. *CoCom agrees to Rewrite Export Rules 'From Scratch,' U.S. Officials Report*, 7 Int'l Trade Rep. (BNA) No. 24, at 635 (June 13, 1990).

93. *U.S., CoCom Allies Continue to Disagree Over Easing Controls on Computer Exports*, 8 Int'l Trade Rep. (BNA) No. 12, at 424 (Mar. 20, 1991).

94. *See, e.g.*, Export Administration Act of 1979, Pub. L. No. 96-72, § 6, 93 Stat. 503, 513-515 (codified at 50 U.S.C. app. § 2405 (1988)).

95. 50 U.S.C. app. § 2405(f) (1988).

96. *Id.*

EAA spells out detailed procedures pertaining to executive reports, which the President should submit to Congress, as well as procedures for the expiration and renewal of the controls.[97] Congress has forcefully injected itself into the foreign policy controls determination process. This action raises the separation-of-powers issue, which is beyond the scope of this Article.[98]

B. Targeted Products

The second threshold determination necessary to the EAA's export control system is the determination of the types of products that should be subject to the export controls—the makeup of the Commodity Control List (CCL). The CCL is a more comprehensive list than CoCom's International Control List.[99] The determination of which items should be included on the CCL significantly impacts individual exporters, but is a decision grounded fundamentally in the military or foreign affairs authority of the President. At this juncture it is important to note an essential dichotomy in the controlled products determination.

The decision involves establishing both the nature and the level of technology to be controlled. A technological definition or standard is used to measure specific products to determine if they are properly classified in a restricted category.[100] The individual exporter, in conjunction with the Commerce Department, decides if a particular product falls

---

97. *Id.*

98. *See* CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 213-15 (1988). Congressional authority over regulating foreign commerce is quite clear, but where foreign trade and foreign policy intersect, tension with the President's claim of authority exists. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

99. *See* David B. Matthews, Note, *Controlling the Exportation of Strategically-Sensitive Technology: The Extraterritorial Jurisdiction of the Multilateral Export Control Enhancement Amendments Act of 1988*, 28 COLUM. L. REV. 747, 755 (1990).

100. *See* MALLOY, *supra* note 7, at 255-64. For example, the CCL entry for Export Commodity Control Number 1388A reads:

> 1388A Specially designed equipment for the deposition, processing and in-process control of inorganic overlays, coatings and surface modifications, for non-electronic substrates by processes defined in the Table in Supplement No. 4 to Part 779 and specially designed automated handling, positioning, manipulation and control components, and specially designed software: therefor.

Bureau of Export Administration Bulletin No. 266 (June 1990). The entry goes on to list more specific types of products that fall within the described category. The first item on the (a) - (g) list is:

within a restricted category. This determination is largely factual and not dissimilar from the Customs Department's classification procedures.[101] The decision regarding the appropriate level of technology that must be restricted for national security reasons involves difficult policy judgments based, in large part, on sensitive, national security intelligence. Like the determination of which countries the EAA should target, the decision regarding which products should be targeted falls within the discretionary foreign affairs authority of the President.

The Commerce Department has made substantial efforts to include the views of the private sector in formulating technological standards. Congress has established Technical Advisory Committees (TAC's) to advise the Commerce Department on technical questions relating to different areas of controls.[102] Ten TAC's are currently in operation.[103]

(a) "Stored program controlled" chemical vapor deposition (CVD) production equipment with both of the following:

(1) Process modified for one of the following:

(i) Pulsating DVD;

(ii) Controlled nucleation thermal decomposition (CNTD); or

(iii) Plasma enhanced or plasma assisted CVD; and

(2) Any of the following:

(i) Incorporating high vacuum (Less than or equal to 10^{-7} atm) rotating seals;

(ii) Operating at reduced pressure (less than 1 atm); or

(iii) Incorporating in situ coating thickness control.

101. The recently enacted Harmonized Tariff schedule (replacing the TSUS listings) is much more extensive than the Commodity Control List, because it attempts to create categories for every conceivable commodity. *See* Harmonized Tariff Schedule of the United States (1989). The difficulties associated with placing a specific product in a generally described category are the same, although the CCL classification process probably relies more heavily on the use of the item. *See generally* Harmonized Tariff Schedule of the United States, General Rules of Interpretations (1989); *see also* Peter B. Feller, *An Introduction to Tariff Classification*, 8 LAW & POL'Y INT'L BUS. 991 (1976).

102. 50 U.S.C. app. § 2404(h) (1988). The role of the TAC's was expanded by the 1988 Omnibus Trade and Competitiveness Act, Pub. L. 100-418, § 2420(a), 102 Stat. 1107, 1358 (1988), to include consultation on mandated decontrol, as well as for the first time, consultation on the promulgation of regulations.

103. The Technical Advisory Committees are: (1) Automated Manufacturing Equipment; (2) Biotechnology; (3) Computer Peripherals, Components, and Related Test Equipment; (4) Computer Systems; (5) Electronic Instrumentation; (6) Materials; (7) Military Critical Technologies List Implementation; (8) Semiconductor; (9) Telecommunications Equipment; (10) Transportation and Related Equipment. For a discussion of the respon-

Industry experts from the TAC's may participate as members of the United States delegation to CoCom meetings and thus help formulate the International Control List, which, in turn, serves as the basis for the CCL.[104] The Commerce Department also publishes, in the Federal Register, requests for proposals to make changes in the CCL. The Commerce Department's efforts to engage the public in the decision-making process, however, may become somewhat slackened in light of recent international efforts to develop a "core list" of controlled technologies for all CoCom members and other cooperating nations.[105] To be sure, the TAC representatives would still provide the United States government with an enlightened position to take to CoCom.

The restriction of items on the CCL by foreign policy controls is even more discretionary because of its political nature. Although these controls utilize the categories of national security measures, the varied purposes and targets for foreign policy controls involve a wider range of goods and more diverse criteria in extending these controls.[106] The EAA provides that such controls should be, to the extent possible, used in conjunction with other nations,[107] but such agreement is hard to come by among the Western allies.[108] Regardless, the United States process for determining the controls that should be applied against other nations for foreign policy reasons offers little room for challenge by affected exporters, except challenges for inconsistencies with statutory mandates.

IV. THE EAA'S LICENSING PROCEDURES: AN OVERVIEW

Although the Commerce Department and Congress have made piecemeal reforms in EAA procedures recently,[109] the hallmark of the export control system has been the finality of decisions reached by the

---

sibilities and activities of the TAC's, *see* 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 8-12.

104. *See generally* Dan Hoydish, *The CoCom List Review Process*, *in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 102.

105. *See* Lavin, *The Core List*, *in* COPING WITH U.S. EXPORT CONTROLS 1991, *supra* note 2, at 87-96.

106. 50 U.S.C. app. § 2405 (1988). The full range of exports are subject to these restrictions, not merely dual use or high technology. *See* CARTER, *supra* note 98, at 64-80.

107. 50 U.S.C. app. § 2403(b) (1988).

108. *See* Homer E. Moyer & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 91, 158-61 (1983).

109. *See supra* notes 55-58 and accompanying text.

Department. The federal courts, as well as Congress, have long recognized that regulatory questions relating to foreign and military affairs fall within the purview of the executive branch.[110] The courts in particular have been reluctant to second guess the President in matters of foreign affairs. On the other hand, the courts and Congress have established rigorous procedural standards for government economic regulation.[111]

Where economic regulation and foreign policy intersect—the law of imports and the law of customs—Congress has provided a broad range of guarantees against regulatory excess. These protections include two specialized federal courts dedicated to providing judicial relief: the Court of International Trade and the Court of Appeals for the Federal Circuit.[112] But on the export side, where emergency rules and national security concerns have dominated, the combination of economic regulation with foreign and military affairs, which makes up the export control system, has been excluded from regulatory due process requirements and judicial review.

In the more than forty years that the program has operated, the rationale for this exemption, and its impact, have never been seriously questioned. But as the principal international threat to United States security recedes, the entire framework of national security export controls is coming under scrutiny. The presumption that these controls can be effectively administered only if free of judicial oversight and other traditional notions of administrative due process raises serious questions in today's environ.

The federal government has controlled exports for a number of reasons, most notably for national security concerns, foreign policy con-

110. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 44-54 (1972).

111. The Administrative Procedure Act, 5 U.S.C. § 552 (1988) provides the procedural framework for government regulation. For a recent, comprehensive overview of this process, see PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (1989).

112. The Court of International Trade is the successor to the United States Customs Court, possessing substantially broader jurisdiction and authority over matters relating to foreign trade. It was created by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified at 28 U.S.C.A. § 1581 (1991)). The Court of Appeals for the Federal Circuit was created through a merger of the Court of Claims and Court of Customs and Patent Appeals by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified at 28 U.S.C.A. § 1295 (West 1991)). These courts consider import issues arising under U.S. customs law, as well as issues concerning unfair trade practices such as dumping goods into or subsidizing exports to the U.S., under the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at 19 U.S.C.A. § 2501 (West 1991)).

cerns, and concerns regarding the short supply of domestic products. As previously discussed, such regulation has primarily come through the EAA. The operating premise for the EAA is that the federal government controls all exports from the United States. The Commerce Department administers the Act on the basis that exporting is a *privilege* flowing from the federal government and that all exports from the United States must be licensed.[113]

This licensing aparatus is complex. The EAA enumerates three types of exporting licenses that the Commerce Department may issue: (1) the general license, (2) the validated license, and (3) the special license.[114] The vast majority of exports are granted a general license, which permits *all* exporters to export certain categories of products to most destinations.[115] By contrast, a validated license is an individual grant of authority to a specific exporter to export a particular product to a particular destination.[116] The third license, a special license, is designed to cover a range of exportations by a particular exporter.[117]

The heart of this licensing system is the list of commodities that the government wishes to regulate.[118] Recall, the CCL contains descriptions of such restricted commodities.[119] Also essential to the operation of this export control regime is the list of countries, arranged in various groupings, that are the target of export controls.[120] The following discussion illustrates this licensing procedure in detail.

A. The Application Process

1. Step One: Determining the Export Commodity Control Number

The initial step for the exporter in applying for an export license is to determine whether the product to be exported requires either a general

113. 15 C.F.R. § 770.3(a) (1990) ("subject to the provisions of §§770.04, 770.5, and 770.6, the export from the United States of all commodities, and all technical data as defined in § 379.1, is hereby prohibited unless and until a general license authorizing such export shall have been established or a validated license or other authorization for such export shall have been granted by the Office of Export Licensing . . . "); *see also* Iain S. Baird, *Export Licensing: An Overview, in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 61-63. Baird is the director of the Office of Export Licensing in the Bureau of Export Administration.

114. 50 U.S.C. § 2403 (1980).

115. 15 C.F.R. § 771.1 (1990).

116. 15 C.F.R. § 772 (1990).

117. 50 U.S.C. § 2403(a)(3).

118. 15 C.F.R. § 799.1; *see also* Hunt, *supra* note 3, at 23-24.

119. *See supra* notes 99-108 and accompanying text.

120. 50 U.S.C. app. § 2403(b) (1988).

or special license. This determination is contingent upon various variables including the product being exported, the destination of the exportation, the probable end-use of the product, and the probable end-user of the product. This process begins with checking the Commodity Control List contained in the Export Administration Regulations for the appropriate classification. Each category of product subject to controls is described in technical terms and designated by a classification number, referred to as an Export Commodity Control Number.[121] The entry includes the type of controls the item is subject to, the countries to which exports of the item are controlled, and other pertinent data.[122] The exporter has to find the category on the CCL that most closely describes the product to be exported. The classification can then be used to check whether there are controls in place for the country of destination. Because the system is driven by these classifications, accurately pigeonholing the product becomes all-important. But the potential universe of products is both extraordinarily fluid and virtually infinite; consequently, placing products in the correct category can be quite problematic.

Within the BXA, the Office of Technology Policy Assessment (OTPA) is primarily responsible for assigning the Export Commodity Control Numbers to individual items. OTPA's Technology Analysis Division consists of four technologically specialized branches responsible for, among other things, maintaining and updating the CCL.[123] An exporter who is uncertain about a product's classification may request a classification designation from OTPA. In turn, OTPA assigns the request to the appropriate technical branch. OTPA has eliminated telephone consultations about classifications because of the huge potential for misunderstanding very technical descriptions, and because of the problems of inappropriate reliance by exporters.[124] Undoubtedly, because of the relatively small number of active practitioners dealing with export control questions, and their familiarity with OTPA staff, there is still significant telephone contact about classifications outside the formal request filing. This access of knowledgeable insiders is endemic to the administration of the EAA.

---

121. 15 C.F.R. § 770.1 (1990).

122. 15 C.F.R. § 770.1 (1990).

123. The branches are: (1) Electronic Components and Instrumentation Technology, (2) Computer Systems Technology, (3) Telecommunications Technology, (4) Capital Goods and Production Technology. For a general description of the functions of OTPA, see 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 3.

124. *See* Evan Berlack, *The Applicant's View of the Licensing Process, in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 118.

In filing the written request, the exporter must try to determine the product's appropriate classification, then submit the request for verification or correction to OTPA, along with an explanation of the reasons for the classification and any technical information or literature about the product that will enable officials to make an informed classification determination.[125] Under the EAA's regulations, OTPA has ten working days to respond to the request.[126] If the OTPA must request additional data concerning the exporter's product, the time limit does not apply. In practice, the exporter desiring the least-restrictive classification will not press OTPA on the time limit so long as the exporter thinks the desired classification might be forthcoming. When OTPA does issue a classification determination, it carries no explanation, simply the requested Export Commodity Control Number and the name and telephone number of the technical staff member who made the determination.

In practice, the determination of the classification by the OTPA usually involves informal contacts between the OTPA commodity specialist and the exporter's legal and technical staff. Although the situation is not adversarial in structure, often the two sides harbor cross-purposes because of the exporter's fundamental interest in obtaining the least-restrictive classification. There is often informal discussion up through the supervisory levels within the OTPA. Should the exporter ultimately disagree with a final classification decision by OTPA staff, the regulations provide for the appeal of any adverse administrative action to the Assistant Secretary.[127] Over the past three to four years OTPA staff could only recall one such appeal being taken from a classification decision.

2. Step Two: Filing the Application

Once an exporter determines that her product falls into a controlled category, by checking the country restrictions and other notations by the ECCN entry, she will know if a validated export license is required. She then files an application for a license, providing the Office of Export Licensing all of the requisite information. The most critical of this information includes the country of destination, the identity of the intermediate and ultimate consignees, the ultimate end-user of the product, and the destined specific end-use. These three categories, the country, the parties, and the use, provide the basis for OEL's review of the ap-

125. *Id.* at 119.
126. 15 C.F.R. § 799.1(f) (1990).
127. 15 C.F.R. § 789.2 (1990).

plication and their exercise of discretion in granting or denying a license. Two of these elements, the country and end-use, also provide the basis for the decisions of the other agencies that may review the application, and for the decision of the foreign nation members of CoCom who may also have to review the application.

3. Step Three: The Preliminary Review of the Application

Prior to conducting any substantive review of the information supplied by the exporter, the Office of Export Licensing reviews the license applications to make certain that all of the blanks are filled in, that requisite supplemental material is provided, and that everything is properly signed. Applications with these types of problems are "returned without action" by OEL. During fiscal year 1989, the Office returned 5692 applications without action out of 85,215 processed.[128] The so-called returned-without-action letters indicate in the most general terms the nature of the deficiency. It is the Office's policy that every exporter receiving this type of letter be informally advised of the problem *prior* to the issuance of the letter.[129] Additional follow-up with the licensing officer is possible if clarification of the problem is necessary.

4. Step Four: The Export Commodity Control Number is Reviewed

Typically, the exporter classifies the product without the help of the OTPA. Even when the OTPA, at the request of the exporter, assigns the Export Commodity Control Number, this categorization is internally verified. When the license application is filed with the Office of Export Licensing and referred to one of the technical branches in that office's Individual Licensing Division, the very first step of the review process includes verification of the Export Commodity Control Number. Disagreement between the OTPA's technical staff and Office of Export Licensing's staff about how a product should be classified is not unheard of, although it usually involves circumstances when the Office of Export Licensing believes the applicant provided inaccurate or incomplete information to the OTPA.[130] Because these offices have very different functions and because the OTPA provides the technical staff to the Assistant Secretary for Appeals from the Office of Export Licensing's decisions,

128. 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 15.

129. *Id.*

130. Differences between the two offices were acknowledged by both those inside and outside BXA.

there is limited formal communication between the two technical staffs, even those dealing with the same technology. Although informal contacts exist, apparently even they are not extensive. When differences arise between the two offices on questions of classification, exporters typically seek, by informal discussions up through the management chain, to have the BXA adopt the least-restrictive classification. Such an informal approach may well reach the Assistant Secretary level if the commodity is deemed to be sensitive.[131] Because the only formal route to appeal an adverse decision on a classification question like this is also to the Assistant Secretary, the lack of formal appeals on these issues is readily apparent.

There is no public record of the Commerce Department's classification decisions. The Commerce Department has no formal internal system for tracking, maintaining, or sharing classification decisions. One OTPA official indicated that providing written explanations of classification decisions would probably require a tripling of staff under current workloads. Active exporters and those exporters that hire experienced representatives have access to their own experiences with the classification process, which further enhances the "insiders" advantage.

