



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 13 | Number 2

Article 6

Spring 1988

Export Controls: Who's Policing the Enforcers

Jere W. Morehead

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

 Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Jere W. Morehead, *Export Controls: Who's Policing the Enforcers*, 13 N.C. J. INT'L L. & COM. REG. 307 (1988).
Available at: <http://scholarship.law.unc.edu/ncilj/vol13/iss2/6>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Export Controls: Who's Policing the Enforcers?

Jere W. Morehead*

Professor Morehead demonstrates in this article that U.S. attempts to limit exports of military technology to Soviet bloc nations routinely fail. Professor Morehead argues that this happens primarily because export control of strategic goods is fragmented among the Departments of Commerce, State, and Defense. He suggests that export control should be centralized into one independent agency. Professor Morehead notes that the 1985 amendments to the Export Administration Act did not adequately address export control problems, nor does the Omnibus Trade Bill.

Quis custodiet ipsos custodes?

JUVENAL, SATIRES VI, 347

The announced policy of the United States is to control the export of arms, military technology, and other strategic commodities to Soviet bloc nations and countries engaged in or supporting international terrorism.¹ In the wake of national attention focused on the Reagan Administration's secret arms sales to Iran, a careful review of U.S. export controls, as a means to prevent the diversion of strategic technology and combat terrorism, demonstrates that they are confused, fragmented, and often contradictory.

This article will review the effectiveness of American export controls, focusing attention on the Export Administration Act as amended in 1985² and, to a lesser extent, on the Arms Export Control Act of 1976.³ No attempt will be made to justify the existence or breadth of such controls on business, although the ongoing debate between experts in economics, business, national security, and foreign affairs has raised compelling issues⁴ that must be resolved ulti-

* Assistant Professor of Legal Studies and Adjunct Assistant Professor of Law, The University of Georgia. Professor Morehead is a former Assistant United States Attorney in the Department of Justice, where he prosecuted cases involving violations of American export control laws.

¹ 22 U.S.C. §§ 2394(a), 2753(f) (1985); 50 U.S.C. app. §§ 2401, 2403-1, 2404, 2405, 2405(j) (1985); 15 C.F.R. § 399.1 (1987); 22 C.F.R. § 126.1(a) (1987).

² 50 U.S.C. app. §§ 2401-2419 (Supp. III 1985).

³ 22 U.S.C. §§ 2751-2796 (1982).

⁴ The burgeoning trade deficit is alarming for the United States. The 1986 deficit was 169.8 billion dollars, a rise of 21.3 billion over the previous year. Truell, *Financing for Exports Grows Harder to Find for all but the Big Firms*, Wall St. J., May 14, 1987, at 1, col. 6. In 1981 the trade deficit by comparison was only 39.8 billion dollars. Bailey & Tucker, *New Commerce Department Study Reports U.S. Imports Surged During 1981-85 Period*, BUS. AMER., July 21, 1986, at 12. Recent statistics evidence no improvement in the problem. Gutfield, *U.S.*

mately by the President and the Congress.⁵

Instead this article seeks to expand that discussion to include the effectiveness of export controls in curtailing the acquisition of goods and technology by restricted countries.⁶ Special attention will be given to cases where export controls have failed to prevent the diversion and transshipment of strategic commodities to the Soviet Union,⁷ Libya,⁸ and Iran.⁹ Any attempt by policymakers to reconcile the legitimate interests of business with national defense needs must ensure that future controls will, in fact, accomplish their intended result. This article will offer recommendations on how that may be achieved.

I. Historical Overview

The United States historically has applied export controls only during wartime and other periods of national emergency.¹⁰ The original source for export controls was the Trading with the Enemy

Trade Gap Widened in July to Record Total, Wall St. J., Sept. 14, 1987, at 3, col. 1. "At 4% of GNP, the trade deficit is unprecedented in both its size and the speed with which it grew." Holliday & Wilson, *Trade Issues: An Overview*, CRS REV., Feb. 1987, at 1. Over a period from 1950-1985, the United States' share of world exports has declined from 21% to 12.6%. Murphy, *Coping with Foreign-Law Impediments to the Export Licensing of United States Technology*, 20 INT'L LAW. 1129, 1131 (1986).

⁵ The trade versus control debate has been pervasive. See H.R. COMM. ON SCI., SPACE & TECH., 100TH CONG., 1ST SESS., NAT'L ACAD. SCI. REP. ON INT'L TECH. TRANSFER 1-17 (Executive Summary 1987) [hereinafter NAT'L ACAD. SCI.]; Nollen, *Business Costs and Business Policy for Export Controls*, 18 J. INT'L BUS. STUD. 1 (1987); Kamerschen & Robinson, *An Analysis of the Export Licensing Mechanism and Its Effect Upon the Competitiveness of U.S. High Technology Exports*, 17 AKRON BUS. & ECON. REV. 12 (1986); Zschau, *Export Controls and America's Competitive Challenge*, 1 HIGH TECH. L.J. 1 (1986); Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C.J. INT'L L. & COM. REG. 423 (1985).

Members of the House-Senate conference are struggling to resolve the trade dispute as they attempt to reconcile differences between the two bodies over the omnibus trade bill. H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. 2981 (1987) (passed House on Apr. 30, 1987); H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. 10,372 (1987) (passed Senate as amended on July 21, 1987). Both the House and Senate versions of H.R. 3 are designed to retaliate against certain unfair trade practices by foreign countries while attempting to boost exports abroad. The highlights and differences between the two versions are described in considerable detail in H.R. 3, OMNIBUS TRADE & COMPETITIVENESS LEGISLATION, 100th CONG., 2d SESS., COMPARISON OF HOUSE & SENATE PROVISIONS (Comm. Print 1987).

⁶ See *infra* notes 49-58 and accompanying text.

⁷ *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 2d Sess. 98-783, at 63-65 (1984) (statement of William Rudman, Director, Strategic Investigations Division, U.S. Customs Service); I.B.M. Germany Case, Rasky and Sanger, *U.S. Split Over Computer Sales to a Soviet-Owned Co.*, N.Y. Times, Sept. 19, 1987, at 1, col. 1.

⁸ *United States v. Elkins*, No. 86-267A (N.D. Ga. indicted July 22, 1986, convicted June 5, 1987). See *infra* notes 154-67 and accompanying text.

⁹ *The United States v. McTavish*, No. 85-226A (N.D. Ga. indicted June 13, 1985, convicted Jan. 17, 1986), *aff'd*, No. 86-8343 (Feb. 17, 1987). See *infra* notes 142-53 and accompanying text.

¹⁰ Berman & Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791, n.1 (1967).

Act of 1917.¹¹ Beginning with World War II and continuing thereafter due to the development of Cold War tensions with the Soviet Union,¹² export controls burgeoned.¹³ Ultimately, Congress created the first extensive export control apparatus in peacetime with the enactment of the Export Control Act of 1949.¹⁴ Over the course of the next twenty years, the authority given to the President under the Act was continually renewed¹⁵ and strengthened¹⁶ to control the flow of domestic exports.

In 1949 the United States and six allied nations also formed an informal group to regulate exports.¹⁷ A few years later, these same nations formed a Coordinating Committee (COCOM)¹⁸ and a China Committee (CHINCOM)¹⁹ to develop, maintain, and update export controls on strategic goods. Each member nation was responsible for implementing export controls through domestic legislation.²⁰

As part of the overall Cold War policy of containing perceived Soviet expansion, Congress subsequently passed other legislation imposing export controls on trade with communist bloc nations.

¹¹ 50 U.S.C. app. § 5(b) (1982) (original version at ch. 106, 40 Stat. 411 (1917)).

¹² Berman & Garson, *supra* note 10, at 795-96.

¹³ See Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 258 (1981).

¹⁴ Export Control Act of 1949, ch. 11, 63 Stat. 7 (repealed 1969).

¹⁵ H.J. Res. 197, 65 Stat. 43 (1951); Act of June 16, 1953, ch. 116, 67 Stat. 62; Act of June 29, 1956, ch. 473, § 1, 70 Stat. 407, 407-08; Act of June 25, 1958, Pub. L. No. 85-466, 72 Stat. 220; Act of May 13, 1960, Pub. L. No. 86-464, 74 Stat. 130; Act of July 1, 1962, Pub. L. No. 87-515, § 1, 76 Stat. 127, 127; Act of June 30, 1965, Pub. L. No. 89-63, § 1, 79 Stat. 209, 209.

¹⁶ Berman & Garson, *supra* note 10, at 800-04.

¹⁷ *Id.* at 834-35. "A series of embargo lists was agreed upon, and a body known as the Consultative Group, composed of export control officials of the various governments, was set up to supervise these lists." *Id.* at 835.

