THE EXPORT ADMINISTRATION ACT OF 1979: ANALYSIS OF ITS MAJOR PROVISIONS AND POTENTIAL IMPACT ON UNITED STATES EXPORTERS

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The postwar development of United States export control policies comprises two contrasting historical periods.[1] The first period, from 1948-1969, was a time of relatively stringent control while the second, from 1969 to the present, has been one of gradually increasing liberalization. The Export Control Act of 1949 (ECA)[2] was pri-

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1. Export controls were imposed for the first time as a necessity of war in 1940 immediately before the fall of France. Comment, *Export Controls*, 58 YALE L.J. 1325, 1328 (1949). However, statutory controls have long existed to regulate the export of specified commodities as strategic and economic measures. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 611-12 (1974). Shihata cites the following examples: United States Shipping Act of 1916, as amended, 46 U.S.C. §§ 808, 835, 46 C.F.R. § 221.5 *et seq.* (regulation of sale and transfer to foreign registry of U.S. citizen-owned ships); Act of October 16, 1917, 12 U.S.C. §§ 95a, 95b; 31 C.F.R. § 54.1 *et seq.* and the Gold Reserve Act of 1934, 31 U.S.C. § 440 (export of gold); Natural Gas Act of 1938, 15 U.S.C. § 717b; 18 C.F.R. § 153.1 *et seq.* (export of natural gas); Tobacco Seed and Plant Exportation Act of 1940, 7 U.S.C. § 576 (export of tobacco seed and live tobacco plants); Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1691 *et seq.*; 68 Stat. 454 (export of subsidized U.S. agricultural commodities to communist countries); Atomic Energy Act of 1954, 42 U.S.C. § 2011 (export of atomic materials and facilities). *See also* International Security Assistance and Arms Export Control Act, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified in scattered sections of 22 U.S.C.).

2. 50 U.S.C. app. §§ 1-44 (1968). In addition to the ECA, another important statute was the Mutual Defense Assistance Control Act (Battle Act), 22 U.S.C. §§ 1611 *et seq.* (1970). Its purpose was to exert economic pressure on specific countries by imposing broad restrictions on the export of military and strategic goods and technology from the United States to countries which permitted the sale of listed controlled items to embargoed destinations. There also was the Mutual Security Act of 1954, 22 U.S.C. § 1934 (1970), which placed licensing controls on arms, ammunition and other war-related exports. For other examples of Cold War-era restrictions on exports to communist countries, *see*, *e.g.*, 15 Fed. Reg. 9040 (1950) (codified at 31 C.F.R. Part 500 (1971)) (trade embargo with People's Republic of China and with North Korea); 28 Fed. Reg. 6974 (1963) (codified at 31 C.F.R. Part 515 (1970)) (trade embargo with Cuba); 29 Fed. Reg. 6010 (1964) (codified at 31 C.F.R. Part 500 (1971)) (trade embargo with North Vietnam). The result of these and other severe restrictions on exports to the Sino-Soviet bloc was a low volume of trade as compared with Western Europe. The American share of East-West trade prior to 1973 was less than four percent. Hoya, *The Changing U.S. Regulation of East-West Trade*, 12 COLUM. J. TRANS-

marily responsible for the Cold War restrictions on trade. It remained in force for twenty years until superseded by the Export Administration Act of 1969,[3] as amended (EAA of 1969).[4]

The stimulus for the ECA was the United States concern for the preservation of national security against the advances of the Soviet Union and Eastern Europe. These fears were realized in 1948 with the Communist coup in Czechoslovakia and the Berlin Blockade. The ECA of 1949 sought to promote the goals of national security by requiring a license for the export to any country (generally except to Canada) of all goods or technology which might endanger national security.[5] The purpose of the EAA of 1969 was similar,[6] but that statute also reflected greater appreciation of the complex relationship between foreign policy and domestic affairs and was intended to liberalize United States export policies and conform them to the changing international trade and political situation. It proposed to attain that objective mainly through the expansion of trade relations with communist countries.[7] Further relaxation was sought through the 1977 Amendments to the EAA of 1969 by qualifying the broad discretion of the President's authority.[8] Thus, the EAA of 1969 together with its amendments at-

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NAT'L L. 1, 4-6 (1973). For historical background on legislation leading to the 1979 Act, *see generally* Comment, *Reconciliation of Conflicting Goals in the Export Administration Act of 1979—A Delicate Balance*, 12 L. & POL'Y INT'L BUS. 415 (1980) [hereinafter cited as *Reconciliation*]; Comment, *The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies*, 2 NW J. INT'L L. & BUS. 179 (1980) [hereinafter cited as *Examination*].

3. 50 U.S.C.A. app. §§ 2401-13 (Cum. Supp. 1978).

4. Export Administration Amendments of 1977, 50 U.S.C. app. §§ 2401-2413 (1976 & Supp. I 1977) (current versions at Pub. L. No. 96-72, 93 Stat. 503 (1979) (to be codified at 50 U.S.C. app. §§ 2401-2419) [hereinafter cited as 1977 Amendments].

5. Hoya, *supra* note 2, at 6.

6. *Id.*

7. *Id.* at 25. The cause of this liberalized policy is attributed by Mr. Hoya to dissent over the Vietnam War and the consequent disillusionment with East-West confrontation. As the opposition of the American public increased, the opportunity arose for proposals to aid peaceful coexistence, one of which was increased East-West trade. Another factor was that the arguments in favor of expanded trade finally overcame the rigid logic against it. *Id.* at 28. The pro-trade arguments have been summarized as follows: (1) increased trade would bring economic benefit to the U.S. based on the principle of comparative advantage; (2) as a matter of human experience, trade improves the political relations between countries; (3) even though trade might be detrimental to national security, there is little that the U.S. can do to affect the elements of communist policy that are opposed to U.S. interests; (4) trade is likely in any case to induce communist nations to adopt policies and practices favorable to the U.S. *Id.* at 32-36.

8. The 1977 Amendments, *supra* note 4, required the President, prior to adopting an export licensing policy, to consider not only the communist or non-communist status of the

tempted to balance the residual Cold War anxiety over Soviet military power, on the one hand, with the increased pressure from the United States exporting community for more open trade policies on the other.[9]

The trend toward greater flexibility of export controls has continued with the Export Administration Act of 1979 (EAA of 1979).[10] Congress optimistically asserted that the new Act was needed in order to extend and revise its constitutionally granted authority to regulate exports. The Act authorizes the revision of the lists of products regulated through export licenses and is designed to achieve consistency in the export control policies of the United States while facilitating improved cooperation with allies.[11] In addition, Congress recognized as a matter of policy "the strong presumption that citizens should be free to engage in international commerce except in instances where regulation is clearly needed to advance important public interests."[12] As a consequence, private exporters may be led to expect greater freedom to engage in international commercial transactions and to find government regulation through export controls to be the exception. To protect the national interest, the EAA of 1979 seeks, therefore, to harmonize the diverse and evolving realities of world trade and international politics with the interests of United States exporters and those of the federal government.

The concern of this Article is with the administrative and procedural provisions established by the EAA of 1979, which are aimed at resolving the conflicting export interests of private export-

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destination country but also that country's present and potential relationship to the United States, the present and potential relationship to countries friendly or hostile to the United States, and the country's willingness and ability to control reexport of United States export items. 50 U.S.C. app. § 2403(b)(2)(A). Another important change was to require the President to consider the foreign availability of an export before imposing export controls. Thus, the export by American sellers of goods readily available in other countries and of comparable quality could be restricted only if the President reasonably believed that United States security would be threatened in the absence of such controls. *Id.* § 2403(b)(2)(B). *See* Comment, "Export Licensing: Uncoordinated Trade Repression," 9 GA. J. INT'L & COMP. L. 333, 340-41 (1979) [hereinafter cited as *Export Licensing*].

9. Hoya, *supra* note 2, at 28; *Export Licensing*, *supra* note 8, at 337. *See also* Metzger, *Federal Regulation and Prohibition of Trade with Iron Curtain Countries*, 29 LAW & CONTEM. PROB. 1000 (1964) (arguing that trade restrictions with communist countries have not successfully weakened these governments and predicting gradual relaxation of them.)

10. 50 U.S.C. app. §§ 2401-2420 (Cum. Supp. 1979) [hereinafter cited as EAA of 1979].

11. Senate Report No. 96-169, 98th Cong., 1st Sess., reprinted in [1979] U.S. CODE CONG. & AD. NEWS 2463, 2464-65 [hereinafter cited as Senate Report].

12. *Id.* at 2466.

ers and the government. The extent to which the licensing requirements and procedural provisions of the 1979 Act implement or inhibit the policy of expanded freedom which Congress intended to give exporters is analyzed, and the manner in which the policy is balanced with the government's mandate to protect United States interests through export controls is considered.

The methodology chosen is to test the 1979 Act for internal consistency by determining the extent that its operational framework advances or frustrates congressional purposes, especially with respect to the private sector. I shall attempt to show that while the 1979 Act is designed to ease export procedures as compared to the 1969 Act, and to accomodate changing world realities, it nevertheless preserves the approach of its predecessors by favoring the Executive. The 1979 Act grants broad discretion to the President without requiring him to show significant foreign policy or national security interests. As a preliminary matter, it is necessary to briefly present the constitutional framework on which the law of export controls rest.

I. THE CONSTITUTIONAL FRAMEWORK

In the realm of foreign affairs the powers of Congress and of the Executive are broader than those in the area of domestic affairs. The United States Government's foreign affairs power is due primarily to express constitutional provisions and recognition by the Supreme Court of the long-standing policy that the constitutional authority of the political branches must be given wider scope if the Government is to act effectively in the international arena. These broader powers are recognized both on a day-to-day basis and in formulating long-range foreign policy.

Each branch of the federal government (Congress, Executive, Judiciary) possesses powers over the conduct of the foreign affairs of the United States. These powers derive directly or implicitly from the Constitution and, as the Supreme Court stated in *United States v. Curtiss-Wright Export Corp.*,[13] from the incidents of sovereignty inherited from the British Crown and external to the Constitution.[14] The scope of foreign affairs powers has eluded precise

13. 299 U.S. 304 (1936).

14. *Id.* at 319. Mr. Justice Sutherland, writing for the majority in *Curtiss-Wright*, reasoned that the states were originally sovereign and had derived this characteristic from England. The Constitution merely allocated powers (previously resting exclusively with the states) between the states and the federal government. Nevertheless, Justice Sutherland con-

definition and the resulting uncertainty of limits within which the coequal branches may operate has, in turn, engendered institutional competition and conflict that is sometimes difficult to resolve.

A. Powers of Congress

With respect to Congress, certain of its foreign affairs powers are enumerated in the Constitution[15] while others are implied by or derived from its express authority.[16] Indeed, the role of Congress in foreign affairs is essential, whether its power is exercised pursuant to explicit or implicit authorization, because the success or failure of a particular foreign policy could depend on congressional support.[17]

Among explicit foreign affairs powers, the exclusive power to regulate commerce with foreign nations under Article I, section 8, clause 3 of the Constitution, has been exercised frequently throughout the history of the United States.[18] The Supreme Court has suggested,[19] that Congress has yet to reach the constitutional limitations of its foreign affairs powers.[20] While the function of the

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tinued, the constitution should not be deemed to exhaust the federal government's foreign affairs powers. *Id.* The view that the federal government, particularly the Executive, derives its powers from international law and practice has been strongly criticized by several commentators. *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Affairs*, 71 MICH. L. REV. 1 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946). *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 19-26 (1972).

15. The Constitution catalogues eleven such powers. U.S. CONST., art. I, § 8.

16. The existence of Congress' implied powers has been validated by the Supreme Court. *See, e.g.*, Perez v. Brownell, 356 U.S. 44 (1958), *overruled in* Afroyim v. Rusk, 387 U.S. 253 (1967); Fong Yue Ting v. United States, 149 U.S. 698 (1893). *See also* L. HENKIN, *supra* note 14, at 326 n.39. The "necessary and proper" clause, as some commentators point out, has been construed to imply the power of Congress to enact legislation limiting the scope of the Executive's foreign affairs power. *Id.*, cl. 18. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 177 (1978) [hereinafter cited as NOWAK]. In addition, congressional appropriations under the "spending power" clause determine the fate of foreign aid programs. U.S. CONST., art. I, § 8, cl. 1. *See* NOWAK, *supra*, at 177.

17. *See generally* NOWAK, *supra* note 16, at 176-79.

