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The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act

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I. INTRODUCTION

The recent failure of Congress to reauthorize the Export Administration Act of 1979 (EAA)[1] caused considerable legal controversy over the continued validity and operation of the EAA's Export Administration Regulations (Regulations).[2] Through these Regulations, the Commerce Department (Commerce) controls the export of nonmilitary goods and technologies[3] to foreign nations and limits the participation of United States persons and companies in boycotts and other restrictive trade practices imposed by foreign nations against Israel and other nations allied with the United States.

While the business community has criticized various aspects of the export controls and foreign boycott restrictions established

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1. 50 U.S.C. app. §§ 2401-2420 (1982). Author's Note: Subsequent to submittal of this article for publication, Congress has enacted the Export Administration Admendments Act of 1985 ("Act"), Pub. L. No. 99-64, 99 Stat. 120 (1985), which reauthorizes the EAA. By its terms, however, the Act is set to expire on September 30, 1989. Act, §120 (amending EAA, § 20). Thus, the problems resulting from the EAA's lapse discussed in this article very well may recur when Congress is again faced with renewing the Act in 1989. For an overview of the Act, see Harris and Bialos, *Congressional Balancing Act Benefits Exporters*, VII *Legal Times of Washington* No. 9, at 17-21 (Aug. 5, 1985).

2. 15 C.F.R. §§ 368-399.2 (1984).

3. The export of military goods and technologies is regulated by the State Department under the International Traffic In Arms Regulations, 22 C.F.R. §§ 121-130.33 (1984), pursuant to the Arms Export Control Act. 22 U.S.C. §§ 2571-2796c (1982). These controls are not affected by the lapse of the EAA. For a list of other export controls not authorized under the EAA, and therefore not affected by its lapse, see *infra* note 117.

under the EAA, the Commerce Department's regulatory system nevertheless has provided a relatively stable framework for overseas transactions. The legality of the Regulations was relatively clear,[4] their applicability to a multitude of transactions fairly predictable, and the process for administering them well-established. This stability was largely due to the requirements and guidelines contained in the EAA itself, which mandated that the Commerce regulate exports and boycott-related practices in a particular manner and limited Commerce's discretion in numerous respects.

However, this cocoon of legality and stability was recently removed because after two years of debate, Congress failed to reauthorize the EAA.[5] Faced with the lapse of this important ena-

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4. *See, e.g.*, United States v. Brumage, 377 F. Supp. 144 (E.D.N.Y. 1974) (sustaining the EAA against various constitutional challenges).

5. The 98th Congress began its unsuccessful efforts to reauthorize the EAA early in 1983, with the introduction of various proposals to reauthorize and amend the EAA. *See* H.R. 381, H.R. 483, H.R. 1197, H.R. 1564, 1565 & 1566, H.R. 2278, H.R. 2281, H.R. 2500, H.R. 2671, S. 397, S. 407, S. 434, and S. 979, 98th Cong., 1st Sess. (1983).

After extensive hearings and markup sessions in the spring of 1983, the House Committee on Foreign Affairs produced a "clean" bill, H.R. 3231, 98th Cong., 1st Sess. (1983), incorporating features from all competing House Proposals. *See Export Administration Amendments Act of 1983*, H.R. REP. No. House Comm. on For. Aff. 98th Cong., 1st Sess. (1983). The Committee favorably reported H.R. 3231 to the full House, which after extensive debates, passed the bill on October 19, 1983.

Similarly, the Senate Committee on Banking, Housing, and Urban Affairs incorporated major provisions of pending Senate bills into a "clean" version of S. 979, and favorably reported the new S. 979 to the full Senate on May 25, 1983. *See The Export Administration Act Amendments of 1983*, S. REP. No. 170, 98th Cong., 1st Sess. 2 (1983). The Senate passed S. 979, with amendments, on March 1, 1983.

The House and Senate reauthorization bills, which sharply diverged on numerous important aspects of export controls, were referred to a Joint House-Senate Conference. After seven months of work, the Conference had resolved nearly all of these differences. In the last days of the 98th Congress, however, the Conference broke down, failing to reach agreement on the following key issues: the role of the Defense Department in reviewing export licenses applications; and the nature of controls on exports and other transactions involving South Africa.

Section 10-g of the Senate bill (S. 939) would have given the Defense Department the authority to review any proposed exports (including so-called "west-west" exports to noncommunist nations) that had a "clear risk" diversion to proscribed nations. The House bill had no identical provision. The Administration opposed the Senate proposal because it wanted the flexibility to allocate these bureaucratic resources. *See* 130 CONG. REC. H. 12147 (daily ed. Oct. 11,

bling statute,[6] President Reagan was forced to reauthorize the

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1984).

Controversy also enveloped a House proposal that would have systematically restricted various transactions with South Africa. Specifically, Section Title III of the House bill established, *inter alia*: (1) mandatory fair employment standards for United States firms operating in South Africa (known as Sullivan Principles) (H.R. 3231, §§ 311, 312); (2) that no bank operating under United States law may make any loan directly, or through a foreign subsidiary, to the South African Government, or any corporation, partnership or other organization owned or controlled by that Government (H.R. 3231, § 321); and (3) that, subject to certain exceptions, no United States person could make any investment, including establishing or making a loan or other extension of credit, in South Africa. The Senate bill had no similar provision.

The Conference failed to reach a compromise on either provision. *See* 130 CONG. REC. S14335 (daily ed. Oct. 11, 1984). A final post-conference attempt at compromise also failed. As reflected in a bill passed by the Senate on October 10, 1984, (*See* 130 CONG. REC. S14083 (Oct. 10, 1984)), the Senate offered to drop its insistence on Defense Department review of "west-west" exports if the House agreed to delete the export controls over bank loans to South Africa. *See* 130 CONG. REC. H12117, 12128-12130 (Oct. 11, 1984) (setting forth text of Senate amendment to H.R. 4230) and 130 CONG. REC. S12147 (Oct. 11, 1984) (Remarks of Sen. Garn (D-Utah). The House rejected this compromise proposal and, instead, passed an amended version of H.R. 4230 (*see* 130 CONG. REC. H12131-12146 (Oct. 11, 1984)) (setting forth text of House amendments), which deleted the Senate proposal on Defense Department review and reinserted the House-sponsored South African sanctions. *See* 130 CONG. REC. S14335 (Oct. 11, 1984) (Remarks of Sen. Garn (D-Utah)). The Senate laid this bill aside for the remainder of the session, thereby ending all attempts to reauthorize the EAA during the 98th Congress. *See* 130 CONG. REC. S14449 (Oct. 11, 1984).

6. The recent statutory lapse period began on March 30, 1984, only after several extensions of the EAA, an earlier lapse of the EAA, and a resulting declaration of emergency. The EAA was originally to expire on its own terms on September 30, 1983. EAA § 20, 50 U.S.C. § 2419 (1982). On September 30, Congress' continued debate over the statute's reauthorization prompted it to amend the EAA by extending its life until October 14, 1983. *See* Pub. L. 98-108, 98th Cong., 1st Sess. (1983). On October 14, 1983, however, Congress let the EAA lapse. In response, the President declared an international economic emergency and maintained the existing Regulations pursuant to IEEPA. Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983), *reprinted in* 19 WEEKLY COMP. PRES. DOC. 1436 (1983).

Thereafter, on December 5, 1983, Congress reinstated and extended the EAA until February 29, 1984. Pub. L. 98-207, 98th Cong., 1st Sess. (1983). *See also* Exec. Order No. 12451 (Dec. 20, 1983), 48 Fed. Reg. 56563 (Dec. 22, 1983) (rescinding Presidential declaration of emergency set forth in Exec. Order No. 12444, *supra*, *reprinted in* 19 WEEKLY COMP. PRES. DOC. 1722-23 (1983)). On the expiration date, Congress again extended the EAA until March 30, 1984. P.L. 98-222, 98th Cong., 2d Sess. (1984). On March 30, 1984, the EAA again expired. The President again declared an international economic emergency and contin-

Regulations on the basis of the amorphous "emergency" powers granted him under the International Emergency Economic Powers Act of 1977 (IEEPA).[7] By executive order, the President declared that a "national emergency" existed by virture of the EAA's lapse and, therefore, continued the Commerce Department's Regulations in force in order to respond to the declared emergency.[8]

This Article examines whether the President's reauthorization of the Regulations is within the scope of the authority provided by IEEPA and explores the potential long term consequences of "life under IEEPA" for the United States system of export and boycott-related controls.

Section I analyzes whether the President's emergency powers under the IEEPA permit the maintenance of regulations originally promulgated under a statute that has since lapsed (i.e. the EAA). The Article demonstrates that when Congress promulgated the IEEPA, Congress expressly evinced its intent to give the President broad emergency authority to regulate exports and boycott-related practices during periods of the EAA lapse. Although there are serious doubts whether the lapse of the EAA rises to the level of an "unusual and extraordinary" threat to the national security, foreign policy, or the economy of the United States sufficient to allow the President to invoke the emergency powers under the IEEPA, the courts' traditionally have been unwilling to review the validity of such Presidential determinations of an emergency. Thus, when the Regulations are maintained under the IEEPA during periods of EAA lapse, they nevertheless should be considered valid.

Section II analyzes how the shift from the EAA to the IEEPA can affect the basic structure of United States export controls and boycott-related restrictions. It then examines the consequences of these changes for both businesses subject to the Regulations and for Congress, which traditionally has exercised a major role in the regulation of exports. Although Congress narrowly structured the

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ued the existing Regulations pursuant to IEEPA. Exec. Order No. 12470 (Mar. 30, 1984), 49 Fed. Reg. 13099 (Apr. 3, 1984), *reprinted in* 20 WEEKLY COMP. PRES. DOC. 452-53 (1984). On March 28, 1985, when the declared emergency ended, the President continued the emergency and maintained in effect the regulations under the IEEPA. *See* 50 Fed. Reg. 12513 (Mar. 29, 1985).

7. 50 U.S.C. §§ 1701-1706 (1982).

