

**LEAVING THE BACK DOOR OPEN: HOW EXPORT CONTROL
REFORM'S DEREGULATION MAY HARM AMERICA'S SECURITY**

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A convoluted system regulating arms-related technology exports has frustrated U.S. defense manufacturers for decades. The Obama Administration is implementing sweeping reforms and relaxing export controls to address these concerns. While described as an attempt to bolster national security by aiding the U.S. private sector's dominance of defense technology markets, these reforms pose a substantial risk of enabling America's enemies in their quest to acquire U.S. military capabilities and defeat our interests domestically and abroad. The battlefields of Iraq witnessed the ability of insurgents to achieve devastating results with relatively simplistic U.S. technologies. Removing higher scrutiny from the exportation of many seemingly innocuous technologies discounts the ability of America's enemies to similarly acquire and utilize these capabilities in asymmetric threats to the military, acts of terror, and daily repression of peoples around the world. Appeasing defense manufacturers, whose ultimate obligations are to shareholders and profitability rather than the security of the American people, may actually harm, rather than bolster, America's national security. By circumventing national security statutes with regulations that focus on high-tech military end items and easing licensing requirements, Export Control Reform leaves the proverbial "back door" open to threats from deregulated technologies.

I. INTRODUCTION

Pursuant to its authority under the Arms Export Control Act of 1976 ("AECA"),¹ the Obama Administration has sought to fundamentally

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¹ 22 U.S.C. § 2778 (2012).

15 N.C. J.L. & TECH. ON. 65, 66
Export Control Reform

overhaul the system controlling the exportation of arms and arms-related technology from U.S.-based manufacturers.² The effort began in August 2009 with a sweeping interagency review of the current export controls that have been long derided as the product of a bygone era.³ The administration targeted four primary areas of reform: (1) the lists of items subject to export controls; (2) the export licensing process; (3) the Information Technology (“IT”) platforms monitoring exports; and (4) the coordination of export control enforcement.⁴ The first wave of these new rules, issued by the Administration through the Departments of State and Commerce, took effect October 15, 2013.⁵

The Export Control Reform Initiative (“ECRI”) attempts to balance the competing interests of advancing research and development for defense technologies, maintaining the competitiveness of U.S. defense technology companies in the global marketplace, and preserving national security.⁶ This Recent Development argues that the proposed Export Control Reform (“ECR”) may help accomplish the first two goals by streamlining the regulatory labyrinth governing defense technology exports, but that the ECR may likely fail to improve national security. In fact, the ECR may

² Office of the Press Secretary, *Fact Sheet: Implementation of Export Control Reform*, THE WHITE HOUSE (Mar. 8, 2013), <http://www.whitehouse.gov/the-press-office/2013/03/08/fact-sheet-implementation-export-control-reform>.

³ Jim Jones, *Export Controls for the 21st Century*, WALL ST. J. (Aug. 30, 2013, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703959704575454313481209990.html> (explaining that current export controls were developed to counter threats posed by proliferation of arms technologies to the Soviet Union); WILLIAM D. HARTUNG, RISK AND RETURNS: THE ECONOMIC ILLOGIC OF THE OBAMA ADMINISTRATION’S ARMS EXPORT REFORMS 1 (Ctr. for Int’l Pol’y 2013), available at http://www.ciponline.org/images/uploads/Hartung_IPR_0713_Economic_Illogic_Arms_Export.pdf (noting that “[i]t is generally agreed that existing export control laws and regulations need to be simplified and updated”).

⁴ *About Export Control Reform*, EXPORT.GOV, http://export.gov/ecr/eg_main_047329.asp (last visited Oct. 27, 2013).

⁵ Akin Gump Strauss Hauer & Feld LLP., *Export Control Reform Is Here: Aerospace Industry is First, Others to Follow*, AKIN GUMP (Apr. 19, 2013), <http://www.akingump.com/en/news-publications/export-control-reform-is-here-aerospace-industry-is-first-others.html>.