18. L. HENKIN, *supra* note 14, at 69.

19. *See, e.g.*, Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied* 390 U.S. 956 (1968), *rehearing denied* 390 U.S. 1037 (1968) (congressional foreign affairs power authorized Court to alter act of state doctrine as previously recognized by Executive); Blackman v. United States, 284 U.S. 421 (1932). *Cf.* Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889) (promulgation of alien immigration and registration laws on basis of foreign affairs powers).

20. L. HENKIN, *supra* note 14, at 74-76; NOWAK, *supra* note 16, at 178-79. *See also* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 922-23 (1959).

federal courts is to designate those limitations, the Judiciary is apparently disinclined to establish a more exacting standard because it might unduly limit the need for flexibility in so complex, unstable and sensitive an area as foreign affairs.

Besides Congress' direct involvement in foreign affairs, the Supreme Court has held that Congress is not prohibited by the Constitution from making relatively broad, though not unlimited, delegations of authority to the Executive and to administrative agencies.[21] Indeed, the Constitution is significantly less restrictive about Congressional delegation in foreign affairs than it is with respect to domestic matters. The Supreme Court ascribes this broader authority, to conduct foreign affairs through delegation of authority, to the recognition of the need by Congress for greater discretion and flexibility in the implementation of foreign policy.[22]

Nevertheless, as Professor Tribe points out, there are definite constitutional limitations on the ability of Congress to delegate power to the Executive in foreign affairs.[23] He also suggests that

21. *See, e.g.*, The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813), where suspension of a trade embargo was linked to the Executive's finding of facts concerning the conduct of foreign countries; FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976), where the Court upheld delegation of authority to the President to make import adjustments for an article pending his finding that the importation thereof threatened national security. It has been suggested, in addition, that a grant of power to Congress under Article I, section 8 of the CONSTITUTION implies the power to delegate authority to implement, for example, by means of drafting regulations or by conditioning the operation of the statute on the finding by the agency of prescribed facts. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 284-85 (1978). Professor Tribe also argues that useful and effective delegation of authority is achieved best by including standards to guide the exercise of such authority. TRIBE at 287. By contrast, it also has been suggested that safeguards, rather than standards, be applied to delegated authority in order to protect against unnecessary and uncontrolled use of discretionary power, and that failure to include these should be regarded as an improper delegation. K. DAVIS, ADMINISTRATIVE LAW TEXT 43-46 (1972). The political theory underlying the delegation question is, in essence, that where the government derives its authority from the consent of the governed, every exercise of such authority must be traceable to one of the representative branches for the purpose of fixing political and legal responsibility. L. TRIBE, *supra* at 286-87. The validity of the doctrine that Congress may under the Constitution broadly delegate authority to the President has been defended by other commentators. *See* L. HENKIN, *supra* note 14, at 24.

22. The language of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), is instructive:

> [C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissable were domestic affairs alone involved.

Id. at 320. *See also* Zemel v. Rusk, 381 U.S. 1 (1965).

23. L. TRIBE, *supra* note 21, at 160-61. Similarly, Congress is forbidden from enacting legislation inconsistent with constitutional prohibitions against certain kinds of legislative action. *Id.* Moreover, as Professor Tribe argues, certain congressional powers are nondele-

such delegation, at the least, cannot be "open-ended." This would amount to placing legislative power in the hands of an administrative agency.[24]

B. Powers of the Executive

The powers of the Executive[25] to make foreign policy and conduct foreign affairs, like those of Congress, are broader than its corresponding domestic powers. Aside from the extensiveness of Executive authority, it is in many situations unchallenged by and superior to that of the other branches, and may be exclusive in other circumstances.[26] Unlike Congress, the Executive is not empowered to directly regulate foreign commerce; it may only do so if authorized by statute.[27] Moreover, the President is entrusted with certain implied or inherent powers, especially with respect to fulfilling his duties as Commander-in-Chief in conjunction with the requirement that he "take care" that the laws are faithfully executed.[28] Within the constitutional and statutory limitations im-

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gable, as where the Constitution provides that the purposes underlying certain grants of authority would not be served were Congress to delegate such power. He describes a hypothetical agency established by the Senate for the purpose of approving or rejecting all future treaties. Such, he argues, would almost certainly violate Article II, § 2 of the CONSTITUTION, which requires that presidentially negotiated treaties can enter into force only upon "the Advice and Consent of the Senate to the extent of a two-thirds majority." *Id.* Finally, Congress may not delegate its "legislative powers" to any agency, although it is constitutionally permissable for agencies to write regulations pursuant to legislation. *Id.*

24. *Id. See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), from which Professor Tribe draws support for the principle of restraints on congressional delegations of authority.

25. The President's foreign affairs powers are enumerated in Article II of the CONSTITUTION. He is empowered to conclude treaties, and to appoint ambassadors, public ministers and consuls subject to the advice and consent of the Senate. U.S. CONST. art. II, § 2. He is authorized, as the representative of the United States, to receive ambassadors and public ministers. *Id.* § 3. As Commander-in-Chief of the military, he exerts sweeping influence on the United States' foreign relations. *Id.* § 2.

26. L. HENKIN, *supra* note 14, at 44, 92-93.

27. *See supra* note 21 and text accompanying for a discussion of Congress' power to enact such statutes.

28. U.S. CONST. art. II, § 3. *See* NOWAK, *supra* note 16, at 174. Professor Henkin argues that under the "take care" clause, the President, as a loyal agent responsible for enforcing federal law, is required "to assure that congressional legislation affecting international relations (say, a regulation of foreign commerce) is carried out as the law of the land." L. HENKIN, *supra* note 14, at 54-55. *See also* Independent Meat Packers Association v. Butz, 526 F.2d 228 (1975) *cert. denied*, 424 U.S. 966 (1976). Congress has occasionally had reason to claim that this duty was less than faithfully executed. For example the Turkish invasion of Cyprus on July 20, 1974, successfully accomplished by means of United States weapons, caused Congress to declare Turkey "immediately ineligible" for further military assistance pursuant to federal law. *See* Foreign Assistance Act, 22 U.S.C. § 2213 (1970). Termination of such aid, however, required affirmative action by the Executive, which was not forthcom-

posed on his authority, the President makes long-range substantive foreign policy decisions over and above the daily conduct of foreign relations.[29]

C. Powers of the Supreme Court

The Constitution also grants the Supreme Court foreign affairs powers,[30] but unlike the political branches, it usually refrains from exercising that power. The Court's basic policy of non-intervention is historic and is attributed to its hesitancy to act outside of the scope of express constitutional authority over foreign affairs.[31] Consequently, the implied foreign affairs power of the Supreme Court, to the extent that it exists at all, has not been defined.

Judicial restraint is reflected by the Supreme Court in that it becomes directly involved in foreign affairs only on matters in which Congress has been silent.[32] It is also reflected by the Court's

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ing. Congress eventually circumvented this presidential reluctance and moved to cut off all military aid to Turkey. Despite opposition from President Ford that the legislative cutoff weakened his authority, Congress embargoed all military aid to Turkey, a response to an act of aggression that was unsuccessful and finally abandoned. Balmer, *The Use of Conditions in Foreign Relations Legislation*, 7 DENVER J. INT'L L. & POL'Y 197, 215-19 (1978).

It has been argued that inherent powers, while not unlimited, are encompassed within a sphere of executive authority which is implied unless expressly limited in the Constitution or by Congress. L. TRIBE, *supra* note 21, at 159. *See* Myers v. United States, 272 U.S. 52 (1926). The executive use of military force without the express authorization of Congress is most readily justifiable as required to defend the nation from external aggression, i.e., as an implied or inherent concomitant of sovereignty. L. TRIBE, *supra* note 21, at 173. Even though the President may be empowered, on those grounds, to make war at his discretion, Congress can limit or deny this altogether. Similarly, the extent of Congress's authority to delegate duties to the President is limited by the Constitution. Thus, with respect to war-making, Congress cannot delegate exclusive authority, absent specific standards, for this would be an overly broad and unconstitutional delegation. *Id.* at 173-76. Not to be confused with inherent powers is the concept of executive privilege. Although not mentioned in the Constitution, this doctrine is invoked by the President when, for whatever reason, he decides to cloak his activities in secrecy. *Id.* at 202-203. This doctrine has been endorsed by the Supreme Court as a privilege devolving from the consitutional doctrine of Separation of Powers. United States v. Nixon, 418 U.S. 683 (1974). It also has become a useful executive tool in the conduct of foreign affairs. See United States v. Reynolds, 345 U.S. 1 (1953).

29. L. HENKIN, *supra* note 14, at 47, 92-93.

30. The Constitution provides that: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; . . ." U.S. CONST., art. III, § 2.

31. NOWAK, *supra* note 16, at 179.

32. For example, in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), a case with far-reaching impact on U.S. foreign relations, the Court upheld the act of state doctrine as recognized under international law. The Court held that this doctrine "in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized sovereign foreign power committed within its own territory." *Id.* at 401.

deference to the Executive in foreign affairs where the Court would otherwise be empowered to act.[33] The Court also yields to Congress where there is a superior legislative finding. In that context the Court recognizes the limitations on its powers and its unfamiliarity with the questions presented. Leaving Congress relatively unencumbered in the conduct of foreign affairs is especially apparent in the area of congressional war powers. As these are exercised in emergencies, they are the constitutional powers the Court is least likely to restrain.[34]

Finally, the Court occasionally avoids review of congressional and executive decisions in foreign affairs by finding such matters to be political questions, and therefore nonjusticiable.[35] Cases presenting such questions are deemed to be improperly before the Court and instead fall within the constitutionally granted authority of the political branches.[36] Thus, it is thought that substantive deci-

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It based the decision on the belief that the Court can enact judicial legislation in foreign relations matters. *Id.* at 423, 428. Thus, Congress would be required to statutorily change the act of state doctrine as formulated in *Sabbatino*. The Hickenlooper Amendment was in fact an attempt to limit the effect of *Sabbatino* by reformulating the act of state doctrine under U.S. law, 22 U.S.C.A. § 2370(c)(2). The Supreme Court lent support to that legislation when it denied certiorari in a case in which the statute was challenged. *See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 956 (S.D.N.Y.) *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied* 390 U.S. 956 (1968). More recently in Pfizer Inc. v. Government of India, 434 U.S. 308 (1978), the Court stated that "it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue." *Id.* at 320. *See* Jones v. United States, 137 U.S. 202 (1890), cited in *Pfizer* for the same principle. *See also* The Paquete Habana, 175 U.S. 677 (1900) for a discussion of the court's authority to construe international law. *See generally* NOWAK, *supra* note 16, at 179-183.

33. In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), the Court recognized the primacy of the Executive in foreign relations and that it should defer to the Executive when it represented that the application of the act of state doctrine would not advance U.S. interests. *Id.* at 767-68. The Court failed to note, however, that even if the Executive is superior in foreign relations expertise, this does not compel the conclusion that the Court should defer to whatever the Executive asserts without being cognizant of independent constitutional questions. The Court's failure to address that question had an unsettling effect on some of the justices, in particular Mr. Justice Brennan, who stated in dissent that such deference diminished the integrity and independence of the court. *Id.* at 773-76, 776-96. He stressed further that any such decisions should be based on constitutional grounds and not on the representations of the Executive. *Id.* at 766-96. *See also* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied* 446 U.S. 957 (1980).

34. L. TRIBE, *supra* 21, at 277. There is, however, no apparent theoretical obstacle to the Court's application of the war powers rationale to non-war powers situations thereby legitimizing perhaps unreasonably harsh peacetime domestic and foreign relations conditions. Deference to Congress in such situations would, according to Justice Brennan, constitute avoidance of judicial functions. *See* First National City Bank, at 776-796 (Brennan J., dissent). *See also* NOWAK, *supra* note 16, at 182-83.

35. *Id.*

36. *See* Powell v. McCormack, 395 U.S. 486 (1969); Mora v. McNamara, 389 U.S. 934

sions in international affairs are better left to Congress and the Executive. The Court thereby eschews an active role in formulating foreign policy.

D. Division of Foreign Affairs Powers

One of the clearest observations to be made concerning the division of foreign affairs powers by the Constitution is that no branch of government absolutely predominates. Instead, the distribution of authority fosters competition for control over foreign affairs, most often between Congress and the Executive. As such both Congress and the President formulate foreign policy within their imperfectly defined limitations.[37] Congress' main tool for assertion of its policy or political interests is through legislation designed to limit or control the President's authority. The President, on the other hand, advances the Executive's interests by means of Executive Agreements[38] and by molding statutory interpretations in its favor.[39] While it can be argued with some confi-

(1967); Baker v. Carr, 369 U.S. 186 (1962); Oetjan v. Central Leather Co., 246 U.S. 297 (1918). *See also* Orlando v. Laird, 443 F.2d 302 (2d Cir. 1971). *See generally* NOWAK, *supra* note 16, at 179-80.