8. Exec. Order No. 12470 (Mar. 30, 1984), 49 Fed. Reg. 13099 (1984).

EAA to provide a long-term framework for export and boycott-related controls, the broadly worded IEEPA does not contain such requirements or guidelines that limit the scope of the Administration's discretion. Thus, under the guise of his emergency powers, the President can safely ignore the requirements and standards of the lapsed EAA, and unilaterally restructure the Commerce Department's Regulations for the duration of the emergency. While the IEEPA permits greater judicial review of Commerce Department actions than did the EAA, such lawsuits rarely succeed in reversing the Commerce Department's decisions and cannot limit the President's discretion to reshape United States export controls and boycott-related restrictions in an emergency. Thus, a lengthy EAA lapse, like the recent one, allows the President to exercise unilateral emergency authority under the IEEPA, resulting in: (1) an unstable regulatory environment for international business transactions; and (2) an eclipse of the traditional role of Congress in structuring export controls.

This article concludes by urging that when the EAA has lapsed, Congress should immediately reauthorize this important enabling statute in order to provide a more predictable regulatory environment for United States exporters and to reclaim its plenary authority in the regulation of foreign commerce. Moreover, with possible future lapses of the EAA in mind, Congress also should amend the IEEPA to require the maintenance of the Regulations *without material change* during future periods of lapse.

II. The Presidential Authority to Regulate Exports and Boycott-Related Practices in an Emergency

The IEEPA authorizes the President to declare a "national emergency" to deal with any unusual and extraordinary threat to the national security, foreign policy, or the economy of the United States,[9] and sets forth specific responses that the President may invoke to respond to and resolve the declared national emergency.[10] While Congress enacted the IEEPA to limit the President's peacetime emergency powers,[11] it is established herein that the statute nevertheless authorizes the President to control both exports and boycott-related practices pursuant to a declaration of

9. 50 U.S.C. § 1701(a)-(b) (1982).
10. *See* 50 U.S.C. § 1702 (1982).
11. *See infra* note 20.

"national emergency."

A. The Breadth of the President's Emergency Authority Under the International Emergency Economic Powers Act

The President's executive order of March 30, 1984 maintained the Regulations in force on the basis of Title II of the IEEPA, which expressly permits the President, upon a declaration of national emergency, the power to:

> regulate . . . prevent or prohibit, any . . . exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.[12]

Like other grants of power involving foreign affairs, the President's emergency powers under Title II have been broadly construed.[13] Recognizing that Congress intended the IEEPA to endow the President with the flexibility to respond successfully to national emergencies within constitutional parameters, the courts have rarely invalidated an executive action based on the IEEPA.[14] When construed in this light, Title II also should be read to permit the President's maintenance of the Regulations during periods of EAA lapse.

The broad language of Title II, on its face, appears to authorize the President's action. The statutory references to the regulation

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12. 50 U.S.C. § 1702(a)(1)(B) (1982).

13. Dames & Moore v. Reagan, 453 U.S. 654, 672 (1981) (In upholding the President's authority under IEEPA to nullify judicial attachments levied against Iran and various Iranian entities and to oust United States courts of jurisdiction over such cases, the Court noted that "the legislative history and cases . . . fully sustain the broad authority of the Executive when acting under this congressional grant of power"). *See also* Florsheim Shoe Co. v. United States, No. 83-1371, slip op. at 16 (Fed. Cir. July 12, 1984) (quoting South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965) (Congressional authorizations of presidential power involving foreign affairs "should be given a broad construction and not 'hemmed in or cabined, cribbed, confined' by anxious judicial blinders.").

14. One of the rare exceptions to this deference is Real v. Simon, 510 F.2d 557 (5th Cir. 1975) (invalidating as arbitrary a provision in the Cuban Assets Control Regulations that permitted a freeze on the assets of a deceased Cuban national because the deceased still had "an interest" in his estate), *reh'g denied*, 510 F.2d 557, *reh'g denied en banc*, 514 F.2d 738 (1975).

of "exportation" and other property transactions affecting foreign "interests" encompass both the Regulations' export controls and restrictions on foreign boycott-related practices within the President's powers under the IEEPA.

The history of Title II confirms its applicability to export controls. The President invoked the IEEPA's predecessor statute, Section 5(b) of the Trading with the Enemy Act of 1917 (Enemy Act),[15] as the basis for maintaining the Regulations on at least four earlier occasions of EAA lapse.[16] In *United States v. Spawr Optical Research Inc.*,[17] several defendants who had been convicted for the unlicensed export of laser mirrors to the Soviet Union during a period of EAA lapse challenged the President's use of Section 5(b) to maintain the validity of the Regulations. In upholding the President's use of the Enemy Act, the Ninth Circuit concluded that "the express delegation in [Section] 5(b) to the President was broad and enabled him to regulate, prevent or prohibit the exportation of *any* property to *any* foreign country. The unambiguous wording of the statute clearly shows that the President's actions were in accordance with the power Congress delegated."[18]

Although Congress limited the scope of the President's peacetime emergency powers when it promulgated the IEEPA in 1977,[19] it did not repudiate this particular use of the President's

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15. 50 U.S.C. §§ 1-36 (1982).

16. *See* Exec. Order No. 11940, 41 Fed. Reg. 43407 (1976); Exec. Order No. 11810, 39 Fed. Reg. 35567 (1974); Exec. Order No. 11796, 39 Fed. Reg. 27891 (1974); Exec. Order No. 11677, 37 Fed. Reg. 15483 (1972).

17. 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

18. 685 F.2d at 1081, n.10. *See also* United States v. Yoshida International, Inc., 526 F.2d 560, 573 (C.C.P.A. 1975) (holding that the President can broadly regulate imports under Section 5(b) of the Enemy Act).

19. Title II does not include the following powers, which were available to the President under Section 5(b) of the Enemy Act: (1) the power to take title to foreign property; (2) the power to regulate purely domestic transactions; (3) the power to regulate gold or bullion; and (4) the power to seize records. *Trading With The Enemy Act Reform Legislation*, H.R. REP. No. 459, 95th Cong., 1st Sess. 15 (1977).

General provisions of IEEPA also limit the emergency powers conferred on the President under Title II by requiring the President to, *inter alia*: (1) consult with Congress prior to and during the exercise of emergency powers, 50 U.S.C. § 1703(a) (1982); (2) transmit a report to Congress on the use of such powers, 50 U.S.C. § 1703(b) (1982); and (3) comply with the procedures for exercising emergency powers set forth in the National Emergency Act, 50 U.S.C. § 1703(d) (1982), 50 U.S.C. §§ 1621-1651(b) (1982).

emergency authority. To the contrary, Congress *expressly authorized* the President to use Title II to keep the Regulations' export controls and restrictions on boycott-related practices in effect during periods of EAA lapse.

A review of the IEEPA's legislative history reveals that, Congress heard considerable testimony concerning the established practice of using Section 5(b) of the Enemy Act to maintain the Regulations of the EAA during lapse periods.[20] To solve the lapse problem, the administration proposed during Committee debate that Congress make the EAA a permanent statute. However, Congress rejected this proposal, concluding that "such important regulatory legislation should be periodically reviewed."[21] In maintaining the EAA's temporary status, Congress thus consciously chose to perpetuate the lapse problem that had continuously plagued the statute's reauthorization.

At the same time, however, Congress also rejected a proposal to repeal Section 5(b) of the Enemy Act and, instead, incorporated its operative language wholesale into Title II of the IEEPA as the basic authorization for the President's peacetime use of emergency powers.[22] In so doing, Congress clearly indicated that Title II of the IEEPA could serve as a statutory backstop in the event of an EAA lapse: "Should a lapse occur . . . the authority of title II of this bill could be used to continue the Export Administration Regulations in effect if, and to the extent that, the President

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20. *See Emergency Controls on International Economic Transactions, Hearings Before House Comm. on Int'l Rel. Subcomm. on Int'l Econ. Pol'y & Trade*, 95th Cong., 1st Sess. (1977) (Statement of Prof. Maier, at 23-24) (Statement of Assistant Secretary of State Julius L. Katz, at 99-100) (Statement of Homer E. Moyer, Jr., Deputy General Counsel, Dept. of Commerce, at 122-23) [hereinafter referred to as *Hearings*].

21. H.R. REP. No. 459, *supra* note 19, at 13.

22. *See Revision of Trading With the Enemy Act, Markup Before House Comm. on Int'l Rel.*, 95th Cong., 1st Sess. (1977) (Remarks of Comm. Chairman Jonathan B. Bingham noting that the emergency powers provided by Title II of IEEPA "are substantially the same as those granted in the Enemy Act") [hereinafter referred to as *Markup*].

Administration witnesses specifically cited the use of Section 5(b) to maintain the EAA Regulations during EAA lapse periods as a major argument in favor of retaining the provision. *See Hearings, supra* note 20, at 124 (Statement of Homer E. Moyer, Jr., Deputy General Counsel Dept. of Commerce, at 123-24) (Prepared Statement of C. Fred Bergsten, Assistant Secretary of the Treasury, at 106-07).

declared a national emergency as a result of such lapse. . . ."[23] Thus, Congress has clearly expressed its intention that the President should use the peacetime emergency powers provided by the IEEPA to maintain both the export controls and boycott-related restrictions established by the Commerce Department pursuant to the EAA during periods of EAA lapse.[24]

B. The Lapse of the EAA as a "National Emergency"

Although Title II of the IEEPA grants the President the authority to establish export and boycott-related controls, the President may declare a "national emergency" and exercise this authority only in the face of an "*unusual and extraordinary threat,* which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States. . . ."[25] The IEEPA expressly states that the President may not exercise the emergency authority "for any other purpose."[26]

Congress intended that this requirement of a real emergency serve as a "substantive restriction" on the "breadth . . . and . . . availability" of the powers delegated to the President by the IEEPA.[27] As a House report, *Trading with the Enemy Act Reform Legislation* (*Trading with the Enemy* Report), states, the "unusual and extraordinary" threat requirement "stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. A national emergency should be declared and emergency authority employed only with respect to a specific set of circumstances

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23. H.R. REP. No. 459, *supra* note 19, at 13. *See also International Emergency Economic Powers Legislation,* S. REP. No. 466, 95th Cong., 1st Sess. 6 (1977); *Spawr Optical Research, Inc.,* 685 F.2d at 1081 (noting that "Congress again conferred on the President the rule-making authority necessary to maintain the [EAA] regulations").