5. Step Five: The Country of Destination is Reviewed

The three primary areas of substantive review—the country, the parties, and the end-use—involve very different mixtures of factual and policy based evaluation. Concerns about the country of destination are probably the most policy-based but still have heavy factual components. Most problematic for the fact-oriented concerns is that much of the factual material the Office is using to make its determinations is confidential in nature—some of it is subject to extremely high level national security classification. Shifting concerns about the behavior and policies of individual countries have a direct impact on the approval of licenses by the Office of Export Licensing.

There are obvious official changes in the status of countries that exporters can discover through published notices,[132] but the more subtle

131. The office directors of the respective offices report to the Assistant Secretary. If there is a fundamental disagreement, the matter will likely reach that level as the exporter seeks resolution.

132. *See, e.g.*, Exec. Order No. 12,772, 3 C.F.R. 294 (1991), *reprinted in* 50 U.S.C. § 1701 (1988) (Blocking Iraqi Government Property and Prohibiting Transactions with Iraq); Exec. Order No. 12,723, 3 C.F.R. 296 (1991), *reprinted in* 50 U.S.C.A. § 1701 (1991) (Blocking Kuwaiti Government Property).

shifts, or those that occur in advance of published changes, may be harder to divine or understand. When the Chinese government imposed harsh measures against the demonstrators at Tiananmen Square, there was both a shift in licensing policy at the Office of Export Licensing and a drop-off in license applications by exporters prior to any official response by the United States. Most shifts, however, are not so high profile. The licensing officers receive notice of changes in policy, but such notices are not public information. Nor are these notices product-specific, although they may be more so with regard to categories. Licensing officers have the responsibility for interpreting and applying policy decisions made about countries. License applications rejected because of unpublished policy biases against a particular nation will include no meaningful explanation in the rejection notice and are thus difficult to appeal either formally or informally.[133]

Another basis for rejecting a license because of the country of destination is the concern that the country has an official or unofficial predisposition towards diverting goods to other, more heavily restricted nations. The basis for this concern may well take the form of classified national security information relating to the policies of the country, the effectiveness of its export control system (including the competency and/or corruptibility of its personnel), and similarly sensitive matters. The information may have come to the Commerce Department from such sources as the State Department, the Defense Department, the National Security Agency, or the Central Intelligence Agency. It may be so highly classified that the licensing officers are not provided with any reason for notice of a restriction, but simply are given the restriction itself. Obviously, the nature of a license application rejection notice based on this kind of information is going to be very summary. In fact, it is unlikely that the notice will differ at all from that provided for a decision based on an unpublished policy concern, discussed above.

6. Step Six: The Users of the Product are Reviewed

The same sources of information used in reviewing the country of destination will provide a partial basis for pre-license checks of foreign consignees and end-users. This part of the application review may involve reference to the BXA's "gray-list" of foreign parties who are con-

133. Although Commerce officials maintain they provide actual notice orally to effected exporters, it is hard to appeal from a decision provided by telephone at the staff level.

sidered to be under some cloud; or if the firm is new or unknown, it will involve some more active investigation by the Office of Export Intelligence or the Office of Export Enforcement.[134] In 1989, 238 license applications were denied or returned without action based on information known to BXA. Another 125 were denied or returned without action after the Office of Export Intelligence or the Office of Export Enforcement conducted prelicense investigations of end-users or consignees.[135] Names of firms on the gray-list come from a variety of intelligence sources. In fact, BXA may have *no* information about the basis for a firm's listing. The list, and the sources and details behind the list's entries, are subject to national security classifications that may reach the highest levels of government. Denial of an application because of a "suspicious" end-user or consignee can be a frustrating experience for an exporter. Although the exporter will be told that there is a problem with one of the foreign parties, the Office will not provide further details. Formal and informal discussions with the Office can be futile, especially when the Commerce Department has no access to the information that put the foreign company on the gray-list in the first place. Although BXA officials will entertain appeals of denials based on "suspect" foreign parties, they will accept only information from the applicant designed to demonstrate the trustworthiness of the foreign party. BXA will not respond with any details about the basis for its suspicions. Thus, the exporter must try to anticipate what may be the problem and address it.

7. Step Seven: The End-Use of the Product is Reviewed

Factual concerns about the ultimate end-use of a product present a somewhat different dilemma for the exporter. Although classified information may play some role, denials for end-use reasons more frequently involve differences between the exporter and BXA or Defense Department officials with respect to technical judgments about an item's technical capacities or limitations. The new restrictions on commodities that could be used for chemical or biological weapons on missile technology will exacerbate this problem.[136] Because the primary concern of the national security controls is the dual civilian and military uses of controlled items, the government examines goods from the perspective of how they might be put to military uses. Exporters marketing to civilian enterprises have no real reason to think in terms of potential military uses. The

134. *See* 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 4-5, 80-81.

135. *Id.* at 80.

136. *See supra* note 2.

potential diversion of an item from civilian to military use involves questions about both the country and the end-user more than the product's inherent use, but BXA often return an application without action if it believes the product renders too big a risk regardless of the bona fides of the end-user.

The exporter may disagree that the equipment is capable of the application BXA has identified. The exporter may argue that the equipment has been modified in such a way as to preclude the suspected application. Although these disputes may involve classified information BXA has about the state of military technology in the end-user's country, they more frequently involve disputes about the capability of the exporter's product. Although the exporter has an interest in understating equipment capabilities in order to get a license, the exporter also has much greater knowledge of the true capabilities of the equipment. Thus, in an informal or formal appeal of license denials based on potential end use, the exporter and BXA stand on somewhat more equal footing with regard to access to the relevant information than they do with regard to rejections based on country policies or suspect end-users. Because the ultimate decision is the Commerce Department's, however, the exporter is still vastly overmatched.

B. Referral of Applications to Other Agencies

Although the Commerce Department is the central agency for the export controls applied to civilian goods, its subdivision, the BXA, does not have sole responsibility for *all* export license applications. The State Department, the Defense Department, and the Energy Department also have key roles in the process.[137] The nature and extent of their involvement—particularly that of the Pentagon's Defense Technology Security Administration—has been the focus of significant discussion, as well as recent legislative action.[138] In theory, when the Commerce Department refers an application to another agency for review, the agency must respond within forty days. Otherwise, the Commerce Department is free to act on its own decision.[139] There is a formal mechanism for resolving disagreements between the agencies over license applications, which ultimately reaches the President.[140] However, neither the time limits nor

137. *See* Andrew P. Hurwitz, Note, *Failures in the Interagency Administration of National Security Export Controls*, 19 LAW & POL'Y INT'L BUS. 337, 549 (1987).

138. 50 U.S.C. app. § 2409(g) (1988). *See* Berlack, *supra* note 124, at 138-41.

139. 15 C.F.R. § 770.13(e) (1990).

140. 50 U.S.C. app. § 2409(g) (1988).

the resolution process work as smoothly as designed. The interagency process was revised somewhat by executive order in December 1990,[141] but exporters will continue to encounter difficulties when involved with the interagency review process.

Two significant problems with the interagency review process involve notice to the exporter of when a license was referred, and whether or not all of the relevant information provided by the exporter to the BXA has been provided to the other agencies. Complaints about delays and the routine disregard of the forty-day deadline are common. The other agencies may not start counting days until they decide they have all of the information they need to make a decision. The exporter may not know when the initial referral to another agency took place, let alone when that agency decided the file was complete and the "clock should start to run." Similarly, the exporter will not know what information the BXA has sent to the other agencies, and thus, may not know how best to deal with problems perceived by the other agencies.

The reviews conducted by the other agencies are more specialized, or focused, reviews of the same elements considered by the Commerce Department. The Pentagon's Defense Technology Security Administration is concerned with the potential military uses of the exported products,[142] while the State Department's Office of East/West Trade is more concerned with the countries of destination.[143] When there is disagreement among the agencies, the Commerce Department will usually be in favor of granting the license and will in fact use its technical people to argue for the grant. The exporter, though not an official party to this review process, will probably be working informally with the BXA staff at some point to make the strongest case for the license. A license application denied as a result of an objection by another agency will not be reflected in the denial notification, nor will details of the basis for the rejection be provided therein.[144]

C. *Referral of Applications to CoCom*

Some especially sensitive license applications must also be reviewed by the other countries that make up CoCom.[145] The number of these

141. *See White House Fact Sheet on Export Controls Procedures, in* COPING WITH U.S. EXPORT CONTROLS 1991, *supra* note 2, at 605.

142. *See* Charles Hamilton, *The Defense Technology Security Administration, in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 341, 350-52.

143. *See* Berlack, *supra* note 124, at 139.

144. *Id.* at 137.

145. 15 C.F.R. § 770.14 (1990).

licenses is dramatically declining in light of political changes in Eastern Europe. Objections raised by other CoCom members tend to be heavily policy oriented and, if acceded to by the United States, represent foreign policy decisions of a very high order.[146]

D. Special Licensing Procedures

In addition to issuing general licenses and validated licenses, the Commerce Department also issues five different types of special licenses to exporters, which are designed primarily to permit repeated shipments to the same end-user of similar goods.[147] The two most common types are project licenses[148] and distribution licenses.[149] In general terms, the project license permits an exporter to export specified products for specified uses for a specified time period. The project license is commonly issued for off-shore construction projects by United States companies involving a wide array of United States source material. The distribution license is the most commonly issued special license and is also the one that raises the most procedural questions. Distribution licenses permit exporters to make multiple shipments of controlled goods to a wide range of pre-approved end-users without securing an individual license for each shipment. The applicant for the distribution license must demonstrate a sophisticated knowledge of the export control system and must have in place a compliance program that will effectively prevent abuses, such as the diversion of the goods or their unauthorized re-export.[150]

Because the Commerce Department is delegating some of its control responsibility to the licensee under distribution licenses, the Office of Export Licensing is required to conduct periodic reviews of the effectiveness of licensees' internal control programs.[151] The Commerce Department can summarily suspend the distribution license if officials determine that the exporter has not met its obligations for policing the shipments.[152] The effect of the suspension is to compel the exporter to

146. These objections are also somewhat unusual, because the United States is the most conservative vote in CoCom. *See, e.g., U.S., CoCom Allies Continue to Disagree over Easing Controls on Computer Exports*, 8 Int'l Trade Rep. (BNA) No. 12, at 424 (Mar. 20, 1991).

147. *See* 15 C.F.R. § 773 (1990).

148. *See* 15 C.F.R. § 773.2 (1990).

149. *See* 15 C.F.R. § 773.3 (1990).

150. *See* Eileen M. Albanese, *The Distribution License Program, in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 219, 228-30.

151. *Id.*

152. *See* 15 C.F.R. § 773.1(f) (1990).

secure a validated license for each export. During fiscal year 1989, the Office of Export Licensing suspended seven distribution licenses.[153] Between 1985 and 1989, the Office suspended a total of forty-one distribution licenses.[154] Although this suspension decision constitutes an adverse agency action under section 789 of the regulations and, like other similar actions, is appealable to the Assistant Secretary, the Assistant Secretary's decision is final. The Office of Export Licensing handles the review, approval, supervision, and suspension of distribution licenses out of one branch; that one branch, consequently, exercises substantial authority over the decision-making process.

E. Foreign Availability Determinations

A common criticism of the United States system of export controls has been that it is anticompetitive.[155] This complaint carries less weight when directed towards foreign policy controls, because the United States is consciously deciding to forego trade in order to make a diplomatic point.[156] With regard to national security controls, however, the criticism is much more pertinent. The purpose of national security controls is to prevent target nations from acquiring goods and technology that could advance their military capabilities at the expense of United States security. Critics have argued that the United States government imposes controls on United States goods despite that those goods are freely available from other, non-controlled sources; thereby depriving United States businesses of markets without any salutary effect on national security. The foreign availability provisions of the EAA, adopted in 1979, were intended to answer this criticism by creating an exception requiring

153. 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 19.

154. *Id.* at 23.

155. *See Reauthorization of the Export Administration Act: Hearings on S.397, S.407, S.434 and S.979 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, (statement of Arthur T. Downey representing the United States Chamber of Commerce); *U.S. Chamber of Commerce Sharply Critical of Administration's Export Control Scheme*, 7 Int'l Trade Rep. (BNA) No. 20, at 684-85 (May 16, 1990).

156. *But see* Interim and Proposed Rules for Expansion of Foreign Policy Controls on Equipment and Technical Data Related to Chemical and Biological Weapons, 56 Fed. Reg. 10,760 (to be codified at 15 C.F.R. pts. 770, 776, 778, and 779). These controls are designed to restrict the proliferation of these weapons. The Bush administration apparently is committed to the controls even if other nations do not cooperate. *See U.S. Announces New Controls on Exports of CBW-Related Goods, Missile Technology*, 8 Int'l Trade Rep. (BNA) No. 11, at 376-77 (Mar. 13, 1991).

decontrol of an otherwise prohibited export if the equivalent product is available from uncontrolled sources.[157] The BXA's Office of Foreign Availability is responsible for determining if in fact the product is available. The process is most often triggered by formal or informal demands of exporters.

The foreign availability determination is mostly a factual inquiry. The Office of Foreign Availability must ascertain four things: (1) Is there a non-United States source for the product? (2) Is the foreign product of truly comparable quality? (3) Is the foreign product available in sufficient quantity to satisfy the controlled country's demand? and (4) Is the foreign product in-fact available to the controlled country, *i.e.*, will the vendor and source country permit the product to be sold to the controlled country customer?[158] Much of this information is available from commercial sources and is provided by the exporter seeking to demonstrate that foreign competitors are marketing without restrictions. The Office relies also on other sources of information, however, including the State Department, the Defense Department, the intelligence agencies, and the Commerce Department's United States and Foreign Commercial Service officers.[159]

Two key points of tension in the foreign availability determination involve judgments about the comparable quality of the foreign product and whether the quantity is sufficient for the needs of the controlled country customer. These issues are similar to disagreements about the potential end-use of a product.[160] Either the Defense Department or one of the intelligence agencies may claim to have classified information about the actual uses of a product or needs of a customer that negates a product's apparent comparable quality or sufficient quantity. Once the Commerce Department has made a preliminary determination of foreign availability, the decision is circulated to the other agencies concerned with the national security control process for review and comment. They may offer additional evidence on the elements of the determination. Congress has described the different burdens of proof for establishing foreign availability, which requires a showing of "reasonable" evidence of the four elements,[161] and for refuting this finding, which requires a

157. 50 U.S.C. app. § 2404(f) (1988).
158. *Id.*
159. *See supra* notes 83-92 and accompanying text.
160. *Id.*
161. 50 U.S.C. app. § 2404(f)(3) (1988).

showing of "reliable" evidence.[162] The final determination, however, is left with the Secretary of Commerce (delegated to the Assistant Secretary for Export Administration), leaving the Assistant Secretary's staff with the responsibility of collecting and weighing the evidence.

The section 789 procedure for appealing an adverse decision would apply to these findings as it does to any other functions carried out by BXA under the EAA, with the already-noted limitations of this process. A positive finding of foreign availability by the Commerce Department does not automatically mean that the product can be shipped to the controlled destination. If the item is controlled through CoCom, the decision must be referred there for four months to enable the other members to consider it and take whatever steps they may wish to take.[163] More significantly, the President has the ability to suspend the decontrol effects of the determination while attempting to negotiate controls with the country that makes the product available. . Although these efforts can take up to eighteen months, if negotiated control is unsuccessful, the United States controls are lifted.[164]

The foreign availability of items that the United States seeks to control for national security purposes has grown with the country's loss of technological dominance in the world. Although most other nations capable of producing high technology products are members of CoCom, differences in interpretation of the definitions embodied in the control list have spawned arguments that equivalent CoCom produced goods are not controlled. Congress has been dissatisfied with the Commerce Department's handling of the foreign availability determinations and has revisited the issue several times, most recently in the 1988 Omnibus Trade and Competitiveness Act.[165]

The legislative changes have focused primarily on the administration of the process, defining standards, establishing deadlines, and clarifying the Commerce Department's sole authority to make these decisions. Consistent with the other administrative decisions made by the Commerce Department under the EAA, Congress has created no external review mechanism for adverse foreign availability decisions. Although there are problems created by the classified nature of some of the infor-

162. *Id.*

163. *Id.*

164. 50 U.S.C. app. § 2404(f)(4) (1988).

165. Pub. L. No. 100-418, § 2418(a), 102 Stat. 1107 (codified at 50 U.S.C. app. § 2404(h) (1988)). Congress required the President to inform congressional committees of his efforts to eliminate the foreign source, and made a series of liberalizing procedural changes aimed at making it easier for an exporter to demonstrate foreign availability.

mation BXA may use in making foreign availability determinations,[166] the basic decision is in the nature of an application of a standard to a set of facts, a process subject to judicial review throughout the federal government. The policy issues arise when the Commerce Department finds foreign availability and the President wishes to try to eliminate, through negotiations, the foreign source's willingness to sell to a controlled country. There appears to be little reason not to allow an exporter, who loses the argument before the Commerce Department that foreign equivalent goods are available, recourse to external appeal.