¹⁸ *Id.* COCOM continues to operate today among the major western nations (Japan and NATO countries, with the exception of Iceland). *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 95-929*, at 157 (1982) (statement of James L. Buckley, Under Secretary of State for Security Assistance). COCOM is responsible for (1) establishing and updating lists of embargoed products and technologies to proscribed countries (Soviet Union, the other Warsaw Pact countries, China, and other Communist countries in Asia); (2) acting as a clearing-house for requests submitted by member governments to export specific items to end users in proscribed countries; and (3) serving as a means for coordinating the administration and enforcement activities of member countries. *Id.*

¹⁹ Berman & Garson, *supra* note 10, at 835. "In 1957, the special China List was abolished and the separate chairmanship of CHINCOM was discontinued. However, COCOM controls now extend to Communist China and North Korea, as well as to North Vietnam. . . ." *Id.*

²⁰ Note, *Export Licensing: Uncoordinated Trade Repression*, 9 GA. J. INT'L & COMP. L. 333, 335 (1979); Berman & Garson, *supra* note 10, at 835. Such legislation was unnecessary in the United States as the existing controls were more stringent than those of COCOM. Note, *National Security Protection: The Critical Technologies Approach to U.S. Export Control of High Level Technology*, 15 J. INT'L L. & ECON. 575, 578 (1981) [hereinafter Note, *National Security Protection*].

The Mutual Defense Assistance Act of 1951, commonly known as the Battle Act,²¹ embargoed the export of arms and other strategic items to nations threatening the security of the United States. Under the Act, the United States denied military, economic, or financial aid to any nation which knowingly shipped such items to prohibited countries.²² The Mutual Security Act of 1954²³ authorized the President to control, "in furtherance of world peace and the security and foreign policy of the United States,"²⁴ the export of military hardware and related technical data.

In 1962 the United States intensified its domestic export controls when Congress amended the Export Control Act to deny an export license if the export "would prove detrimental to the national security and welfare of the United States."²⁵ By the early 1960's, a comprehensive web of export controls was in place as a potent weapon in the escalating Cold War.²⁶ The United States sought to prevent any trade that would contribute to the economic or military development of countries thought to be unfriendly to the United States.²⁷

Nevertheless, influenced by the advent of *detente* with the Soviet Union,²⁸ Congress began relaxing export controls when it enacted the Export Administration Act of 1969²⁹ and its subsequent amendments in 1974³⁰ and 1977.³¹ The Act declared the primary export policy of the United States "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States,"³² and limited controls to the measure necessary to achieve the foregoing stated declaration of policy.³³

²¹ 22 U.S.C. §§ 1611-1613 (1976), *superseded by* Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2419 (1982).

²² *Id.* § 1612(b). See Note, *National Security Protection*, *supra* note 20, at 578-79.

²³ Ch. 937, tit. IV § 414, 68 Stat. 848 (1954), *superseded by* Arms Export Control Act, 22 U.S.C. § 2778 (1976).

²⁴ *Id.* § 414(a).

²⁵ Export Control Amendments of 1962, Pub. L. No. 87-515, § 1, 76 Stat. 127 (1962) (expired 1969).

²⁶ Comment, *supra* note 13, at 261-62.

²⁷ Bingham & Johnson, *A Rational Approach to Export Control*, 57 FOREIGN AFF. 894, 896 (1979).

²⁸ See Note, *National Security Protection*, *supra* note 20, at 580.

²⁹ Export Administration Act of 1969, 50 U.S.C. app. §§ 2401-2413 (1976) (original version at 83 Stat. 841 (1969)) *superseded by* Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2419 (1982).

³⁰ Export Administration Act Amendments of 1974, Pub. L. No. 93-327, 88 Stat. 287 (1974); Pub. L. No. 93-500, 88 Stat. 1152 (1974).

³¹ Export Administration Act Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

³² 50 U.S.C. app. § 2402(1)(B).

³³ For instance, 50 U.S.C. app. § 2402(2) provided:

It is the policy of the United States to use export controls (A) to the extent

Restraining the extent of controls represented a decided change from a more vigorous twenty year policy of "don't sell them (the enemy) anything."³⁴ Within the Act, a profound tension was evident between two competing philosophies: one seeking the benefits of trade and the other concerned with how that trade affects our national security and foreign policy. That seeming contradiction led to repeated criticisms of our export licensing system as being either too loose—helping the enemy build up their technology to the detriment of our national security—or too strict—losing business to other countries without affecting what the enemy could acquire.³⁵

Further liberalization of trade controls came with the Export Administration Act of 1979.³⁶ The Act completely overhauled America's export control program.³⁷ While continuing to acknowledge that national security and foreign policy considerations necessitated the imposition of export restrictions,³⁸ the Act required the Commerce Department, as the primary bureaucratic unit charged with overseeing export controls, to consider as well the balance of trade and the rights of exporters in evaluating export restrictions.³⁹

II. Current Export Control Laws

The United States' export control system currently is regulated by the Department of State and the Department of Commerce, pursuant to authority provided under the Arms Export Control Act of

necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand, (B) to the extent necessary to further significantly the foreign policy of the United States and to fulfill its international responsibilities, and (C) to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States.

A Library of Congress report concluded that the 1969 Act was designed to foster East-West trade, rather than control such trade. LIBRARY OF CONGRESS, FOREIGN ESPIONAGE & U.S. TECHNOLOGY (1980), quoted in *Transfer of U.S. High Technology to the Soviet Union & Soviet Bloc Nations*, S. REP. NO. 664, 97th Cong., 2d Sess. 35-36 (1982).

³⁴ Bingham & Johnson, *supra* note 27, at 896.

³⁵ *Id.* at 897; NAT'L ACAD. SCI., *supra* note 5, at 10-11.

³⁶ 50 U.S.C. app. §§ 2401-2419 (1982). A detailed explanation of the 1979 Act may be found in Comment, *supra*, note 13, at 267-97.

³⁷ Comment, *supra* note 13, at 255.

³⁸ 50 U.S.C. app. § 2401.

³⁹ The 1979 Act provided that:

It is the policy of the United States to use export controls only after full consideration of the impact of 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 and to reduce the serious inflationary impact of foreign demand.

50 U.S.C. app. § 2402(2).

1976⁴⁰ and the Export Administration Act, as amended in 1985.⁴¹ The Department of Defense also plays a key role in determining the technology to be controlled⁴² as does the United States Customs Service in the enforcement of the controls.⁴³

A. *Export Administration Act*

The Export Administration Act is the primary law regulating exports from the United States. Under the Act, it is the policy of the United States to restrict the export of strategic goods and technology on the basis of national security, foreign policy, and short supply.⁴⁴ The controls are implemented by the Commerce Department which exercises export control jurisdiction over most articles, supplies, and unpublished technical data from the United States.⁴⁵ The Commerce Department may issue: (1) a validated license authorizing a specific export upon application by the exporter;⁴⁶ (2) validated licenses authorizing multiple exports upon application by the exporter;⁴⁷ and (3) general licenses without application by the exporter.⁴⁸

The Commerce Department maintains a control list setting forth the licensing restrictions for exporting strategic goods and technol-

⁴⁰ 22 U.S.C. § 2778 (1982). This Act replaced the Mutual Security Act of 1954, *supra* note 23.

⁴¹ 50 U.S.C. app. §§ 2401-2419 (Supp. III 1985). When the Export Administration Act of 1979 expired in 1983, the President issued Exec. Order No. 12,444, 48 Fed. Reg. 48,215 (1983) and Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984), under authority contained in the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1982), to continue the export control regulations promulgated under the 1979 Act. IEEPA also was utilized by the President to prohibit exports to Iran, Libya, South Africa, and Nicaragua. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980), as amended by Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980); Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985); Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985); Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986). For a plain and intelligible introduction to the Act and accompanying regulations see Gerwin, *An Introduction to U.S. Export Control Laws*, 32 PRAC. LAW. 25 (1986).

⁴² 50 U.S.C. app. §§ 2403-1, 2409(g); 22 C.F.R. § 120.2 (1987). The House version of H.R. 3 contains provisions limiting the Defense Department review of license applications to exports to controlled countries. H.R. 3, 100th Cong., 1st Sess. § 332(n) (1987). Both versions provide that if the Secretary of Defense does not respond to a license referred within twenty days, the Secretary of Commerce may make a determination on an application at his own discretion. *Id.* (House version); H.R. 3, 100th Cong., 1st Sess. § 1021 (Senate version).

⁴³ 50 U.S.C. app. § 2411; 22 C.F.R. § 127.4; 50 Fed. Reg. 41,545 (1985).

⁴⁴ 50 U.S.C. app. § 2402(2).