24. The Commerce Department's foreign boycott restrictions probably are also authorized by an alternative delegation of authority in IEEPA, which provides that the President may "regulate or prohibit . . . any transactions in foreign exchange, . . . [and] transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of a foreign country or a national thereof." 50 U.S.C. § 1702(a)(1)(A) (1982). *See Scalia Letter, infra* note 44, at M-2.

25. 50 U.S.C. § 1701(a) (1982) (emphasis added).

26. 50 U.S.C. § 1701(b) (1982).

27. H.R. REP. No. 459, *supra* note 19, at 10.

which constitute a real emergency. . . ."[28]

In an attempt to meet this "real" emergency requirement, the March 30, 1984 executive order invoking the IEEPA states that:

> the unrestricted access of foreign parties to United States commercial goods, technology, and technical data and the existence of certain boycott practices of foreign nations constitute, in light of the expiration of the Export Administration Act of 1979, an unusual and extraordinary threat to the national security, foreign policy and economy of the United States."[29]

Yet, whether the IEEPA's "real emergency" requirement *in fact* has been met, is *not* free from doubt.

The mere reiteration of statutory language in an executive order designed to fulfill that statute's requirements hardly resolves the issue of whether the lapse of the EAA constitutes an "unusual and extraordinary threat" to United States interests sufficient to invoke the President's emergency powers under the IEEPA. Moreover, it is highly doubtful that the problem of unrestricted access to strategic goods and technology that results from the EAA's lapse is "unusual and extraordinary" or "rare and brief." To the contrary, the "leakage" of United States products and technology is the very recurring and predictable problem that prompted Congress to promulgate the EAA in the first place.[30] Congress itself highlighted the nonemergency nature of the export leakage problem in 1977 when it shifted the authority to regulate exports outside the United States from the Enemy Act to the EAA. As then stated by Congress, "this is neither a wartime nor an emergency authority, and it belongs in the nonemergency statutory context of the [EAA]."[31]

It is also uncertain that the lapse of control over foreign boycott-related practices constitutes an "unusual and extraordinary" threat to United States interests. While the President, at least, can justify the exercise of emergency export controls on the ground that the absence of such controls would probably result in transfers of strategic goods and technologies detrimental to United States national security, foreign policy, and economic interests, no such urgent justification requires the President to

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28. *Id.*

29. Exec. Order No. 12470 (Mar. 30, 1984), 49 Fed. Reg. 13099 (1984), *reprinted in* 20 WEEKLY COMP. PRES. DOC. 452 (1984).

30. H.R. REP. No. 459, *supra* note 19, at 17.

31. *Id.*

maintain the EAA's boycott-related controls.[32] Although compliance by United States business concerns with foreign boycotts perpetrated against United States allies clearly would be inconsistent with United States foreign policy interests and, perhaps, would run counter to the international obligations of the United States, such boycott-related conduct by United States nationals would not result in irreparable harm to United States interests.[33] That the EAA itself did not prohibit compliance with foreign boycotts until 1976 underscores the nonemergency nature of this problem. In short, the absence of controls over both exports and boycott-related practices appears to be a "normal, ongoing problem" rather than one that is rare and unusual.[34]

Notwithstanding these serious doubts over whether the EAA's lapse creates a "real" emergency, a reviewing court probably would conclude that the President's determination of an "unusual and extraordinary threat" to United States interests is a "political question" immune from judicial review. Under this doctrine of judicial abstention, the federal judiciary will not adjudicate claims that require an inquiry into the conduct of United States foreign policy because, under the Constitution, such foreign policy matters fall exclusively within the province of the executive and legislative branches.[35] A judicial inquiry into the validity of a

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32. *See Hearings, supra* note 20, at 123 (statement of Homer E. Moyer, Jr., Deputy General Counsel, Dept. of Commerce) (noting that "[t]he transfer of strategic technology during a temporary lapse in export control authority could result in an irretrievable loss, for a one-time acquisition of strategic technology could obviously provide the basis for unlimited production of strategic commodities in the future").

Administration officials testifying before Congress at the time of IEEPA's enactment offered no similar urgency for the maintenance of the EAA's foreign boycott restrictions during its lapse.

33. The only rationale offered by the President in support of maintaining the boycott-related controls is that the lapse of such controls "would seriously harm our foreign policy interests, particularly in the Middle East." *Continuation of Export Control Regulations, Presidential Message To Congress* (Mar. 30, 1984), *supra* note 29, *reprinted in* 20 WEEKLY COMP. PRES. DOC. 453 (Apr. 2, 1984). Neither the President's Executive Order nor his accompanying Message to Congress offer any evidence of irreparable injury which would result from the lapse of these controls.

34. The lapse of a domestic regulatory statute like the EAA also may not constitute a threat "which has its source in whole or substantial part outside the United States." 50 U.S.C. § 1701(a) (1982).

35. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948); Holmes v. Laird, 459

President's determination that an emergency exists under the IEEPA is precisely the type of inquiry that the political question doctrine is designed to prevent; it would allow the courts to second-guess the President's determination of a threat to United States foreign policy, national security, or economic interests, and thereby interfere with the executive branch's ability to flexibly respond to perceived threats.

In short, by steadfastly exercising substantial deference toward the President's emergency determinations under the Enemy Act and the IEEPA,[36] the courts have ceded the power to define international emergencies to the executive branch. Thus, whatever the wisdom of the President's decision to characterize the EAA lapse as a "national emergency," this determination must be regarded as a verity.

C. Emergency Export Controls: A "Rational" Response to the Lapse of the EAA

Although unwilling to examine the validity of a President's determination that a "national emergency" exists, the courts nevertheless will inquire into whether the actions undertaken in response thereto are "*rationally related* to the national emergenc[y] invoked."[37] However, this judicially-imposed limitation on a President's emergency powers under the IEEPA is easily met. Having allowed the President to define an EAA lapse as an "unusual and extraordinary" threat to significant United States interests, the courts can hardly conclude that the President's use of emergency powers to maintain the United States export controls and boycott-related restrictions in force is an irrational response to this perceived threat. If the "termination" or "temporary lapse" of the EAA threatens United States interests by permitting unrestricted exports of strategic goods and compliance by United States persons with foreign boycotts of United States allies,[38] the President's use of the IEEPA to extend the

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F.2d 1211 (D.C. Cir.) *cert. denied*, 409 U.S. 869 (1972).

36. *See* Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 989 (1966); *Yoshida*, 526 F.2d at 579.

37. *Spawr Optical Research, Inc.*, 685 F.2d at 1081 (emphasis added). *Accord Yoshida*, 526 F.2d at 579, n.29.

38. *Continuation of Export Control Regulations, Presidential Message to the Congress* (Mar. 30, 1984), *supra* note 29, *reprinted in* 20 WEEKLY COMP. PRES. DOC. 453-54 (Apr. 2, 1984).

EAA Regulations over such international business transactions is the *most* rational solution to this "national emergency."[39]

D. The IEEPA's Limitations on Emergency Powers Do Not Render Invalid Specific Sections of the Commerce Regulations

Assertions that specific portions of the Commerce Department Regulations lie outside the scope of the President's Title II emergency powers are also without merit. The limitations that the IEEPA places on the President's emergency powers do not disturb the validity of any of the Commerce Department export controls and boycott-related restrictions maintained thereunder.

1. *The Foreign Interest Requirement*

One of the Title II limitations on the President's emergency powers is that actions taken by the President must relate to "property in which any foreign country or a national thereof has any interest."[40] As the New Jersey District Court recently observed, "[t]he term 'any interest' must be defined in the broadest sense and includes any interest whatsoever, direct or indirect."[41] In other words, under the IEEPA, the President may regulate economic transactions involving the most indirect foreign interest, but the President cannot "regulate purely domestic transaction[s]."[42] This broadly construed requirement thus does not disturb the validity of any of the EAA Regulations maintained under the IEEPA,[43] *all* of which apply to transactions involving at least some foreign interest, however indirect or remote.[44]

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39. *See Spawr Optical Research, Inc.*, 685 F.2d at 1081 (holding that "President Ford's effort to limit the exportation of strategic items [under the Enemy Act] clearly had a rational relationship to the prevention of aggression and armed conflict").

40. 50 U.S.C. § 1702(a)(1)(B) (1982).

41. Behring Int'l Inc. v. Miller, 504 F. Supp. 552, 557 n.8 (D.N.J. 1980) (quoting United States v. Quong, 303 F.2d 499 (6th Cir.), *cert. denied*, 371 U.S. 863 (1962)). *See also* Regan v. Wald, 104 S. Ct. 3026, 3034, *reh'g denied*, 105 S. Ct. 285 (1984).

42. H.R. REP. No. 459, *supra* note 19, at 15.

43. *See* Letter from Assistant Attorney General Antonin Scalia to J.T. Smith, General Counsel, Dept. of Commerce ("Scalia Letter") (Sept. 29, 1976), *reprinted in* U. S. EXPORT WEEKLY (BNA) (Oct. 19, 1976) (opining that the Enemy Act provided the President with the authority to maintain the Commerce Department's foreign boycott provisions during lapses of the EAA.)

44. For example, although the Commerce Department Regulations restrict

2. *The IEEPA Jurisdictional Limitation*

Another Title II limitation on the President's emergency powers is its jurisdictional provision, under which the President may regulate only persons and property "subject to the jurisdiction of the United States."[45] Because the EAA contains the identical jurisdictional provision,[46] the Commerce Department's Regulations must be considered valid under the IEEPA to the extent that they are authorized by the EAA.