In August 1990, the Commerce Department released the final version of its new rules for foreign availability determinations under the 1988 statutory revisions. These rules reflect the Department's continuing orientation towards viewing exporting as a privilege. The exporter bears the greater burden of demonstrating foreign availability, notwithstanding the Commerce Department's acknowledgment of the superior position of the government to obtain the relevant information.[167] The Commerce Department has wide latitude in what sources it may consult in making its determination; there is no provision for providing an explanation for its ultimate decision; and the only recourse from an adverse decision is the section 789 procedure discussed next.[168]

F. Regulatory and Statutory Appeals Process

Section 789.2(a) of the EAA's regulations[169] states: "Any person directly and adversely affected by an administrative action . . . taken by the U.S. Department of Commerce may appeal to the Assistant Secretary for reconsideration of that administrative action."[170] Section 789.2(c)(2) provides that "[t]he decision of the Assistant Secretary shall be final."[171] These sections apply to the full range of non-enforcement decisions by the BXA, including classifications, cancellations of distribution licenses, negative foreign availability determinations, and license denials. Section 12(e) of the EAA is entitled "Appeals From License Denials" and provides for review by an administrative law judge "who shall have the

166. "An important participant in the foreign availability assessment process is the intelligence community. Daily review of intelligence data is an integral part of the foreign availability assessment process." 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 55.

167. 55 Fed. Reg. 32,899 (1990) (to be codified at 15 C.F.R. § 791).

168. *See infra* notes 175-82 and accompanying text.

169. 15 C.F.R. § 789.2(a) (1990).

170. *Id.*

171. 15 C.F.R. § 789.2(c)(4) (1990).

authority to conduct proceedings *to determine only whether the item sought to be exported is in fact on the control list.*"[172] The administrative law judge's determination is subject to review by the Secretary, who can affirm or vacate the former's decision.[173] Thus, there are two apparent avenues to secure review of license denials: appeals to the Assistant Secretary and appeals to an administrative law judge. Appeals to the Assistant Secretary[174] under the regulations are not uncommon, numbering around fifty during 1989 (out of 216 licenses denied).[175] However, since the EAA statutory license appeal provision was adopted in 1985, not a single appeal to the administrative law judge has been taken. Under the current arrangement, there is little reason to appeal formally from a denial of an export license or any other adverse decision of the BXA under the section 789 procedures. Because there is significant opportunity for informal discussion at all levels within BXA, and because there is no recourse from either a formal or informal decision at the highest level of BXA, there is no incentive to use the formal mechanism. This aspect of the process places an extraordinary premium on familiarity with the internal procedures and personnel of the BXA. Although knowledgeable insiders have an advantage in any agency, when the agency has been subject to virtually no outside scrutiny for over forty years other than that of Congress, as in this case, the problem is extreme. The absence of written decisions or justifications for agency actions deepens the advantage of familiar representatives able to tap into the informal institutional memory of the organization.

A senior BXA official indicated that the primary reason he believed parties formally appealed license denials was to satisfy contractual

172. Export Administration Act of 1979, *supra* note 67, § 12 (emphasis added).

173. 50 U.S.C. app. § 2412(e) (1988).

174. In 15 C.F.R. § 789.1(b), "assistant secretary" is defined as the Assistant Secretary for Trade Administration. This position was eliminated when the export control area at the Commerce Department was reorganized in 1985. *See* Export Administration Amendments of 1985, Pub. L. No. 99-64, § 116(a), 99 Stat. 152; see 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 5. The new structure provided for two assistant secretaries, an Assistant Secretary for Export Administration and an Assistant Secretary for Export Enforcement. Appeals of export licensing decisions are made to the Assistant Secretary for Export Administration although the regulations have not been formally amended.

175. 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 14. The number of denials is somewhat misleading, because 5692 license applications were returned without action due to some problem in the application. *Id.* The problem could be a substantive one that would lead to a denial if pursued. The Office of Export Licensing does not keep track of licenses returned without action, which are withdrawn.

obligations—by triggering *force majeure* clauses. Some of the formal license appeals are more substantive than that, however, usually involving technical disputes about the use of the equipment. The Assistant Secretary relies on the technical staff in the OTPA to review license applications de novo. This process can provide a beneficial "second look" at a close technical decision. Denials based on country policy decisions or classified data about a suspect end-user, provide little basis for another look by the agency, however. And any application raising truly significant issues of any kind will probably already have reached the Assistant Secretary before the initial decision.

The statutory appeal process for license denials before an administrative law judge is extremely limited. The only issue that can be reviewed, whether or not an item is on the list, is the question of the proper classification under the CCL.[176] An exporter who disagrees with a classification decision could appeal to the Assistant Secretary under the regulatory appeal process. Appeal to an administrative law judge of this question would provide the advantage of a third party "look" at the classification, but the judge's decision is subject to review by the Under Secretary for Export Administration, who would no doubt rely on the staff of BXA for advice. There appears to be little awareness or interest in this provision among those exporters and practitioners who regularly deal with BXA. It is not clear whether this is because there are few classification issues, or because there is little confidence in the procedure offering effective recourse for an adverse decision.

V. THE EAA'S LICENSING PROCEDURES: THE NEED FOR JUDICIAL REVIEW

There are three broad procedural concerns with regard to the Commerce Department's administration of the EAA's licensing procedures. First, a major procedural problem with the EAA's decision-making process is its exemption from judicial review. Second, there is the transparency concern: the effect of limited explanation of adverse actions and unavailability of advantageous and adverse information about actions taken by the Commerce Department with regard to similarly situated parties. The third area of concern—a separation of functions

176. 50 U.S.C. app. § 2412(e) (1988). It is not clear what the practical dimensions of this review are because the provision has never been used. Presumably, the only argument an exporter would have is that the item should be placed in a less-restrictive category.

problem—is the difficulty of obtaining meaningful internal review or oversight without significant prior involvement or pre-judgment by the reviewing official. All three concerns are somewhat related, but they tend to manifest themselves differently at different steps of the process.

A. Absence of Judicial Review

The lack of judicial oversight of the actions of the Commerce Department over the last forty years lies at the heart of the procedural concerns of the EAA.[177] The Commerce Department has administered the EAA secure in the knowledge that its decisions would never be subjected to judicial scrutiny. Despite the continuing development of administrative law and process, the Commerce Department's pervasive regulatory intrusion into foreign trade remains free from judicial review. The operating presumption of judicial review that courts have applied to other agencies has been blunted by the express exemption from the Administrative Procedure Act.

A second reason for the lack of judicial review is the judiciary's self-imposed deference to the executive branch in the foreign affairs arena because of the broad powers granted to the President in the Constitution. This Article examines this traditional basis for excluding export regulation from judicial review as a backdrop to proposing reforms that would open the process up to judicial examination.

1. History of the Exemption from Judicial Review

Barring constitutional limitations, Congress is free to exempt the actions of administrative agencies from judicial review.[178] In the Export Control Act of 1949, Congress exempted the administration of export controls from all but the publication requirements of the 1946 APA, at the time a novel and relatively untested effort to harmonize government agency practices. It is clear from that action that Congress intended to preclude judicial review of export controls. Nevertheless, some background on that decision is enlightening.

In the Second Decontrol Act of 1947,[179] Congress exempted the administration of export controls from all but two sections of the APA:

177. *See generally* Franklin D. Cordell & John L. Ellicott, *Judicial Review Under the Export Administration Act of 1979: Is It Time to Open the Courthouse Doors to U.S. Exporters?*, *in* COSEPUP STUDY, *supra* note 1, app. H, at 321-35.

178. *See* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 128-30 (1985).

179. Second Decontrol Act of 1947, Pub. L. No. 80-188, 61 Stat. 321 (1947).

the section requiring that regulations be published and the section requiring judicial review.[180] From 1947 until the effective date of the Export Control Act, the Commerce Department's export control actions were subject to the judicial review provisions of the APA. Nevertheless, no evidence shows that an exporter ever sought judicial review during that time. The Export Control Act of 1949 was the first post-war codification of the war-time export controls. Congress had enacted export controls previously, but only as part of special war powers. The war-time controls had very short life-spans, and thus, Congress had to renew them continually.[181]

When Congress consolidated the export control authority into a non-emergency statute with the promulgation of the Export Control Act, it discussed generally the APA exemption for export regulations. Still, Congress did not specifically discuss the merits of judicial review. The Commerce Department resisted judicial review under the APA provisions because the APA would require formal adjudication and individual hearings for the Department's license decisions.[182] In contrast, Congress was concerned about the exporters' ability to have formal input into general policy decisions about licensing, and about recourse for hardship situations.[183] Thus, Congress was content to implement existing departmental procedures for appealing licensing decisions[184] and for regulating private sector involvement in setting licensing policy.[185] Congress did not ex-

180. *Id.* § 5 (exempting from the APA the functions exercised under Title III of the Second War Powers Act, as amended, and the functions exercised under the Export Control Act, as amended, except for the requirements of § 3, relating to public information and of § 10, relating to judicial review); *see also* SENATE COMM. ON THE JUDICIARY, 81ST CONG., 1ST SESS., REPORT TO ACCOMPANY S. 1461, SECOND DECONTROL ACT OF 1947 EXTENDING POWERS TO CONTROL EXPORTS AND CERTAIN POWERS UNDER TITLE III, SECOND WAR POWERS ACT (Unnumbered Doc. 1947).

181. *See* Berman & Garson, *supra* note 8, at 791-92. The authority to control exports was renewed annually.

182. *Extension of Export Controls: Hearings before a Subcomm. of the Senate Comm. on Banking and Currency on S. 548,* 81st Cong., 1st Sess. 199-200 (1949) (testimony of Mr. Ostroff, General Counsel, Office of International Trade, Department of Commerce) [hereinafter *Extension of Export Controls*].

183. "The essential safeguards of consultation with the trade in promulgating regulations, and of an opportunity to be heard on appeal from hardship, are obtained through the aforementioned provisions of the bill (4b) and existing agency procedures for review and appeals form licensing and compliance actions." S. REP. NO. 31, 81st Cong., 1st Sess. 6, *reprinted in* 1949 U.S.C.C.A.N. 1094, 1100.

184. *Id.* Procedures for appeal of licensing decisions were at 15 C.F.R. § 378 (1949).

185. S. REP. NO. 31, *supra* note 183, at 6, 1949 U.S.C.C.A.N. at 1100. The consultation requirement was imposed in the Export Control Act of 1949, Pub. L. No. 81-11, § 4(b), 63 Stat. 7, 8 (1949).

pressly address the issue of judicial review in the committee reports of the Export Control Act, although the elimination of the 1947 provision indicates that Congress did intend to exclude export control matters from the judicial review provisions of the APA.

2. The Exemption from the APA is no Longer Applicable

The two reasons the Congress articulated for adoption of the broad exemption from the APA raise questions about the relevance of that congressional intent to the question of judicial review today. The 1949 Export Control Act was still regarded as a temporary statute relating to the immediate after-effects of World War II.[186] The APA in 1946 excluded from its coverage the temporary emergency laws adopted during the war.[187] The Senate report on the 1949 act defended the APA exemption as "in accord with the policy expressed in section 2 of the Administrative Procedure Act itself" (the emergency laws exemption).[188] Forty years later, this statement of Congressional intent is unpersuasive.

The second reason Congress gave for adopting the exemption was the export control program's "intimate relation to foreign policy and national security."[189] The argument echoes that of the general counsel of the Office of International Trade, who supported "a general exemption with respect to all matters which have a bearing on foreign affairs such as export controls."[190] The general counsel was undoubtedly referring to the "military, naval, or foreign affairs function" exemption contained in the rulemaking (section 4) and adjudication (section 5) provisions of the APA.[191] No similar exemption appears, however, in the judicial review section of the APA.[192] The general counsel further suggests that judicial

186. Administrative Procedure Act, Pub. L. No. 79-404, § 2(a), 60 Stat. 237 (1946). This section provided that "[e]xcept as to the requirements of Section 3 (publication), there shall be excluded from the operation of this Act . . . (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter . . . ." *Id.*

187. "There is continued a limited exemption from the Administrative Procedure Act. By section 7, provision is made that section 3 alone (the public information requirement) of the Administrative Procedure Act shall be applicable to the export control program in view of the temporary character of this legislation and its intimate relation to foreign policy and national security." S. REP. No. 31, *supra* note 183, at 6, 1949 U.S.C.C.A.N. at 1100.

188. *Id.*, 1949 U.S.C.C.A.N. at 1100.

189. *Id.*

190. *Extension of Export Controls*, *supra* note 182, at 199.

191. Administrative Procedure Act, Pub. L. No. 79-404, §§ 4(1), 5(4), 60 Stat. 237, (codified as amended at 5 U.S.C. §§ 553(a)(1), 554(a)(4) (1988)).

192. *See* 5 U.S.C. § 701(a) (1988).

review was not an issue considered by the Congressional officials implementing the Export Control Act. Ironically, the role of courts in the oversight of administration agency determinations was largely undeveloped in 1949, despite the establishment of a presumption of judicial reveiw just three years earlier. Thus, although the effect of the addition of the APA exemption was to preclude judicial review, no evidence shows Congress intended to preclude judicial review of export controls by adopting the broad export control exemption in the 1949 Act.

B. Judicial Deference to Foreign Policy Decisions is Overstated

The second element of the judicial review issue involves the judicial deference to the decisions of the executive in matters of foreign affairs. The seminal case defining the President's foreign affairs authority is an early export control case concerning the authority of the President to restrict the foreign sales of munitions. Justice Sutherland, writing for the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,[193] held that the President had the authority to restrict the sales of munitions. Justice Sutherland argued that the President's authority was grounded in the nation's sovereignty, outside the framework of the Constitution. Justice Sutherland's opinion reflected the judiciary's deference to executive power in political contexts in which the President controls foreign commerce. This decision has provided a precedent to which the courts rigidly adhere.[194]

Twelve years later, in *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,[195] the Supreme Court addressed its ability to review a decision made by the President pursuant to authority granted by Congress. The President's decision was about the allocation of foreign air routes. In declining to review the President's decision to award a foreign air route, the Court found that the combination of the President's delegated authority over international air routes and the President's inherent authority over matters relating to foreign affairs rendered the acts of his agent unexaminable.[196] Congress's broad grant of authority to the President over exports in the EAA, when combined with the President's inherent foreign affairs powers, raises questions regarding the extent of

193. 299 U.S. 304 (1936).

194. "Economic sanctions programs have generally been quite successful at shrouding themselves in the constitutional mystique of the foreign affairs powers of the Executive and the needs of national security." MALLOY, *supra* note 7, at 537-38.

195. 333 U.S. 103 (1948).

196. *Id.* at 111.

judicial review if it were available.[197] Which decisions of the Commerce Department would the courts be empowered to review? This question is key to this Article and its recommendations.

C. *Analogous Examples of Tolerated Judicial Review*

Two parallel avenues of judicial activity provide useful references when considering judicial review of Commerce Department export control decisions: the detailed system of judicial review of administrative decisions relating to imports and the judicial treatment of administrative national security or foreign policy decisions under both the Trading With the Enemy Act of 1917[198] and the International Economic Emergency Powers Act.[199] The types of decisions made by the Commerce Department in the administration of export controls include elements from both varieties of actions, although neither approach provides a completely satisfactory model for export controls decisions.

1. Customs Decisions

On the import side of international trade, administrative decisions by Customs officials have long been reviewable by the judiciary. In particular, Customs determinations—classifications of imported items and valuation of such items—have been litigated extensively.[200] These cases primarily involved factual questions whose impact was almost exclusively on the United States importer.[201] Also relating to imports, Congress passed the Trade Agreements Act of 1979,[202] which established a system for judicial review of administrative decisions regarding dumping and subsidization[203] of imports.[204] If the administration finds that an importer has been dumping or subsidizing its products, the administration can im-

197. *See generally* HENKIN, *supra* note 30, at 205-24.

198. 50 U.S.C. app. §§ 1-44 (1988).

199. 50 U.S.C. §§ 1701-1706 (1988).

200. *See* Re, *Litigation Before the United States Court of International Trade*, *reprinted in* 9 U.S.C.A. XI, XVIII-XXV (1990). Judge Re is the Chief Judge of the United States Court of International Trade.

201. *Id.*

202. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§ 2501-2582 (1988)).

203. 19 U.S.C. § 1516a (1988); Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001, 93 Stat. 144, 300-07 (1979) *as amended by* Customs Court Act of 1980, Pub. L. No. 96-417, §§ 601, 608, 94 Stat. 1727, 1744-46 (1980).

204. *Id.*

pose higher import duties on the goods from the foreign state. This determination significantly impacts foreign nations' conduct and economic prospects, and thus directly implicates United States foreign policy.[205] In the Customs Court Act of 1980, Congress created the Court of International Trade[206] and gave it specific authority to review all of these administrative decisions. In addition, the Act provides detailed instructions to guarantee that courts employ the proper judicial procedures, standard of review, and burden of proof.[207]

These examples of judicial review illustrate Congress's reluctance to insulate administrative decisions that affect the foreign policy of the United States from judicial oversight. To be sure, the laws and administrative activity involving imports subject to the Customs Court Act are much more closely tied to economic regulation than to national security concerns. However, several aspects of the administration of export controls under the EAA closely resemble those types of activities.[208] More important to the analysis is the judicial review of administrative activities that directly impact on national security—the judicial oversight of the Trading with the Enemy Act and the International Economic Emergency Powers Act.

2. Trading with the Enemy Act

Under the Trading with the Enemy Act, the Treasury Department exercises licensing controls over a wide-range of foreign commercial activity by United States companies through the Office of Foreign Assets Control.[209] These controls apply to commercial activity with nations generally considered to be among the least friendly to the United States and subject to the strictest controls available under the EAA. Nevertheless, federal courts can review decisions regarding licensable activity.[210]

---

205. *See generally* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 648-788 (1986).

206. Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified as amended in scattered sections of 5, 16, 18, 19, 26, 28 & 44 U.S.C.).