⁶ *About Export Control Reform*, *supra* note 4.

ultimately jeopardize national security because it does not sufficiently ensure that sensitive technologies will reach only end-users whose trade and security policies are aligned with those of the United States given the global threat matrix.⁷ Specifically, one of the fundamental pillars of the proposed reforms, known as the License Exception Strategic Trade Authorizations (“STAs” or “strategic licenses”),⁸ runs counter to, and eviscerates the intent of, existing security focused laws such as the AECA.⁹ Part II of this Recent Development provides the history and current state of the United States’ Export Control system. Part III discusses the current Administration’s objectives and implementation of the proposed reforms. Part IV analyzes the initiative’s possible undermining of longstanding national security statutes and policy. Part V proposes courses of action by which the ECR can achieve the critical balance between competition and security thereby realizing all of its stated goals.

II. CURRENT SYSTEM

To truly grasp the effects the ECR may have on America’s future national security, one must first comprehend the origins of export control and how the current system has developed. Accordingly, Part II will provide a brief history of America’s export control system before proceeding to an in-depth analysis of the present regulatory scheme.

⁷ See HARTUNG, *supra* note 3, at 1–2; see also JAMES R. CLAPPER, STATEMENT FOR THE RECORD ON THE WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE 1–6 (Feb. 16, 2011), available at <http://www.intelligence.senate.gov/110216/dni.pdf> (identifying cyber-threats, terrorism, transnational organized crime, and WMD proliferation as amongst the most serious threats facing American interests in the Twenty-First Century).

⁸ 15 C.F.R. § 740.20 (2013) (authorizing exports, reexports, and in-country transfers, including releases within a single country of software source code and technology to foreign nationals in lieu of a license that would otherwise be required pursuant to part 742 of the Export Administration Regulations).

⁹ 22 U.S.C. § 2778 (2012).

A. *History of Export Control*

The Obama Administration inherited an export control system established during the Cold War.¹⁰ Since the enactment of the AECA in 1976, the defense technology industry has experienced a complete paradigm shift to which many critics argue the current system has failed to adapt.¹¹ Two of the most significantly impacted areas have been the nature of the foremost threats to U.S. national security and the manner in which defense-related technologies are developed.¹²

Regarding the nature of the foremost threats to U.S. national security, the design of the current export control regime is rooted primarily in an attempt to thwart nation-state antagonists, namely the former Soviet Union, from acquiring U.S. military technology.¹³ While this threat is still of substantial concern,¹⁴ the United States must now additionally contend with asymmetric threats of arms technology proliferation by non-state actors like international terrorist organizations.¹⁵

As to the manner in which defense-related technologies are developed, defense technology research and development in the Cold War era was fueled and controlled primarily by the U.S. government.¹⁶ For example, the concept and infrastructure

¹⁰ Jones, *supra* note 3.

¹¹ See, e.g., Jones, *supra* note 3; Nadine Tushe, *U.S. Export Controls: Do They Undermine the Competitiveness of U.S. Companies in the Transatlantic Defense Market?*, 41 PUB. CONT. L.J. 57, 57 (2011).

¹² Jones, *supra* note 3.

¹³ M. Shane Smith, *Arms Control and Non-Proliferation*, BEYOND INTRACTABILITY (July 2003), <http://www.beyondintractability.org/essay/arms-control>.

¹⁴ *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases*, DEP'T OF JUSTICE (Feb. 2013), <http://pmddtc.state.gov/compliance/documents/OngoingExportCaseFactSheet022013.pdf> (noting the prevalence of nation-state antagonists such as China and Iran using proxies to illegally acquire U.S. arms technologies).

¹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-165, COMBATING TERRORISM 15 (2003), *available at* <http://www.gao.gov/new.items/d03165.pdf> (discussing how asymmetric threats from non-state actors like terrorist groups will be one of the most substantial threats to America's security and international interests well into the twenty-first century).

¹⁶ Jones, *supra* note 3.