The broad scope of United States jurisdiction under the IEEPA and the EAA includes the authority to regulate numerous extraterritorial export transactions. Prior to the enactment of the IEEPA, Section 5(b) of the Enemy Act served as the statutory basis for those aspects of the Regulations that control the re-exportation of non-United States-origin commodities and technology by foreign subsidiaries of United States concerns.[47] The President found it necessary to regulate these extraterritorial transactions pursuant to the Enemy Act because the statutory predecessors to the EAA *only* permitted the President to prohibit or curtail exports "from the United States."[48] However, when promulgating the IEEPA, Congress amended the EAA to cover these extraterritorial transactions, thereby eliminating the need to regulate them on a permanent basis under the President's emergency powers.[49] At the same time, Congress clearly indicated its intent that "[e]xport controls of this kind could be implemented in future emergencies under the authority of . . . [T]itle II" of the IEEPA.[50] Thus, to the extent that the EAA Regulations reach extraterritorial transactions like re-exports,[51] Congress

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the release of technical data in the United States, the restrictions only apply to releases made with the "knowledge or intent that the data will be shipped or transmitted" out of the U.S. *See* 15 C.F.R. § 379.1(b)(1)(ii) (1984). This export control has a sufficiently foreign connection, even though indirect, to meet IEEPA's "foreign interest" requirement.

45. 50 U.S.C. § 1702(a)(1)(B) (1982).

46. 50 U.S.C. app. §§ 2405(a)(1) & 2406(a)(1) (1982).

47. H.R. REP. No. 459, *supra* note 19, at 17.

48. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (emphasis added); Export Control Act of 1949, Ch. 11, 63 Stat. 7 (1949).

49. H.R. REP. No. 459, *supra* note 19, at 17.

50. S. REP. No. 466, *supra* note 23, at 6.

51. While current United States export controls have extraterritorial applications (*see* 15 C.F.R. §§ 374, 379 (1984) (regulating re-export of goods and technologies by United States and foreign persons)), the foreign boycott-related re-

plainly has given the President the authority to maintain them under the IEEPA during periods of EAA lapse.[52]

3. *The Personal Communications Exemption*

The IEEPA's blanket prohibition on the emergency regulation of "any postal, telegraphic, telephonic, or other personal communication, which does not transfer any thing of value"[53] does not disturb the validity of the Regulations' restrictions on either the provision of boycott-related information or the export of technical data.

Specifically, the EAA Regulations provide that no United States person may furnish boycott-related information to boycotting nations concerning: (1) the race, sex, or national origin of any United States person, or of any owner, officer, director, or employee of any corporation or other organization that is a United States person;[54] (2) the person's own or any other person's past, present, or proposed business relationships with boycotting nations, businesses, nationals, and residents thereof, or persons blacklisted by boycotting nations;[55] and (3) the membership, affiliation, or contributions of any other person to a charitable or fra-

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strictions largely do not. Their jurisdictional reach is limited to boycott-related conduct by United States persons, which the Commerce Department has defined to include United States residents, nationals, and "controlled in fact" foreign subsidiaries, affiliates, and other permanent foreign establishments of domestic concerns. 15 C.F.R. § 369.1(b)(1) (1984).

52. This is not to say that there are no limits whatsoever on the extraterritorial reach of United States jurisdiction under IEEPA and the EAA. By calling for assertions of jurisdiction to be limited where they impinge on the important national interests of foreign nations, principles of international comity lend considerable support to the curtailment of the extraterritorial exercise of United States jurisdiction under federal regulatory statutes. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); Address by the Honorable Kenneth W. Dam to the American Society of International Law, Washington, D.C. (Apr. 15, 1983); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (Tent. Draft No. 2, 1981). *See also* Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 J. L. & POL. INT'L BUS. 1, 112-114 (suggesting that the jurisdictional reach of the EAA and IEEPA should be limited in accordance with principles of international law).

53. 50 U.S.C. § 1702(b)(1) (1982).

54. 15 C.F.R. § 369.2(c)(1) (1984).

55. 15 C.F.R. § 369.2(d)(1) (1984).

ternal organization which supports a boycotted nation.[56]

While the Regulations thus prohibit overseas "communication" they nevertheless are valid because the IEEPA expressly exempts from regulation *only* "*personal communications* which do not involve the transfer of *anything of value.*"[57] In contrast, the Regulations focus *exclusively* on communications that concern commercial relationships or occur in a commercial setting.[58] Moreover, a boycotting nation's receipt of boycott-related information plainly can be interpreted as a transfer of something "of value" (i.e., of information that could possibly assist them in enforcing boycotts against nations friendly to the United States and against persons who support or have business dealings with boycotted nations. Therefore, the use of the broadly-worded IEEPA to maintain in force the restrictions on boycott-related conduct does not violate the IEEPA limitations.

For similar reasons, the President's use of emergency powers to maintain the Commerce Department's restrictions on the export of technical data also should be considered valid. These Regulations apply only to overseas communications that contain technical data, which is defined to include "information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials."[59] Technical information used in a manufacturing or production process plainly does not qualify as a "personal communication" exempt from regulation under the IEEPA because it is clearly commercial in nature and is often transferred in international economic transactions. Such data is also clearly "of value" not only in a commercial sense, but also in its potential national security significance—which is the very reason why Congress restricts exports of technical data. Thus, the regulation of technical data exports under IEEPA does not affect their validity.[60]

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56. 15 C.F.R. § 369.2(e)(1) (1984).

57. H.R. REP. No. 459, *supra* note 19, at 15 (emphasis added).

58. The prohibitions on furnishing boycott-related information only apply "with respect to a United States person's activities in *interstate or foreign commerce* of the United States. . . ." 15 C.F.R. § 369.2(c)(4) (1984) (emphasis added). *See also* 15 C.F.R. § 369.2(d)(2)(i) (1984) (noting that the regulation applies where the information being furnished pertains to various business relationships).

59. 15 C.F.R. § 379.1(a) (1984).

60. The exemptions from EAA technical data restrictions ensure that personal communications of no commercial or military value will remain unregu-

4. *Recordkeeping, Reporting & Enforcement Powers*

Finally, challenges to the reporting requirements, recordkeeping requirements, enforcement procedures, and most of the penalties established by the EAA Regulations appear to lack a legal basis because Title II of the IEEPA expressly allows such ancillary functions to be exercised with respect to export controls and boycott-related restrictions. The emergency power to "investigate" and "regulate" in Title II encompasses the power to conduct necessary proceedings.[61] The IEEPA also contains a separate provision that grants the President the authority to: (1) "require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise," information relevant to regulated transactions; and (2) "require the production of any books of account, records, contracts, letters, memoranda or other papers" in the custody of a regulated person.[62] This IEEPA provision clearly authorizes all reporting requirements in the EAA Regulations[63] and allows the Commerce Department to subpoena or otherwise obtain discovery of necessary documents in the course of an enforcement action pursuant to the Regulation.[64]

The IEEPA's criminal and civil penalties are very similar to those established under the EAA Regulations. The only difference between the two is that the IEEPA sanctions are less severe.[65] Thus, to the extent that the EAA Regulation penalties are more severe than the IEEPA penalties,[66] they are invalid.

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lated. The Commerce Department specifically excludes technical data in the public domain, scientific data not "directly and significantly related to design, production, or utilization in industrial processes," and educational data transmitted through instruction in academic settings. 15 C.F.R. § 379.3 (1984).

61. *See* 50 U.S.C. § 1702(a)(1)(B) (1982); *Scalia Letter, supra* note 43.

62. 50 U.S.C. § 1702(a)(2) (1982).

63. *See, e.g.*, 15 C.F.R. §§ 369.68, 387.13 (1984).

64. *See* 15 C.F.R. § 388.9 (1984).

65. Maximum fines of $10,000 for a civil violation, and maximum fines of $50,000, or a jail sentence of ten years, or both, for a willful violation.

66. *See, e.g.*, 15 C.F.R. § 387.1(b)(3) (1984) (providing civil fines of $100,000 for each violation involving national security controls); 15 C.F.R. § 387.1(a)(ii) (1984) (providing criminal fines up to five times the value of the exports, or $1,000,000, whichever is greater, for violations of national security and foreign policy controls by persons other than individuals, and fines up to $250,000 for individuals).

It should also be noted that IEEPA penalizes only willful and nonwillful violations, but the Regulations also provide an intermediate set of criminal penalties for "knowing" violations. *See* 15 C.F.R. § 387.1(a)(1)(i) (1984). Because IEEPA

The only penalties among the EAA enforcement tools that the IEEPA does not expressly authorize are administrative denial orders, which suspend or revoke a subject person's export privileges for either an indefinite or specified period.[67] Temporary denial orders, issued on an *ex parte* basis, will summarily deny the export privileges of alleged violators upon a showing that the order will facilitate the enforcement of the EAA Regulations.[68] Temporary denial orders have proven very successful in aiding Commerce Department efforts to obtain necessary information from alleged violators during enforcement proceedings. Permanent denial orders, on the other hand, are issued against persons who the Commerce Department has determined have violated the Regulations.

An argument can be made that the IEEPA, on its face, does not authorize such denial orders. Although the IEEPA expressly permits the President to establish criminal and civil fines, it does not explicitly authorize the permanent denial of export privileges. Similarly, the IEEPA expressly provides for administrative discovery and reporting requirements, but does not explicitly authorize the temporary denial of export privileges as an enforcement tool in administrative proceedings. It is thus arguable that by expressly providing the Commerce Department with a host of penalties and administrative enforcement devices, Congress intended to withhold from the President the authority to use unmentioned sanctions—including denial orders.

Under the broader judicial view of the President's emergency powers,[69] however, the courts would probably find that the IEEPA authorizes denial orders, not as sanctions and enforcement devices, but as prohibitions on exports. In this regard, Title II provides the President with the expansive authority to "prevent or prohibit . . . *any* . . . *exportation* of . . . any property in which any foreign country or a national thereof has any

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does not provide for mid-level liability and penalties, this portion of the Regulations also should be considered invalid. Under IEEPA, "knowing" violations must be treated as either civil violations subject to IEEPA's lesser civil sanctions, or, if willfulness can be proven, criminal violations subject to its greater criminal sanctions.