207. *Id.* § 608

208. Classification of the export commodity is the most obvious example. *See supra* note 27. Foreign availability assessments involve inquiries about foreign economic activity similar to those undertaken in dumping and subsidy investigations. Also, some of the inquiries into policies of the countries of destination of controlled goods resemble inquiries into the subsidization policies of nations in countervailing duty investigations.

209. Foreign Assets Control Regulations, 31 C.F.R. § 500.101-.901 (1990). *See generally* MALLOY, *supra* note 7, at 136-48.

210. *See* MALLOY, *supra* note 7, at 542-79 (discussing court decisions reviewing Treasury actions implementing Trading with the Enemy assets controls).

For example, in 1975, the Fifth Circuit reversed the Treasury's licensing decision in one case on the basis that the Secretary had exceeded his statutory authority under the Trading with the Enemy Act.[211] In 1988, a district court in Florida reversed a Treasury decision denying a license under the Cuban Assets Control Regulations, although it was later reversed by the Eleventh Circuit.[212] Most recently, a federal district court upheld a Treasury decision to deny Capital Cities and American Broadcasting Company the right to broadcast the Pan American Games from Cuba in 1991.[213] Although the courts may observe deference to Treasury decisions, a complaining party can obtain a hearing in court.

3. International Emergency Economic Powers Act

Judicial review is also available for parties complaining about executive branch decisions under the International Emergency Economic Powers Act.[214] In fact, in one situation, the Commerce Department's denial of an export license after the EAA had expired and the regulations had been extended by President Reagan through an executive order issued under the authority of the International Emergency Economic Powers Act was judicially reviewed.[215] In *Nuclear Pacific, Inc. v. Department of Commerce*,[216] a federal judge, in the Western District of Washington, denied the Commerce Department's motion to dismiss the appeal of its denial of an export license to Nuclear Pacific for lack of jurisdiction. The court found that review was not precluded under the Act and that the issues raised were not the kind of intimate foreign policy

211. Real v. Simon, 510 F.2d 557, 565 (5th Cir. 1975) ("In line with these cases, we conclude that the Secretary of the Treasury has exceeded his statutory authority in the interpretation and application of the Trading with the Enemy Act in such a manner as to deny these appellants their unrestricted interest in the estate of Urbano Real.").

212. DeCuellar v. Baker, 686 F. Supp. 890 (S.D. Fla. 1988) *rev'd*, DeCuellar v. Brady 881 F.2d 1561 (11th Cir. 1989). *See* Kathleen M. Donovan, Comment, *Foreign Affairs—Cuban Assets Control Regulations—Cuban Refugee Not Entitled to License to Unblock Interest in United States Indenture Trust Fund*, 14 SUFFOLK TRANSNAT'L L.J. 273 (1990).

213. Capital Cities/ABC Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) ("Finally, OFAC's interpretation of its own regulations to exclude the proposed transactions from the general licensing provision for news gathering activities is not contrary to the regulations' plain language, and is therefore controlling.").

214. 50 U.S.C. §§ 1701-1717 (1988); *see also* Dames & Moore v. Regan, 453 U.S. 654 (1981).

.215. Exec. Order No. 12,470, *reprinted in* 49 Fed. Reg. 13,099 (1984).

216. Nuclear Pac., Inc. v. Department of Commerce, No. C84-49R, slip op. (W.D. Wash. June 8, 1984).

determinations that courts must refrain from considering.[217] Although the court may ultimately defer to the Commerce Department's decision, the court will review the decision despite its recognition that the statute governs sensitive national security issues.

D. Difficulties with Extending Judicial Review to the EAA

Many critics argue that judicial review of Commerce Department decisions regarding matters of national security is both precarious and impractical. If judicial review was generally available for export controls, an indefinite variety and number of issues might reach the courts. The relative disuse of the internal appeals process in the Commerce Department is no guidance for one trying to gauge the variety and number of issues that might reach the courts because an appeal to the chief policymaker, whose decision is final, provides little actual recourse. Thus, complaining parties find the expense and time of using the internal appeals process in the Commerce Department to be fruitless. In contrast, at least initially, there might be a significant number of appeals to the courts from parties complaining about export controls.[218] A brief review

217. *Id.* at 11 ("IEEPA's legislative history does not clearly and convincingly evidence Congress' intent to permit the President to preclude judicial review. Defendants' interpretation of IEEPA would give rise to a host of thorny constitutional issues. The court will not construe IEEPA as authorizing the President to preclude judicial review since that construction is required neither by IEEPA's text nor its legislative history."). In an appeal of a criminal export control conviction, Spawr Optical challenged the President's authority to extend the EAA rules under the Trading with the Enemy Act, and sought review of a decision that a commodity was on the commodity control list. The firm was unsuccessful on all counts, reflecting a stronger view of the preclusion of review language of the regulations. *See* United States v. Spawr Optical Research, Inc., 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983); *see also* United States v. Spawr Optical Research, Inc., 864 F.2d 1467, 1473 (9th Cir. 1988) ("In this case, the secretary has determined that the Spawrs' mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law.").

218. With decontrol resulting from changes in Eastern Europe and the Soviet Union, the number of license denials has declined dramatically over the last five years, from 835 in fiscal 1985 to 216 in fiscal 1989. 1985 BUREAU OF EXPORT ADMIN. ANN. REP. 15 and 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 22. This trend should continue as decontrol accelerates, with Commerce officials predicting a 50% reduction in required validated licenses. *See Commerce to Issue Rules Next Month Decontrolling Bulk of West-West Trade*, 7 Int'l Trade Rep. (BNA) No. 3, at 66 (Jan. 17, 1990); *CoCom Agrees to Rewrite Export Rules 'From Scratch,' U.S. Officials Report*, 7 Int'l Trade Rep. (BNA) No. 24, at 835 (June 13, 1990). New licensing requirements for chemical and biological weapons materials and missile technology may offset this decline. *See U.S. Announces New Controls on Exports of CBW-Related Goods, Missile Technology*, 8 Int'l Trade Rep. (BNA) No. 11, at 376 (Mar. 13, 1991). Any decline in transactions requiring individual

of the steps of the licensing process that might generate such appeals provides some insight into the dimensions of the problem.

As already indicated,[219] decisions about which countries and which technologies to control are not prime candidates for judicial review because they deal so intimately with foreign policy matters. Nonetheless, given the history of Congressional concern about the export control program, a court might usefully examine the extent to which the Commerce Department is following the legislative dictates of Congress. Judicial review could also ensure the President is following the detailed procedure implemented by Congress when initiating and implementing export controls.[220]

After the threshold issues of which country and what level of technology to control are resolved, judicial review becomes much more appropriate. Courts can answer questions about the classification of a product and the assignment of the proper Export Commodity Control Number by applying a pre-determined standard to the set of facts in each case. Thus, courts can readily check the process by conducting an evidentiary review. This process is similar to the Customs Department's determination of which category an import falls into under the Harmonized Tariff Schedule. An important distinction between Customs and BXA decisions, however, is that export control issues arise before the transaction can take place. An importer can pay Customs the liquidated tariff, obtain the goods, and then litigate over the disputed amount. An exporter that loses an argument with BXA will not be able to ship the goods and will lose the sale. Thus, exporters need a faster route of appeals than do importers.

Judicial review of a license denial presents the most difficult administration problems if it forces the Commerce Department to closely examine and articulate its basis for denial of an exporter's license. The difficulty arises in two situations. First, critics argue that courts cannot review Commerce Department decisions grounded in national-security classified information. The Commerce Department cannot share all of its information with the exporter, but the current "trust me" system affords the Commerce Department unrestrained discretion to either accept or deny an exporter's request for a license. Judicial review of the Commerce Department's decisions would force the Department to take a hard

validated licenses may be offset initially by companies taking advantage of the new authority to challenge the Commerce Department.

219. *See supra* notes 74-92 and accompanying text.

220. 50 U.S.C. app. § 2405(b)-(f) (1988).

look at a license request out of fear that its decisions will be reexamined by people outside the BXA. Judicial review would force the Commerce Department to articulate both the confidential factual basis for its decision and the policy reasons why those particular facts compel its decision.

Judicial review is also difficult to administer in cases in which license decisions are made by the licensing officer and the officer's superiors based on their own judgment. Courts should accord substantial deference to these policy-based license decisions, as long as the officers explain their reasons for denying the license to the Commerce Department. The Commerce Department will then have to articulate the officers' reasoning in an adversarial context.

Other bases for license denials, such as disputes over the technical capabilities of a product, or the effectiveness of restrictions on the product or licensee, involve issues quite suitable for judicial review, because they are fact-oriented. Similar questions involving foreign availability determinations and revocation of distribution licenses also readily lend themselves to traditional, substantial evidence or arbitrary and capricious standards of review of administrative action.

VI. THE EAA AND JUDICIAL REVIEW: A RECOMMENDATION

The central proposal of this Article is that the administration actions of the Commerce Department in implementing the EAA should be subject to judicial review. The first proposal would place the Department's actions under the EAA on the same footing as the vast majority of government regulatory processes subject to the APA. The second proposal in this section would fix the location of such judicial review in the Court of Appeals for the Federal Circuit. This court, for the reasons explained below, offers the best environment for the judicial oversight of the complex and sensitive issues presented by the administration of the EAA.

A. The EAA's Exemption to the APA Should be Repealed [221]

The COSEPUP study recommended the outright repeal of the EAA's exemption from the APA.[222] Broad reform of the Commerce Depart-

221. The first recommendation of the Administrative Conference provides: "Repeal of APA Exemption. Congress should repeal section 13(a) of the Export Administration Act, which exempts functions exercised under that Act from the administrative process and judicial review provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 551, 553-559, 701-706)." 56 Fed. Reg. 33,846 (1991).

222. COSEPUP STUDY, *supra* note 1, at 193.

ment's administration of the EAA requires complete repeal of the exemption rather than merely extending the reach of judicial review. Although total repeal would provide primarily for judicial review of all of the Department's actions under the EAA, it would provide other significant benefits. The Commerce Department would be required, for instance, to conform its overall procedures for formal and informal adjudication as well as rulemaking to widely recognized standards of administrative fairness.

As the previous discussion illustrates, the rationale supporting the EAA's broad exemption from the APA is suspect given the political and technological structure of the world today. The original rationale for the exemption—that 1947 export controls were strictly temporary emergency laws—has long since become antiquated. The APA is now a proven standard with judicially refined applications designed to assure the regulated public of procedural fairness. Second, the APA itself includes exceptions, especially for military and foreign affairs functions,[223] that would apply to particularly sensitive national security or foreign policy determinations made by the Commerce Department under the EAA. Third, many of the Department's functions that would, without the exemption, be subject to the APA are already conducted in a manner consistent with the requirements of the Act.

Today's process involves foreign policy or national security considerations almost exclusively. Licensing is the essential military or foreign affairs function carried out by the BXA and, as such, should be exempt from the formal process mandates of the APA. The Attorney General's Manual accompanying the APA, in 1947, had difficulty envisioning an application of the foreign or military functions exception to the adjudication provision.[224] Export licensing for national security or foreign policy purposes would undoubtedly fit that category, even if the decisions were not more appropriately considered informal adjudication.

Similarly, BXA rulemaking governing the actual implementation of export controls falls squarely within the foreign and military affairs functions exception to the section 553 mandates. Rules concerning the countries and goods that should be subject to export controls are critical components of United States foreign policy, often involving multilaterally negotiated requirements. The Attorney General's Manual reflects a

223. *But see* proposal for repeal of the rulemaking exemption discussed *infra* notes 317-28 and accompanying text.

224. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 45 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

somewhat better grasp of the scope of this exception: "In the light of the legislative history, it would seem clear that the exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency."[225] Consistent with the COSEPUP recommendation, however, the current provision of the EAA, which urges maximum public consultation on exempt rulemaking, should be retained.[226]

Undoubtedly, the BXA's most sensitive functions would be exempt from the rulemaking and adjudication requirements of the APA. Other aspects of the administration of the EAA would not be, however, though many of them are already conducted consistent with APA standards. Adjudications for violations of the antiboycott provisions of the APA already are subject to the requirements of sections 554 through 557 of the APA.[227] Moreover, export control violation proceedings have to be conducted in accordance with sections 556 and 557.[228] Certain current *ex parte* treatment of license revocations or suspensions would be newly subject to formal adjudication, but these actions are uncommon.[229] Although some of the BXA's rulemaking would become subject to the APA requirements, much of it would be of the type that the Agency treats consistently with section 553, such as foreign availability procedures and antiboycott regulations. The key difference, however, would be that, instead of the Commerce Department proposing rules for notice and comment at its discretion, the process would be compelled for certain types of rules.

The Administrative Conference of the United States has recommended repealing the categorical exemption for "military or foreign affairs functions" rulemaking.[230] BXA's claim that all of its rulemaking would be exempt under that provision illustrates the inordinately broad

225. *Id.* at 26-27.

226. COSEPUP STUDY, *supra* note 1, at 193.

227. 50 U.S.C. app. § 2410(c)(2)(B) (1988).

228. 50 U.S.C. app. § 2412(c) (1988). One change APA coverage would make is to include export control adjudications as adversarial proceedings under the Equal Access to Justice Act, 5 U.S.C. § 554 (1988). Since the civil penalty proceedings for export control violations, unlike antiboycott cases, are not subject to 5 U.S.C. § 554, the Ninth Circuit has ruled that a successful respondent may not recover attorneys fees from Commerce under the Act. Haire v. United States, 869 F.2d 531 (9th Cir. 1989).

229. 15 C.F.R. § 770.3(b) (1990).

230. 1 C.F.R. § 305.73-5 (1990).

application of the exemption highlighted by the Administrative Conference.[231] The Conference's recommendation acknowledges the need for expedited rulemaking and for military or foreign affairs rules that might involve confidential information. The two suggestions included in the recommendation—an exemption for military or foreign affairs rulemaking involving secret matters and a procedure for defining a narrow category of rules exempt when "impracticable, unnecessary, or contrary to public interest"[232]—would accommodate the critical export control rules. Thus, even if the broad military or foreign affairs exemption for rulemaking were repealed, the most sensitive foreign policy rules and those involving national security classified information would remain exempt from notice-and-comment procedures, subject to existing EAA requirements for consultation.

B. EAA Licensing Decisions Should be Appealable to the United States Court of Appeals for the Federal Circuit [233]

Although the APA mandates judicial review of final agency decisions unless otherwise precluded, it does not specify the nature of the review or which courts must perform the review. The 1988 revisions to the EAA provided for judicial review of export control enforcement actions by the United States Court of Appeals for the District of Columbia. The decisions are to be reviewed using a substantial evidence standard for questions of fact. Questions of law are to be determined under an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test.[234] The following recommendation extends that approach to *all* of the agency functions under the EAA. However, in the end, the position taken by this Article is that the Federal Circuit, as opposed to the D.C. Circuit, is the better forum for such review.

---

231. *See* 55 Fed. Reg. 46,503-04 (1990) (to be codified at 15 C.F.R. pts. 772, 774, 775 & 787).

232. 1 C.F.R. § 305.73-5 (1990).

233. The second recommendation of the Administrative Conference provides: "II. Judicial Review. Congress should amend the Export Administration Act to provide for judicial review in a single forum, the United States Court of Appeals for the Federal Circuit, of all Commerce Department actions (including the imposition of civil penalties) under the Act that are reviewable by the standards of APA section 706." 56 Fed. Reg. 33,846 (1991).

234. 50 U.S.C. app. § 2412(c)(3) (1988).

1. Choice of Forum: Court of Appeals Versus District Court

It is certainly unusual for courts of appeals to review administrative decisions not involving an APA formal adjudication.[235] However, in situations involving the EAA, such high level review is important because of the unique blend of commercial regulation and foreign policy embodied in the administration of the Act. To be sure, district court judges would be capable, to varying degrees, of recognizing foreign policy or national security questions. Some judges would find unreviewable policy questions in virtually every case, thus refusing to consider appeals seriously. Others would seek to impose broad discovery demands on all aspects of the Commerce Department's operations, scrutinizing most elements of the Department's decisions. The majority of district court judges would fall somewhere in between, but with little consistency or pattern.

De novo review in district courts also presents some problems. A trial on the sensitive issues involved in licensing decisions would be highly disruptive to the Commerce Department, with exporters likely seeking to probe the decision-making process through discovery.[236] The recommendations to be discussed below, which are aimed at reforming the licensing process, are designed to establish a record sufficient for review and eliminate the need for additional fact-finding by the court on appeal. Exporters would not have the opportunity to elicit information from the Department in an adversarial setting refereed by an independent judge, because such a process is inappropriate for issues typically decided under the EAA.

---

235. *See* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 54-61 (1975). Professors Currie and Goodman focus on the absence of an agency record as the primary reason informal adjudication is most often reviewed at the district court level. This proposal seeks to cure that problem by forcing Commerce to document the reasons for adverse actions.

236. Criminal defendants have been almost completely unsuccessful in their efforts to explore the licensing decision processes of the Commerce Department. *See* United States v. Spawr Optical Research, Inc., 864 F.2d 1467 (9th Cir. 1988). *But see* United States v. Mandel, 696 F. Supp. 505 (E.D. Cal. 1988), *rev'd*, 914 F.2d 1215 (9th Cir. 1990). The trial judge granted defendant's discovery motion against the Commerce Department on the question of the item being properly on the Control List. *Id.* at 518. Commerce appealed the decision and the Ninth Circuit reversed. Central to both these cases was the political nature of the listing decision and the proper deference due the agency.