37. L. HENKIN, *supra* note 14, at 92-93.

38. The growing reliance on executive agreements (as compared to treaties) bears witness to the growth of presidential power. *See* J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 258 (1977). Executive agreements are binding on the United States if they fall within the President's constitutional or inherent powers or if they are negotiated and ratified by the Executive under previously delegated congressional authority. *Id.* at 257. The Supreme Court has endorsed the validity of executive agreements entered into without congressional approval. United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Belmont, 301 U.S. 324 (1937). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson J., concurring), in which *Curtiss-Wright* was interpreted as applicable when presidential action harmonizes with congressional, but not when there is discord. *Id.* at 635-36, n. 2. *See also* Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), where the Court largely reaffirmed the reasoning of *Curtiss-Wright* and upheld an executive order concerning the interests of U.S. citizens with foreign air transportation. *Id.* at 111; Cramer v. Virginia Commonwealth University, 415 F. Supp. 673 (1980). Executive agreements are limited by the commerce clause from being used in the area of foreign commerce unless by means expressly authorized by Congress. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds* 348 U.S. 296 (1955). The Fourth Circuit held in *Capps* that the commerce clause authorized Congress to regulate potato price supports by statute and that an executive agreement which conflicted with this statute was accordingly void. *Id.* at 659.

Congress also effectively restrains the President and enforces its authority over foreign commerce through use of the appropriations power of Article I, § 8 of the Constitution, and thereby attempts to define the scope of presidential action in a manner consistent with its own foreign policy interests. *See* L. TRIBE, *supra* note 21, at 167.

39. In theory, the President is precluded by the advice and consent requirement of Arti-

dence that the Executive has recently had the advantage over Congress, the ultimate result of the constitutional allocation of power is the creation of substantive foreign policy by both branches.

Thus, while the President is the sole actor in the realm of foreign affairs and creates foreign policy, Congress also implements its own foreign policy objectives through the instrumentality of the Executive.[40] An uneasy and often unequal balance is struck between the political branches of government, with both sides needing flexibility in order to be effective.[41] It is especially significant that the government's foreign affairs powers are subject to constitutional limitations with respect to the treatment of individuals, although those restraints are not as strict in foreign affairs as in domestic matters.[42] While the government's role in international relations is expansive, it is subordinate to the Constitution and is,

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cle II, section 2, of the Constitution from acting unilaterally in the conduct of foreign policy. L. TRIBE, *supra* note 21, at 166. Professor Henkin points out, in addition, that Congress curbs presidential power in other ways. These include unenumerated powers that derive from sovereignty and general powers, such as taxing and spending for the common defense and general welfare, doing what is "necessary and proper" to implement other powers, and making appropriations. L. HENKIN, *supra* note 14, at 68. As a practical matter, however, presidential power is substantially increased by Congress' inability to recognize or compel the President to recognize foreign states; establish, regulate or break relations with them; repudiate treaty relationships; or be directly involved in the creation of foreign policy by announcing doctrines or attitudes of the United States. L. HENKIN, *supra* note 14, at 93.

40. L. TRIBE, *supra* note 21, at 164-65. *See also* L. HENKIN, *supra* note 14, at 47.

41. *See* L. TRIBE, *supra* note 21, at 176-78. *See also* NOWAK, *supra* note 16, at 176, wherein it is stated that the President usually predominates. An example of the congressional-executive relationship is the War Powers Resolution, 87 Stat. 555, P.L. 93-148, 93rd Cong. (H.J. Res. 542, adopted over presidential veto on Nov. 7, 1973). This resolution limits the President's use of armed forces abroad to sixty days with a thirty day extension. It gives the President some flexibility in the conduct of foreign policy concerning national security and allows him to exercise power as commander-in-chief within constitutional and congressional restrictions. It also gives Congress flexibility by allowing it to shorten the sixty day period by concurrent resolution. The practical problem in this area, however, is that once the President commits forces abroad, Congress may be unlikely or unwilling to remove them. *See* TRIBE, *supra* note 21, at 173-180. *See generally* Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977).

42. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding federal statutory restrictions on the civil rights of Japanese-Americans during World War II); Hirabayashi v. United States, 320 U.S. 81 (1943); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied* 446 U.S. 957 (1980). *See* Rosado v. Civilitti, 621 F.2d 1179 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 153 (1981). *See also* L. HENKIN, *supra* note 14, at 210, where it is stated that the Supreme Court has never denied access to an individual claiming violation of his constitutional rights as a result of a foreign affairs action on the basis of the political question doctrine. Professor Tribe points out that the Supreme Court has construed the necessary and proper clause as authorizing Congress to take action in wartime that would be unconstitu-

therefore, not plenary.[43]

II. ANALYSIS OF THE ACT

Like its 1949 and 1969 predecessors, the 1979 Act authorizes export controls to protect the national security of the United States, to promote foreign policy interests and to conserve resources and materials. Export controls may also be used as countermeasures against nations that restrict United States access to supplies of foreign materials. Aside from those purposes a fundamental question raised by the EAA of 1979 is whether its licensing and procedural provisions will accomplish the dual purposes of easing trade restrictions while promoting the necessary interests of the nation. To a significant extent, the 1979 Act recognizes that those goals are not necessarily incompatible and that a more open export control policy coupled with reasonable restrictions is just as likely to promote national interests as is a system of sweeping and repressive controls.

While it is difficult to criticize a statute in the area of foreign affairs only because it demonstrably favors government over private interests, the EAA of 1979 nevertheless contains a number of provisions that present obstacles to the exporter without any apparent easing of the government's burden in the conduct of foreign affairs. To this extent such provisions seem unnecessary. Moreover, they will tend to frustrate congressional policies which have been more than three decades in the making. For analytical purposes the following discussion of the Act has been divided into the general headings of substantive provisions, procedural provisions, export controls and miscellaneous provisions.

A. Substantive Provisions

The substantive provisions of the EAA of 1979 encompass section 2401 (congressional findings) and 2402 (congressional declaration of policy) of the Act.

1. *Congressional Findings*. In the first section of the Act,

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tional in peacetime, including restrictions on individual rights. L. TRIBE, *supra* note 21, at 167, 276.

43. United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). With respect to the role of the President, the Court in *Curtiss-Wright* stated that his plenary powers to conduct foreign affairs "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. *See* Rogers v. Belli, 401 U.S. 815 (1971); Reid v. Covert, 354 U.S. 1 (1967); Afroyim v. Rusk, 287 U.S. 253 (1967); Perez v. Brownell, 356 U.S. 44 (1958).

Congress stated nine findings which are expressed as general propositions.[44] The combination of domestic, governmental and international findings seems to invite a balancing of competing interests but gives no explicit guidance as to the priority among a number of factors taken into account in doing so. Significantly, the means to achieve this balance is suggested by the new findings (subsections (1), (2), (3) and (6)),[45] all of which recognize the interests of private exporters to engage in free trade through foreign exports. Also recognized is the detrimental impact of excessive controls on the ability to engage in free trade and on the domestic economy. These interests are stated independently rather than as subject to the government's national security and foreign policy interests.[46]

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44. These propositions are summarized as follows:
1. Concern that U.S. citizens be able to engage in international trade is a fundamental government policy.
2. Exports have economic benefits to the United States and the world, increase employment and production in the U.S. and reduce inflation by strengthening the balance of trade and the value of the dollar.
3. It is in the national interest for the government and the private sector to give high priority to exports.
4. The United States' economic and foreign policy goals may be affected by the availability of certain materials that the U.S. exports.
5. National security may be threatened by failure to consider whether exports of goods or technology will contribute significantly to the military potential of other countries singly or in concert.
6. Uncertainties in export policy can cause domestic business to reduce efforts and thereby adversely affect the United States' balance of trade.
7. Unreasonable controls on access to world supplies can have widespread political and economic effects.
8. Export controls for national security purposes should especially consider the export of technology and of goods which contribute to the transfer of technology that could aid the military potential of other countries and threaten the security of the United States.
9. Minimal controls on agricultural commodities and products are needed in order to keep domestic agriculture strong and free of government supports, to achieve a positive balance of payments and to eliminate hunger worldwide.

45. Five interests were recognized under the EAA of 1969. *See supra* note 3 and accompanying text. The first stated that the quantity and composition of products available at home and abroad may affect the United States' economy and foreign policy. *Id.* § 2401 (1). Secondly, Congress stated that it would be detrimental to national security to permit without restriction the export of certain materials that could make a significant contribution to the military potential of other nations. *Id.* § 2401 (2). The third finding expressed concern over the adverse effects on United States balance of payments that may be caused by unwarranted export restrictions, especially when such restraints are more severe than those imposed by countries with whom the United States has defense treaties. *Id.* § 2401 (3). Fourth, Congress recognized that uncertainty in export policy causes business to curtail foreign trade and further impairs the United States' balance of payments situation. *Id.* § 2401 (4). The fifth finding states that unreasonable restrictions on access to supplies creates political instability and slows the progress of nations. *Id.* § 2401 (5).

46. The findings of the EAA of 1969, *supra* note 3, also were intended to balance national security and foreign policy interests with those of the private sector to engage in free trade. The first two findings relate to government interests, while the latter three are

There is no indication in section 2401 that the private sector must automatically yield whenever the government represents that foreign affairs considerations predominate. Instead, private interests are presumably weighed against those of the government. Although greater consideration is in all probability to be given to foreign policy, it should not imply that private interests can be disregarded. Moreover, subsection (3)[47] recognizes that the interests of government and the private sector are not always adverse but are often mutual, and subsection (2)[48] makes it possible to coordinate those interests. This relationship can be expected to provide some guidance in the determination of future export policy.

In section 2401, Congress recognizes that export controls have a serious impact on the exporting community. It follows that the interests of exporters will be considered and that the harshness of controls will not be unnecessarily imposed. Thus, section 2401 purports to recognize an obligation on the part of the government to fairly represent exporters.

While it may appear that the interests of exporters will carry more weight than under previous legislation, that expectation may be frustrated by findings that Congress did not make. Notably absent from section 2401 is reference to a general rule stating that the freedom to export is more practicable and beneficial to the United States economy than a system of controls, or that controls should be an exceptional measure to be invoked only where military, national security or similar foreign policy objectives predominate.[49] Also omitted is a finding as to the impact on export control policies of broad Executive discretion and the lack of adequate remedies against abuse of such discretion.[50]

From the viewpoint of exporters, the failure to address the problem of discretion makes it difficult to discern consistency and to predict the development of government export control policies. It appears that Congress has chosen to place less emphasis on consistency in exchange for allowing the Executive to retain great flexibility. Perhaps Congress believes that the demands of a rapidly

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designed to relax trade controls. Although Congress was aware of the benefits of free trade, it nevertheless subordinated this goal to protection of national security and advancement of foreign policy. *Export Licensing*, *supra* note 8, at 337-38.

47. *Supra*, note 44.

48. *Id.*

49. *See* Senate Report, *supra* note 11, at 2466.

50. For a discussion of the constitutional dimensions of executive discretion, *see supra* notes 25-29 and text accompanying.

changing global picture necessitates that approach. Thus, what is consistent for the exporter may appear too rigid and confining for the government, especially when faced with the potential hostility of a foreign power. This is not to say that no effort is made to accord exporters evenhanded treatment, but rather that Congress did not wish to diminish the efficacy of export controls as a foreign policy weapon. If that is the crux of Congressional policy, the new findings announced in subsections (1), (2), (3) and (6) appear to be little more than desiderata.[51]

2. *Congressional Declarations of Policy*. The congressional declarations of policy in the EAA of 1979, as declared in section 2402, are generally similar to its predecessor, notwithstanding the new findings in section 2401. The basic policy is to balance the interests of the government and exporters in a manner consistent with contemporary political realities and the current status of international trade. Section 2402 further declares that the new Act seeks to improve the position of private parties to the greatest extent, while remaining compatible with foreign policy and national security.[52]

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51. *Supra*, note 44.