67. *See* 15 C.F.R. § 388.3 (1984) (permanent denial orders); 15 C.F.R. § 388.19 (1984) (temporary denial orders).

68. 15 C.F.R. § 388.19(2) (1984).

69. *See Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), and discussion thereof in Section I(A), *supra*.

interest."[70]

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In summary, both Congress and the courts have sanctioned the presidential regulation of exports and boycott-related practices during a "national emergency" prompted by the EAA lapse—Congress, by granting the President broad powers under Title II of the IEEPA to respond to emergencies and the judiciary, by its refusal to scrutinize presidential emergency determinations that the EAA lapse creates an "unusual and extraordinary threat" to United States interests.[71] Thus, when the EAA Regulations are maintained under the IEEPA during periods of EAA lapse, regulated businesses should consider appropriate measures to comply therewith.

III. The Shape of United States Export Controls and Boycott-Related Restrictions Under the IEEPA

The valid maintenance of the Regulations under the President's Title II emergency powers for an extended period of time raises the serious prospect of major alterations being made in the basic structure of United States export controls and boycott-related regulations. Such changes, which the President can impose unilaterally pursuant to the IEEPA during EAA lapse periods, can affect significantly the regulatory climate for businesses engaged in international transactions and can undermine the traditional role of Congress in structuring United States export

70. 50 U.S.C. § 1702(a)(1)(B) (1982) (emphasis added).

71. Notwithstanding the lapse of the EAA and the President's invocation of IEEPA, Congress continued to appropriate funds for the administration and enforcement of the Commerce Department's system of export controls and boycott-related regulations. *See Fiscal 1985 Congressional Budget Submission* (requesting $22,749,000 for administration and enforcement of export controls by the Commerce Department's International Trade Administration (ITA)); H.R. Rep. No. 802, 98th Cong., 2d Sess. at 12 (1984) (noting approval of entire ITA request, with exceptions not here relevant); *Departments of Commerce, Justice, and State and the Judiciary, and Related Agencies Appropriation Act, 1985*, P.L. 98-411, 98th Cong., 2d Sess. (1984) (enacting appropriation sought by ITA for export control functions during periods when Regulations are maintained pursuant to IEEPA). Congressional appropriation during the recent lapse period further indicates Congressional acquiescence in, and approval of, the President's use of IEEPA to regulate exports and boycott-related conduct when the EAA has lapsed.

controls.

A. Presidential Discretion to Restructure Export Controls During an Emergency

As noted at the outset, the Commerce Department has based its regulatory framework for overseas transactions, to a large extent, on the requirements, guidelines, and statements of policy in the EAA.[72] Thus, the crucial issue is whether the President can utilize the emergency power under the IEEPA to make major structural changes in export controls and boycott regulations—and, in the process, legally disregard the EAA's limitations on executive discretion.

In promulgating the IEEPA, Congress was deeply concerned with the breadth of the President's discretion in exercising emergency authority. The *Trading With the Enemy* Report notes that section 5(b) of the Enemy Act[73] had a "history of expansive use of emergency powers" and, "through usage and amendment, had become an unlimited grant of authority for the President to exercise, at [the President's] discretion, broad powers in . . . the international economic arena without congressional review."[74] Indeed, the legislative history of the IEEPA provides numerous examples of age-old declarations of emergency, that continued to form the basis for presidential actions.[75]

In an attempt to prevent these perceived abuses of the emergency power, Congress subjected the President's exercise of emergency powers under the IEEPA to "strict procedural limits."[76] Specifically, the IEEPA provides that a two-house congressional veto can terminate presidentially-declared emergencies and, thereby, invalidate any regulations that the President has promulgated pursuant to IEEPA emergency powers.[77] However, even if the use or threatened use of this veto authority by Congress could have served as a potent check on the breadth of the President's emergency power under the IEEPA,[78] the Supreme

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72. *See supra* text accompanying note 4.
73. H.R. REP. No. 459, *supra* note 19, at 10.
74. *Id.* at 7.
75. *Id.* at 5-6.
76. *Id.* at 11. For a description of other procedural limitations, *see supra* note 19.
77. 50 U.S.C. § 1706(b).
78. As a practical matter, the congressional power to terminate an IEEPA

Court's recent ruling that one-house legislative veto provisions are unconstitutional[79] probably renders the IEEPA's two-house termination authority invalid as well.[80] Thus, regulations that the President promulgates pursuant to emergency authority under the IEEPA, in all probability, are not subject to any significant threat of a congressional veto that would terminate an IEEPA emergency.

Moreover, the IEEPA does not impose any substantive constraints on the President's ability to exercise emergency powers. Congressional concern over limiting the President's emergency powers was tempered by Congress' desire to provide the President with authority "sufficiently broad and flexible to enable [the President] to respond as appropriate and necessary to unforeseen contingencies."[81] Consequently, Congress rejected "recommendations that it place a definite time limit on the duration of any state of national emergency."[82] Thus, if the requisite procedural steps are followed,[83] the President may maintain in effect indefinitely the "national emergency" caused by the EAA lapse and

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emergency has never been used and is ill-suited to restrain presidential regulatory authority during an emergency. By terminating an emergency to invalidate certain regulatory actions that it found repugnant, Congress would also invalidate *all* other emergency regulations promulgated during the emergency and prohibit the issuance of any further regulations. Thus, the overly broad nature of this power may deter Congress from its use, particularly when the termination of the emergency will result in the same problem created by the lapse of the EAA in the first place—namely, a window of time during which no controls over exports or foreign boycott-related practices would be in effect. In short, even though Congress dislikes specific regulations issued by the President during an emergency, it may prefer to allow the presidential regulations rather than to operate with no regulations at all, which is the inevitable result from its use of the emergency termination power.

79. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

80. A major constitutional defect of the one-house veto relied on by the Court in *Chadha* was its failure to comply with the Article I requirement that all legislation be "presented" to the President for approval or disapproval. The two-house termination authority in IEEPA suffers from the same constitutional defect. *See Chadha*, 462 U.S. at 974 ("The Court's Article I analysis appears to invalidate all legislative vetoes irrespective of form or subject.") (White, J., dissenting).

81. H.R. REP. No. 459, *supra* note 19, at 10.

82. *Id.*

83. To maintain an emergency past its anniversary date, the President must publish a Federal Register notice to that effect, 50 U.S.C. § 1622(d) (1982), and continue submitting required periodic reports to Congress. 50 U.S.C. § 1703.

thereby control exports for the duration of the lapse period. Indeed, even if Congress reauthorizes the EAA, the President can veto the reauthorization bill, extend the IEEPA emergency, and control United States export controls and foreign boycott regulations under the IEEPA for an extended period of time.

The IEEPA also places no substantive limitations on the President's ability to exercise emergency powers *during* a declared emergency. In the face of Administration objections, Congress specifically rejected a proposal that would have given it the authority to invalidate specific regulations issued by the President during an emergency.[84] Thus, Title II places no limitations on the nature of the export controls and boycott-related restrictions that it authorizes the President to promulgate.

Furthermore, no special constraints apply where a federal regulatory statute, replete with requirements and guidelines established by Congress, lapses. Although "the [Commerce Department] policies and regulations in effect prior to expiration were kept in effect" during past EAA lapses,[85] the IEEPA neither requires the President to maintain the status quo nor bars the President from undertaking a complete overhaul of United States export control and foreign boycott regulations. Thus, a declaration of a "national emergency" allows the President to disregard legally the requirements, standards, and guidelines of the EAA, and to restructure completely the Commerce Department's regulations until Congress reauthorizes the EAA.[86]

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84. Early versions of IEEPA contained such a provision. *See* H.R. REP. No. 7738, 95th Cong., 1st Sess., § 206(b)(1) & (c) (July 13, 1977). Administration officials opposed the provision on the grounds that it was unnecessary and unlawful—unnecessary because "Congress can always modify or revoke the President's emergency powers through legislation," and unlawful because it would have violated "the constitutional principle of the separation of powers." *Markup, supra* note 22, at 13 (testimony of Hon. C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs).

85. *Hearings, supra* note 20, at 124 (remarks of Homer E. Moyer, Jr., Dep. General Counsel, Department of Commerce).

86. *See Hearings, supra* note 20, at 124 (remarks of Rep. Jonathan B. Bingham (D-N.Y.)) (observing that, under the President's emergency authority, the executive branch "would claim freedom to regulate exports entirely at its own discretion, without reference to any of the statutory guidelines provided by Congress in the [EAA]").

B. Judicial Review: A Limited Constraint on Executive Discretion Under the IEEPA

Although there is a greater opportunity for judicial review of Commerce Department regulatory actions under the IEEPA than under the EAA, the limited nature of this judicial constraint on the regulation of exports and boycott-related practices during an IEEPA emergency cannot serve to effectively limit the President's ability to make wholesale changes in the Regulations.

1. *The Availability of APA Review*

The EAA[87] expressly provides that Commerce Department regulatory actions taken thereunder are not subject to judicial review under the Administrative Procedures Act (APA).[88] Thus, when the EAA is in force, the Commerce Department's actions enforcing United States export controls and boycott-related restrictions, such as denials of export license applications, could not be set aside by federal courts on the grounds that they are arbitrary, capricious, an abuse of discretion, or not in accordance with law.[89]

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87. EAA § 13(a), 50 U.S.C. § 2412(b).

88. 5 U.S.C. §§ 551-553. The EAA's lapse also raises the question whether Commerce Department rulemakings are now subject to the notice and comment requirements of the APA and APA-type judicial review. The EAA expressly provides that any Commerce Department functions are exempt from the rulemaking requirements of section 553 of the APA. Because IEEPA does not contain a similar exemption, Commerce Department rulemakings are theoretically subject to APA requirements.

