Recommendation 91-2

Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings

(Adopted June 13, 1991)

The Export Administration Act (EAA), 50 U.S.C. App 2401-2420, authorizes the Commerce Department to restrict exports of goods and technology from the United States in the interests of national security, foreign policy objectives, and preservation of this country's access to commodities in short supply. It is the principal element in a scheme of export controls that emerged after World War II to serve three ends: reduction of the domestic impact of worldwide postwar shortages of critical goods, priority allocation of resources to rebuild Europe under the Marshall Plan, and restriction of the access of Eastern Bloc nations to technology useful for military purposes. Over the years, restricting access to useful technology has become the primary goal of the EAA, although the countries against which those restrictions are directed have changed from time to time in the light of shifting political considerations.

The EAA has an international aspect. The United States works with its allies through a coordinating committee on multilateral export controls (CoCom) to identify commodities that should be controlled as well as countries that should be the targets of various export controls. Using the lists thus generated, the Commerce Department is responsible, under the EAA, for a licensing scheme involving three different categories of licenses: (1) General licenses, which are applicable to most export transactions and permit them to occur without specific license applications; (2) individual validated licenses, which the agency grants or denies based on factors including concerns about the ostensible and the possible uses of the commodity, opposition from the Department of Defense or State to the proposed export, available information about the end-user, and policy determinations about the destination country; and (3) special licenses, such as distribution licenses and project licenses, that allow particular exporters to make multiple exports of certain types without applying for an individual license for each export. The Export Administration Act also contains provisions prohibiting participation in unsanctioned foreign boycotts and authorizes the Commerce Department both to make rules to carry out its provisions and to enforce its provisions, including the anti-boycott provisions.

The EAA includes a provision explicitly exempting the Department's activities from the administrative process and judicial review provisions of the Administrative Procedure Act. As a result, administrative licensing decisions are final and unreviewable; agency rules implementing

the EAA are subject neither to judicial review nor to the notice-and-comment requirements of 5 U.S.C. 553, although, in the latter respect, Congress has said that "to the extent practicable, all regulations imposing controls on exports * * * [should] be issued in proposed form with meaningful opportunity for public comment before taking effect." 50 U.S.C. App. 2412(b).Enforcement decisions are less affected by the exemption, as statutory amendments in recent years have imposed the formal hearing requirements of 5 U.S.C. 556-57 on administrative enforcement proceedings and have authorized judicial review of enforcement decisions according to APA standards.

Because of the broad APA exemption, the Commerce Department has implemented the EAA with relatively little judicial scrutiny. It has had little incentive to provide generally accessible explanations for its actions. The EAA requires that license denials be accompanied by a written statement including, *inter alia,* a statement of the statutory basis for the denial; in practice, however, this statutory requirement has often been met in a minimal and uninformative way. Exporters have often been frustrated in their attempts to learn the reasons for negative licensing decisions or to predict the outcome of future license applications; they have also been without recourse to challenge Commerce Department actions as arbitrary or contrary to statute. Because legislation to reenact and amend the EAA is now pending,[1] reexamination of the APA exemption is timely.

The APA exemption dates back to passage of the first comprehensive export control legislation in 1949. At that time, Congress cited two reasons for the broad exemption: first, the legislation was seen as temporary, essentially an extension of emergency war measures, and second, it was closely related to foreign policy and national security concerns.

After more than 40 years, the export program gives no indication of being "temporary," albeit sunset dates in the various export control statutes have necessitated several extensions and reenactments. Changes in the statute incident to reenactment and evolving policy at the Commerce Department have gradually increased access to information about the Department's actions and public participation in policymaking. Legislation to reenact the export controls program, passed in 1990 but subjected to a pocket veto by the President, would also have provided for limited judicial review of licensing decisions. But these measures still leave the

[1] The Act expired on September 30, 1990; the export controls program continues in effect, however, by Executive Order issued under authority of the International Emergency Economic Powers Act, 50 U.S.C. 1702. Executive Order 12730, September 30, 1990. Legislation to extend the export controls program was passed by Congress in 1990 but pocket vetoed by the President.

relevant procedures well short of APA standards. And the need for such a broad exemption from APA provisions based on foreign policy and national security considerations is not at all clear. Much of the business conducted by the Commerce Department under the EAA is similar to that conducted by other regulatory agencies, and the interests at stake for potential exporters are similar to those of regulated entities under other licensing schemes. The agency can expect to benefit from public input in the rulemaking process just as other agencies do. Moreover, the APA includes specific exemptions from its rulemaking and formal adjudication provisions for agencies' military and foreign affairs functions, which would be available to reduce the required level of agency process when necessary,[2] as well as an exception to its judicial review provisions for action "committed to agency discretion by law." Other international trade and export control statutes, which presumably have foreign affairs implications, have operated successfully within this framework.