⁴⁵ *Id.* §§ 2403-2406. Although the Department of Commerce is under a statutory duty, pursuant to 50 U.S.C. app. § 2413, to provide annual reports to Congress on the implementation of these controls not later than December 31 for the preceding fiscal year, no annual reports have been issued by the Commerce Department more current than fiscal year 1984. Telephone conversation with Bonnie Grist, Aide to U.S. Rep. Douglas Barnard, Sept. 29, 1987.

⁴⁶ 50 U.S.C. app. § 2403(a)(1).

⁴⁷ *Id.* § 2403(a)(2).

⁴⁸ *Id.* § 2403(a)(3).

ogy.⁴⁹ The control list includes all commodities subject to Commerce Department export controls.⁵⁰ It does not include arms, ammunition, and other military items whose export is exclusively controlled by the Department of State.⁵¹ The list encompasses so-called dual use technology; that is, technology which has both civilian and military applications.⁵² In reviewing the control of any item, the following factors usually are considered: its essential features including the level of its technical sophistication, civilian uses, military and military-support uses, end use pattern in the United States, and foreign availability.⁵³ Exports are grouped into ten general categories;⁵⁴ within these general categories, entries on the list define the commodities controlled to the specific country groups and destinations.⁵⁵

For export control purposes, foreign countries are separated in the federal regulations into seven country groups designated by the symbols "Q", "S", "T", "V", "W", "Y", and "Z".⁵⁶ The controlled countries generally are either communist, associated with international terrorism, or engaged in human rights violations.⁵⁷ Exports to free world countries are controlled only to the extent necessary to avoid the risk of transshipment to controlled destinations.⁵⁸

To prevent transshipment, authorization must be obtained from the Commerce Department to reexport from one country to another American goods or technology previously exported pursuant to a validated license.⁵⁹ Significant criminal and administrative sanctions may be imposed upon violators.⁶⁰

In 1985, several changes occurred in the Act when Congress passed the Export Administration Amendments Act.⁶¹ The amendments revised and extended the Export Administration Act through 1989.⁶² The amendments relaxed licensing procedures,⁶³ expedited the review process for exports to COCOM nations,⁶⁴ clarified en-

⁴⁹ *Id.* § 2403(b).

⁵⁰ 15 C.F.R. § 399.1(a) (1987).

⁵¹ *Id.* § 399.1(a). The arms control regulations are outlined at *infra* notes 80-102 and accompanying text.

⁵² 15 C.F.R. § 399.1(a).

⁵³ *Id.* § 370.1(b)(3).

⁵⁴ *Id.* § 399.1(b).

⁵⁵ *Id.* The list and accompanying interpretations is over one hundred printed pages in length. *Id.* § 399.1-399.2 supp. I.

⁵⁶ *Id.* § 370 supp. I.

⁵⁷ *Id.*

⁵⁸ 50 U.S.C. app. § 2402(2).

⁵⁹ 15 C.F.R. § 374.1-.9.

⁶⁰ 50 U.S.C. app. § 2410.

⁶¹ *Id.* §§ 2401-2419.

⁶² *Id.* § 2419.

⁶³ *Id.* § 2404(e).

⁶⁴ *Id.* § 2409(o).

forcement responsibilities,⁶⁵ strengthened congressional oversight,⁶⁶ stiffened penalties for firms or individuals evading or attempting to evade export controls,⁶⁷ and strengthened contract sanctity for domestic firms engaged in the delivery of goods abroad.⁶⁸

The Export Administration Act is due to be extended in 1989.⁶⁹ A number of changes in the Act, however, have been proposed in the omnibus trade bill, H.R. 3.⁷⁰ Both the Senate and House versions of the bill provide for easing re-export authorization,⁷¹ liberalizing controls on exports to Western countries and to COCOM members,⁷² eliminating unilateral controls except for controls on goods or technology with no foreign availability,⁷³ and decontrolling components or parts unless the product as a whole will make a significant contribution to the military potential of a controlled country.⁷⁴

The House version establishes a goal of reducing the control list forty percent over the next three years,⁷⁵ limits Pentagon review of licenses to exports to controlled countries only,⁷⁶ requires the Secretary of Commerce to conduct quarterly reviews of the control list,⁷⁷ and establishes a Presidential Commission on export control reform.⁷⁸ The Senate version provides for sanctions against Toshiba Machine Company, Kongsberg Vaapenfabrik Trading Company, and any other firm or individual participating in a diversion of national-security sensitive goods and technology to the Soviet Union in violation of export controls established by COCOM.⁷⁹

III. Arms Export Control Act

The control of inherently military items falls under the umbrella of the Arms Export Control Act.⁸⁰ The Act permits the President

⁶⁵ *Id.* § 2411.

⁶⁶ *Id.* § 2405(f).

⁶⁷ *Id.* § 2410.

⁶⁸ *Id.* § 2405(m).

⁶⁹ *Id.* § 2419. The termination date of the current version is September 30, 1989.

⁷⁰ H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. 2981 (1987) (passed House on Apr. 30, 1987); H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. 10,372 (1987) (passed Senate as amended on July 21, 1987).

⁷¹ H.R. 3, 100th Cong., 1st Sess. § 1006 (Senate version); H.R. 3, 100th Cong., 1st Sess. § 332(c) (House version).

⁷² H.R. 3, 100th Cong., 1st Sess. §§ 1004-1005 (Senate version); H.R. 3, 100th Cong., 1st Sess. § 332(d) (House version).

⁷³ H.R. 3, 100th Cong., 1st Sess. § 1009 (Senate version); H.R. 3, 100th Cong., 1st Sess. § 332(f) (House version).

⁷⁴ H.R. 3, 100th Cong., 1st Sess. § 1016 (Senate version); H.R. 3, 100th Cong., 1st Sess. § 332(m) (House version).

⁷⁵ H.R. 3, 100th Cong., 1st Sess. § 332(f).

⁷⁶ *Id.* § 332(n). See *supra* note 42.

⁷⁷ H.R. 3, 100th Cong., 1st Sess. § 332(e).

⁷⁸ *Id.* § 339.

⁷⁹ H.R. 3, 100th Cong., 1st Sess. §§ 1029-1033.

⁸⁰ 22 U.S.C. § 2778 (1982).

"to control the import and export of defense articles and defense services."⁸¹ The Act authorizes the President to designate items which shall be deemed defense articles and defense services.⁸² Such items constitute the United States Munitions List.⁸³ The President has delegated his export control authority to the Secretary of State.⁸⁴ Within the State Department, the controls are administered by the Office of Munitions Control (OMC).⁸⁵

Manufacturers and exporters of defense articles or defense services must register with OMC.⁸⁶ Licenses for the export of most defense articles must be obtained from OMC prior to export.⁸⁷ OMC may require that the applicant be a United States citizen, national, or permanent resident.⁸⁸ Exporters must ascertain the specific end-user and end-use of the defense article.⁸⁹ A statement explaining the prohibition against diversion or transshipment of the article beyond the end-user is an integral component of the shipper's export declaration, bill of lading, and invoice.⁹⁰

In 1985, the Department of State overhauled the International Traffic in Arms Regulations (ITAR)⁹¹ issued under the authority of the Act.⁹² Although the basic regulatory scheme was not affected by the revisions, the changes eliminated confusion over the relation of the ITAR to the export regulations administered by the Commerce Department, explained how defense articles and defense services are placed on the Munitions List, provided more guidance to applicants on how to apply for licenses, and improved the enforcement of the regulations.⁹³

⁸¹ *Id.* § 2778(a)(1).

⁸² *Id.* "Designations of defense articles and defense services are based primarily on whether an article or service is deemed to be inherently military in character." 22 C.F.R. § 120.3 (1987).

⁸³ 22 U.S.C. § 2778(a)(1). The United States Munitions List is enumerated in the Code of Federal Regulations. 22 C.F.R. § 121. It includes twenty specifically enumerated categories of controlled items. *Id.* § 121.1. The list is followed by interpretations explaining and amplifying its terms. *Id.* § 121.2-.15.

⁸⁴ Exec. Order No. 11,958, 42 Fed. Reg. 4311 (1977), amended by Exec. Order No. 12,118, 44 Fed. Reg. 7939 (1979), reprinted in 22 U.S.C. § 2751 (1982).

⁸⁵ 22 C.F.R. § 120.1.

⁸⁶ *Id.* § 122.1.

⁸⁷ *Id.* § 123.1(a).

⁸⁸ *Id.* § 123.1(b).

⁸⁹ *Id.* § 123.9(a).

⁹⁰ The mandatory statement is contained in 22 C.F.R. § 123.9:

These commodities are authorized by the U.S. Government for export only to (*country of ultimate destination*). They may not be resold, diverted, transferred, transhipped, or otherwise be disposed of in any other country, either in their original form or after being incorporated through an intermediate process into other end-items, without the prior written approval of the U.S. Department of State.

⁹¹ The ITAR applies to items "deemed to be inherently military in character." *Id.* § 120.3.