15 N.C. J.L. & TECH. ON. 65, 69
Export Control Reform

necessary for global positioning devices to operate were originally created by the Department of Defense.¹⁷ Beginning in the 1990s, the Department of Defense began moving towards procuring military technologies from commercial “off the shelf” U.S. sources.¹⁸ Today, the United States’ tactical advantage on the battlefield is heavily dependent upon military and defense technologies initially developed, often for commercial purposes, by the American private sector.¹⁹ The development and purchase of the Lakota (Light Utility Helicopter-72A), the first new helicopter introduced to the American military arsenal in twenty years, illustrates this shift.²⁰

Commercial “off the shelf” procurement adds value in three primary ways for U.S. defense procurement. First, it allows for the tremendous research and development costs associated with introducing new technologies to the market, which would otherwise be borne by the Department of Defense, to be funded through private investment capital.²¹ These investments are derived from the “current and projected commercial demand” rather than from government appropriations.²² The second major advantage of “off the shelf” solutions is timing.²³ By avoiding lengthy research and development periods, the military user is not locked into a

¹⁷ AERONAUTICS AND SPACE ENGINEERING BOARD, NATIONAL RESEARCH COUNCIL, *THE GLOBAL POSITIONING SYSTEM: A SHARED NATIONAL ASSET* 16 (National Academies Press 1995).

¹⁸ *About Export Control Reform*, *supra* note 4.

¹⁹ Jones, *supra* note 3.

²⁰ Col. L. Neil Thurgood & John Burke, *Commercial-off-the-Shelf (COTS): A Success Story*, AVIATION TODAY (July 1, 2010), available at http://www.aviationtoday.com/regions/usa/Commercial-off-the-Shelf-COTS-A-Success-Story_68854.html#.UlhiRxZ0VUQ (describing the successful avoidance of the normal Department of Defense development cycle of a military aircraft that requires over a decade and hundreds of billions of dollars). The aerospace and avionics industries are among the leading examples of this trend, with Boeing alone receiving over 32 billion dollars from government defense spending in 2012. EBIT Financial Analyses Center, *Boeing Co. Analysis of Revenues*, STOCK ANALYSIS ON NET, <http://www.stock-analysis-on.net/NYSE/Company/Boeing-Co/Analysis/Revenues> (last visited Oct. 12, 2013).

²¹ Thurgood & Burke, *supra* note 20.

²² Thurgood & Burke, *supra* note 20.

²³ Thurgood & Burke, *supra* note 20.

15 N.C. J.L. & TECH. ON. 65, 70
Export Control Reform

technology configuration that would otherwise be outdated by the time of production.²⁴ By syncing procurement to “competitive market demand,” the government “essentially is pacing the commercial market wave.”²⁵ Lastly, the “off the shelf” model allows both the military customer and the manufacturer to diversify risk.²⁶ If a manufacturer is solely dependent upon prime government contracts for revenue, it may be unable to survive during downturns in defense spending cycles.²⁷ By including national or global commercial outlets, the commercial developer is able to spread its risk over a wider base.

In order to prevent these privately developed technologies from following the currents of the market place into adversarial hands, controls are placed on to whom U.S. companies can export critical technologies.²⁸ Decades of additional regulations drawing “very little distinction between relatively low-tech and widely available items and the most advanced proprietary technology” accumulated upon one another.²⁹ The result is a convoluted system of export controls that the National Research Council described as “fundamentally broken.”³⁰ Many observers, including the President’s Export Council, say the current controls limit a commercial developers’ ability to diversify their risk by competing in the

²⁴ Thurgood & Burke, *supra* note 20.

²⁵ Thurgood & Burke, *supra* note 20.

²⁶ Thurgood & Burke, *supra* note 20.

²⁷ Thurgood & Burke, *supra* note 20.

²⁸ See 22 U.S.C. § 2778 (2012) (controlling arms and arms-related exports); see also 50 U.S.C. § 2401 (2012) (establishing the National Nuclear Security Administration to prevent arms proliferation via energy technology exports).