2. Choice of Forum: Court of Appeals Versus Court of International Trade

Another possible model for EAA judicial review would lodge exclusive jurisdiction to the Court of International Trade for appeals from EAA decisions. The Court of International Trade currently considers appeals of Commerce Department decisions relating to import regulation and appeals of Customs Bureau decisions relating to classification and liquidation issues. In adjudicating such issues, the court employs a substantial evidence standard. Appeals can be taken from this court to the Court of Appeals for the Federal Circuit.[237] However, although giving exclusive jurisdiction to the Court of International Trade would address the inconsistency concern, there is no reason to create a two-tier system of review on the record.

The speed of the review is a critical consideration in recommending Court of Appeals review on the record. Unlike appeals of Customs liquidations, when an importer can pay the tariff that Customs assigns and then litigate over the difference through the Court of International Trade, a license denial by the Commerce Department effectively quashes the transaction. Although an exporter might find it more convenient to file an appeal with the local federal district court, crowded federal dockets and the likelihood of the Commerce Department appealing an adverse decision to the court of appeals make such district court appeals unattractive. There is no quick method of appeal under any circumstance, but obtaining review on the record in the court of appeals should facilitate the process.

3. Choice of Forum: The Administrative Conference's Recommendation

The Administrative Conference has adopted a recommendation providing criteria for Congress to use in determining the appropriate forum for judicial review.[238] One of these criteria allows federal district courts to review informal administrative actions in the first instance, such as product classification and licensing. However, if the following three conditions are satisfied, the initial review should take place at the federal appellate level.[239] First, the issue of law must have a broad social or legal impact.[240] This condition would be met by the foreign policy im-

237. 28 U.S.C. § 2645 (1988).
238. 1 C.F.R. § 305.75-3 (1990).
239. *Id.* § 305.75-3(g).
240. *Id.*

plications of EAA appeals. Second, an evidentiary record must exist.[241] This would be met by the adoption of the recommendations discussed below, which call for the reform of the internal procedures at BXA. Third, appeals must be few in number or likely to reach the court of appeals in any event.[242] This condition would probably be met on both accounts. The number of potential appeals is hard to gauge, but are necessarily limited to those who have business licenses denied or adverse classification decisions. Any exporter with a large enough transaction at risk to appeal to one court will likely be prepared to take it to the next level as well. Thus, the proposal that federal courts of appeals initially review EAA issues, as opposed to federal district courts, is consistent with the standard the Administrative Conference recommended that Congress apply in determining where to lodge appellate jurisdiction.

4. Choice of Forum: Court of Appeals for the District of Columbia Circuit Versus the Federal Circuit

After having argued that the appellate level is better suited for initial review of EAA decisions, an issue remains: which appellate court should have jurisdiciton over such appeals? The selection of the appropriate court of appeals to hear questions under the EAA involves considerable speculation about the nature of the issues that will be raised on appeal. These matters should be heard in one court for reasons of consistency and the development of subject-matter expertise. The court should be one both familiar with administrative law and procedural questions and sensitive to issues that often impact delicate foreign affairs matters. Either the District of Columbia Circuit or the Federal Circuit would satisfy these qualifications. However, it is unclear whether issues appealed would primarily involve questions about when to defer to the executive on national security or foreign policy issues or relatively technical questions regarding the nature and classification of the technology being exported.

Although the D.C. Circuit Court of Appeals is traditionally regarded as the appropriate appellate court for administrative law matters and those matters involving sensitive policy or constitutional issues, a review of all the factors relevant to EAA appeals suggests that the Federal Circuit Court of Appeals has a distinct advantage. First, the Federal Circuit

241. *Id.*
242. *Id.*

hears, by a vast margin, more administrative law cases than any of the other circuits.[243] Second, it has a substantial foreign affairs docket. The appeals from regulatory decisions involving imports and customs have far-reaching foreign policy implications. The court has become knowledgable in many of the nuances of international trade, which would be useful in EAA decisions, and has dealt with complex issues dramatically affecting our relations with our foreign trading partners.[244]

Finally, the expertise the court brings to high-technology patent cases would prove critical in assessing appropriate technological categorization of advance-technology products. Such expertise should assure critics concerned about opening up complex EAA licensing issues with national security implications to judicial review. The review would be both scientifically and judicially competent.[245] This factor is the strongest reason to lodge jurisdiction over EAA matters with the Federal Circuit.

VII. NEEDED MODIFICATIONS TO ACCOMODATE JUDICIAL REVIEW

In order for the EAA's licensing decisions to be subject to serious judicial review, it is requisite that the Commerce Department modify the current EAA procedural framework. The following discussion suggests several of these procedural changes. Adopting these recommendations would cause both the Commerce Department and affected exporters to lose some procedural rights they might prefer to retain under a different system. The Commerce Department would no longer issue final, unreviewable decisions. The Department would instead have to adopt internal procedures providing for greater formal notice and explanation of decisions. Exporters naturally would benefit from these changes. By not having de novo judicial review of Commerce Department decisions in federal district court, however, exporters would also lose opportunities for discovery, confrontation, and cross-examination, which they might regard as a more effective method of review. The Commerce Department benefits overall from not being subjected to the disruptive litigation rigors accompanying de novo review.

---

243. Peter H. Schuck & E. Donald Elliott, *To the CHEVRON Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1018.

244. *See* David M. Cohen, *International Trade Decisions of the United States Court of Appeals for the Federal Circuit During 1989*, 39 AM. U. L. REV. 1171, 1172-1204 (1990).

245. *See* S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 860-65 (1990). *See generally* CHARTOVE, PATENT LAW DEVELOPMENTS IN THE UNITED STATES FOR THE FEDERAL CIRCUIT DURING 1989 at 1075.

The specific recommendations for improving the decision process within the Commerce Department are presented below. If implemented, they would create a substantial agency record providing ample basis for judicial review by the Court of Appeals for the Federal Circuit. Adopting these recommendations is critical to implementing judicial review and should not be considered as a severable recommendation. Prior to enumerating the proposed changes, it is important to fully understand the problems with the current procedural framework.

A. The Problems: Lack of Formal Explanations and Information

Although the Commerce Department makes a diligent effort to educate exporters about the EAA's regulations, formal written explanations of the regulations are rare, and information about the treatment of specific exporters is available in only the most general terms. Thus, there exists neither records for review in each individual case nor a basis for comparison of treatment of similarly situated parties. Reforms in this area are a critical predicate to meaningful judicial review.

1. Minimal Accountability for Administrative Decisions

The BXA maintains relatively close contacts with exporters seeking guidance in the application process by providing them with oral explanations of adverse decisions.[246] Yet, when a classification request is rejected and the commodity is placed in a more restrictive category, or when a license is denied, the Bureau provides the exporter only a summary written explanation. Although the EAA requires explanations of agency actions,[247] the BXA has interpreted this to mean it need only give

246. 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 15 ("In any case, an application is never Returned Without Action (RWA) unless the applicant has been contacted and is aware of the situation."). A BXA official informally indicated that exporters whose licenses are denied always know in advance through informal, oral contacts.

247. 50 U.S.C. app. § 2409 (1988). Subsection (f)(3) provides:

> (3) In cases where the Secretary has determined that an application should be denied, the applicant shall be informed in writing, within 5 days after such determination is made, of—
>
> (A) the determination,
> (B) the statutory basis for the proposed denial,
> (C) the policies set forth in section 3 of this Act . . . which could be furthered by the proposed denial,
> (D) what if any modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with export controls imposed under this Act . . .,

the exporter a minimal recitation of statutory provisions underpinning its decision.

BXA's decisions are not the product of formal adjudication; they are merely the initial outcome of BXA's administrative process. Any appeals process, including the existing internal appeal, is based on this preliminary decision. But the exporter has no written explanation of BXA's decision on which to base an appeal. Thus, BXA staff can recharacterize their decisions to effectively respond to the exporter's written appeal. By providing only the most general explanation, BXA has eliminated external accountability at the critical initial decision stage. Although the decision is on the record, its rationale is not, and thus, it can be reshaped and rejustified in response to the exporter's attacks. Meaningful judicial review (short of a complete de novo proceeding) is virtually impossible without a written basis for BXA's initial decision. The exporter must rely on the testimony of a knowledgeable insider who can obtain the most complete explanation of a decision and inject some informal accountability into the process.

2. Minimal Record of Past Decisions

Another problem with the current procedures at the Commerce Department is the impossible task exporters have in trying to prepare applications and arguments based on past BXA treatment of similar commodities. An exporter applying for a license to export a piece of technology never sold abroad must approach the Bureau without the benefit of any detailed knowledge of how the BXA has treated a competitor's similar products (or identical products if the exporter is a reseller). Unless the exporter hires an export control practitioner familiar with BXA treatment of the particular technology, the exporter will approach the Bureau relatively uninformed and dependent on what the staff says. This

---

(E) which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for considerations with regard to such modifications or restrictions, if appropriate,
(F) to the extent consistent with the national security and foreign policy of the United States, the specific considerations which led to the determination to deny the application, and
(G) the availability of appeal procedures.

The Secretary shall allow the applicant at least 30 days to respond to the Secretary's determination before the license application is denied. In the event decisions on license applications are deferred inconsistent with the provisions of this section, the applicant shall be so informed in writing within 5 days after such deferral.

may affect the classification of the product, as well as the ultimate issuance of the license. The exporter has no way to know if the Commerce Department accorded the product the same treatment as other comparable commodities.[248]

In theory, the Commerce Department could treat comparable commodities consistently internally by ensuring each receives the same Export Commodity Control Number and the same licensing analysis by the licensing officer. Because different licensing officers may evaluate virtually identical commodities, each applicant may receive different treatment.[249] Other variables may account for the disparate treatment: different end-users, one trustworthy and the other not; intervening shifts in policy toward the market country; agreement on end-use modification; or restrictions in one case and not in another. The difficulty is that neither the exporter nor the courts (if judicial review becomes available) have any way to examine the treatment of similarly situated goods.

The EAA provides for confidential treatment of information provided by exporters in the licensing process.[250] Only information that the Secretary of Commerce deems important to the national interest is publicly released. Currently, the Commerce Department publishes an annual report that lists commodities licensed to each restricted nation. This report includes the CCL number, a general description of the commodities, the number of licenses granted for each type of commodity, and the total dollar value of the licenses for each commodity for each country.[251] The report gauges the general patterns of licensing for each year, but it has some serious omissions.

---

248. A recent General Accounting Office Study of informal advice provided by BXA staff revealed a similar problem: "Industry representatives told us Commerce Staff sometimes give inaccurate or inconsistent advice in response to export control questions. Similarly, Price Waterhouse's study of Commerce's district offices found that inconsistent responses from Commerce staff cause problems for companies seeking definitive policy advice on which to base business decisions. Commerce officials also recognize the problem of inconsistent and inaccurate oral advice." U.S. GEN. ACCOUNTING OFFICE (GAO), EXPORT CONTROLS: OPPORTUNITIES FOR INSPIRING COMPLIANCE WITH EXPORT ADMINISTRATION REGULATIONS 12 (1990).

249. Almost every practitioner interviewed had at least one first or second hand account of disparate treatment by BXA staff. Many of these examples came from telephone discussions with staff, but a significant number involved actual application responses. Counsel indicated these could often be pursued informally to a supervisory level for resolution.

250. 50 U.S.C. app. § 2411(c) (1988).

251. *See* 1989 BUREAU OF EXPORT ADMIN. ANN. REP. app. E.

For example, although the report indicates the number of licenses granted, it does not provide either the total number of licenses applied for in each type of commodity or the number of licenses returned without action or denied. What is more problematic is that the information is only provided in general terms. For example, in fiscal year 1989, the Commerce Department licensed one laser system in CCL category 1522 to the Soviet Union. It had a value of $179,553.[252] Depending on trade press coverage of the sale, another exporter may or may not be able to predict exactly what the item was, who was exporting it, or who in the Soviet Union was purchasing it. At the other extreme, the Commerce Department licensed 1,007 computers in CCL category 1565 to the Soviet Union in 1989, with a value in excess of $116 million.[253] Although an exporter might expect that the Commerce Department would approve a license for exporting that type of computer equipment to the Soviet Union, the exporter whose license is denied would have no basis for comparing the two commodities to perfect an appeal.

The Commerce Department maintains that information regarding the identity of the exporter, the customer, and the product details is proprietary, and is kept confidential.[254] The Commerce Department releases, in its annual report, such information only after it has been determined to be in the national interest. Although this approach does preserve some important proprietary information, it also provides the Commerce Department a shield from judicial review by making it impossible to perfect a basis for appeal by relying on the public record.

If a court is to determine whether or not an agency has acted in an arbitrary or capricious fashion, the court must have access to information about how the agency has treated similarly situated parties. Adding judicial review to the EAA licensing decisions without providing the injured party and the courts access to relevant information will seriously impede effective review. An enforcement procedure is needed to ensure that the Commerce Department will provide the kind of information parties need to perfect an appeal.

252. *Id.* app. E-8.

253. *Id.*

254. In 1961, newly appointed Secretary of Commerce, Luther Hodges, instituted a new policy, making publicly available on a daily basis: (1) a general description of the item approved for export, (2) the amount or number of items approved, and (3) the country of destination. Hodges had earlier indicated his intention to disclose the identity of the exporter. EXPORT ADMINISTRATION REPORTS, 56TH QUARTERLY REPORT 26-27 (1961). The Department discontinued the daily licensing list during the 1970s.

3. Overlapping Functions

The BXA is a relatively small agency with a very discrete set of functions to carry out. Still the agency is currently run by an undersecretary, a deputy undersecretary, an associate deputy undersecretary, two assistant secretaries, and two deputy assistant secretaries performing the same functions that one deputy assistant secretary handled as briefly as ten years ago.[255] Thus, difficult policy questions get worked through an entire chain of command before they are resolved, leaving no official who has not already been significantly involved in the process. As currently structured, the system encourages frustrated exporters to make informal inquiry and petitions at all stages if the issue is important or controversial. Consequently, frustrated exporters take only the most mundane decisions through the "formal" appeal process. Relatively few things are formally appealed. The preference for informal inquiries could become a serious problem if judicial review were provided for administrative decisions and parties were required to exhaust their administrative remedies through the section 789 appeal process.[256]

The separation of functions problem relating to licensing is not unique to the BXA. Typically there is a potential problem when the staff that performs the license review and prepares a recommendation is also the staff that performs support functions for the appellate decision maker.[257] Within BXA, an effort is made to rely on the staff of the OTPA to review license applications denied by the Office of Export Licensing and appealed to the assistant secretary. In theory the reverse

255. *Compare* 1980 BUREAU OF EXPORT ADMIN. ANN. REP. ii (Deputy Assistant Secretary for Export Administration; Director, Office of Export Administration; Director, Office of Antiboycott Compliance) *with* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 765 (reprinting a BXA organizational chart, which includes an Under Secretary, a Deputy Under Secretary, an Associate Deputy Under Secretary, two Assistant Secretaries, two Deputy Assistant Secretaries, and seven Office Directors). In 1980, those officials supervised the processing of 73,318 license applications, compared to 85,215 in 1989. *See* 1980 BUREAU OF EXPORT ADMIN. ANN. REP. 6; 1989 BUREAU OF EXPORT ADMIN. ANN. REP. 22.

256. The disdain for formal appeals would be a particular problem given the current lack of any kind of record for appeal or limits on the Assistant Secretary's contacts in deciding the appeal. Adding judicial review, given the exhaustion requirement, without internal reforms at BXA could result in an exporter being compelled to formally appeal to an individual who has already informally told her no. This change will not enhance the procedural fairness of the export control regime.

257. *See generally* Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME LAW. 351, 388-403 (1981). Export licenses are informal adjudications, so the legal control is somewhat different; however, the fairness problem and the perception-of-fairness problem is quite similar.

process would work for appeals of commodity classification decisions made by OTPA, with the Office of Export Liscensing providing the staff work for the assistant secretary. This system probably operates effectively for low-profile, low-stakes license applications, but those are not the ones likely to end up in court if judicial review is extended to the administration of the EAA.

OEL maintains that it will invariably notify the exporter informally when a license application is going to be denied. At that point, the knowledgeable exporter (or representative) begins to work through the BXA's hierarchy.[258] Meetings may begin with the branch chief in the Office of Export Liscensing and proceed up to the undersecretary depending on the importance and sensitivity of the issue. If the Defense Department is involved, the exporter may meet with officials of the Defense Technology Security Administration, as well as secretarial officials at the Pentagon. Sufficiently important issues, or active exporters, may attract the attention of interested members of Congress who provide BXA with their perspective on the merits of the license application.[259] If all of these efforts are ultimately in vain and the license denial initially indicated by the OEL staff is issued, the exporter's case has already been before the official charged with responsibility for hearing appeals of such adverse agency actions.

Before the export licensing function was separated from the International Trade Administration at the Commerce Department, the official hearing appeals was the Assistant Secretary for Trade Administration. This person was responsible for the export and import regulatory programs at the Commerce Department. Although a central policymaker on export control matters, the official had a much wider range of responsibilities, which resulted in far less daily involvement in licensing decisions. If the Assistant Secretary had been involved in a matter, an appeal could be referred to the Under Secretary for International Trade. This official was responsible for the entire range of trade-related ac-

258. *See* Berlack, *supra* note 124, at 136. The process of knowledgeable Washington lawyers meeting informally with agency staff is not unique to BXA, of course. All of the practitioners interviewed were personally familiar with staff at all levels of BXA and made frequent use of their relationship. What distinguishes this situation is the very limited size of the knowledgeable bar and agency, the stakes involved in these export transactions, and the total absence of external accountability for BXA officials. Whatever deal a lawyer can work out meeting with officials almost certainly will be the best deal available.