⁹² 49 Fed. Reg. 47,682 (1984).

⁹³ *Id.*

Office of Munitions Control licenses currently are denied for the export of defense articles and defense services destined for communist countries.⁹⁴ This restriction applies as well to nations with which the United States maintains an arms embargo or "whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States."⁹⁵ The government prohibits as well the export of items to countries supporting international terrorism.⁹⁶ The Secretary of State has designated Libya, Syria, Iran, Cuba and the People's Democratic Republic of Yemen (South Yemen) as countries that repeatedly have provided support for international terrorism.⁹⁷ Substantial criminal and civil penalties may be imposed for violations of the Act including imprisonment,⁹⁸ criminal fines,⁹⁹ debarment,¹⁰⁰ seizure and forfeiture of illegal exports,¹⁰¹ and civil penalties.¹⁰²

IV. Problems with Export Control Administration

Despite these elaborate regulations of strategic exports to prohibited countries, controlled exports have frequently found their way abroad in violation of U.S. export policy either through administrative error, the machination of private exporters, or both. The Congress repeatedly has grappled with many cases where export controls have failed to prevent diversions to Soviet bloc nations and countries engaged in or supporting international terrorism.¹⁰³

⁹⁴ 22 C.F.R. § 126.1.

⁹⁵ *Id.*

⁹⁶ See 22 U.S.C. § 2778(a)(1); BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPECIAL REPORT NO. 149, ECONOMIC SANCTIONS TO COMBAT INTERNATIONAL TERRORISM 4 (1986) [hereinafter SPECIAL REPORT NO. 149]. The Arms Export Control Act requires the President to terminate all direct government-to-government military sales to any nation which aids or abets international terrorism by granting sanctuary from prosecution to any individual or group which commits an act of international terrorism, unless national security considerations require otherwise. 22 U.S.C. § 2753(f).

⁹⁷ SPECIAL REPORT NO. 149, *supra* note 96, at 3.

⁹⁸ 22 U.S.C. § 2778(c) provides that individuals convicted under the Arms Export Control Act may be imprisoned for as much as ten years for each violation.

⁹⁹ The law permits the imposition of a fine of as much as one million dollars for each violation of the Arms Export Control Act. *Id.*

¹⁰⁰ 22 C.F.R. § 127.6.

¹⁰¹ *Id.* § 127.5.

¹⁰² The civil penalties may not exceed \$500,000 for each violation. 22 U.S.C. § 2778(e); 50 U.S.C. app. § 2410(c) (Supp. III 1985); 22 C.F.R. § 127.9.

¹⁰³ See *Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 35-377 (1978); *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, *supra* note 18; *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 98th Cong., 1st Sess. 98-14 (1983); *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on Int'l Finance & Monetary Policy of the Comm. on Banking, Housing & Urban Affairs*, 98th Cong., 1st Sess. 98-114 (1983); *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 7; *Transfer of Technology: Hearings*

Each time the complaints have been the same—the loss of strategic goods and technology to restricted nations—and each time the answers have been the same—programs have been instituted to correct the deficiencies in the controls.¹⁰⁴ The concern is understandable in light of the considerable harm that may be incurred by the United States when Western goods and technology are acquired by restricted countries.¹⁰⁵

In recent years Congress has expressed increasing alarm at the disarray in the export control program in the face of a systematic effort by restricted countries to obtain U.S. goods and technology. Most of that concern has been directed at licensing and enforcement responsibilities housed in the Commerce Department under the Export Administration Act. The Department of State's record in controlling the export of exclusively military items, under the Arms Export Control Act, has been evaluated sparingly.¹⁰⁶ Under that Act, licensing decisions are made by the State Department¹⁰⁷ and the enforcement responsibilities rest with the Customs Service.¹⁰⁸

Such decisions are comparatively easy to make when one is dealing with the obvious risks presented by weaponry, and no significant

Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 98th Cong., 2d Sess. 98-986 (1984).

¹⁰⁴ The utter frustration of Congress was expressed by Senator Jake Garn, then Chairman of the Senate Banking, Housing and Urban Affairs Committee: "This review is becoming an annual exercise. Unfortunately, the problems persist and we continually are found examining serious instances where our control effort has failed. We were told first that there was no enforcement problem. Then we were told that the Commerce Department was beefing up its efforts to put an end to the problem." *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra note 7, at 1.*

¹⁰⁵ American intelligence sources argue that the Soviets acquire Western technology primarily for military purposes and, in the process, save hundreds of millions of dollars in research and development costs, modernize their military industry, limit production costs and improve their weapons performances. CENTRAL INTELLIGENCE AGENCY, *SOVIET ACQUISITION OF WESTERN TECHNOLOGY* (1982), reprinted in *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra note 18, at 7-23.* Moreover, these Soviet acquisitions present additional problems for the Western military strategy:

The United States and its Allies traditionally have relied on the technological superiority of their weapons to preserve a credible counterforce to the quantitative superiority of the Warsaw Pact. But that technical superiority is eroding as the Soviet Union and its Allies introduce more and more sophisticated weaponry—weapons that all too often are manufactured with the direct help of Western technology.

Id. at 9.

The cost of terrorist countries obtaining military equipment and technology is just as disturbing. "From 1973 through 1985, more than 6,500 terrorist incidents, including 150 lethal attacks against U.S. citizens accounting for 405 deaths, were recorded worldwide." Garrett, *Terrorism and the Use of Military Force*, DEFENSE, May-June 1987, at 26.

¹⁰⁶ See *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra note 18, at 163-65.*

¹⁰⁷ 22 C.F.R. § 123.1 (1987).

¹⁰⁸ *Id.* § 127.4.

systemic problems have been detected with licensing and enforcement under the Arms Export Control Act.¹⁰⁹ The same, however, cannot be said of the Export Administration Act. The State Department's and the Customs Service's job is a good deal less problematic than that of the Commerce Department. For one thing, Commerce must execute a policy from between the conflicting priorities of controlling strategic exports and encouraging U.S. foreign trade, while State's restrictive function is easier to conceptualize and therefore to execute. Furthermore, implementation of export controls on military hardware involves none of the complex fact determinations and close exercises of judgment required in Commerce's regulation of dual-use exports.

Even allowing for the difficulty of its task, the Commerce Department's handling of the Export Administration Act has left much to be desired. In the past decade, the Senate has conducted several hearings on the illegal diversion of strategic exports to the Soviet Union.¹¹⁰ The first inquiry arose after the Commerce Department licensed the transfer of certain key American technology to the Soviet Union by Dresser Industries of Dallas, Texas—one of the nation's leading manufacturers of oil well drilling equipment.¹¹¹ The committee scrutinized the enforcement controls in the Commerce Department, and in its report highlighted the testimony of a Commerce Department investigator. The investigator conceded that the KGB could not have organized enforcement functions within the Department in a way more beneficial to Soviet interests.¹¹²

A few years later, in 1982, the Senate held in-depth hearings on the loss of technology to Soviet bloc countries.¹¹³ A number of Sen-

¹⁰⁹ A Commerce Department official contended that those problems have been avoided in the State Department because of the smaller size of the munitions list and the ability of the United States Government to control as well who produces the weapons. *Transfer of Technology: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, *supra* note 103, at 127 (statement of William T. Archey, Acting Assistant Secretary for Trade Administration, Commerce Department).

¹¹⁰ See sources cited *supra* notes 18, 103. Actually, the Senate has been concerned about the loss of technology to the Soviet Union since at least 1951. In a report issued after hearings that year, the Senate Committee on Interstate & Foreign Commerce noted that "[a] matter of grave and constant concern to the United States is the extent to which materials of critical or strategic nature flow from the west to those countries behind the Communist iron curtain which seek the eventual destruction of the western way of life." S. REP. NO. 944, 82d Cong., 1st Sess. I (1951).

¹¹¹ *Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, *supra* note 103, at 2. The export actions examined involved two applications. "One covered technical data for use in a \$144 million 'turnkey' project to construct a plant to manufacture high quality oil drilling rock bits. The other application covered a computer controlled electron beam welder to be used in manufacturing the rock bits." *Id.* In a study made by the Defense Science Board, (Bucy Report) the Board concluded that the export involved technology and equipment easily diverted to military use. *Id.* at 3.

¹¹² S. REP. NO. 664, *supra* note 33, at 36.

¹¹³ *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hear-*

ators used the opportunity to air their concerns about the capacity of the Commerce Department to effectively enforce export controls.¹¹⁴ The Commerce Department promised the Senate it would adopt a new policy focused on tightening export controls.¹¹⁵ Nevertheless, the following year Congress was examining the problem again—this time referring to it as a “hemorrhage of strategic goods to our adversaries.”¹¹⁶ The hearings were called this time to review the Commerce Department’s fulfillment of its responsibilities to control exports in light of pending legislation for extending the Export Administration Act.¹¹⁷ Senators reviewed findings of the Inspector General of the Commerce Department, which were highly critical of the Department’s performance.¹¹⁸

A recurring issue in the hearings was concern over divided loyalties within the Commerce Department¹¹⁹ due to that department’s having responsibility both to promote and to control exports.¹²⁰

ings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra note 18.