52. *See Export Licensing*, *supra* note 8, at 336. Policy considerations are summarized as follows:

1. Uncertainty in export control policy should be minimized, and trade with all countries encouraged, except those the President determines to have interests incompatible to our own.
2. Export controls are to be used only after full consideration of economic impact and only if necessary to
   —control the export of goods and technology that would significantly contribute to the military potential of other countries in a manner detrimental to U.S. national security;
   —control exports to further U.S. foreign policy objectives; and,
   —control exports to protect the United States economy from the drain of scarce resources and to reduce inflation caused by foreign demand.
3. Export controls should be imposed in full cooperation with other nations and to achieve uniformity of export control policy with countries with which the United States has defense treaties.
4. Economic resources and trade potential should be utilized to further the growth of the United States' economy and to further national security and foreign policy objectives.
5. The United States' policy is
   —to oppose boycotts and other restrictive trade practices directed against nations friendly to the U.S. or against United States persons;
   —to encourage or require U.S. citizens engaged in foreign trade to refrain from participating in such boycotts;
   —to develop international cooperation and international rules to ensure free access to world supplies.
6. Private industry and government should review the desireability of subjecting products to export controls.
7. Export controls, including license fees, can be used to secure removal by for-

The most significant features of the policy declarations in section 2402 are the two new subsections (1) and (10) which express the intention of Congress to encourage expanded trade and to increase the trading potential of United States citizens.[53] Subsection (1) strongly implies that Congress intended to promote an expanded export policy unless the Executive believes in the light of the evidence that export of certain items will be detrimental to national security, foreign policy or domestic supplies.[54] In no sense can subsection (1) be reasonably interpreted as creating a presumption against export controls in favor of free trade, which the Executive must rebut. That would be inconsistent with the findings of section 2401.

It is noteworthy that export controls must be compatible with basic due process guarantees under subsection (10). Explicit due process protections are not, however, defined anywhere in the Act, although they could be inferred from a number of provisions.[55] Even if such inferences could not be drawn, the fact that neither the EAA of 1969[56] nor the ECA of 1949[57] was ever challenged as unconstitutional makes it improbable that any provision of the EAA of 1979, with its declared policies of greater protection for private interests, would be struck down on constitutional grounds.[58] A somewhat more tenable prospect is that particular action by the Executive, or by an agency to which the Executive may lawfully sub-

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eign countries of restrictions on access to supplies, which increase domestic inflation, create shortages or attempt to influence U.S. foreign policy, but the President should first use diplomatic means to effectuate this policy.

8. Export controls can be imposed to prevent and suppress international terrorism.
9. Export controls can be imposed in cooperation with countries with whom the United States has defense treaties in order to restrict the flow of certain goods and technology to countries that could increase their military potential against the United States.
10. It is United States policy to give high priority to trade by U.S. citizens except if in conflict with national security, foreign policy and short supply objectives, but such controls must be consistent with basic standards of due process.
11. Restrictions on the export of agricultural commodities and products are to be minimized.

53. The EAA of 1969 also encouraged free trade except with those countries determined to be opposed to U.S. national security interests. EAA of 1969, *supra* note 3, § 2402(1).

54. *See Export Licensing*, *supra* note 8, at 338, where the author states that the President's broad discretion under the 1969 Act and amendments to impose export controls without being required to justify his actions to affected parties weakens the congressional policy of facilitating exports.

55. *See infra* notes 133-37, 191 and text accompanying.

56. *See supra* notes 3-4.

57. *See supra* note 2.

58. For a discussion of constitutional protections afforded to individuals in the area of foreign affairs, *see supra* note 42 and text accompanying.

delegate authority,[59] may be invalidated as in violation of a specific statutory provision.

Although Congress appears to be more solicitous toward exporters than ever before, it was nevertheless careful to avoid saying that any member of the exporting community has a "right" to engage in foreign commerce. Instead as the Senate Report on the Act makes clear only the "ability" to engage in these activities must be protected, although permission to export can only be required so as to effectuate the policies of section 2402.[60] Congress' intention may be interpreted as requiring the Executive to give active consideration to private parties as an important additional factor in foreign policy decisions. Nevertheless the Executive's failure to consider private parties' interests does not constitute the denial of a "right" to export nor is it a violation of due process protections.

Along these lines, a reasonable interpretation of subsections (1) and (10) is that even if the Executive takes the private sector's interests into account, and thereafter imposes harsh policies, no one's "rights" would be violated since the statute only requires that those interests be considered. Nowhere does it state how much weight need be given to private parties or that it is an abuse of discretion to totally disregard private interests after recognizing the fact that they exist. Apparently, as a matter of policy, the President is only obligated to express an appreciation for the interests of exporters, but he need not let those interests enter significantly into a particular decision. The new policies embodied in the Act could, however, spark litigation on the issue of abuse of such discretion. Thus, where the President's decision is totally without rational basis or if he acts beyond the scope of his authority, the courts might be compelled to invalidate his action or limit its scope, both with respect to a decision based on constitutional grounds and a statutorily-created right.[61]

Despite the pronouncements favoring private interests, the policy statements do not seem to be an adequate safeguard against continued needlessly harsh export policies. As a practical matter, United States foreign policy objectives must be consistent with existing international trade realities.[62] But the policies set forth in

59. *See* EAA of 1979, *supra* note 10, § 2403(e).

60. Senate Report, *supra* note 11, at 2466; EAA of 1979, *supra* note 10, § 2403(d).

61. The role of the courts in the conduct of foreign affairs is discussed *supra* notes 29-33 and text accompanying.

62. *See* McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters*, 3 L.

section 2402, by failing to sufficiently curb Executive discretion, would permit unrealistic export controls to continue. Thus, for example, the Executive could impose a unilateral control (as opposed to steps taken as part of a multinational arrangement) on an item not controlled by other nations but available in similar quantity and quality, if it deems that such control would protect national security. This action would be consistent with the policies of section 2401, including subsections (1) and (10), provided that the Executive voiced concern for the adverse impact that its action might have on exporters. The President need not, however, allow the harshness of this impact to dissuade him if he is convinced that a given policy is in the national interest. He is likely to be restrained only if his action in such circumstances is completely unreasonable or not authorized by the Act. Even if such control is unlikely to be successful, it would probably stand as a justified exercise of Executive authority.

An export control adopted under the 1979 Act to effectuate a national security of foreign policy objective is likely to be valid despite the policy designed to accommodate exporters. Moreover, economic and political factors affecting exporters may be irrelevant if they are deemed to be outweighed by national security or foreign policy interests. Thus, it is of slight consequence that the United States lacks a monopoly on the goods or technology it seeks to control and fails to secure an agreement with allies to place similar controls on these items.[63] In this respect the export control may be detrimental to the United States balance of trade. It may also be counterproductive, if trade with countries opposed to United States interests is encouraged, because it effectively negates the government's ability to control certain items. Thus, policies favoring expanded and stable trade appear unlikely to overcome the presumption favoring national security or foreign policy as formulated by the Executive. Absent standards to guide the Executive in weighing private interests or economic and political factors, the

& POL'Y IN INT'L BUS. 42, 99-100 (1971), who notes that the liberalizing trend in U.S. export policies is strongly influenced by political and military events abroad, especially those that take place in Eastern Europe and the Soviet Union. In the aftermath of the Islamic revolution in Iran, the Middle East also is likely to be of increasing concern.

63. *See also* Skol and Peterson, *Export Control Laws and Multinational Enterprises*, 11 INT'L LAW. 29, 29-30 (1977) [hereinafter cited as Skol]. The authors argue that with respect to multinational enterprises, the United States must bring its export control policies into line with those of other free world countries and thereby make U.S. policies more effective.

policy of promoting greater participation by the exporting community can be readily defeated.

B. Procedural Provisions

Section 2403 of the EAA of 1979 contains several general provisions, some of which are definitional while others are directive or operational. The most important provision is subsection (a) which defines the types of export licenses that the Secretary of Commerce (hereinafter Secretary) may require exporters to obtain. These include: (1) the validated license, which authorizes the export of a specific item upon acceptance of the exporter's application[64] (2) the qualified general license, which permits multiple exports following acceptance of an application,[65] (3) the general license which allows items to be exported without the need for an application[66] and (4) such other types of licenses as may assist the Secretary to enforce the Act.[67] In addition under section 2403(b), the Secretary of Commerce is responsible for maintaining a commodity control list, which catalogues controlled goods and technologies for purposes of national security and foreign policy.[68]

1. *Validated License*. The validated license is granted once the good or technology is determined to be non-strategic in character; that is, as one commentator suggests, they must not upgrade the scientific, technological or industrial capacity of the country to which they will be exported, or re-exported and used by such country in a manner detrimental to United States security.[69] Other criteria considered before granting a validated license include access to such goods and technology from other sources, the recipient country's military posture and the confidence the United States has in that particular country.[70] By contrast, the general license grants broad permission to export, but it is also conditional and revocable.[71]

A validated license may be required only if (1) the goods or

64. EAA of 1979, *supra* note 10, § 2403(a).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*, 2403(b).
69. McQuade, *supra* note 62, at 76.
70. *Id.* at 71.
71. *Id.* at 76. Only general and validated licenses were permissible under the EAA of 1969. *Cf.* Export Administration Regulations, 15 C.F.R. §§ 371, 372 (1978).

technology sought to be exported is restricted by a multilateral agreement to which the United States is a party and which requires the parties to approve the export; (2) other nations are not as advanced as the United States with respect to the goods or technology; or (3) the United States is seeking comparable controls on the goods or technology from other suppliers, and the Secretary judges a validated license to be necessary pending conclusion of such agreement.[72]

Despite the apparent limitations on the use of the validated license, the Secretary is given broad discretion to require it. The validated license is limited to the situations described unless to do so is impracticable or inconsistent with national security interests.[73] Impracticability or conflict with the national security are not defined for the purposes of this section, but it appears that a general finding would suffice which means that the validated license could swiftly supplant the qualified general license.

2. *Qualified General License*. The qualified general license (QGL), an innovation of the 1979 Act, merits special attention. The great increase in the volume of license applications between 1977 and 1979 created delay and uncertainty for exporters and threatened to overwhelm licensing agencies with applications.[74] Consequently, the 1979 Act attempts to reduce the number of applications in part by means of the QGL. The purpose of this type of license is to "permit multiple shipments to a particular consignee or for a specified end use."[75] Creation of this license category represents a departure from the practice of the EAA of 1969 whereby a separate validated license was required for each shipment made to destinations in controlled countries.[76] The mission of the QGL is to reduce the amount of paperwork and the expense to applicants and the government without weakening the government's ability to impose export controls.[77]

The QGL is intended by Congress to be available instead of a

72. EAA of 1979, supra note 10, § 2404(e)(2).

73. *Id.*

74. *Reconciliation*, *supra* note 2, at 427-28. It has also been pointed out that greater precision with respect to the commodity control list under §§ 2403(b) and 2404(c) by means of targeting militarily critical technologies for export controls will further reduce license applications since control of obsolete and non-critical items does little to protect national security. *Id.* at 429-33.

75. Senate Report, *supra* note 11, at 2472.

76. EAA of 1969, *supra* note 3.

77. Senate Report, *supra* note 11, at 2472.

validated license where feasible and appropriate.[78] However, a QGL may be required for export of goods or technology restricted by a multilateral agreement to which the United States is a party, and that agreement does not require the parties to approve the export.[79] Thus, the QGL may bring substantial improvement in licensing procedures where, for example, an exporter makes multiple shipments of a non-strategic item to a controlled country. That situation aside, the QGL is not likely to ease the burden on exporters primarily because the Secretary retains broad discretion to determine whether a validated license is needed.

The Secretary's discretion is influenced by numerous unpredictable external factors, such as the political realignment of former trading partners. Thus, where a change or imminent change of government is viewed as detrimental to United States security, goods or technology that could have been shipped under a QGL, almost overnight would require a validated license. The QGL gives the appearance of expedited procedure,[80] but the burdens on the exporter may remain as heavy in a given situation as under the 1969 Act.