In practice, however, the Commerce Department and other agencies that exercise rulemaking functions under IEEPA can invoke the "foreign affairs" exemption in the APA, which renders the notice and current requirements of section 553 inapplicable to all "foreign affairs functions." APA § 553(a)(1). The Commerce Department has already invoked the APA's foreign affairs exception with respect to the new export control regulations it has proposed or adopted under IEEPA. *See* 49 Fed. Reg. 50,608, 50,609 (Dec. 31, 1984) (final rules on exports of computer software and hardware); 49 Fed. Reg. 35,790, 35,791 (Sept. 12, 1984) (proposed rules on new distribution license procedures).

Of course, because the foreign affairs exception only pertains to the APA's notice and comment requirements, judicial review is still available. APA-type review of informal rulemakings, however, is limited to determining whether the newly promulgated rule being challenged is arbitrary and capricious, APA § 706(2)(A)—a standard which is difficult to meet. *See also* discussion, *infra,* of other potential barriers to judicial relief (which apply to review of rulemakings as well as license denials and other agency actions).

89. These four grounds are the basic APA standards of judicial review for

Because the IEEPA does not contain any express exemption from APA judicial review, the EAA's lapse raises the question whether the Commerce Department actions taken under the IEEPA are subject to the APA judicial review or still are exempt by the EAA provision. The Western District Court of Washington has considered this issue and, in *Nuclear Pacific, Inc. v. Department of Commerce*,[90] concluded that APA-type review is available for actions taken pursuant to the IEEPA. As noted by the court,[91] the strong presumption in favor of judicial review over administrative actions can be overcome only by "a showing of 'clear and convincing' evidence" that Congress intended to preclude such review.[92] Because the IEEPA does not have an express exemption from review, and because its "legislative history does not clearly and convincingly evidence Congress' intent" to either preclude such review or "to permit the President" to do so by regulation, the *Nuclear Pacific* court was unable to find that Congress intended to preclude review.[93]

2. *The Limited Utility of APA Review*

Even assuming that APA judicial review is available under the IEEPA, it is probably of limited utility. There are a number of legal obstacles that substantially hamper the ability of the courts to set aside the actions of all executive departments, including

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final agency actions. 5 U.S.C. § 706(2)(A) (1982). Commerce Department actions taken under the EAA were probably subject to judicial review when they presented federal questions, when the regulatory action being challenged was alleged to be unconstitutional or in excess of its statutory authority. *See* 28 U.S.C. § 1331. The EAA contains no "clear and convincing" evidence that Congress meant to preclude the review of non-APA judicial challenges to the Commerce Department's regulatory determinations. Abbott v. Gardner, 387 U.S. 136, 140 (1967). Indeed, section 13(a)'s exclusive reference to the judicial review provisions of the APA is strong evidence that Congress intended to preclude only APA-type review.

90. No. C84-49R (W.D. Wash. June 8, 1984).

91. *Nuclear Pacific*, slip op. at 11.

92. *Abbott Laboratories*, 387 U.S. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962)).

93. *Nuclear Pacific*, slip op. at 11. Even assuming that Congress authorized the President to preclude APA-type review under IEEPA by regulation, there is no evidence that he has done so. As the court in *Nuclear Pacific* stated, "[t]he regulations themselves do not unambiguously preclude review; they simply provide that the decision of the Assistant Secretary on an appeal 'shall be final.'" *Id.*, *citing* 15 C.F.R. 389.2(c)(2).

the Commerce Department.

As a threshold matter, the courts probably will require prospective plaintiffs to exhaust all of their administrative remedies before they can obtain judicial relief. The courts, therefore, will review only "final," rather than "preliminary, procedural, or intermediate" administrative actions taken under the IEEPA.[94] Thus, by the time the plaintiff has completely exhausted the administrative process, the intervening events may very well have rendered the initial judicial challenge moot. For example, temporary denial orders issued in the early phase of a Commerce Department investigation, by definition, must be lifted by the time the investigation is brought to a close.

Furthermore, there is a substantial chance that a reviewing court would consider a plaintiff's claim against the Commerce Department to be nonjusticiable under the "political question" doctrine. Of course, the *Nuclear Pacific* court refused to apply this doctrine to bar its review of the Commerce Department's decision denying the plaintiff a license to export lead glass windows to India. While recognizing the inherent nonjusticiability of congressional and presidential policy decisions to "restrict the export of goods and technology that could be used directly or indirectly in the development of nuclear weapons," the court concluded that it could review the legality of "regulations promulgated by the Department of Commerce to implement these decisions, and the manner in which the regulations were applied to [the plaintiff]."[95] The court then reviewed the plaintiff's claims that: (1) its exports were not subject to the Regulations; (2) the Regulations were void for vagueness; and (3) the Commerce Department's denial of its license had been arbitrary and capricious. As noted in the decision, courts commonly review such claims "when agency action is challenged," and the claims can "be resolved without encountering [political questions]."[96] Other courts, however, are not likely to draw such a fine distinction and exercise "deference" to the

94. 5 U.S.C. § 704. Even in those rare circumstances when a court waives the exhaustion requirement, it will *only* review a preliminary agency determination if the plaintiff's interests in rapid "judicial resolution" of the claim outweigh the interests of the agency in: (1) "making a factual record and exercising its discretion free of judicial intervention;" (2) "discouraging frequent flouting of the administrative process;" and (3) "correcting its own errors." *Nuclear Pacific,* slip op. at 15.

95. *Id.* at 13.

96. *Id.* at 14.

"policy decisions" of Congress and the executive branch, on the one hand, while reviewing closely the Commerce Department's regulations and decisions implementing such policies, on the other. Indeed, since the Commerce Department frequently bases its export licensing decisions on important foreign policy and national security considerations, the political question doctrine may, contrary to *Nuclear Pacific* prove particularly nettlesome to plaintiffs challenging license denials.[97]

Even a plaintiff that clears these difficult hurdles still faces serious difficulties of proof. Judicial review under the APA must be based upon the entire record before the agency when it made its challenged determination.[98] However, the Commerce Department probably will refuse to certify the whole record to the court and will reject plaintiff's discovery requests on grounds of foreign policy and national security. Thus, without the benefit of an examination of critical portions of the agency's record, a reviewing court probably will defer to, rather than overturn, the challenged executive branch decisions on export controls.[99]

Finally, once past these procedural hurdles, the plaintiff still faces the difficult APA standards for invalidating agency action. While there may be infreqent cases in which plaintiffs successfully demonstrate that the Commerce Department has violated its own regulations, the typical challenge must demonstrate that the Commerce Department's action was arbitrary and capricious, or an abuse of discretion. A reviewing court will not disturb an agency's determination under this standard unless the administrative record, as a whole, shows that the agency did not consider all the relevant factors and made a "clear error of judgment."[100] In practice, plaintiffs will find it diffcult to overcome the judicial deference displayed toward agency actions under this APA

97. The political question doctrine is probably less of a barrier to judicial review of the Commerce Department's actions enforcing foreign boycott-related restrictions. The application of these precise regulations to a particular transaction is largely a technical legal matter and does not involve the exercise of discretion and making of policy judgments to the same extent as do many export licensing decisions.

98. 5 U.S.C. § 706 (1982).

99. *See, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953) (sustaining refusal of Air Force Secretary to disclose certain materials on ground that disclosure would seriously hamper national security); WRIGHT & MILLER, 8 FEDERAL PRACTICE AND PROCEDURE § 2019 (1970).

100. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

standard.[101]

Although such legal obstacles sharply limit the utility of APA judicial review over Commerce Department actions taken under IEEPA, the mere threat of such review may be a useful lever for a Commerce Department supplicant. In this regard, knowledge of the applicable APA standards probably will cause Commerce Department officials to consider all relevant factors and, at least, appear to act fairly. Moreover, in close cases, the Commerce Department may well err in favor of a prospective plaintiff rather than face a probing judicial inquiry into its internal decisionmaking process. In this regard, it should be recalled that the *Nuclear Pacific* court denied the plaintiff's claim *only* after it had reviewed: (1) the Commerce Department's interpretations of its regulations; (2) the record underlying its decisions; and (3) the views that had been aired at interagency meetings. In short, from an exporter's perspective, the threat of such extensive inquiry may have more salutory effects on the Commerce Department's decisions than the risk of losing the lawsuit that prompted the inquiry.

Of course, neither the actuality nor the threat of APA judicial review compensates for or protects against the President's ability to restructure entirely the Commerce Department's Regulations pursuant to the IEEPA. Even drastic changes in existing export controls and boycott-related regulations would not constitute arbitrary or capricious actions, or an abuse of discretion by the Administration provided that it sets forth a reasoned basis for its actions.[102] Thus, unless future changes in the Regulations are ei-

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101. In *Nuclear Pacific,* the court reasoned that the Department had properly considered all the factors required by the Regulations in denying the plaintiff's license application, *see* 15 C.F.R. § 378.4, and that its "[w]eighing [of] the factors . . . is a policy decision entrusted to agency discretion." Nuclear Pacific, Inc. v. Department of Commerce, No. C84-49R (W.D. Wash. Aug. 3, 1984). In reaching this conclusion, the court rejected the plaintiff's argument that one relevant factor—the availability of the product from a non-U.S. source—should have resulted in the issuance of a license. The court concluded that plaintiff's concentration on this factor "ignores the overwhelming evidence of the concern felt by *all* the agencies involved over the other [relevant] factors." Slip op. at 9 (emphasis in original). This decision probably typifies the extent to which reviewing courts will not disturb discretionary agency actions under the "arbitrary and capricious" rubric. Agency actions "committed to agency discretion by law" are immune from judicial review under the APA. 5 U.S.C. § 701(a)(1).

102. *See, e.g.,* Columbia Broadcasting Systems, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

ther irrational or promulgated without a stated basis, the courts probably will uphold their validity.