²⁹ Jones, *supra* note 3; see also Nathan Hodge, *Export Control: Higher Fence for a Smaller Yard?*, WSJ BLOGS (July 1, 2010 7:00 AM), <http://blogs.wsj.com/washwire/2010/07/01/export-control-higher-fence-for-a-smaller-yard/> (explaining that the primary concern throughout the Cold War decades was preventing nation-state, i.e. Soviet, acquisition of any military technologies). Gen. Jones (Ret) provided this article with an example of disparate items receiving the same scrutiny, “Currently a bracket or screw used in an F-18 is treated the same for control purposes as the aircraft itself.” *Id.*

³⁰ NAT’L RES. COUNCIL, BEYOND FORTRESS AMERICA: NATIONAL SECURITY CONTROLS ON SCIENCE AND TECHNOLOGY IN A GLOBALIZED WORLD 4 (National Academies Press 2009).

15 N.C. J.L. & TECH. ON. 65, 71
Export Control Reform

international marketplace.³¹ Their argument contends that this limitation, in turn, ultimately threatens America's security by disrupting research and development operations of the very domestic commercial companies the military depends upon for "off the shelf" technology procurement.³²

B. Current Export Control System

The aforementioned layers of regulations have created an export control system governed by overlapping governmental jurisdictions.³³ The U.S. Government currently maintains two separate lists of items subject to export controls.³⁴ The more restrictive of these is the United States Munitions List ("USML").³⁵ This list is administered by the Department of State under the International Traffic in Arms Regulations ("ITAR").³⁶ The USML severely constrains the export of defense items deemed to be "Significant Military Equipment" ("SME").³⁷ "[SME] means articles for which special export controls are warranted because of their capacity for substantial military utility or capability."³⁸ The USML enumerates twenty-one categories of military technologies ranging from fighter jets and tanks to electronic sub-components that are subject to licensing requirements for each individual item.³⁹

³¹ See The President's Export Council, *Compilation of the Council's Recommendations during the First Term of the Obama Administration, 2010-2012* (Dec. 6, 2012), http://trade.gov/pec/docs/PEC_Term_Report_2010-2012_12062012.pdf; see also Jones, *supra* note 3 (supporting the need for the ECR to strengthen U.S. arms market dominance). See generally Tushe, *supra* note 11 (arguing that the current export controls place American companies at a competitive disadvantage).

³² Jones, *supra* note 3.

³³ *About Export Control Reform*, *supra* note 4.

³⁴ *About Export Control Reform*, *supra* note 4.

³⁵ See 22 C.F.R. § 121.1 (2013).

³⁶ See *id.*

³⁷ See *id.*

³⁸ *Id.* § 120.7(a).

³⁹ See *id.* § 121.1.

15 N.C. J.L. & TECH. ON. 65, 72
Export Control Reform

The second primary list controlling U.S. exports is the Department of Commerce's Commerce Control List ("CCL").⁴⁰ The CCL imposes lighter scrutiny on exports because it "primarily controls dual-use items, i.e., commercial items with possible military applications, and some military items of lesser sensitivity."⁴¹ Congress authorized this regulatory oversight via the 1979 Export Administration Act ("EAA") and the 1977 International Emergency Economic Powers Act ("IEEPA"),⁴² with the Bureau of Industry and Security implementing the scheme through the Export Administration Regulations.⁴³ Table 1 illustrates the key differences between the two primary current export control systems.⁴⁴

⁴⁰ See Ministère de la Défense, *The Obama Administration's Export Control Reform* (July 6, 2012), <http://www.defense.gouv.fr/irsem/publications/lettre-de-l-irsem/lettres-de-l-irsem-2012/lettre-de-l-irsem-n-5-2012/dossier-strategique-etat-des-lieux-du-marche-et-de-l-industrie-de-defense-mondiale/the-obama-administration-s-export-control-reform>.