This view is consistent with section 2404 (f) which permits the Secretary, pursuant to regulations, to determine that where a particular item is available in comparable quantity and quality to controlled countries, a validated license is unnecessary,[81] for in that situation as well a validated license may still be required by the President should he determine that use of a QGL would prove detrimental to national security.[82]

3. *Licensing Procedures*. Section 2409 of the Act sets forth the mechanics for obtaining an export license. Briefly, this provision establishes a timetable for review of license applications and the information that must be supplied to and by the applicant in the review process.[83]

a. Timetable. The Secretary has ten days from the receipt of an application for initial screening to determine if the application has been properly completed, if it must be forwarded to another department or agency for review, or whether it must be forwarded

78. EAA of 1979, *supra* note 10, § 2404(e)(1).
79. *Id.* § 2404(e)(3).
80. *Id.* § 2404(e)(1).
81. *Id.* § 2404(f).
82. *Id.*
83. EAA of 1979, *supra* note 10, § 2409(a).

to any multilateral review procedure to which the United States is a party, which usually means to the "Coordinating Committee" (COCOM).[84] COCOM is an informal voluntary international body, established for the mutual security of member states and consists of Japan and NATO members except Iceland.[85] The Secretary, upon review, must inform the applicant of his decisions.[86] Unless referred and if the application is properly completed, the license must thereafter be issued or denied within ninety days.[87]

If the application is forwarded to another government department or agency, they have thirty days (with provision for a thirty-day extension) to review and forward its observations and recommendations to the Commerce Department.[88] The Secretary then has ninety days after receipt of the referred agency's views to issue or deny the license,[89] unless the application is then referred to COCOM.[90]

Applicants are informed of any agency objections and are given an opportunity to respond to the referred agency's views before the Secretary can render a decision, to the extent that such procedure is consistent with United States national security and foreign policy.[91] If the application is denied, the Secretary must give reasons, if national security and foreign policy so permit, and

84. *Id.* § 2409(b).

85. COCOM has two basic functions: to maintain a list of strategic goods and technologies which may be embargoed or monitored and to secure agreement on measures designed to prevent re-export of controlled items and thereby limit the build-up of the military potential of communist countries. Skol, *supra* note 63, at 40. Embargoed items fall into three principal categories: those used in arms production; those used in military technology; and, those with military significance intended for areas in short supply. *Examination supra* note 2, at 185. COCOM was established in 1950 through U.S. legislative proposals aimed at terminating trade with countries that engaged in unregulated commerce with the Soviet bloc. *Id.* at 41. The COCOM participants each have different attitudes toward the items proposed for control. As a consequence of this disagreement, COCOM activity tends to be coordinated around the "lowest common denominator," which means also that the list of U.S. controlled items is more comprehensive than the COCOM list. McQuade, *supra* note 62, at 72-73. COCOM success has traditionally been linked to the attitudes of COCOM members toward U.S. participation. Tension between COCOM members and the U.S. has been generated over the desire of COCOM members to make U.S. national security interests secondary to their own trade interests. *Examination*, *supra* note 2, at 197.

86. EAA of 1979, *supra* note 10, § 2409(b).

87. *Id.* § 2409(c).

88. *Id.* § 2409(d) and (e).

89. *Id.* § 2409(f). If referred agencies give conflicting recommendations, the Secretary must within the ninety-day period prescribed in section 2409(f), resolve the conflict. *Id.*

90. *Id.* § 2409(b)(5).

91. *Id.* § 2409(f)(2).

inform the applicant of appeal procedures.[92] Normally an applicant who is denied a license or whose application is not acted upon within required time periods may appeal to the Secretary.[93]

If the processing of an application does not conform to the requirement of section 2409(j)(2), or if the processing does conform but the Secretary fails to notify the applicant, injunctive or other appropriate relief is available in the Federal District Court.[94] Finally, any time period prescribed in section 2409 can be extended, upon notice to Congress and the applicant, if the Secretary determines that the importance and complexity of an application requires additional time for negotiations to modify it.[95]

b. Technical Advisory Committee. The EAA of 1979 reenacts another important innovation of its predecessor by providing for the creation of technical advisory committees.[96] The 1979 Act provides that if a substantial number of representatives of an industry learn that their goods or technology are subject to export controls for national security reasons, the Secretary, upon being requested by them in writing, will appoint such a committee with respect to any goods or technology that are difficult to evaluate due to technical questions, availability, use of protection and technology, or licensing procedures.[97] The committee will be composed of members of the federal government and industry.[98] The purpose of these committees is to aid the Secretary in implementing the policies of the Act,[99] and to provide information in the areas described above.[100]

The key factor in determining whether to establish a technical advisory committee appears to be that the export item is "difficult to evaluate."[101] This is a somewhat easily satisfied criterion be-

92. *Id.* § 2409(f)(3).

93. *Id.* § 2409(j)(1), (2).

94. *Id.* § 2409(j)(3).

95. *Id.* § 2409(f)(4).

96. *Id.* § 2404(h); *cf.* EAA of 1969, *supra* note 3, § 2404(c).

97. EAA of 1979, *supra* note 10, § 2404(h)(1).

98. *Id.*

99. *Id.* § 2404(h)(2). The Secretary is required to consult with committees having such expertise on technical questions, world-wide availability and utilization of production technology, the effect of licensing procedures on the level of export controls, and exports subject to multilateral controls in which the United States participates. *Id.*

100. *Id.*

101. *Id.* § 2404(h)(1).

cause it presents few obstacles to Commerce Department action and invites extensive private sector participation.

c. Obstacles for the Exporter. Despite Congress' intention to place greater emphasis on a trade expansion policy under the new Act,[102] the licensing procedures do not readily facilitate that purpose. One difficulty that an applicant may encounter is the double licensing requirement resulting from the COCOM referral. The applicant must obtain a license from COCOM if a product originating in the United States is shipped to a COCOM country for re-export from that point to a controlled country.[103] Approval of the application by the Commerce Department is subject to COCOM approval.[104] The approval of the application by COCOM, however, is not subject to the Commerce Department's approval. This is so because the list of COCOM-controlled items is shorter than the United States control list. That difference reflects COCOM's frequent lack of unanimity respecting items that United States security agencies believe merit control.[105] The applicant may, therefore, find his way successfully through the initial Commerce Department screening, the special Defense Department procedures under section 2409(g), and through the COCOM process, only to be denied in the final stage of the United States determination for national security reasons. This procedure is unique among COCOM nations since the United States is the *only* member that requires two licenses: one for export to a COCOM country and another for re-export from a COCOM country.[106]

The decision by Congress not to adopt a single license requirement, like that of its COCOM partners, reflects continued (and perhaps unnecessary) concern over strategic items. In pursuit of that goal, Congress has failed to enact a licensing procedure that eliminates undue delay for exporters who are subject to multilateral controls or to provide for speedy review of a COCOM partner's exception requests which are also subject to mutilateral controls.[107]

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102. *See* notes 53-63 *supra* and accompanying text.

103. *See* Sen. Rep., *supra* note 11, at 2473. For a comparison with licensing procedures under the EAA of 1969, *supra* note 3, *see Export Licensing*, *supra* note 8, at 347-50.

104. Senate Report, *supra* note 11, at 2473. A COCOM member also may petition member states to exempt a domestic exporter from multilateral restrictions for one-time sales. *Examination*, *supra* note 2, at 190.

105. *See* EAA of 1979, *supra* note 10, § 2409(h).

106. *See* McQuade, *supra* note 62, at 92. COCOM's effectiveness also is weakened by the fact that it is an entirely voluntary organization with no power to enforce its decisions on member nations. *Reconciliation*, *supra* note 2, at 445.

107. *See* Senate Report, *supra* note 11, at 2473.

In this situation, the licensing process shows no improvement, from the exporter's point of view, over the procedure of the EAA of 1969. A United States company may, as a result, feel compelled to circumvent United States procedures by applying for an export license through a foreign subsidiary where the country of residence is more receptive to export license applications than is the United States.[108] It is also detrimental to United States trade since it compels foreign firms to find substitutes for United States components delayed by licensing procedures.[109]

Another potential obstacle for the exporter is the requirement that the Secretary consider agency views in granting or denying a license application. The extent of this duty goes no further than requiring the Secretary to take those views into account.[110] Presumably the Secretary need only declare that the agency's views were considered. Even if the agency presents overwhelming evidence against imposing an export control, the Secretary is not bound by that conclusion. Thus, there may be the burden of additional delay for the exporter without a corresponding duty on the Commerce Department to consider the agency's views.

One reason for the Secretary's broad discretion is that the Act does not specify how much weight, if any, must be accorded to agency input, and therefore does not significantly reduce that discretion. The absence of such an evidentiary standard also prevents federal agencies from indirectly creating foreign policy. Moreover, section 2409 (f) apparently does not require the Secretary to state reasons for accepting or rejecting agency recommendations.

A related difficulty is the conditional requirement that the Secretary inform the applicant of the reasons for a negative agency determination[111] or of the reasons for denial of his application.[112] The exporter is entitled to an explanation in these situations unless, in the Secretary's judgment, this would prove to be inconsistent with foreign policy or national security interests. The Secretary's discretion in that matter is so broad as to virtually preclude reviewability, provided that his discretion is not abused or arbitrarily applied.[113]

108. *Examination*, *supra* note 2, at 198-99.

109. *See* Hoya, *supra* note 2, at 9.

110. EAA of 1979, *supra* note 10 § 2409(f). *See Examination supra* note 2, at 192.

111. EAA of 1979, *supra* note 10, § 2409(f)(2).

112. *Id.* § 2409(f)(3).

113. *See* K. DAVIS, *supra* note 21, at 514-18.

Under section 2409(g) the applicant who survives the ordinary rigors of the section 2409(f) licensing procedures must also satisfy the provisions of the Act for special procedures available to the Secretary of Defense. This provision authorizes the Secretary of Defense to review any item proposed for export to a controlled country, independent of a referral by the Commerce Department. The Secretary of Defense must then recommend to the President that it be disapproved where it is determined that exportation will significantly contribute to the military potential of a country opposed to United States national security.[114] Moreover, pursuant to consultation with the Secretary of Defense as to categories of items that the Secretary should review for national security purposes, the Secretary of Commerce must give notice of license requests for exports of goods and technology to controlled countries to the Defense Department. Only then can the Commerce Department issue a license pending approval by the President within the alloted period of time.[115] The President has thirty days thereafter to accept, reject, or modify the recommendation of the Defense Department to disapprove the license, whereupon none will be issued.[116]

Section 2409(g) thereby effectively imposes another procedural hurdle for the applicant seeking to export goods or technology to a controlled country, which is likely to be communist. This section also appears to relieve the President of the duty to state reasons for disapproval, and thus, does not provide a right of appeal. Moreover, it is silent as to what constitutes a significant contribution to the military potential of an adversary and does not specify what is meant by national security or how a threat to it is to be determined. However, as the President is not required to state reasons for disapproving an application and as no right of appeal exists, it may be presumed that these terms are susceptible of broad interpretation. Thus, except for the determination that the export item will make a significant contribution to the military potential of a controlled country to the detriment of national security, section 2409(g) vests broad discretion in the Secretary of Defense once categories of con-

114. *Id.* § 2409(9)(1).

115. EAA of 1979, *supra* note 10, § 2409(g)(a).

116. The Secretary of Defense has thirty days after being informed of the request to recommend that the President disapprove. *Id.* § 2409(g)(2)(A). Within this time the Secretary of Defense may also decide to notify Commerce that he approves of the request subject to certain conditions. *Id.* § 2409(g)(2)(B). Defense may simply give its approval. *Id.* § 2409(g)(2)(C).

trolled items are agreed on with the Secretary of Commerce.[117]

The Defense Department's power to review any proposed export within a predetermined category independently of referral by Commerce could mean that the entire section 2409 procedure can be "short-circuited." As a consequence, a license applicant would have no opportunity to respond to agency views. The reasons for denial of the application need not be given, and the applicant would have no right of appeal. The President is allowed to deny a license application based on a minimal determination of need, but he is not required to make a corresponding showing of the effectiveness of the control. Thus, as to certain categories of goods and technology, section 2409(g) places an almost preemptive power in the hands of the Defense Department.[118] This power reflects a strong Congressional preference for leaving national security interests in the firm grip of the Executive, a grip not yet to be loosened by the interests of exporters.

d. Gains for the Exporter. The foreign availability provisions may nevertheless represent some gains for exporters. First, the role of the government in licensing procedures is more clearly drawn.[119] Second, the Office of Export Administration of the Commerce Department is solely authorized to monitor foreign availability, which makes for greater efficiency and consistency.[120] Third, the Secretary may for the first time establish procedures and guidelines to determine foreign availability.[121] On balance, however, the unwillingness of Congress to shackle the Executive in national security matters makes the question of substantial gains by exporters problematic because of the broad grant of authority given to the Executive. In addition, the broad discretion, the seemingly deliberate vagueness of terms and the lack of guidelines may not only lead to unpredictability for both exporters and trading partners, but may also result in inconsistencies in foreign policy. Ultimately the Act and those who apply it may do a disservice to the private as well as to the public sectors. That potential disservice is compounded by the detrimental economic impact that denial of a license application may have. This procedure may also dissuade exporters from

117. *Id.* § 2409(g)(1).
118. EAA of 1979, *supra* note 10, § 2409(g).
119. *Id.* § 2404(f).
120. § 2404(f)(5).
121. *Id.* § 2404(f)(1).

seeking trade with socialist or less developed countries deemed potentially hostile to the United States interests.