Increased availability of judicial review would help to ensure the Department complies with applicable statutory standards and maintains a reasonable level of quality control in its decisionmaking under the EAA. While the presence of military and foreign affairs considerations will impel a reviewing court to give the Commerce Department great latitude to exercise its discretion, a court could usefully review many legal and factual issues under traditional APA standards without interfering with the executive branch's ability to conduct foreign policy or protect national security.

The Administrative Conference concludes, therefore, that the APA exemption is unnecessary and should be repealed. This conclusion is in accord with that of a recent National Academy of Sciences study on export controls, which also urges repeal of the APA exemption.[3] While the exemption repeal is the heart of this recommendation, the Conference also believes various additional actions by Congress or the Commerce Department would be useful to enhance the benefits of making the APA applicable. These are explained briefly below.

Judicial review: Although the Conference believes that, as a general matter, judicial review of Commerce Department actions under the standards of the Administrative Procedure Act is entirely appropriate, control of exports nevertheless remains a sensitive area. Thus, it is

[2] The Administrative Conference has previously recommended restricting the military and foreign affairs exemption from APA rule-making requirements to apply only where there is a need for secrecy in the interest of national defense or foreign policy. ACUS Recommendation 73-5, Elimination of the *"Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 CFR 305.73-5 (1991).

[3] Panel on the Future Design and Implementation of U.S. National Security Export Controls, Finding Common Ground: U.S. Export Controls in a Changed Global Environment (National Academy Press 1991).

important to structure judicial review in a manner that will minimize the burdens on the conduct of foreign policy and national security affairs. Direct review in the court of appeals is appropriate here because of the policy considerations involved, because there are not likely to be large numbers of appeals, and because, in the case of rulemaking, the public interest will require prompt, authoritative determinations of a rule's validity. See ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*.[4] Consolidation of review of all export control matters in a single court of appeals would preserve uniformity in statutory interpretation and enable the court to develop expertise in the subject matter. Because it already enjoys some expertise in international trade and technological issues and is likely, based on its experience with many types of litigation involving the federal government, to be sensitive to the government's legitimate need for discretion in implementing export controls as well as to the interests of private parties, the Court of Appeals for the Federal Circuit is the most appropriate court for assignment of this responsibility.

Informal adjudications: Under the APA, Commerce Department action on individual license applications should be treated as informal adjudication. While formal hearing proceedings are used to make decisions in some licensing programs administered by other agencies, there is no indication that such procedures are required here, and the high volume and time sensitivity of export license applications favor retention of the existing informal approach.

Another category of Commerce Department action handled informally is requests for advice as to the proper classification of a commodity. These requests permit an exporter to seek guidance concerning the appropriate category for an item on the list of controlled commodities (because different categories entail different export restrictions) and may be made at an exporter's option; such requests are appropriately treated as informal agency adjudication under the APA.

The Commerce Department should increase exporters' access to information about the decisions it makes in these informal adjudications. Clear statements of the agency's reasons for classifying exports in particular categories or denying licenses will both help exporters to determine how to proceed and provide a record for judicial review of the Department's action. Publication of those licensing and classification decisions that may have precedential value (along with a statement of the reasons for them) will benefit both agency and exporters by bringing a greater measure of predictability to the licensing process.

[4] 1 CPR 305.75-3 (1990).

A special problem arises when license denials turn on classified information. The government has a strong interest in protecting the substance and sources of such information from disclosure, but, without access to the information that forms the basis for a license denial, it can be almost impossible for the exporter to evaluate whether the agency action is correct and to challenge the denial on administrative or judicial review. Steps should be taken to ensure exporters (or their counsel) have the maximum feasible access to the information supporting the license denial and that agency staff claims that undisclosed classified information supports a denial are carefully scrutinized on administrative review.

Formal adjudications: Current statutory provisions already make enforcement proceedings under the EAA (including both export control and anti-boycott enforcement proceedings) formal adjudications by specifically applying sections 556 and 557 of the APA to those proceedings. Deletion of the general exemption from the APA would leave these procedures unchanged. To facilitate the consolidation of judicial review in one court and to conform to generally sound practice respecting administrative sanctions,[5] the Administrative Conference recommends one change in these enforcement procedures: that *de novo* district court penalty collection proceedings be eliminated in favor of on-the-record review in the Court of Appeals for the Federal Circuit, and that the Commerce Department have authority to collect its own civil penalties once the opportunity for judicial review has passed. Under this approach, failure to pay a penalty after it has become final and not subject to appeal, or after the reviewing court has entered final judgment in favor of the agency, would result in a collection action in federal district court in which the validity and appropriateness of the order imposing the penalty would not be reviewable. This change would also have the effect of mooting a current controversy about whether the conduct of administrative enforcement proceedings tolls the 5-year statute of limitations for commencement of a district court action to collect a civil penalty.