⁴¹ THE WHITE HOUSE, *supra* note 2. For examples of dual-use items, see 15 C.F.R. § 774 (Supp. 1 2013) (referencing The Wassenaar Arrangement, *Wassenaar Arrangement on Export Controls For Conventional Arms* (Dec. 12, 2012), available at <http://www.wassenaar.org/controllists/2012/WA-LIST%20%2812%29%201/WA-LIST%20%2812%29%201.pdf>). The list includes rocket propulsion technologies which can be used to launch telecommunication satellites or converted to carry Inter-Continental Ballistic Missiles and GPS technologies used in cell phones and automobile navigation systems or converted for precision munitions. *Id.*

⁴² See 50 U.S.C. § 1701 (1977) (abrogated), amended by 50 U.S.C. § 1702 (2013).

⁴³ See 15 C.F.R. § 734 (2013).

⁴⁴ Ministère de la Défense, *supra* note 40.

Table 1. Current US Export Control System

Technology	Dual-Use	Munitions/SME
Legislative Authority	1979 Export Administration Act (EAA, expired); 1977 International Emergency Economic Powers Act (IEEPA)	1976 Arms Export Control Act (AECA)
Agency of Jurisdiction	Department of Commerce, Bureau of Industry and Security	Department of State, Directorate of Defense Trade Controls
Implementing Regulations	Export Administration Regulations (EAR)	International Traffic in Arms Regulations (ITAR)
Control List	Commerce Control List (CCL)	Munitions List (USML)

The “fundamentally different structures, different levels of specificity, and different definitions” of technologies covered by the USML and CCL, combined with the previously discussed paradigm shift in the defense technology industry, has resulted in substantial “confusion and inefficiency” amongst exporters, manufacturers, and government enforcement entities alike.⁴⁵ This confusion stems partially from ambiguity in which government agency is the proper licensing authority,⁴⁶ when a license is required, and which list controls a given technology.⁴⁷

An oft-repeated critique of the current system is that it “attempts to control too much.”⁴⁸ U.S. defense manufacturers expend enormous sums of financial and manpower resources to

⁴⁵ *About Export Control Reform*, *supra* note 4.

⁴⁶ *See About Export Control Reform*, *supra* note 4.

⁴⁷ *See About Export Control Reform*, *supra* note 4.

⁴⁸ Ministère de la Défense, *supra* note 40.

15 N.C. J.L. & TECH. ON. 65, 74
Export Control Reform

help avoid violations of export control regulation.⁴⁹ Perhaps more importantly, U.S. companies frequently claim they are punished in the international marketplace by foreign entities' attempts to circumvent, or altogether avoid, the stringent controls governing exports and re-exports from the United States.⁵⁰ The Commerce Department posted a request for public comment on this issue in the *Federal Register* in 2009.⁵¹ The responses were rife with anecdotal evidence of "foreign purchasers' efforts and incentives to avoid using U.S.-origin parts, components, and employees" and the resulting economic competitive disadvantage export controls placed upon U.S. companies.⁵² Many western European companies and governments have officially or indirectly avoided incorporating technologies subject to ITAR in their defense procurements⁵³ to escape ITAR's considerable administrative costs, delays in manufacturing supply chains, and prohibitions against serving lucrative markets like China.⁵⁴ One U.S. semiconductor manufacturer noted in the public comments that Israeli, French, and United Kingdom customers constantly report "they will always buy a non-U.S. sourced part even for substantially more money to avoid EAR and especially ITAR."⁵⁵

⁴⁹ See Gary Locke, Secretary, Dep't of Commerce, *Remarks at 23rd Annual Bureau of Industry and Security Update Conference* (Aug. 31, 2010), <http://www.commerce.gov/news/secretary-speeches/2010/08/31/remarks-23rd-annual-bureau-industry-and-security-update-conferenc> (discussing how "time [U.S. exporters] could be spending figuring out how to sell their products is instead spent navigating a confusing and time-consuming export control bureaucracy"); see also Akin Gump Strauss Hauer & Feld LLP, *Export Control Reform Is Here: Aerospace Industry is First, Others to Follow*, AKINGUMP (Apr. 19, 2013), <http://www.akingump.com/en/news-publications/export-control-reform-is-here-aerospace-industry-is-first-others.html>.