259. *Id.* at 141-42.

tivities at the Department and dealt with export control issues primarily at the broad policy level.

The BXA was created by the 1985 amendments to the EAA to give greater emphasis to the export control functions of the Commerce Department and to isolate them further from the trade development and promotion functions of the other parts of the International Trade Administration.[260] One inevitable result has been much greater involvement by the most senior officials in the more routine aspects of the licensing process because of their far narrower areas of responsibility. They are more likely to have considered a problem or issue raised by a sensitive license application and are more readily accessible to exporters and their representatives, because export controls are their only area of responsibility. This problem is likely to worsen dramatically if the projected fifty percent decline in the need for validated licenses occurs.[261] Making use of the section 789 appeals process in this context is not an especially attractive prospect for an exporter who has just had a license rejected by the official to whom the exporter must now appeal. Combine this with the ready familiarity of officials in a small bureaucracy and the total lack of restraint on *ex parte* contacts in the appeals cases and the prospects for meaningful appeal appear quite bleak. Possible approaches to this problem in the licensing procedures of BXA will be discussed in the following section.

B. The Solutions: Increased Accountability, Public Notice, and Improved Appellate Process[262]

The following recommendations reflect the need for the Commerce Department to continue to provide administrative review while providing more thorough, formal explanations for its actions.[263] The primary impetus driving this change is the need for a fully developed record for

260. Export Administration Amendments of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985).

261. *Id.*

262. These recommendations generally track the final recommendations adopted by the Administrative Conference of the United States. 56 Fed. Reg. 33,841-47 (1991) (to be codified at 1 C.F.R. § 305.91-2). The most substantial differences involve the suggestions for refinements of the agency internal appeal process.

263. The third recommendation of the Administrative Conference provides:

> III. Informal Adjudications. Requests for proper classification of proposed exports and applications for validated licenses or reexport authorizations are appropriately treated as informal adjudications under the APA. The Department of Commerce should make the following improvements in the applicable procedures:

judicial review. Moreover, notwithstanding the importance of informed judicial review, other changes are needed to re-orient the export licensing process towards external accountability that is consistent with the guidelines under which most other administrative agencies currently operate.

The suggestions below cut across a wide range of the BXA's activities and require significant changes in the manner in which BXA operates. Although the changes are necessary to provide exporters with the same degree of procedural protections available to other United States businesses subject to government regulation, the recommendations should not be read as a condemnation of the BXA itself or its attitude toward exporters.

---

a.) Whenever the Commerce Department initially denies a license application or responds to a classification request by placing the item in a category different from that proposed by the requester, it should provide sufficient written explanations for its decisions to enable applicants to understand the basis on which decisions have been reached and pursue internal appeals.

b.) Review by the Secretary or the Secretary's delegate of staff decisions on product classification or license applications should be available on request of the applicant. To the extent possible, the decision on review at the secretarial level should be in detail sufficient to permit others to evaluate its precedential value. The Commerece Department should publish and index in an appropriate manner those decisions on requests for classification and individual liscense applications that have possible precedential value, in addition to general written guidance on classification issues.

c.) To eliminate a duplicative review procedure, Congress should repeal section 13(e) of the Export Administration Act, which provides for limited appeals of license denials through an administrative law judge hearing process.

d.) When a license application has been denied, or has been the subject of negative considerations or recommendations under section 10(f)(2) of the Export Administration Act, based on classified information, the Commerce Department should adopt procedures to permit the maximum disclosure of such information consistent with national security and foreign policy (including, where appropriate, disclosure to the applicant or applicant's counsel under protective order). On administrative appeal of any license denial based on undisclosed classified information, the Secretary (or the Secretary's delegatee) should personally review the classified information and certify that it is properly classified and supports the action taken.

56 Fed. Reg. 33,846 (1991).

The BXA is, in many respects, an unusually service-oriented bureaucracy. The extent of its public education efforts and the substantial informal assistance it offers exporters in coping with the controls system indicate the Bureau's commitment to facilitating exports. Notwithstanding this approach, the Bureau's procedures have evolved over the years into an informal, insular system that avoids written explanations whenever possible—one that has operated confident that its decisions are ordinarily beyond review or challenge outside the Commerce Department. This confidence has fostered a somewhat paternalistic regulatory culture, and all of the procedures, services, and advice offered to exporters reflect the ultimate, absolute authority of the Bureau administering a system of privileges. The recommendations that follow are aimed at injecting a degree of creative tension into the BXA's practices by requiring the agency to document its decisions, knowing that a court of law may judge it against a broader standard of fairness.

1. Provide Substantive Written Explanations of Decisions

These explanations should be provided, at a minimum, when the BXA's licensing decision is inconsistent with the expressed assumptions or expectations of the exporter. The explanation should indicate the reasons for the decision, articulating the policy that provided the basis for the decision if, in fact, it is grounded in policy. Factual disagreements should be spelled out, along with the basis for the BXA's contrary factual assertions.

When OTPA decides that the exporter's classification of a commodity is incorrect, the notice of reclassification should indicate the exporter's error and OTPA's basis for the new classification. If the exporter correctly classified the commodity, but did so based on clearly erroneous assumptions, OTPA's classification should also indicate that error. Such information is already communicated to exporters informally, according to OTPA staff. This information would not have to be exceptionally detailed unless warranted by the complexity of the decision. Customs classifications are explained in some detail and might serve as an appropriate model. If OTPA agreed with the analysis and classification conclusion of the exporter, a simple statement to that effect would suffice. This would provide the exporter with a written basis for its reliance should questions arise later.

When the Office of Export Licensing rejects a license, or returns it without action, the notice itself should provide the explanation for the action. Currently, exporters are generally advised informally of the reasons through telephone contact or meetings, but these explanations

should be committed to writing. Again, the explanation need not be elaborate unless circumstances warrant, but it should be sufficient in and of itself to put the exporter on notice of the factual and policy issues that led to a denial of the license or its return. When the Office of Export Licensing grants a license subject to express limitations, it should provide a written explanation of the basis for the restrictions. This would facilitate an appeal of the restrictions, as well as protect the licensee in the event questions arise later about the restrictions.

This recommendation would also apply to any staff decision affecting an exporter's license application. Decisions concerning the foreign availability of a commodity, for example, should include a statement that the claim had been accepted for the reasons the exporter provided. If the claim is accepted because of different information obtained by BXA, an explanation of that information should be given to the licensee. If the claim is rejected, an explanation of why the claim was rejected, including the reasons for disbelieving the exporter's submitted data should be given to the licensee. Such decisions may require lengthier explanations than simple license denials, but given the requirements and standards applied to foreign availability, such decisions merit fuller treatment.

These explanations would provide the exporter with a record of BXA's decisions and its concomitant justifications. This would, in turn, provide the basis for the internal appeal and would begin to build a record for judicial review if the internal review is unsuccessful. It would also encourage BXA to succinctly articulate the justifications for its adverse decisions. Because the written statement would reflect the formal position of BXA, it would also help the exporter respond informally to the Bureau in addressing those specific items listed as the basis for the adverse action.

The greatest difficulty raised by this recommendation is how to treat decisions based on classified information. This is particularly a problem for license denials because, unless BXA can be forced to offer some explanation when classified information plays a role in its decision, exporters will still be unable to respond to such denials, even informally. Much of the process, therefore, will continue to be shielded from external review and accountability. Although preserving the confidentiality of intelligence information is obviously critical to national security, there must nevertheless be some mechanism to challenge its accuracy and applicability. The following recommendation addresses this concern.

2. Provide Sufficient Information for an Informed Appeal

The Department of Commerce is severely limited in its ability to disclose information used as a basis for an adverse action when such information is classified because of its impact on national security. A negatively affected exporter must nonetheless be able to make an informed objection to such a determination. Otherwise, the entire licensing process may be funnelled into the classified information domain by the Commerce Department in an effort to avoid judicial scrutiny.

Congress should require the Department to use classified information as a basis for a license denial only when it forms the essential predicate for the adverse action. Exporters should be alerted in such instances to the fact that their license application has been denied for this reason. Exporters should also be told precisely which part of their application raised the problem. At that point, the Department should strive to permit an adversely affected exporter (or their counsel) to have access to the information in order to frame a response.

Currently, there are procedures in the Department that allow exporters charged with violations based on classified information to access that information in order to defend themselves.[264] These rules—or some variant thereof—should apply to exporters appealing license denials as well.

When national security concerns simply do not permit an exporter access to the information that is the basis for the license denial, the exporter should still be able to appeal the decision administratively. The official hearing the appeal should be required to personally review the information and certify that it is properly labelled "classified" and that it supports the adverse action in the manner the Department staff claims.

It is unusual for information affecting national security to have such a profound impact on commercial activity. Consequently, there is little precedent offering guidance on an appropriate method for balancing commercial interests with national security interests.[265] The recommendation suggested by this Article seeks to balance the exporter's need for information that will enable the exporter to prepare an intelligent appeal against the government's legitimate national security concerns. Simply put, the Department of Commerce should not be able to summarily cite national security intelligence concerns as a basis for licensing decisions, so as to avoid close scrutiny. This procedure, coupled with the prospect

264. 15 C.F.R. § 788.11 (1990).

265. *But see* Jaksetic, *supra* note 15, at 193-203.

of judicial review by judges who would actually examine the evidence, should induce the Commerce Department to use this basis for license denials as even-handedly as all others that the exporter currently can challenge fully and openly.

3. Provide Public Notice of Classification and Licensing Decisions

While the previous two recommendations deal with providing information to a specific exporter about the Commerce Department's treatment of that exporter's application, the following recommendation concerns the public dissemination of information for the benefit of prospective exporters. Implementing this recommendation means balancing an exporter's interest in keeping the details of the proposed exportation secret against exporters' interests, as a class, in knowing that similar products will be treated in a similar fashion by the Commerce Department.

The Commerce Department currently protects information it receives on export license applications as proprietary information, ordinarily disclosing only the most general data. This proprietary approach rests on the assumption that exporters will refrain from seeking export licenses if the information they include is accessible by competitors.[266] This assumption has been substantially weakened, however, by several factors, including the combination of United States firms' heightened interest in exporting, the anticipated dramatic reduction in the number of exports requiring validated licenses, as well as the continuing vigor of enforcement activity.

Much of the necessary information on an application could be disclosed without revealing details of individual transactions. For example, the Commerce Department has specific product information and the appropriate Export Commodity Classification Number for each license it issues. An exporter wishing to export a similar product should be able to access this information to discover how the Department is likely to treat the application. If an item has not been classified, the potential exporter should still be able to determine how similar items in the trade have been classified. This data could be available by product, brand, and model number and cross-referenced by broader product categories. Explanations provided under these reforms should also be made available. The information would not have to be compiled and published, but could be available in electronic form similar to systems the Com-

266. *See* EXPORT ADMINISTRATION REPORTS, 56TH QUARTERLY REPORT 28.

merce Department currently uses to apprise exporters of the status of their particular application. Copies of the classification form that the Commerce Department provides to the exporter should also be made publicly available. Disclosing how a product has been classified should not place any exporter at a competitive disadvantage, unless an exporter was able to obtain a more favorable classification than a similarly situated exporter—an outcome this reform is designed to correct.

Disclosing licensing information presents a more sensitive problem and is not likely to provide as definitive comparative information. There are too many variables in the licensing determination for an exporter to know with certainty that an export licensed for a competitor to a certain country, would be licensed to a similarly situated exporter. This knowledge would, however, permit the exporter to explore, with the Commerce Department, the exact reason for a license denial. It is possible to provide at least this much information without placing the licensed exporter at a competitive disadvantage.

Information about the products licensed and the country of destination are the key pieces. A prospective exporter should be able to find out if an Acme Widget Model 5 has been licensed for export to Mongolia in the last five years. Less valuable, but still helpful, would be the knowledge that some product with the same Export Commodity Control Number as the Acme Model 5 was licensed to Mongolia in the last five years. The name of the end-user or consignee would not have to be available, nor would details of any restrictions on the licenses, although a notation that there were restrictions would be beneficial. The Commerce Department has all of this information, and licensing officers are, or should be, looking at it when applications are reviewed. Consequently, setting up a system to make it available to the public would not be too difficult.

The benefits of providing exporters with access to this information are obvious. Exporters would know quickly their licensing prospects and would be better able to alert the Commerce Department to apparent inconsistencies in the treatment of their application. The disadvantage is that any other exporter could use this information to discover, for example, those controlled nations to which the Acme Company had sold its Model 5 Widget. This disadvantage will likely shrink as the number of controlled nations decreases. With the elimination of validated license requirements for sales to Western nations, the most critical business information that might have been available is already gone. A company that obtains a license after much struggle understandably might wish to keep that information secret from its competitors. However, a

regulatory system must be established to ensure that similarly situated parties receive similar treatment. Unless such parties, or the courts reviewing these decisions, know how other parties are treated, they cannot press the regulatory agency for similar treatment.

4. Provide a More Responsive Internal Appeals Mechanism

Any non-enforcement adverse action (other than rulemaking) taken by the Department of Commerce under the EAA is currently appealable by the exporter under section 789 of the EAA.[267] This procedure will assume even greater significance for both the exporter and the Department with the advent of general judicial review. The internal appeals process will have to be exhausted by the exporter before judicial review can be had,[268] while the record generated by the Department will be closely scrutinized by the court in considering the exporter's appeal.

With better written explanations at the initial licensing and classification decision stages and judicial review following the internal agency appeal, resort to the administrative law judge for license appeals provided in section 13(e), which is seldom used,[269] should be repealed. All informal adjudication decisions should be appealable internally. Outlined below are ways to revise that process to make it more responsive to the exporter's needs and assure a substantial record for judicial review without significantly affecting the Department's interests in administering the EAA.

(a) Exporters Should be Entitled to Hearings

Under current procedures, an exporter may appeal any non-enforcement decision of BXA, which directly and adversely affects the exporter's application, to an assistant secretary. This right to appeal should be retained. However, the rules now provide that, although an exporter may request an informal hearing, the assistant secretary has discretion to grant or deny that request.[270] This discretion permits the assistant secretary to pre-judge the issue and determine which appeals merit a hearing and which do not. It reflects one of the basic flaws in the current system—the intimate familiarity of the assistant secretary with these issues before they are ever formally presented. Finally, the regula-

267. 15 C.F.R. § 789 (1990).

268. *See* PIERCE ET AL., *supra* note 178, at 190-96.

269. *See supra* text accompanying note 176.

270. 15 C.F.R. § 789.2(b)(3) (1990).

tions should permit an exporter to waive this right to a hearing and proceed on the written record; however, it should be the exporter's option rather than the Department's.

(b) Maintain Complete Records of All Appellate Proceedings

Under current procedures, if an appealing party is granted an informal hearing, that party may request that a transcript be made and is responsible for the cost of the requested transcript.[271] If judicial appeal of EAA decisions is permitted, both the exporter and the Commerce Department would have a strong interest in the reviewing court being able to review the complete record of the proceedings before the Department. Although the exporter should pay the cost of a copy of the transcript, the exporter should not have to bear the cost of transcription. The current policy reflects the attitude that the export license is a privilege granted to the exporter and that the exporter should bear any extra costs associated with obtaining that privilege.

(c) Decisions on Appeal Should Provide Detailed Discussion

Current rules require that appeals decisions be in writing and that they contain the reasons for the action.[272] Current decisions are final, however, and will never be considered as the basis for review by the courts. Department decisions under the recommendations enumerated in this Article, however, would be subject to review by the courts. It would, therefore, be in the best interests of both the appellant/exporter and the Commerce Department for the decision to include a thorough discussion of the reasoning and basis for the action.

(d) Appellate Official Should be as Neutral as Possible

Appeals should be decided by the official with the least contact with day to day operations of the export administration process and the greatest policymaking authority. Currently, this would be the Undersecretary for Export Administration. The person hearing the appeal should not have been actively involved in the matter being appealed. This revision would enhance the overall fairness of the process. As indicated above, this fairness will become increasingly difficult to achieve, given the compression of authority within the Department and the pending decline in the number of export license applications. However, if the

271. 15 C.F.R. § 789.2(b)(4)(iv) (1990).
272. 15 C.F.R. § 789.2(c)(1) (1990).

decision of this official is appealable to a court, heightened sensitivity to prior involvement may make the Undersecretary more cautious about getting involved in routine matters.

Perhaps more important than this concern is the need to have the appeal decided by the senior export control policy official of the Department. License-denial issues, in particular, frequently involve difficult policy determinations. The Department will want the courts to defer to the judgment of the Department on policy questions. Although courts are already inclined to defer when the issue can be isolated to a policy question, this deference will be all the greater if that question has been addressed by the senior policymaker at the Department in a reasonable opinion. The credibility of the decision of the Department on appeal, and the likelihood that it will subsequently be upheld, will be greater if the matter is decided at the highest level.

(e) Appeallate Decisions Should be Rendered Within Ninety Days

Delays in export licensing decisions can be very expensive to the exporter. Commercial transactions that are dependent on securing a validated license may not survive an extended period of review and consideration. It is critical, therefore, to place a reasonable limit on the amount of time the Commerce Department may take in considering an appeal of a classification, licensing, or other administrative decision.