C. The Regulatory Climate For Businesses

The magnitude of costs and uncertainty that regulated businesses will encounter as a result of the President's broad discretion to control exports under the IEEPA largely depends on how closely the President follows the requirements and guidelines in the EAA. Particularly during long EAA lapse periods, the executive branch is free to make major revisions in the Commerce Department's Regulations[103] which could deviate from the requirements and policies that Congress established in the EAA. Although it is difficult to predict accurately which, if any, EAA-mandated features of United States export controls will be discarded during a particular period of EAA lapse, it is possible to identify the kinds of changes that, if made, could radically alter the regulatory climate facing United States exports and other regulated businesses.

1. *Export Controls*

In the EAA, Congress established a number of export control requirements that exporters view as salutary in nature. Specifically, the EAA mandated a multi-tiered system of licenses that included: (1) "validated licenses" for specific exports to be applied for and approved in advance of the actual shipment of the exported goods; (2) "qualified general licenses" that offer exporters the flexibility to make the multiple exports specified in their applications; and (3) "general licenses" that authorize businesses to export goods and technologies without application or advance approval.[104] Congress also established the general policy in the EAA that the Commerce Department should grant qualified general licenses and general licenses to the "maximum extent practical" with national security and foreign policy objectives.[105]

The statute further required the Commerce Department to

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103. For example, the Commerce Department has proposed and is currently holding hearings on substantial amendments in the regulation governing distribution licenses. *See* 49 Fed. Reg. 35,790 (1984) (to be codified at 15 C.F.R. §§ 373 and 376).

104. EAA § 4(a).

105. *Id.* § 5(e)(2), (3).

consider the "foreign availability" of goods and technologies in determining: (1) whether it should subject these articles to licensing requirements; and (2) if so, whether it should grant the exporter the required license.[106] Thus, an advanced technology article that was freely available abroad might be exempt from the Commerce Department's export controls. The EAA also established a number of requirements for the processing of export licenses by Commerce, including, *inter alia,* mandatory deadlines,[107] the involvement of other agencies in the licensing process, and agency recordkeeping procedures. Any of these EAA-mandated features can be written out of the Regulations by the President in the exercise of the emergency authority provided by the IEEPA. The President has the authority to eliminate statutory deadlines, to restructure the licensing system restricting the availability of general licenses and qualified general licenses, and to require the Commerce Department to limit an article's export without regard to its foreign availability. In short, while operating under the IEEPA, the President has the unbridled power to adopt new features or extend current features of export controls that could have serious adverse consequences for the business community.

The President's broad authority under the IEEPA to unilaterally restructure United States export controls in a manner detrimental to the interests of United States exporters is vividly illustrated by President Reagan's recent decision to enhance the role of the Defense Department in the review of export licenses. In this regard for the practice established under the IEEPA (which called for the Defense Department to scrutinize *only* exports to communist countries),[108] the President used his emergency au-

106. *Id.* § 5(f).

107. To ease the undue burdens on exporters caused by bureaucratic delays, the EAA contained deadlines for the Commerce Department's license decisions, which ranged anywhere from 90 to 240 days, depending on the involvement of other federal departments and agencies and the degree of inconsistency contained in their recommendations on the proposed export. *Id.* § 10(f),(j).

108. Although the EAA, on its face, appeared to permit Defense Department review of exports to noncommunist countries (*see* EAA § 10(g)(1) (authorizing Defense Department review of exports to any nation to which exports are controlled on national security grounds)), the Commerce Department, in practice, did not construe the statute to allow such review and only referred certain exports to communist countries to the Defense Department for its review. Thus, even though the EAA may not, by its terms, have been intended to prevent what

thority to authorize the Defense Department to review the license applications for exports to those western nations that carry a significant risk of diversion to communist countries.[109] By unilaterally injecting the Defense Department into the process of reviewing "west-west" exports, the President has increased the possibility that export license applications will be denied or seriously delayed.[110] There is little doubt that the President's unilateral decision will have adverse impact on international business transactions.

Thus, the structure of United States export controls is far more subject to the political vicissitudes of executive branch decisionmakers under the IEEPA than under the EAA. Whatever the Administration's present intentions or actions in a particular lapse situation, the *availability* of the emergency authority to restructure export controls is likely to breed the *political will* to do so. For example, the President could easily restructure export controls as a means of sending diplomatic signals or responding to foreign policy developments. A downward turn in relations between the United States and the Soviet Union could easily lead to far more restrictive export controls. Thus, export trade could be held hostage to political ends with even more frequency under the IEEPA than under the EAA.

Consequently, while the future shape of export controls under the IEEPA is unknown, the potential harm to the business community from a long-term reliance on the President's emergency powers is clear. The increased potential for massive and sudden

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the President has done, in practice it served as such an impediment. Congress has perceived the EAA as an impediment to an enhanced Defense Department role in export licensing, as illustrated by the Senate proposal to amend § 10(g) of the EAA to authorize expressly Defense Department review of west-west exports. *See supra* note 5.

109. This decision was made by the National Security Council in a classified directive widely reported in the press. *See Pentagon-Commerce Department Dispute Resolved,* N.Y. Times, Jan. 13, 1985, § 3 at 1. The Washington Post, Jan. 12, 1985, at 1.

110. The Undersecretary of Commerce, Lionel Olmer, recently told the Senate Banking Committee that Defense Department delays in reviewing and clearing export licenses cost businesses millions of dollars in lost sales. 4 *Washington Trade & Tariff Letter* (Gilston), No. 43, at 2 (Oct. 29, 1984). "I would be happy to give the committee chapter and verse on the disarray" caused by the Defense Department, Olmer said. *Id.* He added that there were "enormous delays" in Defense Department's reviews of export licenses, with the Defense Department acting "well in excess" of the thirty-day EAA deadlines. *Id.*

changes in the Regulations makes the exporters' task of planning for future contracts, sales, and production more difficult. The increased role of the Defense Department in west-west licensing review has already made the likelihood of obtaining future licenses for the export of large numbers of sensitive products more difficult to predict. These planning difficulties undoubtedly will increase the costs and risks of export businesses and will "chill" export transactions in general. Thus, from a business perspective, United States exporters are better off with the stable regulatory environment of the EAA than with the uncertainties associated with life under the IEEPA.

2. *Foreign Boycott-Related Restrictions*

In enacting the EAA, Congress also outlined the basic structure of the Commerce Department's foreign boycott regulations. Specifically, the EAA required the Commerce Department to establish both broad prohibitions on boycott-related conduct and narrow exemptions from these prohibitions which serve as "safe harbors" for regulated persons. In implementing these prohibitions and exemptions, the Commerce Department has even identified particular provisions that, if included in contracts, letters of credit, and other commercial instruments, would qualify for an exemption.[111] Thus, to a large extent, compliance with the EAA's restrictions on foreign boycott-related practices is a matter of ensuring that the standard contract provisions deemed legally permissible by the Department are utilized in place of other provisions whose legality is uncertain. Thus, the regulatory framework for boycott-related transactions that was provided by the EAA had a minimal effect on the structure of the majority of legitimate overseas transactions and made compliance with the exemptions relatively easy and inexpensive.

However, the lapse of the EAA and the maintenance of the Regulations under the IEEPA, gives the Administration broad emergency authority to restructure the foreign boycott regulations in ways that could create uncertainty in and, consequently, impede overseas transactions.[112] The Commerce Department

111. *See* 15 C.F.R. § 369, Supps. 1-12.

112. Although it is highly likely that the Administration has the authority to eliminate the EAA's prohibitions on boycott-related practices, which mainly apply to businesses' involvement with the Arab nations' boycott of Israel, political considerations render such regulatory actions highly unlikely.

could eliminate several of the safe harbor exemptions that the EAA required the Commerce Department to include in the Regulations. Thus, businesses subject to the foreign boycott controls probably were better with the certainty of the EAA than with the instability of life under the IEEPA.

D. The Congressional Role in Regulating Exports

The unbridled authority of the President to restructure the Regulations pursuant to IEEPA also may undermine the traditional role of Congress in regulating export transactions. The Constitution plainly grants Congress the preeminent, if not exclusive, role in regulating exports, providing that Congress has the plenary authority "to regulate Commerce . . . with foreign Nations."[113] In exercising this constitutional authority, Congress has largely occupied the field of export controls through a series of related legislation including, *inter alia* the EAA, the Arms Export Control Act of 1978,[114] and the Nuclear Non-Proliferation Act of 1978.[115]

While the Constitution also confers "inherent powers" on the President,[116] including the exclusive authority "to speak or listen as a representative of the nation" in foreign affairs,[117] these inherent powers probably do not include the right to unilaterally regulate exports. "[T]he power to regulate interstate commerce is *not*

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113. U.S. CONST. art. I, § 8.

114. 22 U.S.C. §§ 2751-2794 (1982).

115. 22 U.S.C. § 3201. Other congressional enactments governing exports include: Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-996 (governing narcotics and dangerous drugs); Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* (governing nuclear materials and equipment); Natural Gas Act of 1938, 15 U.S.C. 717B (governing natural gas); Federal Power Act of 1920, as amended, 16 U.S.C. § 824(a)-(e) (governing electric power); Tobacco Seed and Plant Exportation Act of 1940, 7 U.S.C. §§ 516-517 (governing tobacco seeds and live tobacco plants); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (governing endangered fish and wildlife); Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. §§ 1531-1543; Act for the Protection of Bald and Golden Eagles, as amended, 16 U.S.C. § 668 (governing migratory birds and bald and golden eagles); Antarctic Conservation Act of 1978, 16 U.S.C. § 2401 (governing Antarctic mammals, birds, and plants); and 35 U.S.C. §§ 6, 181-188 (governing unclassified technical data contained in patent applications).