⁵⁰ See Tushe, *supra* note 11, at 67.

⁵¹ See Request for Public Comments on the Effects of Export Controls, 74 Fed. Reg. 263-03, 264 (Jan. 5, 2009).

⁵² Tushe, *supra* note 11, at 69.

⁵³ See Tushe, *supra* note 11, at 70.

⁵⁴ See Tushe, *supra* note 11, at 67–68 (discussing the statutory disallowance of reexport of U.S. origin items to China).

⁵⁵ Email from Rob Christ, Sales Director, to Jennifer Thompson, Export Compliance 87 (Feb. 17, 2009), available at http://efoia.bis.doc.gov/index.php/component/docman/doc_view/698-us-origin-parts?Itemid=526.

15 N.C. J.L. & TECH. ON. 65, 75
Export Control Reform

While ITAR's precise impact on U.S. companies is nearly impossible to quantify, the marketing of "ITAR-free product lines" to European buyers reflects the economic reality that ITAR's associated costs are hindering international sales of U.S. arms technologies.⁵⁶ Small to mid-size U.S. tech firms most acutely feel the effects of a reduced global market for U.S. arms technologies.⁵⁷ Considering these firms are the "source of much innovation"⁵⁸ deemed by defense experts like General Jim Jones (Ret) to be "critical to our national security,"⁵⁹ it is understandable why the ECR has been urged since the Clinton administration.⁶⁰ The ECRI's proposals and implications, however, go far beyond what previous reform proposals ever contemplated and have the potential to exacerbate weapons proliferation and undermine American security.⁶¹

⁵⁶ See Tushe, *supra* note 11, at 69 n.97 (noting "marked weakening of US defense trade ratios with the EU 15" since 2004).

⁵⁷ See *id.* at 71.

⁵⁸ Ctr. for Strategic & Int'l Studies, *Briefing of the Working Group on the Health of the U.S. Space Industrial Base and the Impact of Export Controls* 10 (2008), available at http://csis.org/files/media/csis/pubs/021908_csis_spaceindustryitar_final.pdf.

⁵⁹ Jones, *supra* note 3.

⁶⁰ See HARTUNG, *supra* note 3, at 1 (stating that long years of industry pressure had paid off, resulting in the Obama Administration's proposed reforms of arms export control as "far beyond anything contemplated during the Bush or Clinton Administrations").

⁶¹ See *id.*; see also RICHARD D. CUPRIT, *RELUCTANT CHAMPIONS: U.S. PRESIDENTIAL POLICY AND STRATEGIC EXPORT CONTROLS* 164 (Routledge 2000) (explaining that Clinton's proposals for a licensing policy contrasted sharply with "positive, pro-competitiveness measures" supported by defense manufacturers and how the Clinton national security team placed little faith in export controls to solve WMD proliferation); Gary Stanley, *The Politics of Export Control Reform: Why Less Licensing = More Complexity*, NEXT LABS (Aug. 15, 2013), <http://nextlabs.wordpress.com/2013/08/15/the-politics-of-export-control-reform-why-less-licensing-more-complexity/> (explaining the reforms pushed through by the Obama Administration have been broader than Bush or Clinton era reforms, particularly with respect to licensing exemptions).