Congress has amended the EAA to impose numerous statutory deadlines for decisions by the BXA and other agencies involved in reviewing license applications.[273] However, these deadlines are more provisional than real because of the unreviewability of Commerce Department decisions. Consequently, if an exporter pressures the Department to meet a deadline, the Department can certainly provide the quickest answer—invariably negative—leaving the exporter without recourse.[274] If the exporter believes more time may permit the Commerce Department to be satisfied that the export is not a threat to national security, the exporter will most likely not press the deadline. By introducing judicial review into the process, the existing statutory deadlines will take on new meaning. Exporters will have recourse from arbitrary determinations of the Department in response to deadline pressure. The Commerce Department, in turn, will have the external motivation Congress intended

273. 50 U.S.C. app. § 2409 (1988).

274. *See* Daedalus Enters., Inc. v. Baldrige, 563 F. Supp. 1345 (D.D.C. 1983); *see also* Hunt & Breed, *supra* note 68, at 363, 386.

by legislating deadlines. The ninety-day limit on appeals is consistent with this approach.

VIII. THE EAA'S ENFORCEMENT PROCEDURES: IN NEED OF REFORM

Enforcement of the export control provisions of the EAA is centered in the Office of Export Enforcement of the BXA. Responsibility is shared, however, with the Customs Service, which has the responsibility for patrolling the nation's ports and screening exports,[275] and with elements of the Justice Department, such as the FBI with respect to criminal investigations.[276] There has been a significant amount of tension between the Commerce Department and Customs in recent years over which agency has primary responsibility for investigation and enforcement, and Congress has attempted to define the boundaries.[277] Exports seized by Customs trigger Customs procedures and penalties relating to forfeiture of the goods.[278] The Commerce Department remains responsible for prosecuting EAA violations and imposing appropriate sanctions.

Violations of the EAA can result in criminal penalties exceeding $1 million and five years in prison, civil penalties of $10,000 per violation, and denial of export privileges.[279] Until 1988, export denials were not subject to any kind of judicial review,[280] while civil penalty determinations were reviewable only through a convoluted collection process.[281] The administration of the EAA is an involved regulatory program with serious penalties for violations, but the classification and licensing process, as well as the enforcement scheme, are not dissimilar from the administrative functions of other agencies.[282]

---

275. *See* Hunt & Breed, *supra* note 68, at 370-71.

276. *Id.* at 372, 386.

277. *See* Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 113(a)(5), 99 Stat. 120 (codified at 50 U.S.C. app. § 2411(a)(2) (1988)).

278. *See* Steven L. Basha, *Customs Export Enforcement*, *in* COPING WITH U.S. EXPORT CONTROLS 1990, *supra* note 3, at 399-405.

279. 50 U.S.C. app. § 2410 (1988).

280. *See infra* note 317, § 2428.

281. 50 U.S.C. app. § 2410(f) (1988).

282. The classification process strongly resembles the process used in Customs classification of products to determine the appropriate tariff. The process entails identifying which narrative description of a type of product on either the CCL or Harmonized Tariff-System list most closely matches the product in question. The licensing aspect of the regime is somewhat more unusual in that it involves prior approval of a large volume and wide range of individual transactions or activities. With regard to the number and significance of decisions, the process resembles Immigration and Naturalization Service functions. The range of value of transactions affected—from virtually no-value provisions of some technical data to multi-million dollar equipment sales—may be unique, but there

A. *Criminal Enforcement Actions Under the EAA*

Because the EAA includes criminal penalties for violations, the Commerce Department works closely with the Justice Department and local United States attorneys. There have been a significant number of criminal prosecutions for violations of the EAA.[283] The nonreviewability of certain Commerce Department administrative decisions has an effect on what defendants can argue in such criminal cases. When defendants have sought to challenge the classification of a product on the commodity control lists, courts have deferred to the discretion of the Secretary and declined to permit inquiry.[284] Although the Commerce Department must prove all elements of the criminal offense,[285] the present judicial non-reviewability of the classification and licensing decisions presents an obstacle in criminal cases to the defendant's ability to question the correctness of the Commerce Department's decisions.

B. *Civil Enforcement Actions Under the EAA*

Civil enforcement actions are far more common than criminal prosecutions and, within the last six years, Congress has moved the EEA's civil enforcement procedures much closer to the standards set out in the APA. Since 1985, civil enforcement actions for export control violations must be brought before an ALJ in a hearing pursuant to sections 556 and 557 of the APA.[286] The ALJ makes a recommended decision and forwards it to the Under Secretary for Export Administration, who may affirm, modify, or vacate the order.[287] Since 1988, final Commerce enforcement judgments for export control violations—the decision of the Under Secretary—have been appealable to the United States Court of Appeals for the D.C. Circuit.[288] These changes were the

---

are parallels throughout governments. It is unusual, however, to have one agency licensing such a diverse range of transactions. As to enforcement, only the occasional use of national security classified information distinguishes the program at all from the rest of government regulatory enforcement efforts.

283. For fiscal years 1985-1989 the Commerce Department imposed civil penalties in 138 cases and assisted the Justice Department in obtaining 41 criminal convictions. During that time, the Commerce Department also issued 30 temporary denial of export privileges orders. *See generally* 1985-89 BUREAU OF EXPORT ADMIN. ANN. REPS.

284. *See, e.g.*, United States v. Spawr Optical Research, Inc., 864 F.2d 1467, 1473 (9th Cir. 1988); United States v. Mandel, 914 F.2d 1215, 1220-23 (9th Cir. 1990).

285. United States v. Gregg, 829 F.2d 1430, 1435-36 (8th Cir. 1987).

286. 50 U.S.C. app. § 2412(c)(1) (1988).

287. *Id.*

288. 50 U.S.C. app. § 2412(c)(3) (1988).

result of many years of effort by concerned exporters, and coincided with a D.C. Circuit decision that raised the first hint of judicial review of an enforcement decision.[289]

One of the most controversial areas of Commerce Department enforcement of the EAA has been the Department's use of temporary denial orders to prevent persons from exporting from the United States. The particular procedures in this process were required to be reformed by 1985 amendments to the EAA.[290] When the Commerce Department learns that a violation of the export control rules is imminent, the Department may apply for a 180-day temporary denial order against the suspected party from the Assistant Secretary for Export Enforcement.[291] This order can be issued on a wholly *ex parte* basis, and they frequently are.[292] Like other regulations providing for emergency administrative actions, the Commerce Department's rules provide for a hearing following the issuance of the order. Unlike other programs, however, the hearing must be sought by the affected party in the form of an appeal of the order to an administrative law judge. At the hearing, the affected party is entitled to challenge the finding that a violation of the EAA is imminent.[293] The decision of the judge is in the form of a recommendation to the Assistant Secretary for Export Enforcement, the official who

289. Dart v. United States, 848 F.2d 217 (D.C. Cir. 1988). In this case, William Dart was charged by the Commerce Department with violating the export control provisions of the EAA, though the administrative law judge found that the Department had failed to prove the charges. The Assistant Secretary reversed the administrative law judge decision and imposed a civil penalty against Dart. Dart sought review of the decision in federal district court, but the judge dismissed for lack of jurisdiction based on the language of the EAA that such decisions are final. Before the court of appeals, supported by an amicus curiae brief filed by the American Bar Association, Dart argued that the Secretary exceeded his statutory authority to "affirm, modify or vacate" administrative law judge decisions by, in this case, reversing the decision. In an opinion analyzing the legislative history of the EAA preclusion of judicial review, the court found that it did have the authority to review actions of the Secretary that were in excess of his legislative authority, and that this was such a case. The court of appeals reversed the district court in May 1988 and returned the matter to the Commerce Department for action consistent with its opinion. In August, the EAA was amended to provide for judicial review of export control enforcement actions.

290. Export Administration Amendments of 1985, Pub. L. No. 99-64, § 114(3)(d), 99 Stat. 120, 151 (codified at 50 U.S.C.A. app. § 2412(d) (1990)). This enactment provided the first express statutory basis for temporary denial orders. *See* Hunt & Breed, *supra* note 68, at 382.

291. 50 U.S.C. app. § 2412(d) (1988).

292. *See* Hunt & Breed, *supra* note 68, at 383-84.

293. 15 C.F.R. § 788.19(d)(2) (1990).

granted the temporary denial order initially.[294] The denial orders can be extended repeatedly, on the basis that the danger of a violation is still imminent.[295] When judicial review of export enforcement actions was added with the 1988 amendments, judicial review was also provided for temporary denial orders.[296] According to the Commerce Department, most temporary denial orders are directed against foreign parties, and consequently little use is made of the administrative procedures.[297]

C. *Judicial Review*

Notwithstanding the 1985 and 1988 legislative reforms, several anomalies in judicial review of EAA enforcement remain to be addressed. This report has only treated the export control provisions of the Export Administration Act to this point. Since 1965, the EAA has also been the vehicle for the U.S. law restricting the participation of Americans in the foreign boycotts or embargos of other nations.[298] Commerce was required to collect reports from U.S. companies of requests they received to participate in unsanctioned foreign boycotts, the primary one being the Arab boycott of Israel. In response to the enhanced power of the Arab boycotting states following the oil price increases of the mid-1970's, these so-called "antiboycott" provisions of the EAA were substantially strengthened in 1977 to prohibit certain activities by U.S. firms in support of unsanctioned foreign boycotts. A separate Office of Antiboycott Compliance was created to enforce these provisions. While Congress incorporated the antiboycott prohibitions into the EAA and its set of civil and criminal sanctions, concerns were raised about the rather summary nature of enforcement procedures under the act. In response, the 1977 amendments required that hearings for violations of the antiboycott rules be conducted pursuant to sections 556 and 557 of the APA.[299] Commerce adopted regulations implementing this requirement,

294. 15 C.F.R. § 788.19(e)(4) (1990).

295. 15 C.F.R. § 788.19(d)(3) (1990).

296. 50 U.S.C. app. § 2412(d)(3) (1988).

297. Hunt & Breed, *supra* note 68, at 384.

298. 1965 Amendments to the Export Control Act of 1949, Pub L. No. 89-63, 79 Stat. 209 (1965) (codified at 50 U.S.C.A app. §§ 2401-2403 (West Supp. 1990)). For a discussion of the development of the antiboycott provisions of the EAA, see Howard N. Fenton, III, *United States Antiboycott Laws: An Assessment of Their Impact Ten Years After Adoption,* 10 HASTINGS INT'L & COMP. L. REV. 211, 232-37 (1987).

299. 1977 Export Administration Amendments, Pub. L. No. 95-52, Title II, 83 Stat. 846 (1977) (codified at 50 U.S.C.A app. § 2410(c)(2)(B) (West Supp. 1990)). *See Senate Comm. on Banking, Housing and Urban Affairs, Report to Accompany S.69 Export Administration Amendments of 1977,* No. 104, 95th Cong., 1st Sess. 22 (1977).

which became the basis for rules for all enforcement actions following the 1985 amendments.

While introducing APA standards for initial hearings, the 1977 antiboycott amendments added nothing to the judicial review process under the EAA. At that time the only means of judicial review of sanctions imposed under the act applied to monetary fines imposed for violations.[300] Denial of export privileges was not subject to any form of outside review. When a civil fine was imposed, however, the department had to bring an action for recovery of the fine in federal district court, where all elements establishing liability were subject to de novo consideration by the court.[301] Another provision of the EAA provided that payment of a civil fine could be made a condition for the "granting, restoration, or continuing validity of any export license, permission, or privilege granted" under the act.[302] With Commerce having this kind of leverage, it is no surprise that until a respondent in an antiboycott action refused to pay a fine in 1981, this avenue of judicial review had never been used.

When the de novo procedure was first used in *U.S. v. Core Laboratories,*[303] a question arose about the appropriate statute of limitations to apply. Core argued that the five year general civil statute of limitations for government actions should apply to the filing of the suit in district court to collect the fine imposed by the Commerce Department. Commerce argued that the five year statute applied to the initiation of the administrative action before the ALJ at Commerce, and then began to run again after the Commerce decision for the filing in district court, essentially two five year statutes. The Fifth Circuit adopted Core's argument and dismissed the case. Three years later the issue was raised again in *U.S. v. Robert Meyer,*[304] when Commerce was unable to get into court to collect the fine within five years. Meyer moved to dismiss, citing *Core,* but the First Circuit adopted the Commerce Department argument of two spearate five year statutes and ultimately upheld the imposition of the fine. This division between the two circuits has not been addressed by any other court, although the EAA extension

300. 50 U.S.C.A app. § 2412(f) (West Supp. 1990).
301. 50 U.S.C.A app. § 2410(f) (West Supp. 1990).
302. 50 U.S.C.A app. § 2410(e) (West Supp. 1990).
303. U.S. v. Core Laboratories, 759 F.2d 480 (5th Cir. 1985).
304. U.S. v. Robert E. Meyer, 808 F.2d 912 (1st Cir. 1987).

adopted by the House of Representatives in June, 1990 included language adopting the *Core* interpretation of one five year statute.[305]

The 1988 EAA amendments that provided for appeal of Commerce export control enforcement decisions to the D.C. Circuit did not address the provision providing for separate, de novo civil actions to collect the fines. Inasmuch as the process has never been used for collection of export control civil penalties, this oversignt probably has little practical impact on the administration of the law. In theory, however, an exporter subjected to a civil penalty that is upheld by the Court of Appeals could take advantage of the de novo procedure to attempt to relitigate all of the issues decided by Commerce.[306] For violators of the antiboycott provisions of the law, this remains the only route to judicial review. This anomalous situation is a result of the piecemeal reform of the procedures for administration of the statute and should be resolved as a part of a comprehensive reform of the standards and procedures under the Export Administration Act.

D. EAA Enforcement Procedures: Some Recommendations

This recommendation will affect three different aspects of enforcement and administrative activity under the EAA.[307] The first will be to harmonize all formal adjudications under the statute. The second will

---

305. H.R. 4653, 101st Cong., 2d Sess., § 16 (b), 136 CONG. REC. H3343-54 (1990). This provision was dropped by the conference committee.

306. This is extremely unlikely because even in the boycott cases the district court has relied on the record of the hearing before the ALJ at Commerce to decide the matter rather than actually relitigating the elements of the violation. *See* U.S. v. Robert E. Meyer, No. 85-04798 (D. Mass. 1987).

307. The fourth recommendation of the Administrative Conference provides:

> IV. Formal Adjudications.
>
> a.) Congress should amend the Export Administration Act to provide the right to a prompt post-denial (or post-suspension) hearing on the record, subject to the formal adjudication provisions of the Administrative Procedure Act, for parties subject (1) to unilateral Commerce Department decisions to suspend or revoke validated licenses when the suspension or revocation turns on the specific circumstances of a particular exporter or commodity, or (2) to temporary denial orders under section 13(d) of the Export Administration Act. Congress should establish appropriate deadlines for the conduct of such hearings.
>
> b.) The Commerce Department should, to the extent possible, limit the scope of unilateral license suspensions and temporary denial orders to the circumstances posing a threat of violation of the Export Administration Act.

be to require formal adjudication in some situations when it is not currently used. The third will be to eliminate a cumbersome and confusing system for imposing and collecting civil money penalties.

1. Harmonize Enforcement Actions

The piecemeal amendment of the EAA procedures over the years has resulted in a number of anomalies. Although export control and antiboycott enforcement actions were both made subject to sections 555 to 558 of the APA at different times, section 554 applied only to antiboycott actions.[308] This has led one court to decide that the Equal Access to Justice Act does not provide for attorneys' fees for parties successfully defending export control enforcement actions.[309] Amendments providing for judicial review of export control enforcement actions in the Court of Appeals for the D.C. Circuit left intact the de novo appeal in federal district court of antiboycott enforcement actions.[310] A uniform application of the APA formal adjudication requirements to all such actions by the Commerce Department should follow automatically from repeal of the APA exemption urged in the previous section.[311] But because of the existing partial incorporation of APA standards, care will have to be taken in legislating such a change to achieve the desired consistency.

2. Some Additional Cases Should Require Formal Adjudication

Probably the most significant recommended change in this area is the application of the formal adjudication requirements to license revocation and suspension activities of the Department not presently subject to formal hearing requirements. Although current rules require a post-denial formal hearing when the Commerce Department issues an *ex parte*

> c.) Congress should amend the civil penalty provisions of 50 U.S.C. App. §§ 2410 and 2412 to eliminate the requirement of de novo proceeding in federal district court and provide instead that any assessment of civil penalties is final, subject to judicial review under 5 U.S.C. § 706 in the Court of Appeals for the Federal Circuit; a civil penalty assessment that survives judicial review or becomes final without judicial review should be enforceable by the agency in a summary collection in federal district court.

56 Fed. Reg. 33,846 (1991).

308. *Compare* 50 U.S.C. app. § 2410(c)(2)(B) (1988) *with* app. § 2412(c)(1) (1988).

309. Haire v. United States, 869 F.2d 531 (9th Cir. 1989).

310. *See infra* note 317, § 2428.

311. *See supra* notes 226-37 and accompanying text.

order denying export privileges,[312] the recommendation would also require a hearing whenever the Department suspends or revokes a license based on a determination specific to that transaction or exporter.[313] This may have the most immediate impact on the treatment of distribution licenses, which can now be suspended or revoked without any requirement for a formal hearing before an administrative law judge.[314]

This requirement would not apply to licenses suspended or revoked because of a policy change with regard to a foreign nation, or a decision to newly restrict a category of technology previously licensed. Such decisions would be subject to administrative and judicial scrutiny under the rulemaking procedures considered in previous sections. When the Commerce Department acts adversely on an *ex parte* basis against an individual licensee, the licensee is entitled to a formal hearing as soon as possible following the action. The Commerce Department should act only on such basis when immediate violations or other harmful actions are about to occur.