116. United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

117. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936).

among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."[118] Thus, the ability of the executive branch to establish restrictions on exports is both derived from, and limited by, congressional delegations of authority.[119]

The IEEPA represents a commingling of congressional authority over the regulation of foreign commerce with presidential authority over matters relating to foreign affairs.[120] In fashioning the IEEPA as a statutory framework for international emergencies, Congress attempted to achieve a delicate balance between these executive and congressional powers, placing "necessary limits on the exercise of these emergency authorities by the President, while still providing him with necessary flexibility to react to unforeseen emergencies in the future."[121] Whether the President's broad power to restructure export controls under the IEEPA upsets this balance and undermines the plenary role of Congress in regulating exports largely depends on the duration of the EAA lapse period.

When as in the past, the EAA lapse period and the resulting invocation of IEEPA is for short periods during which Congress debates and eventually reauthorizes the statute, the traditional role of Congress is enhanced. As discussed above, Congress plainly intended the President to use the IEEPA's emergency powers as a short-term, stopgap device. Rather than make the EAA permanent, Congress chose to maintain the statute's temporary status and thus allow the President to use the IEEPA as a "backstop" during the anticipated short-term EAA lapses. This statutory interplay of the EAA and the IEEPA gives Congress the

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118. *See Guy W. Capps, Inc.*, 204 F.2d at 659; *Yoshida Int'l, Inc.*, 526 F.2d at 572. Nevertheless, some commentators have contended that "the President's constitutional authority to conduct foreign relations gives him some incidental power in related fields such as international trade." Morse & Powers, *U.S. Export Controls and Foreign Entities: The Unanswered Questions of Pipeline Diplomacy*, 23 VA. J. INT'L L. 537, 555 (1983). This argument takes on added legitimacy in emergency situations when the President can respond more quickly and flexibly than Congress and the courts.

119. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

120. *See Yoshida Int'l, Inc.*, 526 F.2d at 572; Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 110 (1948).

121. *Markup*, *supra* note 22, at 9 (Statement of Cong. Jonathan B. Bingham).

ability to assert vigorously its constitutional role and reevaluate the structure of export controls every several years.

Where the EAA lapse is of longer duration, as occurred recently, the role of Congress in structuring export controls can be effectively undermined by the President's continued reliance on the emergency authority under IEEPA. During a long EAA lapse period, the President may unilaterally restructure existing export controls and foreign boycott regulations— in disregard for the congressionally established EAA requirements and guidelines. Thus, the longer the duration of the lapse period, the greater the chances are that the President will exercise the broad IEEPA authority to rewrite the existing Regulations. While Congress undoubtedly intended that its power to terminate an emergency by concurrent resolution would be used to check the President's use of the IEEPA, the probable invalidity of this device has upset the IEEPA's delicate balance and left the President's broad powers uncurbed.[122]

IV. Conclusion: The Case for the Reauthorization of the EAA and the Revision of the IEEPA

In sum, although the President's use of the IEEPA emergency powers to regulate exports and boycott-related transactions is lawful, both regulated businesses and Congress have substantial interests in ensuring that a declared "national emergency" resulting from the EAA's lapse is one of short duration.

While regulated businesses probably can obtain APA judicial review of final Commerce Department actions taken under the

122. The President's recent decision that authorized the Defense Department to review west-west license applications, *see supra* text accompanying notes 110-12, graphically illustrates the erosion of Congress' control over exports that the EAA lapse has caused. The Defense Department's role in export licensing is not a mere bureaucratic "turf" battle, but is a central issue in the debate over precisely how restrictive export controls should be. Congress traditionally played a major role in deciding how to allocate export control functions among the various federal departments and agencies. The issue of whether the Defense Department should be given additional review authority over west-west exports was hotly contested in the 98th Congress in the course of its long debates over the renewal of the EAA. Congress' failure to resolve this difficult issue was one of the major reasons for the EAA's recent lapse. *See supra* note 5. Nonetheless, the President, exercising IEEPA emergency powers unilaterally, authorized the Defense Department review, and, thus, enhanced the role of the Defense Department in the export licensing process.

IEEPA, this one benefit of the IEEPA, unavailable under the EAA, neither compensates for, nor limits, the instability of the IEEPA's regulatory environment provided by the IEEPA. The ability of the President to unilaterally restructure export controls exposes international business transactions to considerably more risk under the IEEPA than under the EAA. Thus, the business community probably is better off under any version of the EAA enacted by Congress rather than under a declaration of "national emergency" pursuant to the IEEPA.[123]

Congress also has an incentive to quickly reauthorize some version of the EAA after the statute has lapsed. The longer the lapse period runs, the greater is the opportunity that exists for the President to restructure export controls and repudiate the export control policies established by Congress in the EAA. Thus, to maintain its plenary role in regulating exports, Congress should reauthorize the EAA forthwith once it has lapsed. Future Congresses should not allow controversies over certain specific export control issues to prevent the reenactment of the overall structure of export controls provided by the EAA with all deliberate speed—which is precisely what happened during the recent EAA lapse period. After lengthy deliberations, a joint House-Senate conference convened by the ninety-eighth Congress reached agreement on all but two controversial issues: the role of the Defense Department in reviewing exports to western nations and the extent of controls over private bank loans and other transactions involving South Africa.[124] For more than two years, these two issues essentially prevented Congress from reestablishing the basic long-term framework for export controls in a reenacted EAA.[125]

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123. In fact, the fears of regulated businesses concerning the legislation to reauthorize the EAA should be allayed by the EAA renewal legislation, which is more favorable to exporters than its predecessor statute. For example, the Act (1) creates a new "comprehensive operations license" which authorizes multiple exports and reexports of technology and related goods between a domestic concern and its foreign affiliates where the exporter has an effective internal compliance system; (2) eliminates United States licensing requirements for exports of certain relatively low-technology goods and technology to nations that are members of COCOM, a group of 15 nations which maintains multilateral export controls on exports to the Soviet bloc; (3) bars the imposition of export controls solely on the basis that a product contains an embedded microprocessor; and (4) makes the "foreign availability" of a product an even more important criteria in licensing decisions. *See* Act, §§ 104(a), 105(b), 105(j), and 107.

124. *See supra* note 5.

125. In the event that compromise on any controversial issues proves diffi-

Congress also should consider an amendment to the IEEPA to ensure that its long term constitutional role in regulating exports remains intact. The probable invalidity of the legislative veto and emergency termination provisions in the IEEPA also have left Congress unarmed against the President's ability to reshape export controls during a declared emergency.[126] To remove this threat to congressional authority over export controls, the IEEPA should be amended to provide that during periods when the EAA has lapsed, the President *only* is empowered to maintain *intact* the system of export controls and boycott-related restrictions that were in force when the emergency began (i.e., with no *material changes* allowed during the duration of the emergency).[127] In ad-

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cult, Congress, as it has done in the past, simply could extend the expired EAA. Notwithstanding the lapsed statute's drawbacks, even the lapsed EAA is better than continued reliance on IEEPA.

Alternatively, Congress could treat the South Africa controls separately by severing them from the EAA reauthorization legislation. These controls are sufficiently important and unique to be properly handled through separate legislation. The EAA renewal legislation would, therefore, be considered on its own merits, and its enactment would not be hampered by controversy over the South African controls.

126. This is not to say, of course, that the President's broad authority to regulate exports under IEEPA is unconstitutional. The executive branch's broad authority to regulate exports under IEEPA is still a constitutional delegation of the plenary authority of Congress to regulate foreign commerce. In enacting IEEPA, Congress plainly set forth an "intelligible principle" that made it clear when presidential action is proper. Hampton & Co. v. United States, 276 U.S. 394 (1928); *Yoshida Int'l, Inc.*, 526 F.2d at 581; Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 480 (CCPA 1959). The intelligible principle is embodied in IEEPA's express limitations on the President's ability to exercise emergency powers. For a full discussion of these limitations, see *supra* notes 26-42 and accompanying text. These limitations prevent IEEPA's Title II powers from running afoul of the unlawful delegation doctrine. *Yoshida Int'l, Inc.*, 526 F.2d at 581; Unidyne Corp. v. Iran, 512 F. Supp. 705, 709 (E.D. Va. 1981).

127. Senator Heinz (R-Pa.) proposed two amendments to IEEPA during the debate over renewing the EAA near the end of the 98th Congress that also warrant serious consideration.

The first would make it clear that IEEPA does authorize the imposition of controls over exports. 130 CONG. REC. S143333-34 (daily ed. Oct. 11, 1984) (Amendment 7119 to H.R. No. 4230, § 131(a)(3)). While IEEPA, as presently drafted, does authorize such controls, *see supra* discussion in Section I, it would do no harm to make this authority express, and, thereby, make it impossible for a court to invalidate the entire system of Commerce Department export controls currently authorized under IEEPA technologies for adversaries of the United States.

The second Heinz amendment would exempt any executive branch export

dition to preserving Congress' preeminent role in shaping export control policy, this type of amendment would help ensure that future EAA lapses will provide regulated businesses with a far more stable regulatory environment for overseas transactions than is now present under the IEEPA.[128]

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control actions taken under IEEPA from APA-type judicial review, thereby making IEEPA consistent with the EAA. 130 CONG. REC. S14334 (daily ed. Oct. 11, 1984) (Amendment 7119 to H.R. No. 4230, § 131(c)). Given the limited utility of APA-type review for exporters, *see supra* Section II(B), such an amendment is desirable because it would prevent costly and unsuccessful court challenges brought at exporters' expense. For discussion regarding *Nuclear Pacific*, *see supra* notes 92-98 and accompanying text.

128. Congress also should consider restricting the President's authority to regulate exports under IEEPA in one other respect. By its terms, IEEPA not only allows the President to restrict exports during periods when the EAA has lasped, but also allows the President to regulate exports when the EAA is in effect. Thus, through this residual authority under the IEEPA, the President can declare an emergency and regulate exports in a manner inconsistent with the requirements or provisions of the EAA. For example, while Congress has now limited the President's authority to impose foreign policy controls and break contacts under the Act, the President, nevertheless, can defeat these restraints by bypassing the EAA and operating under IEEPA. Congress, thus, should consider remedial legislation to ensure that the policies which it established in the EAA are honored and *not* undermined by the unbridled exercise of the President's residual authority to regulate exports under the IEEPA.