¹¹⁴ For instance, Senator Nunn (D-Ga.) noted that, from as early as 1963, the Commerce Department was undermanned and undertrained as a law enforcement organization, while the Soviets were becoming increasingly adept in the successful acquisition of American technology. *Id.* at 4-5 (statement of Senator Sam Nunn). Senator Chiles (D-Fla.) likewise expressed concern over the Department’s problems in enforcing export controls. *Id.* at 26 (statement of Senator Lawton Chiles).

¹¹⁵ Indeed, a Commerce Department official bragged to the Senate Committee about recent organizational realignments and adjustments, including the establishment of a new export enforcement organization under the direction of a former federal prosecutor experienced in export diversion cases, evidencing the Commerce Department’s commitment to enhancing enforcement efforts. *Id.* at 266-67 (statement of Lawrence J. Brady, Assistant Secretary of Commerce for Trade Administration, Commerce Department).

¹¹⁶ *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 103, at 3.*

¹¹⁷ *Id.* at 1.

¹¹⁸ Senator Cohen summarized the Inspector General’s report:

It is clear that the Department’s failure to provide adequate resources, policy guidance, and management direction has impeded the compliance effort and produced, at the very least, the perception of a de facto supremacy of trade promotion over the Department’s export control functions. What is also clear from the findings in this report is that the Department of Commerce has not taken a bold lead in forging an aggressive multiagency effort to halt the illicit export of controlled products.

Id. at 6 (statement of Senator William Cohen). The complete Inspector General’s Report may be found in *Transfer of United States High Technology to the Soviet Union and Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra note 18, at 607-37.*

¹¹⁹ This was not the first time Congress had addressed this problem. In a Senate report issued the previous year, the staff found that “[t]he Commerce Department has as its major focus the promotion of trade and is not comfortable with the task of limiting the sale of anything, whether it is dual-use technology or some other commodity.” S. REP. NO. 664, *supra note 33, at 37.*

¹²⁰ One committee witness, with over 26 years experience in the export control area of Commerce, noted the good relations the Export Licensing Division and the Office of International Trade had with the business community. *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 103, at 121* (statement of Theodore L. Thau, Retired Commerce Department Official). He observed that, in contrast, Commerce officials involved in export control “generally are always at risk that their

Many argued that Commerce cannot be charged on the one hand with promoting exports and, on the other hand, with controlling them.¹²¹ One witness, with twenty-six years experience in the Commerce Department, testified that the conflict was unsolvable, so long as both functions remained in the same department.¹²²

Over the next few months, the Senate continued to review¹²³ the pervasive Soviet evasion of export controls through diversion, transfer, reexport, and the creation of dummy companies in Western Europe.¹²⁴ Although the Commerce Department assured the Congress that it had made great strides in improving its licensing and enforcement capabilities,¹²⁵ many senators remained skeptical.¹²⁶

V. Case Histories of Ineffective Export Controls

A. VAX Computers

Numerous failures of the export administration system since the 1982 hearings have served to confirm this senatorial skepticism. The following year, in fact, the Senate held hearings to investigate the attempted diversion to the Soviet Union of sophisticated VAX 11/782 computers and large amounts of additional high tech equip-

decisions may have to be unpleasant to businessmen. . . . Removing commodities from licensing restrictions is pleasant. But when licenses must be denied, when commodities must be controlled, or when a businessman must be charged with violating controls, then the work of the export control official is negative and unpleasant, to himself, and to everyone else in the Department who has the pleasant duties I have described." *Id.*

¹²¹ *Id.* at 5, 18, 92 & 116.

¹²² *Id.* at 116 (testimony of Theodore L. Chau).

¹²³ *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on Int'l Finance & Monetary Policy of the Comm. on Banking, Housing & Urban Affairs, supra* note 103.

¹²⁴ *Id.* at 172 (statement of William Schneider, Under Secretary for Security Assistance, Department of State).

¹²⁵ *Id.* at 168-69. Commerce officials cited the creation of a separate Office of Export Enforcement, an increased enforcement budget, the hiring of 35 criminal investigators and intelligence specialists, the opening of new enforcement field offices, the development of memoranda of agreement with other agencies on the sharing of information and the use of public presentations designed to encourage private sector compliance with export controls. *Id.* at 168-69.

¹²⁶ Four years later, the Senate was still arguing with the Commerce Department about their failure to comply with reforms mandated by the 1985 amendments to the Export Administration Act relating to Commerce's administration of the Act. In a hearing with then-Secretary of Commerce Malcolm Baldrige, Senator Proxmire expressed his continued frustration:

In 1983 and 1984, Senator Garn and I believed that the Commerce Department should not manage our export licensing program because of the inherent conflict there between trade promotion and export administration. To lessen that conflict, the 1985 act mandated that Commerce create a new Under Secretary for Export Administration so that function had higher visibility and could command more resources and respect. Commerce has resisted establishing such a position. I, for one, will not go along with any further delays in implementing that Congressional mandate.

Export Controls: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, 100th Cong., 1st Sess. 100-107, at 17 (statement of Senator William Proxmire) (1987).

ment.¹²⁷ The Commerce Department was accused of,¹²⁸ and admitted,¹²⁹ making numerous mistakes with respect to the licensing and investigation of the case. The errors included inadequately disseminating and analyzing sensitive intelligence, a lengthy delay in starting an investigation of the suspects, failure to cross-reference files on different suspects, and ignoring other obvious signs of possible diversion.¹³⁰

The chronology of events in the VAX case demonstrates inherent problems with the present export control enforcement system.¹³¹ The Commerce Department received information in May 1980 linking Richard Mueller, a fugitive under indictment in California for export violations, with a foreign firm, MRI, an end-user on several validated export licenses from the United States. Mueller was interested in purchasing, through MRI, American semiconductor manufacturing systems for resale to the Soviet Union.

Between the time Commerce received this information and July 5, 1983, Commerce approved sixteen export licenses in favor of MRI as the approved end-user,¹³² one just three days after this negative information was received. Commerce conducted no investigation before issuing the licenses beyond arranging an interview regarding the allegations with a MRI official overseas. When the interview, conducted by an inexperienced foreign commercial service official, resulted in a denial by MRI of any wrongdoing on its part, the Commerce Department terminated their inquiry without further action.¹³³ On November 22, 1982, another source reported suspicious conduct by MRI to the Commerce Department. This time MRI had purchased equipment without requesting installation or inspection as specified in the sales contract and included in the purchase price. Moreover, contrary to normal practice, MRI had failed to order warranty replacement parts.

Despite this additional information, Commerce subsequently licensed the export to MRI of two sensitive VAX computers, inte-

¹²⁷ *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 7.*

¹²⁸ *Id.* at 63-73.

¹²⁹ *Id.* at 15-16 (testimony of William T. Archey, Acting Assistant Secretary for Trade Administration, Commerce Department).

¹³⁰ *Id.* at 15.

¹³¹ The chronology is taken from the testimony of Warren Rudman, Director of Strategic Investigations, U.S. Customs Service. *Id.* at 63-65.

¹³² *Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra note 103, at 71* (statement of John M. Walker, Jr., Assistant Secretary for Enforcement & Operations, Department of the Treasury).

¹³³ *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 7, at 64* (statement of Senator Warren Rudman).

grated circuits, and an ion implanting system.¹³⁴ Commerce waited several months, until March 24, 1983, to request onsite overseas inspection of MRI's facility. In another interview with the MRI official, he finally admitted that his firm had engaged in illegal conduct. This admission was relayed to the Commerce Department on June 27, 1983, along with a recommendation to deny the firm and this individual further export privileges. Nevertheless, the following month, the Commerce Department proceeded to license the export of another VAX computer to MRI before rescinding the license, however, later that month. Commerce took no further action on the case until November 1983, when it learned that the Customs Service was investigating MRI and Mueller.¹³⁵ Commerce and Customs then embroiled themselves in a dispute over control of the investigation. This disagreement was serious enough to require mediation by the Administration, and full cooperation in the investigation by Commerce was not forthcoming for some time.¹³⁶

The hearings over the VAX case again raised the issue of a pro-export bias in the Commerce Department; the Senate Committee Chairman piqued that if Commerce had their way, they would sell everything because doing so would create additional employment.¹³⁷ Commerce Department officials again assured Congress that the VAX case was an isolated historical event, now solved by institutional

¹³⁴ Two years earlier the Defense Department had warned the Commerce Department that the VAX computer system was a target of the Soviet Union. *Id.* at 34 (statement of Stephen D. Bryen, Deputy Assistant Secretary of Defense, Int'l Economic, Trade & Security Policy). At the time the license was approved, this equipment represented state-of-the-art computer hardware capable of supporting and accelerating Soviet military modernization programs.