3. Eliminate Cumbersome System for Collecting Civil Fines

The third change that this recommendation would effect is to eliminate the existing procedure for collecting civil money penalties through de novo proceedings in federal district court.[315] This recommendation is consistent with the position of the Administrative Conference with regard to these penalties.[316] The existing system would prove unnecessary once uniform judicial review were established for all enforcement or penalty determinations. This change would also eliminate the existing confusion over the appropriate statute of limitations for enforcement actions.

IX. REGULATORY RULEMAKING UNDER THE EAA

A. EAA Regulations are not Subject to Notice-and-Comment Provisions

Because of its World War II origins as an emergency statute, the EAA has always been exempt from the requirements of the APA.[317] The APA was promulgated in direct response to the meteoric growth of

312. 15 C.F.R. § 788.19 (1990).
313. 15 C.F.R. § 770.2(b) (1990).
314. 15 C.F.R. § 773.5(g) (1990).
315. 50 U.S.C. app. § 2410(f) (1988).
316. *Cf.* 1 C.F.R. § 305.72-6, .79-3 (1990) (recommending careful consideration of penalties and procedures when imposing civil penalties).
317. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982).

regulatory agencies during President Roosevelt's New Deal era.[318] The notice-and-comment provisions of the APA, at the core, are intended to "afford parties affected by agency regulations a meaningful opportunity to participate in the rulemaking process."[319]

Because of the EAA's exemption, the Commerce Department's rulemaking under the Act is not subject to these notice-and-comment provisions, which have become the standard for administrative agency action. However, despite this exemption, the EAA does have internal mechanisms designed to foster some level of public comment. Section 13(b) of the EAA calls for public participation, including publication of the rules imposing controls on goods and technology, with the exception of militarily critical technologies, in proposed form, whenever possible.[320] The EAA also requires that the Secretary of Commerce keep the public advised of any changes to the export control laws and that, when formulating export control policies, a broad range of public groups should be consulted to get their input.[321] To achieve this public notice, the Secretary is required to publish all changes in the licensing requirements in the Federal Register.[322] The EAA has additional publication requirements, which include notices for review of the Commodity Control List,[323] and foreign availability reviews.[324] The Bureau of Export Administration (BXA), the administrative arm of the Commerce Department with respect to export controls, generally attempts to publish, for comment, proposed regulations relating to non-sensitive or non-time critical issues. For example, the rules implementing the 1988 changes in the foreign availability provisions went through the notice-and-comment procedure before they became final, but the Commerce Department went to some length to indicate that such procedures were discretionary.[325] When

318. *See generally* William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669, 671 (1989).

319. *Id.* at 670.

320. 50 U.S.C. app. § 2412(b) (1988). The COSEPUP STUDY recommends retaining § 13(b) even after repeal of the APA exemption. COSEPUP STUDY, *supra* note 1, at 193. This Article concurs in that recommendation.

321. 50 U.S.C. app. § 2403(f) (1988).

322. 50 U.S.C. app. § 2404(c)(3) (1988).

323. *Id.*; *see also infra* notes 83-92 and accompanying text.

324. *Id.*

325. "5. Section 13(a) of the Export Administration Act of 1979 (EAA), as amended (50 U.S.C. app. 2412(a) (1988)), exempts this rule from all requirements of Section 553, including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these

Congress considered repealing the EAA's APA exemption in the 1979 revision of the EAA, the Assistant Secretary of Commerce for Industry and Trade testified in opposition, stating that the Department is "committed to a policy of issuing regulations in proposed form whenever possible. [When] . . .we must issue regulations with immediate effect, we will still provide meaningful opportunities for public comment."[326]

Changes in licensing requirements compelled by global events or the receipt of information classified for national security reasons are not well-suited to the notice-and-comment process. The APA takes cognizance of these circumstances in both, the exemption for military and foreign affairs functions,[327] and in the "impracticable, unnecessary, or contrary to public interest" exemption[328] from the notice-and-comment requirement. At present, it is within the sole discretion of the Commerce Department to publish proposed regulations for comment. The Commerce Department frequently follows the framework of the APA rulemaking provision, but it is doing so at its discretion and without any external compulsion, oversight, or verification.

B. The EAA's Regulatory Review Procedures

The BXA's regulations and rulemaking decisions, by virtue of the EAA's exemption from the strictures of the APA, are exempt from judicial review. The EAA's regulations provide, however, that any person

---

requirements, because it concerns a foreign and military affairs function of the United States. Section 13(b) of the EAA does not require that this rule be published in proposed form because this rule does not impose a new control. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

Because of the importance of the issues involved, however, this rule was published in proposed form and public comments were solicited. Although there is no formal comment period on this final rule, additional comments from the public are always welcome." 55 Fed. Reg. 32,899, 32,900 (1990) (to be codified at 15 C.F.R. pt. 791).

326. *U.S. Export Control Policy and Extension of the Export Administration Act: Hearings before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs on S. 737 and S. 977,* Part III, 96th Cong., 1st Sess. 32-33 (1979) (statement of Frank A. Weil, Assistant Secretary for Industry and Trade, Department of Commerce).

327. 5 U.S.C. § 553(a)(1) (1988). This exemption for rulemaking has been sharply attacked. The Administrative Conference of the U.S. adopted a recommendation for repeal of this broad exemption and the substitution of narrower exemptions for rules involving matters required to be kept secret for national defense or foreign policy reasons. *See* 1 C.F.R. § 305.73-5 (1990); *see also* Arthur E. Bonfield, *Military and Foreign Affairs Function Rulemaking under the APA*, 71 MICH. L. REV. 221 (1972).

328. 5 U.S.C. app. § 553(b)(B) (1988).

may submit a request to "issue, amend or revoke a regulation" at any time,[329] but such requests are not covered by the appeals process described in that section.[330] Thus there is no formal administrative or judicial mechanism for review of the rules promulgated under the EAA.

The American Bar Association's 1986 resolution, which calls for the implementation of judicial review procedures in the EAA, commented on several problems relating to rulemaking, including "the failure to offer an opportunity for meaningful public comment on proposed regulations" and "determinations, where agency actions do not adhere to the letter or spirit of the authorizing legislation."[331] A number of practitioners expressed concern most recently about failures and delays in the Commerce Department's implementation of express Congressional mandates under the 1988 revision to the EAA.[332] Because of the EAA's exemption from judicial review, such inquiries are beyond approach.

C. *A Needed Change: Rulemaking Procedures that Encourage Public Input*

The Department of Commerce should provide for rulemaking procedures that will maximize public input notwithstanding the military and foreign affairs exemption to the APA.[333] Although the EAA has not been

329. 15 C.F.R. § 789.3 (1990).

330. 15 C.F.R. § 789.2(a) (1990).

331. A.B.A. SEC. PUB. UTIL. L. REP. 113 B, *supra* note 34, at 25. These views were most recently reiterated by the International Law and Practice Section of the A.B.A. during House of Representative hearings on the 1990 reauthorization of the EAA. *Export Facilitation Act of 1990: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs,* 101st Cong., 2nd Sess. 101-482 (1990) (testimony of Grant D. Aldonis on behalf of the International Law and Practice Section, American Bar Association).

332. The new foreign availability rules published by Commerce after 2 years was one point of criticism. *See* 55 Fed. Reg. 32,899 (1990)(to be codified at 15 C.F.R. pt. 791). Other concerns were expressed about the failure to implement mandated decontrol of certain categories of products. *See Administration Said to be Lax in Complying with Export Control Provisions of Trade Act,* 6 Int'l Trade Rep. (BNA) No. 41, at 1,339 (Oct. 18, 1989).

333. The final recommendation of the Administrative Conference provides:

> V. Rulemaking.
>
> a.) Although the military and foreign affairs exemption of section 553 of the APA will be available to the Department of Commerce for some of its rulemaking under the Export Administration Act, the Conference supports the recent recommendation of the National Academy of Sciences that Congress should retain section 13(b) of the Export Administration Act. That section, which ex-

subject to the notice-and-comment requirements of the APA, Congress has nonetheless added requirements to the Act that call for the Commerce Department to consult with affected parties and solicit public views when amending the EAA's regulations. This reflects Congress's view that, notwithstanding the very significant military and foreign affairs functions served by the EAA, the Commerce Department should develop the EAA's regulations in public view. Repeal of the APA exemption would make notice-and-comment rulemaking the rule for the Commerce Department, requiring the Department to defend its claimed exceptions.

Because the Commerce Department already claims the broadest possible reach for the military and foreign affairs exception within the APA rulemaking requirements,[334] and because regulations implementing the EAA will inevitably have some military or foreign affairs implications, Congress should maintain section 13(b) of the EAA, which calls for public input,[335] and the other provisions mandating public consultation.[336] Although the Department of Commerce makes reasonable efforts to solicit public input on its implementing regulations, the mandate of the APA will give great impetus for expanding those efforts. With the ad-

---

horts the Department to provide "meaningful opportunity for public comment" in departmental rulemakings "to the extent practicable," plainly expresses a congressional understanding that not all departmental rulemaking falls within the appropriate bounds of the military and foreign affairs exemption, and thus appropriately encourages the Department to exercise restraint in its application.

b.) To the extent feasible, the Department of Commerce should treat foreign availability determinations under sections 5(f)(1) and 5(f)(2) of the Export Administration Act as rulemaking within the terms of section 553 of the APA. Where, for reasons of time or other considerations, such determinations must be made in the context of decisions on individual license applications, the Department should publish the determination made with an invitation for public comment respecting related future determinations. 56 Fed. Reg. 33,846-47 (1991).

334. *See, e.g., supra* notes 184-91 and accompanying text. ("The provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in the effective date, are inapplicable because this regulation involves a foreign and military affairs function.") The rule related to what documents an exporter had to submit and/or retain to evidence compliance with the regulations.

335. 50 U.S.C. app. § 2412(b) (1988).

336. *See supra* notes 113-15 and accompanying text.

dition of meaningful judicial review, the rulemaking process at the Department should become substantially more responsive to concerns of Congress and the regulated public.

X. CONCLUSION

The United States and other technologically advanced nations continue to have an interest in preventing certain foreign states access to advanced technology. The United States' recent experience with Iraq vividly illustrates this point. The United States government will continue to enforce a system for controlling American exports in support of national and global security concerns and foreign policy objectives. But the Cold War era national security arguments that propelled the current system of controls are being reexamined, and the arbitrary and nonreviewable procedures implementing these controls must also be reexamined.

The primary premise of the recommendations accompanying this Article is that regulation explained and exposed to outside scrutiny is likely to be sounder regulation. The EAA blends economic regulation, foreign policy decisions, and national security classified information in a complicated system of trade controls that has a dramatic effect on United States foreign trade. The recommendations presented in this Article attempt to take that blend into account while offering ways to provide American exporters the kind of administrative due process and fundamental fairness they have otherwise come to expect in traditional governmental regulation of business.

Appendix A

INDIVIDUAL LICENSING DECISIONS

GENERAL RECOMMENDATIONS

i. Repeal APA exemption. Provide for review on record in D.C. Fed. Dist. Ct. (substantial evidence on facts; arbitrary and capricious on law).

ii. Provide for appeal of right by exporter of adverse decision to Under Secretary for Export Administration.

iii. Provide for on-the-record hearing of appeal, including transcript, notice and record of ex parte contacts, written decision including reasons, and ninety-day deadline to hear and decide.

Individual Licensing Decisions	Initial Decision Procedures	Explanation of Initial Decision	Agency Appeal	Judicial Review	Recommendations
1. Classification of the product under the CCL (assignment of Export Commodity Control Number).	Exporter makes initial determination in all cases. (a) *May request official* Commerce decision from OTPA. See Article Pt. V(A)(1). (b) OEL licensing officer will review/ revise classification decision by either exporter or OTPA if license application filed. See Article Pt. V(A)(4).	(a) Oral communication with exporter. No written explanation. See Article Pt. V(A)(1). (b) Oral communication with exporter. No written explanation. See Article Pt. V(A)(4).	(a) & (b) Appeal to ALJ, subject to Assistant Secretary review (never used), or direct appeal to Assistant Secretary for Export Administration under 15 C.F.R. pt. 789 (seldom if ever used). See Article Pt. V(F).	None Available	• General recommendations i, ii, iii. • Provide exporter with written explanation of classification when it differs from exporter's. • Publish and compile classification decisions.

Individual Licensing Decisions	Initial Decision Procedures	Explanation of Initial Decision	Agency Appeal	Judicial Review	Recommendations
2. Decision to grant or deny individual validated export license. (a) Internal Commerce decision	(a) OEL licensing officer reviews application. Will grant license, return application without action, or deny license. Factors considered include: current policy toward country of destination, end use of product, end user or intermediate consignee. May involve use of national security classified information. See Article Pt. V(A)(2)-(6).	(a) Oral communication with exporter. One sentence application specific statement on returned without action or denial notices. See Article Pt. V(F). May refer to unacceptable end user or general national security concern.	(a) Appeal to Assistant Secretary for Export Administration under 15 C.F.R. pt. 789 (OTPA will review file of OEL license denial decision on appeal to Assistant Secretary). See Article Pt. V(F).	None available	• General recommendations i, ii, iii. • Provide for in camera review by ALJ of adverse licensing decision based on classified information. Permit ALJ to seek additional information from exporter and Commerce. • Provide that on judicial review Commerce has burden of demonstrating the validity and applicability of confidential information used in decision. • Provide exporter with written explanation of adverse licensing decisions, including reasons for return without action. • Publish and compile licensing decisions.
(b) Referral of application to other agencies (Defense, State, Energy) for review.	(b) Other agencies have right to review and recommend action on certain categories of applications. Disagreements about granting a license are resolved at White House level. See Article Pt. V(B).	(b) Oral communication with exporter. Denial notice will not indicate existence or nature of other agency objection.	(b) Theoretical right to appeal to Assistant Secretary for Export Administration under 15 C.F.R. 789. High level policy decision makes reversal improbable.		

Individual Licensing Decisions	Initial Decision Procedures	Explanation of Initial Decision	Agency Appeal	Judicial Review	Recommendations
2. Continued					
(c) Referral of application to CoCom for review. See Article Pt. V(C).	(c) Certain applications must be referred to CoCom members for review. Objections are negotiated.	(c) Oral communication with exporter. Denial notice will not indicate existence or nature of CoCom	(c) Theoretical right to appeal to Assistant Secretary for Export Administration under 15 C.F.R. 789.		
3. Distribution license suspensions (special branch of OEL handles entire distribution license process). See Article Pt. V(D).	OEL branch conducts audits of licensees, suspends license if company control procedures are inadequate. Suspension takes effect immediately. (Licensee must seek individual licenses for each shipment once distribution license suspended.	Suspension notice contains no explanation. Oral communication with licensee about inadequacies in internal control program prior to or after suspension.	Appeal to Assistant Secretary under 15 C.F.R. pt. 789.	None available	• General recommendations i, ii, iii. • Provide written explanations for for any adverse decisions.
4. Foreign availability determinations (whether United States controlled commodity is freely available to controlled country from other sources). See Article Pt. V(E).	OFA conducts review of commodity availability, based on data from exporters and other sources (including classified data). If positive finding of foreign availability, President can suspend finding up to 18 months to negotiate for controls on foreign goods.	No requirement for explanation of decision. Conclusion published in Federal Register.	Appeal to Assistant Secretary under 15 C.F.R. pt. 789.	None available	• General recommendations i, ii, iii. • Provide written explanations for finding of no foreign availability.

Appendix B

ENFORCEMENT DECISIONS

Enforcement Actions	Initial Decision Procedures	Explanation of Initial Decision	Agency Appeal	Judicial Review	Recommendations
1. Temporary Denial Orders (suspension of ability to export).	Staff recommendation to Assistant Secretary for Export Enforcement that violation of EAA is imminent. Informal hearing before Assistant Secretary available, but most involve ex parte determination of order shutting off all exports.	Notice will state bare finding that violation of EAA was imminent. No explanation provided.	(a) Exporter can challenge finding before ALJ in APA hearing. ALJ issues opinion with recommendation to Under Secretary for Export Administration, who will issue final decision.	Final agency decision can be appealed to D.C. Circuit Court of Appeals.	Repeal APA exemption. All APA formal adjudication procedures to apply. EAJA will apply.
2. Violations of export control provisions of EAA.	OEC staff issues charging letter triggering APA hearing before ALJ. ALJ issues opinion and recommendation to Under Secretary for Export Administration.	ALJ opinion includes discussion of changes, explanation of decision and recommendations. Published in Federal Register.	Exporter or staff can file objections to ALJ decision with Under Secretary. After review on record and pleadings Under Secretary issues opinion and final agency decision.	Final agency decision can be appealed to D.C. Circuit Court of Appeals.	Repeal APA exemption. All APA formal adjudication procedures to apply. EAJA will apply.
3. Violations of antiboycott provisions of EAA.	OAC staff issues charging letter triggering APA hearing before ALJ. ALJ issues opinion and initial decision. (Most enforcement actions involve consent agreements without hearings.)	ALJ opinion includes discussion of charges, explanation of decision and recommendations. Published in Federal Register.	Respondent or OAC can appeal to Under Secretary for Export Administration. There may be informal hearing or review on record and pleadings. Under Secretary issues opinion and final agency decision.	Commerce must bring trial de novo action in Federal District Court to collect fine imposed.	Repeal APA exemption. Provide for appeal to D.C. Circuit consistent with export control cases.