III. ECRI OBJECTIVES

The ECRI's ultimate stated objective is to "enhance U.S. national security and strengthen the United States' ability to counter threats such as the proliferation of weapons of mass destruction."⁶² The ECRI seeks to realize this end by "focusing on controlling the most critical technologies, preserving the technological edge that U.S. forces enjoy on the battlefield, and strengthening our economic competitiveness."⁶³ Accordingly, the administration identified the four primary areas of reform: (1) the lists of items subject to export controls; (2) the export licensing process; (3) the IT platforms monitoring exports; and (4) the coordination of export control enforcement.⁶⁴

One of the key aspects of the ECR is to combine the USML and CCL into a single, three-tiered control list.⁶⁵ This single control list will adopt unified definitions of key statutory terms as well as criteria for determining when export licensing is required.⁶⁶ The intended result of this effort is to move from "broad, open-ended, subjective, catch-all, or design intent-based criteria" to a "positive" list of items subject to export controls.⁶⁷ A "positive" control list is one that attempts to draw a bright-line around the most critical technologies by "[d]escribing items using objective criteria" or "other precise descriptions."⁶⁸ By "erect[ing] higher walls around the most sensitive items,"⁶⁹ the Obama Administration hopes to "better focus its resources . . . while

⁶² *About Export Control Reform*, *supra* note 4.

⁶³ Jones, *supra* note 3.

⁶⁴ *About Export Control Reform*, *supra* note 4.

⁶⁵ See *Export Control List Review and Creating a Single Control List*, EXPORT.GOV (last updated Sept. 25, 2013), http://export.gov/ecr/eg_main_027617.asp (explaining the proposed ECR system would be a three tiered system, wherein the USML and CCL would be merged into one list of controlled items) [hereinafter *Export Control List Review*].

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *Id.* (including characteristics such as accuracy, speed, wavelength, and units of measure (e.g., hertz, horsepower, and microns) as "positive" attributes).

⁶⁹ *Id.*

15 N.C. J.L. & TECH. ON. 65, 77
Export Control Reform

providing American companies with a streamlined export authorization process for thousands of parts and components.”⁷⁰

Before a single positive control list can be realized, however, the Administration recognizes that a fundamental reorganization of items governed by the USML is necessary.⁷¹ Restructuring will allow many technologies previously captured under the USML to migrate to the EAR and its more relaxed controls. “The items involved are mostly spare parts and weapons components, but some finished products . . . will also be removed from the USML.”⁷² Most items moving from the USML to the CCL will be moved into what is referred to as the 600 Series, governing items “specially designed” for military-related purposes.⁷³ The 600 Series offers the most stringent controls under the EAR.⁷⁴ Even under the 600 Series restrictions, however, many arms-related technologies will be green lighted for exportation without a license.⁷⁵

Revising licensing requirements, another cornerstone of the ECR, operates in conjunction with the restructuring of the USML and CCL to serve two ostensible purposes.⁷⁶ First, it is to create a “one stop shop” for businesses seeking to export their arms technology by combining the current authority of three separate

⁷⁰ THE WHITE HOUSE, *supra* note 2.

⁷¹ *About Export Control Reform*, *supra* note 4.

⁷² HARTUNG, *supra* note 3, at 4 (listing older model C-130 transport planes, Black Hawk and Huey helicopters, and engines for C-17 transport planes as examples of finished products moving to the CCL).

⁷³ See 15 C.F.R. § 772.1 (2013) (defining “specially designed” as an item that “as a result of ‘development’ has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant [Export Control Classification Number] or U.S. Munitions List (USML) paragraph;” *or* if it “is a ‘part,’ ‘component,’ ‘accessory,’ ‘attachment,’ or ‘software’ for use in or with a commodity or defense article ‘enumerated’ or otherwise described on the CCL or the USML”).

⁷⁴ See Melvin S. Schwechter, *Executive Alert*, BAKERHOSTETLER (Aug. 2, 2013), <http://www.bakerlaw.com/alerts/president-obamas-export-control-reforminitiative-continues-with-final-revisions-to-four-us-munitions-list-categories-and-proposed-changes-to-an-additional-one-8-2-2013/> (explaining many regulatory burdens will follow items moved from the USML such as Automated Export System filing requirements and prohibitions on Chinese end uses).

⁷⁵ *Id.*

⁷⁶ *About Export Control Reform*, *supra* note 4.