The computer system had a complete configuration identical to a number of highly classified U.S. defense systems. . . . Among the tasks that this particular system could carry out include the simulation of the operation of military systems, such as missile targeting, at faster than real-time, or the time it takes for a missile to hit its target; the simulation of terrain-following radar for cruise missiles and flight paths of intercontinental ballistic missiles; and command and control for targeting antiaircraft batteries of guns and missiles; and the design and manufacture of very highspeed integrated circuits. This application, essential for the manufacture of smart weapons, is totally embargoed to the Soviet Union and Eastern Europe.

Id. at 32.

¹³⁵ The Committee Chairman was incensed over the Department's lack of initiative in dealing with the MRI problem: "Doesn't anybody stay after work? Does anybody pick up a phone or do you just put it in a pouch and that takes care of your duties for the day? . . . Is there anybody in our Government that says, 'Hell, this is important,' and maybe makes a call himself?" *Id.* at 65-66 (statement of Senator Jake Garn).

¹³⁶ *Id.* at 70-73 (statement of William Rudman, Director, Strategic Investigations Division, U.S. Customs Service). The bureaucratic bickering between Commerce and Customs has been a longstanding problem. Senator Proxmire has noted the obvious: each has a role in administering our export control program and wants to guard its own turf. *Id.* at 3 (statement of Senator William Proxmire). The administration has attempted to solve this complex problem through a memorandum of understanding, delineating the respective responsibilities of each agency. 50 Fed. Reg. 41,545 (1985).

¹³⁷ *Id.* at 53 (statement of Senator Jake Garn).

changes taken to improve the Department's enforcement program.¹³⁸ Although many of the MRI exports were recovered by Customs Service, the Soviet Union received enough technology to save \$80 million a year for a decade in research and development costs.¹³⁹

B. *United States v. McTavish and United States v. Elkins.*

Of course, the Soviet Union is not the only restricted nation circumventing United States export controls. The Commerce Department's annual report dealing with export administration reveals how widespread these trade violations are,¹⁴⁰ and the systemic nature of the problem is demonstrated forcibly by two recent cases of significant diversions of strategic items.¹⁴¹ The cases, *United States v. McTavish*¹⁴² and *United States v. Elkins*,¹⁴³ concerned a tangled web of diversions to Iran and Libya, countries engaged in international terrorism.¹⁴⁴

McTavish involved exports and attempted exports of controlled items to Iran and Chile from 1982 until 1985,¹⁴⁵ including gyroscopes for the inertial navigation system of the F-4 *Phantom* combat aircraft, gas masks for use in chemical warfare, and spare parts for the C-130 and L-100 cargo aircrafts.¹⁴⁶ The scheme entailed exports from the United States to an alleged end-user in Hong Kong. The items subsequently were diverted to Iran and Chile.¹⁴⁷ The exports required validated licenses from either the State Department or the Commerce Department depending upon their military or civilian application.¹⁴⁸ The perpetrators accomplished the diversions by concealing the identity of the true end-user and misdescribing the exports.¹⁴⁹

¹³⁸ *Transfer of Technology and the Dresser Industries Export Licensing Actions: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, supra* note 103, at 77 (testimony of William T. Archey).

¹³⁹ *Id.* at 33 (statement of Stephen D. Bryen).

¹⁴⁰ Each year the Commerce Department reports detected violations in the Export Administration Annual Report. Their most recent report, issued on October 23, 1985, for fiscal year 1984 indicated 51 cases were referred to the Department of Justice for possible criminal prosecution. 1984 U.S. DEP'T COM., EXPORT ADMIN. ANN. REP. 61.

¹⁴¹ The author investigated and indicted both of these cases before leaving the Department of Justice. Care has been taken to limit disclosure to information already in the public domain.

¹⁴² No. 85-226A (N.D. Ga. indicted June 13, 1985, convicted Jan. 17, 1986), *aff'd*, No. 86-8343 (Feb. 17, 1987).

¹⁴³ No. 86-267A (N.D. Ga. indicted July 22, 1986, convicted June 5, 1987).

¹⁴⁴ See *supra* note 97 and accompanying text.

¹⁴⁵ Chile's record on human rights and international terrorism has concerned the United States. Therefore, the International Security and Development Act of 1981 placed restrictions on exports to Chile. Pub. L. No. 97-113, § 726(b), 95 Stat. 1554 (1981).

¹⁴⁶ *McTavish*, indictment at 7-13.

¹⁴⁷ *Id.* at 5-13.

¹⁴⁸ *Id.* at 13-19.

¹⁴⁹ *Id.* at 6.

Although Hong Kong is a known *entrepôt* for smuggling strategic items from the United States to Iran,¹⁵⁰ these export licenses were routinely approved by the Commerce Department.¹⁵¹ Indeed the three-continent conspiracy was detected only by some rather innovative investigative techniques used by the Customs Service.¹⁵² The Commerce Department was unaware of an international operation that would eventually lead to a twenty count indictment and the recovery of approximately \$2.5 million worth of goods.¹⁵³

Elkins presents an even more disturbing example of how easy it is to evade export controls. *Elkins* involved the diversion of two Lockheed L-100-30 aircraft and spare parts from the United States to Libya.¹⁵⁴ According to the indictment, the exports were part of a conspiracy by the Libyan Armed Forces, not only to acquire these enormous aircraft capable of carrying troops and military cargo, but to subsequently convert them into aircraft capable of aerial refueling of Libyan fighter jets.¹⁵⁵ The aerial refueling systems were to be obtained by Libya from a California firm.¹⁵⁶

The details of the *Elkins* case belie previous claims by the Commerce Department regarding its improved licensing and enforcement controls.¹⁵⁷ For example, the Commerce Department's own regulations restrict the sale of such aircraft to Libya or Libyan nationals.¹⁵⁸ The *Elkins* defendants filed license applications with the

¹⁵⁰ Karniol, *Iran's Hong Kong Connection*, DEF. & FOREIGN AFF. May 1986, at 42.

The visible edge of this trade is not substantial in terms of value: it was worth roughly \$10 million in 1984 and \$6.6 million in 1985. However, these figures reflect only those goods which were landed in the British colony and thus fully documented. Transshipments—that is, goods which transit through Hong Kong and are seldom checked by the authorities—are not recorded. But a U.S. intelligence source says there are 'indications' that a further volume of strategic materials bound for Iran passes through the territory in this manner.

Id.

¹⁵¹ *McTavish*, indictment at 5-13.

¹⁵² The Customs Special Agent on the case, Joseph R. Webber, developed a significant portion of the case by regularly sifting through a trash dumpster, at three o'clock in the morning, located behind the U.S. exporter's establishment. Hooper, *We Talk Trash*, CUSTOMS TODAY, Spring 1987, at 2.

¹⁵³ Evidence was introduced at the trial that the American and Hong Kong coconspirators also were trafficking in stolen U.S. military aircraft parts, which they attempted to sell to Libya. *Id.*

¹⁵⁴ *Elkins*, indictment at 9-10.

¹⁵⁵ *Id.* at 18-19.

¹⁵⁶ *Id.* at 18.

¹⁵⁷ *MRI/Mueller: Vax Case, Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, *supra* note 7, at 6-10 (statement of William T. Archey, Acting Assistant Secretary for Trade Administration, Department of Commerce).

¹⁵⁸ 15 C.F.R. § 385.7(d) provides in pertinent part: "This control indicates . . . aircraft that will be exported or reexported to Libya or Libyan nationals. . . . Applications will generally be denied for exports that would constitute a high risk of increasing Libyan capabilities to carry military cargo or troops or to conduct military reconnaissance or observation missions." The C-130 (military version of the L-100-30) is a highly valued plane

Commerce Department indicating the aircraft and spare parts were being purchased by a West German firm, Contrust GMBH, ostensibly for oil exploration in Benin, a remote African nation.¹⁵⁹ The \$57 million export was approved by the Commerce Department despite disclosure by Lockheed-Georgia that Libyan nationals ran the West German firm.¹⁶⁰ At the time the license was approved, the Commerce Department also knew the defendants previously had sought to purchase the C-130 military cargo aircraft, ostensibly on behalf of the government of Bolivia.¹⁶¹ That deal collapsed when Lockheed-Georgia discovered no one in Bolivia knew the defendants.¹⁶²

The admission alone that the aircraft were going to be exported to Benin should have raised some suspicion at the Department of Commerce. Benin is an avowedly Marxist state which has close ties with the Soviet Union.¹⁶³ Since 1972, its political structure has centered around a group of left-wing military officers, operating under a National Revolutionary Assembly.¹⁶⁴ In 1984, a Defense Department publication indicated the presence of Soviet military personnel in Benin.¹⁶⁵ Moreover, Libyan Revolutionary Leader Colonel Ghaddafi visited Benin in 1983.¹⁶⁶ Despite all this available information linking the aircraft sale to Libya, the transaction was approved apparently without suspicion by the Department of Commerce.¹⁶⁷

C. IBM/Transnautic

The most recently disclosed export control blunder by the Commerce Department has enabled a Soviet-owned company in West Germany to obtain technology Defense Department experts claim

which Libya has been trying to acquire since 1973. O'Shea, *Lockheed Plane in Libya Plot Has a World-Class Reputation*, Atl. Const., July 24, 1986, at 7A, col. 6. The differences between the C-130 and the L-100-30 are minimal. *Elkins*, indictment at 15.