The Commerce Department imposes sanctions without the benefit of formal adjudicatory procedures through the issuance of temporary denial orders and the suspension or revocation of licenses without notice or hearing under 15 CFR 770.3(b). Under the EAA, the Department may issue temporary denial orders denying exporting authority without notice where necessary to prevent an imminent violation of the EAA. Licenses may be suspended or revoked under Commerce Department regulations whenever the Office of Export Licensing believes the terms

[5] See ACUS Recommendation 72-6, *Civil Money Penalties as a Sanction*, 1 CFR 305.72-6 (1991); ACUS Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*, 1 CFR 305.79-3 (1991).

and conditions of the licenses are not being followed, or when required to implement a change in regulatory policy.

Because these actions are taken to prevent imminent or continuing violations of the EAA, the Conference recognizes the Commerce Department may need to take unilateral action. Nevertheless, when the circumstances requiring the action are individual to an exporter or a commodity and not, for example, related to an abrupt change in a destination country's status, exporters should be afforded a full opportunity to defend themselves in post-denial formal hearings. Existing procedures for temporary denial orders provide for prompt post-denial review, although with a full formal hearing; these existing procedures may offer a valuable avenue for seeking emergency relief from a denial order, but a full-scale administrative hearing should be available at the request of the party subject to the denial order. Concomitantly, judicial review of temporary denial orders, now governed solely by an arbitrary and capricious standard, should include substantial evidence review. At present, unilateral license suspensions are reviewable only through an informal agency process like that afforded license denials, and not at all in court. Because of their impact on existing economic relationships, the Administrative Conference believes suspensions grounded in the unique circumstances of a particular exporter or validated license should be followed by full formal procedures at the licensee's request.

Rulemaking: Once brought under the APA, Commerce Department rulemaking under the Export Administration Act would still be subject to the military and foreign affairs exception to notice-and-comment procedures; not every rulemaking under EAA necessarily falls within the terms of that exception, but some do. In recommending the APA apply to export control proceedings, the recent National Academy of Sciences study proposed that section 13(b) of the EAA be retained, to reflect Congress' belief that military and foreign affairs considerations do not require all EAA rulemakings fit the APA exemption and to encourage the Department to exercise some restraint in applying the exemption. The Conference endorses this recommendation.

The Conference also recommends that "foreign availability determinations," not specifically designated as rulemaking under the EAA, be so treated by the Commerce Department whenever possible. Under the Act, exports that would otherwise be restricted are permitted when the product involved is already available to the end-user from a foreign source. These determinations may often affect many potential exporters, rather than just one, and provision of an opportunity for public comment before making such a determination will enable

Commerce to get a clearer picture of the relevant considerations. The Conference's recommendation, however, acknowledges foreign availability determinations may sometimes initially arise in the context of license determinations where time is of the essence; in such cases, public comment might be solicited after the determination rather than before.

Recommendation

1. *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 (5 U.S.C. 551, 553-559, 701-706).

2. *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.

3. *Informal adjudications*. Requests for proper classification of proposed exports and applications for validated licenses or re-export authorizations are appropriately treated as informal adjudications under the APA. The Department of Commerce should make the following improvements in the applicable procedures:

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 explanation for its decisions to enable applicants to understand the basis on which decisions have been reached and to pursue internal appeals.

b. Review by the Secretary or the Secretary's delegate of staff decisions on classification requests 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 Commerce Department should publish and index these decisions in an appropriate manner, together with other decisions on requests for classification and individual license applications that have possible precedential value and any 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 consideration 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 delegate) should personally review the classified information and certify that it is properly classified and supports the action taken.

4. *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.

c. Congress should amend the civil penalty provisions of 50 U.S.C. App. 2410 and 2412 to eliminate the requirement of *de novo* proceedings 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 action in federal district court.[6]

5. *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

[6] See ACUS Recommendation 72-6, supra n. 4.

National Academy of Sciences that Congress should retain section 13(b) of the Export Administration Act. That section, which exhorts the Department to provide "meaningful opportunity for public comment" in departmental rulemaking "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,[7] 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.

Citations:

56 FR 33844 (July 24, 1991)

__ FR _____ (2011)

1991 ACUS 8

[7] Cf. ACUS Recommendation 73-5, supra n. 2.