C. Export Controls

1. *Mechanisms for Implementing National Security Controls.* Congress has recognized throughout the history of export control legislation that the success of United States export controls for national security purposes depends on the unrestricted foreign availability of goods and technology comparable in quantity and quality to those produced in the United States.[122]

a. Congressional Controls. Section 2404 of the Act authorizes the President to prohibit or curtail the export of any goods or technology in the interest of national security.[123] The new Act continues the approach of its 1969 predecessor[124] by providing that export policy with respect to granting validated licenses to controlled countries will regard that country's communist or non-communist status as only one factor.[125] Other factors that must be considered include: (1) a country's present and potential relationship with the United States, (2) its present and potential relationship with countries friendly or hostile to the United States and (3) its ability to control re-export of United States goods and technology consistent with United States foreign policy.[126]

The fact that the EAA of 1979 substantially re-enacted the same criteria that were considered under the amendments to the old Act suggests that Congress was satisfied with this approach and that it intended the derivative benefits of this statutory framework to accrue unabated for the exporting community. This policy of freer trade with all countries is an instance in which ideological and political differences are deemed compatible with mutual economic benefit between countries having different economic structures.[127]

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122. Examination, *supra* note 2, at 185-86, 194-95.

123. EAA of 1979, *supra* note 10, § 2404(a)(1).

124. *See* EAA of 1969, *supra* note 3, § 2403(a)(2)(A) and (B). *See also Export Licensing*, *supra* note 8, at 340-41, where the author notes that the 1977 Amendments to the EAA sought to limit the President's discretion in the area of national security export controls by requiring him to consider the same factors now embodied in section 2404 of the 1979 Act.

125. EAA of 1979, *supra* note 10, § 2404(b).

126. *Id.*

127. With respect to "retransfers" or re-exports of U.S. exports, one commentator terms the control over re-export as an "anti-diversionary" requirement, which is imposed by both the general and validated licenses. By means of this requirement, an item may not first be shipped to a permissable destination and then transshipped to an impermissable one without

b. Executive Controls. Subsections (b), (c) and (f) of section 2403 impose affirmative obligations on the Executive in establishing export controls. Subsection (b) requires the Secretary to maintain a Commodity Control List which includes all goods and technology governed by export controls under the Act.[128] Subsection (c) concerns the foreign availability of export items.[129] Consistent with section 2404(f), it requires the President to refrain from imposing export controls for foreign policy or national security purposes if he determines that there exist no restrictions on an item of comparable quality and quantity from foreign sources.[130] If he determines through "adequate evidence" that the absence of such control would prove detrimental to United States foreign policy or national security interests, he may impose controls.[131]

The "adequate evidence" test, although not defined in the Act, appears to be a rather undemanding evidentiary standard and seems comparable to the "substantial evidence" test adopted by the courts for review of other types of administrative decisions.[132] It is,

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U.S. approval. McQuade, *supra* note 62, at 78. As a result, it is difficult to negotiate the commercial documents, such as letters of credit, used in the transaction, even though this type of control may be ineffective. *Id.* Moreover, friendly countries may complain of these controls as having extraterritorial effect. *Id.* at 79. *Cf.* EAA of 1979, *supra* note 10, § 2404(1), which imposes export controls when "reliable evidence" is presented that goods or technology subject to controls have been converted to military use following export to a country under national security controls. In such cases and despite issuance of a validated license, the Secretary is directed to deny all further exports to the responsible party regardless of foreign availability and to take such additional steps against the responsible country as will deter further use of such products. In testimony before the Senate Committee which considered the 1979 Act, former Secretary of State Rusk reaffirmed this policy:

> We should be reminding ourselves that trade occurs when it is of benefit to both parties . . . During the postwar decades when we were in a very strong trade position, many of us tended to think of trade as a "favor" which we were doing for someone else. That attitude is a luxury which we may not be able to afford with our present large trade deficit.

Senate Report, *supra* note 11, at 2469. One commentator points out that the low volume of trade between the United States and communist countries relative to Western Europe can be traced to United States legal restrictions. Hoya, *supra* note 2, at 4, 8. In view of the congressional policy to expand trade with communist nations and of the most favored nation status for tariff treatment granted to the People's Republic of China and the Socialist Republic of Romania, it makes no sense to continue denial of MFN status to the Soviet Union. *See also* Metzger, *supra* note 9, at 1017-18; Comment, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, 8 L. & POL'Y INT'L BUS. 193 (1976); Pavelic, *Exporting to the People's Republic of China*, 11 CASE W. RES. J. INT'L L. 337 (1979).

128. EAA of 1979, *supa* note 10, § 2403(b).

129. *Id.* § 2403(c).

130. *Id.* § 2404(f).

131. *Id.* § 2403(c).

132. The Senate Report reads this provision as requiring the President to assess foreign

therefore, probably a less exacting requirement than the preponderance test. Accordingly, the burden of justifying an export control despite foreign availability may not be very difficult to meet. This minimal restraint on presidential authority reflects congressional deference in foreign policy and national security matters even though it could mean giving a competitive advantage to foreign exporters. The standard further reflects the unwillingness of Congress to tie the President's hands by a more difficult requirement, thereby sacrificing his ability to respond quickly and flexibly to changing circumstances abroad.

Subsection (f) of section 2403 imposes a public notice requirement on the Secretary concerning changes in export control policy and procedures for the purpose of encouraging trade.[133] Moreover, subsection (f) requires that the Secretary "shall meet regularly" with the business community to review export control policy and foreign availability.[134] This subsection is silent as to the consequences of the Secretary's failure to meet with or of his disregarding the views of business people. However, in the light of the congressional policy that export controls be administered "consis-

availability and, where it exists in a comparable manner, to present "adequate evidence" that export controls are still necessary for foreign policy and national security purposes. Senate Report, *supra* note 11, at 2471. The Report does not define the evidentiary standard, nor does it designate who determines its adequacy. The Supreme Court has indeed equated the "substantial evidence" test with the concept of adequate evidence. The Court has stated that this standard "means such relevant evidence as a reasonable mind might accept as *adequate* to support a conclusion. . . . [This] does not go so far as to justify orders without a basis in evidence having rational probative force." (Emphasis added). Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). The "substantial evidence" test also has been held to be a lesser standard than the weight or preponderance test, and the fact that inconsistent conclusions are supportable in the record does not mean that an agency's findings lacks adequate evidentiary support. NLRB v. Colombian Enameling & Stamping Co., 306 U.S. 292 (1939). One commentator has defined the "substantial evidence" test as such that the agency's determination will be "supported by substantial evidence on the record considered as a whole." E. GELLHORN, ADMINISTRATIVE LAW AND PROCEDURE 265 (1972). Thus, the "substantial evidence" and "adequate evidence" tests are essentially tests requiring a rational basis for an agency decision. *See also* United States v. U.S. Gypsum, 333 U.S. 364 (1947); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977). The substantial evidence test and presumably the adequate evidence test as well would preclude reversal on review unless the evidence provides no reasonable basis for the agency's conclusion, and while variations in the results reached by appellate courts can be expected, both substantial evidence and adequate evidence would appear to bar a reviewing court from substituting its own judgment on the facts. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 255-262 (1980) [hereinafter cited as 3 DAVIS, TREATISE]. The "substantial evidence" test was adopted in the Administrative Procedure Act, 60 Stat. 237, § 10(e), 5 U.S.C.A. § 706(E). No similar evidentiary standard was adopted under the EAA of 1969.

133. EAA of 1979, *supra* note 11, § 2403(f).

134. *Id.*

tent with basic standards of due process,"[135] a claim in the nature of a due process violation of a statutory right could be inferred should the Secretary fail to hold regular meetings. Depending on the meaning ascribed to "regularly", the courts may be more willing to recognize a claim under subsection (f), as doing so would have no direct impact on the Executive's ability to impose export controls.[136] Finally, the President is required to review United States export policy not less than every three years with respect to controls maintained cooperatively with other countries, and annually as to other controls, to determine the continuing efficacy of United States policy toward individual countries.

c. Private Exporter Views. Another positive aspect of the statutory scheme governing national security controls is the voice given to private parties potentially affected by such controls.[137] Once the Departments of Commerce and Defense have established the commodity control list as to the export of items to controlled countries for national security purposes,[138] the 1979 Act requires that prior to issuing regulations concerning review of export controls on the commodities list, the Secretary must consult with mem-

135. *Id.*, § 2402(10).

136. *Cf.* EAA of 1969, *supra* note 3, § 2403(2) which provides that the Secretary must apprise the business community "with a view to encouraging the widest possible trade."

In a variety of contexts the Supreme Court has recognized that due process requires at least an informal adjudication, consisting of notice of the claimed violation to the affected individual, an opportunity to respond to the charges, and a pre-decision hearing. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (due process requires that student be apprised of evidence against him and be allowed to respond before suspension from school); Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (informal academic dismissal procedure where medical student had notice of dismissal and reasons for it and opportunity to talk to appropriate officials was consistent with due process); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) (terminating service for nonpayment of bill without first providing opportunity to present complaint of being overcharged violated customer's due process rights); Morrissey v. Brewer, 408 U.S. 471 (1972) (right to probable cause hearing and later final hearing prior to decision to revoke parole); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (right to probable cause hearing and hearing before final decision prior to revocation of probation); Wolff v. McDonnell, 418 U.S. 539 (1974) (right to written notice of claimed violations and statement of factual basis and opportunity to respond required prior to prisoner's loss of good time); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits could not be suspended pending outcome of termination hearing). *See generally* 2 K. Davis, ADMINISTRATIVE LAW TREATISE 473-522 (2d ed. 1979).

137. *Cf.* EAA of 1969, *supra* note 3, § 2404, which provides that the President in his discretion can seek advice from private industry to the extent this is consistent with national security.

138. EAA of 1979, *supra* note 10, § 2404(c)(1), (2).

bers of the exporting community who may be affected.[139] This requirement applies only to goods and technology and not to militarily critical technologies.[140] Also, permitting parties "potentially affected" to submit their views considerably widens the range of technical, industrial and market information available to the Commerce Department. Moreover, the receipt of such information is not limited by national security interests.[141] Assimilation of a great deal of information may cause delay in processing license applications, but the final decisions will presumably lead to fairer and more reasonable decisions with respect to the private sector than might result without such input. That is due to the expertise of industry officials willing to share technical evaluations on the worldwide state of the arts in high technology areas.[142] The correctness of the Secretary's decision is by no means assured, since the views of industry are not binding on him. Section 2404(c) fails to specify what weight, if any, should be given to private sector opinions, nor does it require the Secretary to state reasons for rejecting industry views. Presumably, therefore, industry data could be accorded minimal significance, or it could even be totally disregarded.[143]

d. Validated License. Another mechanism for implementing national security controls is by means of the validated license. Exporters are required to obtain this type of license only if: (1) their product is restricted under a multilateral agreement to which the United States is a party (i.e., COCOM), and under such agreement, approval of the participating states is required, (2) other nations have not developed the goods or technology to a greater extent than the United States (foreign availability), and (3) the United States seeks to control such goods or technology by securing similar con-

139. *Id.* § 2404(c)(3).

140. *Id.* § 2404(c)(1), (2).

141. Controls on militarily critical technologies are governed by § 2404(d) and do not permit input from private industry for such determinations.

142. Section 2404(c)(3) also requires that as part of the review prior to issuing regulations, an assessment of foreign availability of listed items be made.