¹⁵⁹ *Elkins*, indictment at 10.

¹⁶⁰ Thurston, *Libya Plot for Planes Unmasked*, Atl. Const., July 24, 1986, at 7A, col. 4. In the article a Lockheed-Georgia spokesman said the company passed its files of the defendants and their company on to the Commerce Department during the license application review.

¹⁶¹ Thurston, *supra* note 160.

¹⁶² *Id.* at 1, col. 3; *Elkins*, indictment at 15.

¹⁶³ C. PHILLIPS, *AFRICAN POLITICAL DICTIONARY* 75-76 (1984).

¹⁶⁴ *Benin: General Data & Government*, in *KALEIDOSCOPE CURRENT WORLD DATA* 5 (1987).

¹⁶⁵ 1984 U.S. DEP'T DEF., *SOVIET MIL. POWER* 114-15.

¹⁶⁶ *Benin: Chronology*, in *KALEIDOSCOPE CURRENT WORLD DATA* 2 (1985). Since the export, Libya and Benin have been linked together in a plot to blow up an overseas U.S. Embassy. *African Nation Foils Plot to Blow Up U.S. Embassy*, Atl. Const., Aug. 12, 1986, at 3A, col. 3.

¹⁶⁷ *Elkins*, indictment at 19. For further background on the Elkins case, see Lachica, *U.S. Accuses Seven of Plot to Export Aircraft to Libya*, Wall St. J., July 24, 1986, at 8, col. 1; Treadwell & Ostrow, *7 Indicted in \$50-Million Sale of Transport Aircraft to Libya*, L.A. Times, July 24, 1986, at 3, col. 1; Corwin, *Chance Talk Led to Sale of Planes to Libya, U.S. Reveals*, L.A. Times, July 27, 1986, at 3, col. 1; Harvey, *Trial Turns on Whether Four Knew Libya Was Real Buyer of Lockheed Planes*, Atl. Const., Apr. 24, 1987, at 2A, col. 1; Thompson, *1 of 3 Convicted of Conspiracy in Libya Sale*, Atl. Const., June 6, 1987, at 1, col. 1.

poses a threat to American national security.¹⁶⁸ Although government officials are divided over whether national security was compromised, there is no dispute that the Commerce Department's licensing and enforcement units made another very serious mistake.¹⁶⁹

The facts of the case are not in dispute. In September 1986, I.B.M. Germany¹⁷⁰ approached the Commerce Department for a license to sell a Model 4381 mainframe computer¹⁷¹ to Transnautic, a German company controlled by a Soviet state-controlled company.¹⁷² The Defense Department recommended that the license be denied, and for several months all indications pointed to a concurrence by the Commerce Department. Nevertheless, on June 10, 1987, unbeknownst to the Pentagon, the Commerce Department unilaterally granted the license after adding some monitoring controls to try to allay national security concerns.¹⁷³

When I.B.M. officials informed Transnautic that the license finally had been approved, they discovered that Transnautic already had purchased an I.B.M. compatible AS-8043 mainframe from a competitor.¹⁷⁴ This second license application was routinely approved by the Commerce Department, even while the dispute with I.B.M. was pending. The only difference: the second license application did not disclose Transnautic as a Soviet-controlled company.¹⁷⁵

The Commerce Department has failed to explain why Transnautic was not listed in their control system as a Soviet-controlled company or why none of their licensing or enforcement officials noticed the omission in the second license application. Commerce's failure to cross-reference license applications by name of exporter and of foreign importer creates the possibility that a foreign government might use the Department procedures in bad faith. This might be done by submitting several applications for the same export, with each application offering different information, in hopes that one of the requests will be approved. Moreover, if this case suggests that the Commerce Department depends solely upon the honesty and

¹⁶⁸ Rasky & Sanger, *U.S. Split Over Computer Sale to a Soviet-Owned Co.*, N.Y. Times, Sept. 29, 1987, at 1, col. 1.

¹⁶⁹ Pentagon officials have gone so far as to accuse the Commerce Department of "deliberate deception" in this case. *Id.* at D6, col. 6.

¹⁷⁰ I.B.M. Germany is a subsidiary of International Business Machines Corporation. *Id.* at D6, col. 2.

¹⁷¹ Although the computer does not represent new technology, it is one of the more powerful computers manufactured by I.B.M. The computer is several times more powerful than the type COCOM authorizes for sale to the Soviet Union. *Id.* at D6, col. 1-2 (statement of Fred C. Ikle, Under Secretary, Department of Defense).

¹⁷² "Transnautic, a Hamburg-based shipping company, is 51 percent owned by Sovfracht, a Soviet state-controlled company." *Id.* at D6, col. 2.

¹⁷³ *Id.* at D6, col. 5.

¹⁷⁴ *Id.* at D6, col. 5-6.

¹⁷⁵ *Id.* at D6, col. 6.

good faith of the exporter to disclose links with prohibited countries, one can only ponder how many other illegal exports go completely undetected.¹⁷⁶

VI. Possible Solutions

The foregoing cases demonstrate that the administration of export controls is laden with serious problems. The breakdowns in the system can no longer be ignored if the United States intends to curb illegal exports to restricted nations. Despite the natural tendencies of politics to avoid difficult and controversial issues, problems in the administration of export controls compel appropriate legislation. The following suggestions seem to the author to be promising reforms of export administration.

A. Licensing

At the outset, the cumbersome licensing system needs to be centralized in one agency, its sole charge to make decisions on the export of commercial and military items and technology of strategic significance. Licensing decisions presently are divided between the Commerce Department and the State Department, with review by the Defense Department as well. This has led to dilution of expertise, conflicts over shared responsibilities, and duplication of investigative efforts. Moreover, the list of controlled items has burgeoned in recent years and there is no viable process for removing goods and technology that no longer are strategic to national security.¹⁷⁷ To be effective from a national security standpoint, export controls should regulate only those products that are likely to create the greatest threat should they fall into enemy hands.¹⁷⁸

Directly addressing shortcomings in licensing, Senator Garn proposed, in 1983, the establishment of a separate Office of Strategic Trade for the purpose of consolidating the licensing of export controls into one agency.¹⁷⁹ His proposal would eliminate the licensing function of the Commerce and State Departments.¹⁸⁰ He argued

¹⁷⁶ Fred C. Ikle, Under Secretary, Department of Defense, has admitted that this mistake was discovered "almost accidentally." Once again, the Commerce Department has assured critics that it is modifying procedures to prevent repetition of the incident. *Id.* at D6, col. 1.

¹⁷⁷ NAT'L ACAD. SCI., *supra* note 5, at 13.

¹⁷⁸ 130 CONG. REC. S2142 (daily ed. Mar. 1, 1984) (statement of Senator Sam Nunn). Nunn argued that "[w]ith improved intelligence as to what specific technologies the Soviets are most in need of, U.S. officials should be able to shorten the list significantly. Instead of doing an inadequate job controlling too many products, American policy should be revised by seeking to control only those products which, from a national defense point of view, are likely to pose the greatest threat to us should they fall into the hands of an adversary." *Id.*

¹⁷⁹ S. 434, 98th Cong., 1st Sess. (1983). Enforcement responsibility would have been transferred to this office as well. *Id.*

¹⁸⁰ *Id.* § 5.

that it is essential to place the administration of export control in a highly visible federal agency whose only purpose is export control.¹⁸¹

Certainly, a positive component of the proposal would be the elimination of the conflict of interest between export promotion and export control in the Commerce Department.¹⁸² The streamlining of licensing review into one agency would make the elimination of nonstrategic commodities on either the Munitions or CCL lists more attainable, since the proposal vested all licensing decisions in one agency.