143. EAA of 1979, *supra* note 10, § 2404(c). One commentator points out that there are limitations on the utility of government consultation with industry. For example, national security interests may prevent industry advisers from obtaining all the information necessary to make the best assessment possible. McQuade, *supra* note 62, at 96. Moreover, because of the confidentiality requirements of the Act, the government may be prohibited from disclosing information from license applicants to private consultants. EAA of 1979, *supra* note 10, § 2411(c). It is also an undesirable policy to reveal confidential information from applicants. McQuade, *supra* note 62, at 96.

trols from other suppliers, and the Secretary deems a validated license to be necessary pending conclusion of such multilateral agreement.[144]

A significant feature of the validated license provision is the foreign availability requirement. Under the 1979 Act, the Secretary is barred from requiring a validated license if foreign availability exists in fact, that is if other nations possess comparable capabilities to export goods or technology potentially subject to validated license requirements.[145] If the President determines that the lack of control would be detrimental to national security, he may require a validated license despite foreign availability.[146] The President is not required to balance national security against the detriment to exporters due to foreign availability nor even to define in specific terms the national security interest affected. Absent the Presidential determination, the Secretary must grant the application for a validated license where foreign availability exists.[147] Thus, Congress again expressed its determination that national security shall predominate over private economic interests even though the validated license would be ineffective and requiring it would result in a competitive advantage to foreign producers. Henceforth, Congress entrusts wide discretion to the Executive in the granting of such licenses, for the President is authorized to determine what national security interest is sufficient to require a validated license.[148] Even though such a finding could be refuted by evidence of a foreign availability showing that national security objectives are not advanced by the President's actions, it would appear that Congress is being overly cautious and overly protective of national security, as the President need make little more than a cursory finding of a threat to national security. Congress has apparently given in to ideology over practicability on this point because ultimately economic interests are ill-served.

2. *Foreign Policy Controls*. Section 2405 of the Act sets forth six somewhat overlapping criteria that the President must consider before imposing export controls on goods, technology or information for reasons of foreign policy. These factors include: (1) the

144. See notes 69-73 *supra*, and accompanying text.
145. EAA of 1979, *supra* note 10, § 2404(f)(1).
146. *Id.*
147. *Id.*
148. *Id.*

probability that such controls will be effective, such as control of foreign availability;[149] (2) the compatibility with foreign policy objectives, such as control of terrorism and the implementation of United States policy toward controlled countries; (3) the reaction of other countries to the imposition or expansion of such controls; (4) the effect on exports, employment, production and the reputation of the United States as a world supplier; (5) the ability of the United States to enforce such controls; and (6) the foreign policy consequences of not imposing such controls.[150]

The Act does not expressly require the President to demonstrate that he has met these criteria. Instead, as the Senate Committee noted, he must only consider those factors. In addition no statutory guidance as to the priority or relative weight to be accorded to each factor exists. Thus, provided the President shows that they entered into the decision-making process, he would be free to balance these considerations in any order and attach whatever significance he deems appropriate. Section 2405 could reasonably be read as providing that the President may be found to be in violation of the 1979 Act if he ignores these criteria altogether, but this section does not seem to imply that the President must rest his decision solely on these six factors. However, they are worded so broadly that almost any determination could seemingly be based on one or more considerations.

It is also noteworthy that the President must consider among these six criteria the potential impact of his decision on the private sector and domestic economy.[151] The possibility of adverse domestic effects need not, however, decisively influence the President's decision to impose export controls. He is clearly entitled, based on the wording of the Act[152] to disregard this factor if, in his discre-

149. One commentator states that foreign availability, which is generally understood to mean what can and cannot be exported to communist countries, is an essential consideration in a licensing decision but that the test for determining its existence is difficult to apply. The first problem is with interpretation of the term, and the second relates to collecting sufficient reliable information with which to make an accurate assessment. Finally, problems arise with respect to the requirement of validated licenses from the Department of Commerce for technology and/or component parts whose origin causes concern. McQuade, *supra* note 62, at 88-90. The author concludes that "[t]here is no litmus paper test" to resolve a problem of this complexity. *Id.* at 91.

150. EAA of 1979, *supra* note 10, § 2405(b).

151. Senate Report, *supra* note 11, at 2470.

152. EAA of 1979, *supra* note 10, § 2405(b)(4).

Section 2405(b) provides in relevant part:

> When imposing, expanding, or extending export controls under this section, the President shall consider—

tion, he finds that foreign policy interests predominate. In short, the President must consider all of the factors enumerated in section 2405. Failure to do so could give rise to violation of the 1979 Act on the part of the President for abuse of discretion. He need not, however, regard any of those factors as decisive or even persuasive to his determination to impose export controls, and even if he were to be found in violation, the remedy might only be an order directing him to show that the six factors cited in section 2405 were considered. His response to such order could be perfunctory.

3. *Short Supply Controls*. Section 2406 of the Act establishes the authority and procedure which Congress considered necessary to alleviate shortages in domestic supplies. This section also governs such matters as the export of crude oil and petroleum products and agricultural commodities.

In order to prevent "excessive drain" of domestic goods and to reduce inflation caused by foreign demand,[153] section 2406 authorizes the President to impose export controls.[154] The President does this by allocating a percentage of export licenses based on a determination of the equitable trade treatment given the United States by other countries and by their treatment of the United States in periods of short supply.[155] This provision also invites comment from "all interested parties"[156] regarding the impact of quantitative restrictions and licensing methods.

a. Monitoring Recyclable Metallic Materials. Section 2406 also provides a limited alternative to licensing through a system of monitoring recyclable metallic materials in short supply.[157] To solicit the views of the private sector in this situation is reasonable since its members are likely to have specialized information that could assist the government. Consideration of private views is consistent with the application procedures for validated and qualified general licenses.[158]

. . .

(4) the likely effects of the proposed controls on . . . individual United States companies and their employees and communities, including the effects of the controls on existing contracts; . . .

153. EAA of 1979, *supra* note 10, § 2402(2)(C).

154. *Id.* § 2406(a)(1).

155. *Id.*

156. *Id.* § 2406(a)(2).

157. *Id.* § 2406(c)(1).

158. The House version of this provision would have granted the right of petition to the

Any representative of an industrial entity engaged in processing recyclable metallic materials with respect to which there has been an increased domestic price or shortage as a result of increased exports may activate the monitoring process by petitioning the Commerce Department for monitoring or export controls or both.[159] The Secretary then initiates notice and comment proceedings giving interested parties thirty days to respond. If the petitioning party requests a public hearing, one must be conducted.[160] The Secretary has forty-five days after this proceeding terminates to decide whether to impose monitoring, licensing or both.[161] He also must publish proposed regulations within fifteen days and wait another thirty days for public comment before implementing his decision through the regulations.[162]

The Secretary is also authorized to impose temporary monitoring or controls following a petition but before making a final decision. This is done if he deems such action necessary to stem the flow of scarce resources and reduce the inflationary impact of foreign demand.[163] The meaning of "temporary" is not defined, but regardless of what it means, it raises a question of the difficulty of lifting temporary controls once the machinery to impose them is in place. There is doubt that such controls would be readily removed because section 2406(c) does not provide a test for evaluating either the relative merits of the petitioner's request to impose monitoring or the responses of the opposing parties. The absence of such guidelines invites the Secretary to arbitrarily maintain the temporary monitoring or control imposed following a petition and may place an unreasonably high burden of proof on the responding party to get them lifted. Thus, section 2406(c) may fufill its in-

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Commerce Department for any material or commodity subject to export controls. House Conference Report No. 96-482, 98th Cong., 1st Sess., *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 2496, 2508 [hereinafter cited as House Report]. *See* also EAA of 1979, *supra* note 10, § 2406(g) for the procedures to control short supplies of agricultural commodities. Significantly, this section requires approval by the Secretary of Agriculture for any action taken thereunder with respect to any agricultural commodity, except where the President determines that action must be taken to carry out national security and foreign policy objectives under § 2402(2)(A) or (B). The views of the private sector are not invited. *Cf.* § 2402(11) which states that one goal of the 1979 Act is to minimize export controls on agricultural goods. *See generally* Comment, *Promoting Agricultural Exports: The Agricultural Trade Act of 1978*, 5 N.C.J. INT'L L. & COM. Reg. 263 (1980).

159. EAA of 1979, *supra* note 10, § 2406(c).

160. *Id.* § 2406(c)(2).

161. *Id.* § 2406(c)(3).

162. *Id.* § 2406(c)(4).

163. *Id.* § 2406(c)(8).

tended purpose of temporary monitoring or controls, but it may have the unintended secondary effect of discouraging foreign commerce in the recyclable metals industry.

The Senate Report expressed concern over the issue of "panic ordering" of the item in question once a petition is made.[164] The Committee acknowledged this potential problem but believed that it would be resolved once the industry grew accustomed to the new procedure and that it would not automatically result in monitoring or controls.[165] The Committee's response, however, seems rather sanguine in the light of the potential difficulties of temporary monitoring discussed above. It can also be argued that once an industry representative petitions for monitoring, there must be a serious problem that may not be adequately answered within the statutory time constraints or else the petitioner would not have sought government intervention. Thus, the Committee may have dismissed the question with too facile an answer.

b. Monitoring Domestically-Produced Crude Oil. Another provision of section 2406 that is certain to restrict the exporting ability of many private parties is the prohibition on the exportation of domestically-produced crude oil.[166] The legislative history makes clear that this restriction is directed against the export of oil produced from the Alaskan North Slope (ANS).[167] The 1979 Act prohibits the export of domestically-produced crude oil transported over the Trans-Alaskan Pipeline, unless it is exported to an adjacent country for refinement and consumption there, in exchange for an equal quantity of oil from the recipient country.[168] The exchange must also lower oil prices in the United States or be temporarily exported across an adjacent foreign country for reasons of convenience and efficiency of transportation.[169]

Domestic crude oil cannot be exported, except if the President expressly determines that such export would: (1) not diminish the quantity or quality of United States crude; (2) result in lower acquisition costs to United States refineries within three months following initiation of the exchange and result in a savings of seventy-five per cent or more, as reflected in lower wholesale and retail

164. Senate Report, *supra* note 11, at 2474-75.
165. *Id.*
166. EAA of 1979, *supra* note 10, at § 2406(d).
167. *See, e.g.*, Senate Report, *supra* note 11, at 2476-77, 2493-96.
168. EAA of 1979, *supra* note 10, § 2406(d)(1).
169. *Id.*

prices; (3) be made pursuant to contracts terminable if United States crude oil supplies are threatened, interrupted or diminished; (4) be consistent with national interest; and (5) be in accordance with other provisions of the Act.[170] Following those determinations, Congress has sixty days in which to approve the President's findings by concurrent resolution.[171]

This provision was attacked by a number of Senators who argued that its effect would be to inhibit the development of domestic crude oil resources at a time when foreign supplies were uncertain and fuel prices at home were steadily increasing.[172] Prohibiting crude oil exports, they believed, would discourage the efforts of the private sector by foreclosing access to foreign markets and have a negative impact on the economy. To those objections, the Committee responded simply that ANS production would increase into 1980; however no evidence of that effect was offered.[173] The Committee also urged completion of pipelines and refineries on the West Coast as the means to stimulate ANS development, but it admitted that little action had been taken.[174]

Both sides to that debate engaged in a degree of speculation, and only the passage of time will prove which, if either, was correct. In the meantime, section 2406 creates serious difficulties for crude oil producers who must pay higher transportation costs to ship their product to the more distant domestic markets of the Midwest.[175] The prospects for export are somewhat remote due to the difficult "express findings" that the President must make under section 2406 before exportation can occur. The wording of section 2406 suggests that he must at least present clear and convincing evidence of all five factors.[176] The prohibition on the export of domestically-produced crude oil is, therefore, an exception to the general policy of encouraging free trade. This prohibition however, seems to lack a persuasive rationale.

4. *Foreign Boycotts*. The area of unsanctioned international boycotts, governed by section 2407, reflects an obvious congressional preference strongly favoring foreign policy over the interests

170. *Id.*
171. *Id.*
172. Senate Report, *supra* note 11, at 2493-96.
173. *Id.* at 2476-77.
174. *Id.* at 2494-95.
175. *Id.* at 2476.
176. EAA of 1979, *supra* note 10, § 2406(d)(2)(A).

of exporters. Section 2407 empowers the President to issue regulations prohibiting any person within the United States who engages in domestic or foreign commerce from participating in foreign boycotts imposed against a country friendly to the United States and which is itself not the object of a boycott.[177]

Section 2407 requires that any United States person approached to participate in a foreign boycott, regardless of whether or not he intends to comply, must report those facts to the Secretary of Commerce.[178] The anti-boycott provisions were retained intact from the EAA of 1969[179] and clearly represent a policy that Congress is determined to enforce.[180] This is evidenced by the affirmative duties imposed on individuals with no apparent recognition of the economic harship they may suffer at the hands of the boycotting country for failing to comply with that country's demands. In summary, the anti-boycott provisions of section 2407 prohibit United States persons from taking part or complying with the secondary or tertiary aspects of unsanctioned international boycotts, but they permit compliance with the primary boycott.[181] The prohibitions and duties of section 2407 are stated with sufficient conciseness and consistency to enable businesses to predict administrative enforcement. However, the EAA of 1979 is but one of sev-

177. *Id.* § 2407(a)(1). For other statutes which contain anti-boycott provisions, *see* the Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1061-1064, 1066, 1067, 90 Stat. 1525 (adding I.R.C. §§ 908, 999), modifying I.R.C. §§ 952, 955; Sherman Act Section 1, 15 U.S.C. §§ 1-8 (1976). *See also* Note, *Through the Antiboycott Morass to an Export Priority*, 9 GA. J. INT'L & COMP. L. 357 (1979) [hereinafter cited as *Antiboycott Morass*]. The following are also prohibited acts under § 2407:

1. Refusal to do business with any boycotted country or with any business organized under the laws of that country pursuant to a request or agreement with the boycotting country;
2. Refusal to employ or use of any other form of discrimination against any U.S. person on the basis of race, religion, sex or national origin or against his/her supervisor or employer;
3. Furnishing information with respect to race, religion, sex or national origin of any U.S. person or his/her supervisor or employer;
4. Furnishing information regarding the business relationship of any person with a boycotted country or with business concern organized under the laws of that country or with any national or resident of the boycotted country;
5. Furnishing information about the membership of any person or involvement in activities supporting a boycotted country; and,
6. Implementing letters of credit which contain conditions or requirements to comply in any manner which violates the regulations issued under this section.

178. EAA of 1979, *supra* note 10, § 2407(b)(2).

179. EAA of 1969, as amended, *supra* note 3, § 2403-1a.

180. *See* Senate Report, *supra* note 11, at 2479. For a discussion of the conflicting interpretations of the antiboycott provisions under 1977 amendments to the EAA, *see* "Antiboycott Morass," *supra* note 177, at 358-60.

181. *See* "Antiboycott Morass," *supra* note 177, at 358.

eral laws with which they must contend.[182]

5. *Procedures for Hardship Relief*. Under section 2408 hardship relief from export controls is available to any person who uses a product produced abroad from a good historically obtained from the United States but which is subjected to an export control.[183] It is also available to any person who historically has exported such a good.[184] Persons affected in either manner may petition the Secretary for exemption from the control because of the "unique hardship" it imposes on them. Petitions must demonstrate the need for relief.[185] Following the petition, the Secretary has thirty days in which to grant or deny relief and to give reasons for denial.[186] Exemptions could also be granted subject to conditions determined by the Secretary.[187]

In reaching a decision, the Secretary is required to consider certain factors. In case of unique hardship, he must consider: (1) that no practicable domestic market exists; (2) the possibility of serious financial loss; (3) petitioner's inability to obtain, except through exports, an essential item for domestic use which is produced abroad from the controlled good; (4) the extent to which denial of the petition would create conflict, detrimental to the applicant, with other international agreements to which the United States is a party; (5) possible adverse effects on the United States economy; and (6) other relevant factors.[188] The Secretary must also consider the effect that a favorable decision would have on reaching the objectives of the short supply program.[189]

Section 2408 of the 1979 Act contains no changes from its 1969 predecessor and continues to present a relatively uncomplicated procedure. However, like several other provisions of the Act previously discussed, it gives no guidance to the Secretary in assessing the priority among, or in according weight to, the factors he is required to consider. In particular, no definition is provided with re-

182. *See id.* at 374. Thus, for example, the Internal Revenue Code provides that participation in an international boycott may result in the reduction of certain benefits otherwise allowable to U.S. shareholders of foreign controlled corporations and denial of tax deferrals. 26 U.S.C.A. § 999(b)(3).

183. EAA of 1979, *supra* note 10, § 2408(a)(1).

184. *Id.* § 2408(a)(2).

185. *Id.*

186. *Id.* § 2408(b).

187. *Id.* § 2408(b).

188. *Id.* § 2408(c)(1).

189. *Id.* § 2408(c)(1) and (2).

spect to the phrases "historically obtained from the United States" or "any person who historically has exported such a good," in section 2408(a). This section also fails to provide for reviewability of the Secretary's decision. If indeed no right to review is available, there is in effect no curb on the agency's discretion. It seems anomalous to permit appeals under the licensing procedures,[190] albeit of very limited scope, but to overlook it altogether in the hardship case, especially if the economic impact on the exporter in both situations may be comparable. The consequence of this statutory omission may be significant, for a petitioner can apparently claim that the Secretary's discretion was not so broad as to totally preclude judicial review.[191]

D. Miscellaneous Provisions

Several unrelated provisions merit consideration as these may affect the ability of exporters to freely engage in foreign commerce. These provisions are ancillary to the major sections discussed

190. *See* notes 64-93 *supra*, and accompanying text.

191. The prevailing rule today is that an agency decision is reviewable unless the matter is so committed to agency discretion as to preclude review; that is, the statute which guides agency action is drawn so broadly as to leave no law to apply in a given case. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Thus, if the statute in question gives plain and explicit directives, this restricts the scope of agency discretion, for then there is applicable law, and the agency decision is reviewable. *Id.* In *Volpe* the statute in question was the Federal Highway Act, which provided that the Secretary of Transportation "shall not approve any program or project" that required the use of public parklands "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park. . ." 23 U.S.C. § 138 (1964 ed., Supp. V); 49 U.S.C. § 1653(f) (1964 ed., Supp. V). The Court found this statutory language to be "a plain and explicit bar" to the use of federal funds for highway construction through parks except in unusual situations. *Id.* at 410.

This rationale appears to apply, in the absence of dispositive case law, to the hardship petitions under section 2408, since the Secretary is directed to consider several specific factors, and his decision must reflect consideration of these factors. He is thus barred from acting unless he makes specific showings required by the Act. In this manner, Congress appears to have limited the Secretary's discretion and raises the question whether he has acted within the limits of applicable law. Accordingly, his decision should be reviewable, and the failure to grant review would constitute denial of due process. Like the appeal process in section 2409(j), however, the right of appeal under section 2408 may be limited to the Secretary and not to the courts, except if there is abuse of discretion.

Reviewability also may be precluded if explicitly provided by statute. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). Section 2408 of the 1979 Act contains no such express provision, and section 2412(a) while exempting the act from the judicial review provisions of the Administrative Procedure Act, does not expressly preclude all judicial review. *See generally* K. DAVIS *supra* note 21, at 508-13; E. Gellhorn, *supra* note 132, at 243-47. *See also* Administrative Procedure Act, 5 U.S.C.A. § 704, 60 Stat. 237, § 10(c); 80 Stat. 378.

above, but persons subject to the 1979 Act should be alerted to them.

1. *Violations and Penalties*. Section 2410 provides for sanctions to be imposed for violations of the Act. Significantly, the criminal penalties for willful or knowing violations are increased, relative to the 1969 Act, to fines of not more than $100,000 or five times the value of the export, whichever is greater, or a maximum of ten years imprisonment or both.[192] Knowing violations of lesser gravity are punishable by fines of up to $50,000 or five times the value of the export, whichever is greater, or a maximum of five years imprisonment or both.[193] Finally, civil penalties of up to $5,000 for each violation and suspension or revocation of the right to export may be imposed.[194] No distinction is made with respect to the penalties imposed between first and subsequent violations.[195]

2. *Confidentiality*. Section 2411 contains a nondisclosure provision which states that except where Congress expressly provides to the contrary, information which the government requires to be furnished to it shall not be disclosed unless the Secretary of Commerce determines that nondisclosure is contrary to national security.[196] The Senate Committee expressed doubt that the public interest would be served by requiring disclosure to foreign and domestic competitors of United States firms of information such as the value and nature of exports, the parties to the transaction and shipping dates, where this information is provided to the government pursuant to a license application.[197] Thus, there is a strong presumption in favor of confidentiality under the 1979 Act. The opposite presumption would unnecessarily weaken the competitive position of exporters, would not benefit government and might also discourage exporters from being forthright.

3. *Exemption from Administrative Procedure and Judicial Review*. Section 2412 of the 1979 Act takes something away but gives something in return. Like its predecessor,[198] decisions made pursu-

192. EAA of 1969, *supra* note 3, § 2410(b).
193. EAA of 1979, *supra* note 10, § 2410(a).
194. *Id.* § 2410(c).
195. *See* Senate Report, *supra* note 11, at 2479.
196. EAA of 1979, *supra* note 10, § 2411(c).
197. Senate Report, *supra* note 11, at 2480.
198. EAA of 1969, *supra* note 3, § 2412.

ant to section 2412 remain exempt from certain provisions of the Administrative Procedure Act (APA).[199] However, that section permits public participation, if practicable, in the writing of export control regulations before being issued in final form and if regulations imposing controls do not take effect immediately.[200]

Section 2412 reflects the growing but still limited concern of Congress for the procedural rights of exporters. Exempting the 1979 Act from the APA implies that in the special context of foreign affairs, insofar as it is consistent with the Constitution, the 1979 Act and any applicable case law provide the procedural guidelines. This framework, however, may inadequately protect the exporter's interests because of the exemption from APA requirements. There may in fact be no genuine national security or foreign policy interest to protect, but this does not make the exemption inapplicable.[201]

Additionally, section 2412 places no duty on the Secretary of Commerce to invite or accept public comment. He can also disregard such input entirely if immediately effective export regulations must be instituted.[202]

4. *Effect on Other Acts*. Section 2416 states simply that the EAA of 1979 has no effect on export controls established under other acts.[203] Thus, the exporter should not optimistically conclude that simply because the goods or technology contemplated for export withstand the rigors of the 1979 Act they will not be barred from export by some other statute.

III. CONCLUSION

Congress has taken measures to bring about improvements believed to be necessary in the area of export controls while preserving what is regarded as the strengths of the former statute.

199. EAA of 1979, *supra* note 10, § 2412(a).

200. *Id.* § 2412(b).

201. The undesirable consequences of this circular argument have prompted some commentators to assert that procedural safeguards in administrative decisions involving foreign or military affairs should yield only if the risk to security is real and significant. *See* Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 222 (1971); *see also* Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in Economic Regulation*, 17 AD. L. REV. 159 (1965).

202. EAA of 1979, *supra* note 10, § 2416.

203. The potential consequences of overly broad discretion have been previously discussed. *See* notes 50, 62, 78-82, 110-116 and 125-128 *supra*, and accompanying text.

Exporters may benefit from the availability of the qualified general license, the opportunity given to interested parties to comment prior to implementation of export controls and attempts to reduce administrative discretion. They may suffer, however, from overly-broad discretion, from the inadequacy of hardship exemption procedures or from the general insufficiency of review. It may prove most detrimental of all, in view of the other shortcomings of the Act, that export activities are defined in terms of "ability" rather than "rights," for that may effectively mean that the new Act is little more than a cosmetic change. Whether the intended improvements are realized or simply become unfulfilled aspirations will be determined by the efficiency and sense of fairness with which the statute is administered, the easing of burdens on exporters (primarily with license applications) and perhaps most importantly the viccissitudes of world events.

To say that the EAA of 1979 is an overall improvement compared to its predecessor depends on who makes this assertion and when it is made. The interest of Congress, the Executive and the exporting community are all at stake at any given time, and these are constantly influenced by often unpredictable events at home and abroad. Thus, the liberalizing trend in export controls over the past decade may again be temporarily curtailed as a result of the Executive's response, for example, to further Soviet expansion beyond Afghanistan,[204] to political upheaval among Middle East oil producers or revolution in Central America.[205] Improved legislation is, therefore, a fluid notion subject to assessment in the light of many factors and perhaps more so in the realm of foreign affairs.

The strength of a statute often lies in its ability to balance conflicting or competing interests in a manner satisfactory to the affected parties. The EAA of 1979 recognizes the obvious situation in which the government and the exporter seek objectives that may be difficult to reconcile and further recognizes as never before that the freedom to engage in foreign trade can bring nationwide benefits that the government itself may be unable to achieve. However, the 1979 Act provides inadequate means to assess the relative weights

204. President Carter invoked the national security and foreign policy provisions of the EAA of 1979, §§ 2404(c) and 2405(g)(3) as the statutory authority for imposing an embargo on the shipment of agricultural commodities to the Soviet Union in response to its invasion of Afghanistan. 16 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, No. 4, 183-84 (January 28, 1980).

205. *See* McQuade, *supra* note 62, at 100.

to be accorded to affected interests. To do that might require relaxation of the Executive's traditionally strong grip on foreign affairs. There appears to be no reason to conclude at this juncture in the history of export control legislation that Congress is prepared to induce the Executive to relax that grip. It is premature to judge the soundness of that broad policy. The best advice may be, therefore, that the 1979 Act should be evaluated as it is implemented and amended to solve the problems that emerge with practical experience.