Garn's initiative received considerable support in the Senate. Eighteen Senators supported the idea from its inception, and the Committee on Banking, Housing, and Urban Affairs issued a report finding considerable merit in the proposal.¹⁸³ Indeed, the entire Senate passed legislation requiring the President to submit a proposal for the creation of an Office of Strategic Trade.¹⁸⁴

The independent agency concept, however, was not included in the 1985 amendments to the Export Administration Act ultimately enacted.¹⁸⁵ Successful opposition to the proposal came from the Department of Commerce and its supporters in the House of Representatives who argued that the existing licensing arrangement, shared between Commerce, State, and Defense, was necessary to ensure that differing viewpoints on the export question received consideration.¹⁸⁶

Continuous breakdowns in the licensing function by the Commerce Department undermine the arguments made against a single independent agency. The Department's recent track record is the strongest justification for reconsidering the proposal and removing the export licensing from an organization institutionally incapable of performing that task. Licensing should be controlled by an in-

¹⁸¹ *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on Int'l Finance & Monetary Policy of the Comm. on Banking, Housing & Urban Affairs, supra* note 103, at 717-18 (statement of Senator Jake Garn). "There is little consensus on export control in this administration, nor is there likely to be much in any administration as long as our system is bureaucratically deemphasized and top policy is made on an ad hoc basis by individuals, not one of which has a day-to-day single purpose responsibility for and experience in export administration." *Id.* at 717.

¹⁸² *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra* note 103, at 5 (statement of Senator William Cohen).

¹⁸³ S. REP. NO. 170, 98th Cong., 1st Sess. (1983).

¹⁸⁴ S. 979, 98th Cong., 2d Sess. § 15, 130 CONG. REC. 2143 (daily ed. Mar. 1, 1984). For the full text of S. 979, see 130 CONG. REC. 2252 (daily ed. Mar. 4, 1984).

¹⁸⁵ *See supra* note 41.

¹⁸⁶ H.R. REP. NO. 257, 98th Cong., 1st Sess. 9 (1983). The House Report concluded "that the only means of assuring that both economic and national security or foreign policy considerations are fully weighed in export control decisions is to involve fully and equally the Departments charged with furthering these goals." *Id.*

dependent agent capable of evaluating the delicate balance between trade and export control.

B. Enforcement: Congressional Hearings and the 1985 Amendments to the Export Administration Act

Once licenses are issued, split responsibility between Customs and Commerce causes even further problems. Enforcement operations are hindered by shared responsibility between the two. Dual jurisdiction means increased costs of operation. The finite appropriation given to the enforcement function is divided between two policing organizations. Enforcement of export controls needs to rest exclusively with the Customs Service.

Enforcement was one of the major issues Congress examined during the many hearings held on export control. As early as 1983, Senator Nunn proposed legislation to improve the enforcement of export controls by placing all enforcement functions in the Customs Service.¹⁸⁷ That proposal also would have solved the counterproductive problem of interagency competition between Customs and Commerce.¹⁸⁸ Nunn justified placing the enforcement responsibility with Customs due to its institutional investigative experience and Commerce's lack of expertise in that area.¹⁸⁹

Nunn's proposal also received widespread support; legislation passed the Senate the following year transferring enforcement authority to Customs.¹⁹⁰ Support, however, did not endure for Nunn's legislation and it was not included in the 1985 amendments to the

¹⁸⁷ S. 407, 98th Cong., 1st Sess. (1983).

¹⁸⁸ See *supra* note 136 and accompanying text.

¹⁸⁹

Customs is a law enforcement agency with longstanding jurisdiction and experience in detecting, investigating, and apprehending criminal violators of Federal Laws. The Commerce Department's experience and tradition in law enforcement are, at best, limited and recently claimed. I believe there is no question which agency should be directed to carry out enforcement of export laws. Whether it is within a new Office of Strategic Trade or under an amended Export Administration Act, the responsibility to investigate violations of the law should rest with the Customs Service.

Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 103, at 29 (statement of Senator Sam Nunn).

¹⁹⁰ S. 979, 98th Cong., 2d Sess. (1984). For a full description of the Senate bill, see *Senate Approves Tougher Curbs on Exports*, 42 CONG. Q. 523 (1984). In committee hearings, Senator Garn described the bill as "an extremely good proposal . . . Customs has the background and expertise and the mandate to enforce." *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra* note 103, at 25 (statement of Chairman Jake Garn). The Committee's Minority staff agreed, finding, "effective enforcement of the Export Administration Act is beyond the institutional capabilities of the Commerce Department." *Id.* at 41. Even industry leaders found merit in transferring the enforcement function from the Commerce Department to the Customs Service. *Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on Int'l Finance & Monetary Policy of the Comm. on Banking, Housing & Urban Affairs, supra* note 103, at 297-98 (statement of James A. Gray, President, National Machine Tool Builder's Association).

Export Administration Act.¹⁹¹ Critics successfully argued that changes in the Commerce Department's administration and jurisdiction would solve the enforcement problem.¹⁹²

The 1985 amendments sought to clarify the roles of the two agencies with respect to export enforcement and were supplemented by agency regulations setting forth the distribution of responsibilities between the two agencies.¹⁹³ Unfortunately, the changes have created more problems than they have solved.

Both agencies remain involved with inspections and investigations of suspected export control violations. Although Customs now has primary responsibility for enforcement and investigation at the border and ports of entry or exit, Commerce is not excluded from such activities.¹⁹⁴ Moreover, within the United States, both agencies may conduct investigations, jointly or independently; Commerce is expected to focus its attention on the domestic circumvention of the export licensing system.¹⁹⁵ Customs has responsibility for foreign investigations, but here again Commerce is allowed to deal with foreign authorities on policy and operational matters related to licensing or administrative sanctions.¹⁹⁶

Commerce also may conduct prelicense checks and postshipment verification outside the United States.¹⁹⁷ Such authority provides the Commerce Department with an opportunity to place many investigations under this large umbrella. Under the rubric of a prelicense check or a postshipment verification, Commerce is free under the new law to conduct extensive foreign investigations.

If recurring enforcement deficiencies are to be overcome, Congress must recognize that a forty year record of ineptitude and gross inefficiency on the part of the Commerce Department underscores the systemic nature of the problem and the need for corrective action.¹⁹⁸ The Customs Service should enforce export controls without interference from the Commerce Department.

¹⁹¹ See *supra* note 41.

¹⁹² *Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra* note 103, at 51-77 (statement of Lionel Olmer, Under Secretary of International Trade, Department of Commerce).

¹⁹³ 50 Fed. Reg. 41,545 (1985).

¹⁹⁴ *Id.* at 41,546.

¹⁹⁵ *Id.* Interestingly, there really is no other significant domestic function in export enforcement besides the investigation of licensing violations.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Senator Garn made this point very forcefully when he chastised a Commerce Department official at a 1983 Senate hearing:

You indicate that improvements are being made and further improvements are planned, I commend you for that, but that's the same story I've heard ever since I have been in the Senate. These complaints are as old as 1948. On December 18, 1948 the Senate Committee on Expenditures in the Executive Departments issued a report in its hearings on the administration of export controls by the Commerce Department. In that report the committee

VII. Conclusion

The persistent efforts of the Congress over the past several years to examine and reform export controls are commendable. Unfortunately, the Garn and Nunn proposals, which would have had a positive impact, failed to receive the support of the Reagan administration or pass both houses of Congress.¹⁹⁹ The hodgepodge reforms of 1985 did not solve the problems of export control administration. H.R. 3 also fails to address these two central concerns.²⁰⁰ Only if the United States centralizes export controls, by placing licensing authority in an independent agency and enforcement responsibility in the Customs Service, can it successfully manage the export of strategic goods and technology to restricted countries.

criticized gross inefficiency on the part of employees and noted the enforcement responsibility was taken lightly.

Export Administration Act: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, supra note 103, at 79 (statement of Senator Jake Garn).

¹⁹⁹ As a strong Reagan supporter, Senator Garn was particularly disappointed with the administration's refusal to support major reform:

Again, I am disappointed that the interadministration negotiation did not result in an administration bill to establish an OST [Office of Strategic Trade], a proposal submitted by 18 members of the Senate, many of whom are the staunchest supporters of this administration. There is even wider support for removing criminal enforcement from the Commerce Department, which we all must agree was never designed to be a law enforcement agency. That proposal, too, Mr. Chairman, seems to have been rejected.

Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on Int'l Finance & Monetary Policy of the Comm. on Banking, Housing & Urban Affairs, supra note 103, at 718 (statement of Senator Jake Garn).

²⁰⁰ The Senate version calls, however, for the General Accounting Office to submit a report to the Congress "concerning procedural improvements to ensure the efficient administration of export controls under the Export Administration Act of 1979 without adversely affecting the national security interests of the United States." H.R. 3, 100th Cong., 1st Sess. § 1028 (1987). The House version provides for establishing a Presidential Commission to consider reforms in the administration of export controls to the President and Congress. H.R. 3, 100th Cong., 1st Sess. § 339.