15 N.C. J.L. & TECH. ON. 65, 78
Export Control Reform

government agencies to issue licenses.⁷⁷ It also seeks to remove “significant obstacles and delays in providing equipment to Allies and partners.”⁷⁸ The proposed licensing policy allows a new exception to EAR restrictions, “strategic licenses,”⁷⁹ that permits technologies reclassified under the EAR 600 Series to be exported without a license to thirty-six countries “friendly” to the United States.⁸⁰ The final STA rule also removed the requirement of civil end uses for technologies exported to eight countries—Hong Kong, Singapore, and Taiwan among them—separate from the thirty-six countries exempted from licensing rules.⁸¹

IV. FRUSTRATING SECURITY LEGISLATION

Current proposals for reforming the primary control lists and licensing process pose a substantial likelihood of eviscerating the intent of the very statutory authority pursuant to which they were enacted.⁸² Accordingly, Part IV of this Recent Development will focus on these two areas of proposed reforms, first analyzing the legality of the ECR under established administrative law and then contrasting the ECR’s objectives with existing national security policy.

⁷⁷ *Id.*

⁷⁸ THE WHITE HOUSE, *supra* note 2.

⁷⁹ Export Control Reform Initiative: Strategic Trade Authorization License Exception, 76 Fed. Reg. 35276 (June 16, 2011) (to be codified at 15 C.F.R. pt. 738).

⁸⁰ Schwechter, *supra* note 74; *see* 15 C.F.R. § 740.20(c)(1) (2013) (listing “Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, and the United Kingdom” as friendly countries).

⁸¹ 15 C.F.R. § 740.20(c)(2) (clearing also Albania, India, Israel, Malta, and South Africa for exports of “lesser sensitivity”); *see also* 76 Fed. Reg. 35276.

⁸² 22 U.S.C. § 2778 (2012).

15 N.C. J.L. & TECH. ON. 65, 79
Export Control Reform

A. *Ultra Vires: Several Fundamental Reforms Under the ECR Contradict Its Statutory Authority*

The Obama Administration's ECRI is being enacted pursuant to delegated executive authority "to control the import and the export of defense articles and defense services" in furtherance of "the security and foreign policy of the United States."⁸³ While administrative determinations of which items no longer warrant USML control have been excepted from judicial review,⁸⁴ "the President remains constrained by Congress's determination that certain defense articles . . . warrant stricter controls."⁸⁵ The Supreme Court established a two-part test for determining whether to grant deference to a government agency's interpretation of a statute that it administers in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁶ The first prong of the *Chevron* test is to determine if Congress has spoken directly on the "precise question at issue."⁸⁷ "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁸⁸ Thus, the inquiry need not continue to the second prong unless this threshold question is answered in the negative.⁸⁹ If the court determines "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁹⁰

⁸³ *Id.*; see THE WHITE HOUSE, *supra* note 2.

⁸⁴ 22 U.S.C. § 2778(h) (2012).

⁸⁵ AM. BAR ASS'N CTR. FOR HUMAN RIGHTS, PROPOSALS TO RELAX EXPORT CONTROLS FOR SIGNIFICANT MILITARY EQUIPMENT 3 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/individual_rights/jdweb_aba_chr_white_paper_on_proposals_to_relax_export_controls_for_significant_military_equipment_final.authcheckdam.pdf.

⁸⁶ See 467 U.S. 837, 842–43 (1984) (holding that "[w]hen a court reviews an agency's construction of the statute which it administers . . . if . . . Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on permissible construction of the statute").

⁸⁷ *Id.* at 842.

⁸⁸ *Id.*

⁸⁹ *Id.* at 842–43.

⁹⁰ *Id.* at 843.

15 N.C. J.L. & TECH. ON. 65, 80
Export Control Reform

Agency interpretations “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁹¹

The issue in *Chevron* was whether the Environmental Protection Agency’s (“EPA”) “decision to allow states to treat all . . . pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ [wa]s based on a reasonable construction of the statutory term ‘stationary source.’ ”⁹² The EPA rules were promulgated based upon amendments to the Clean Air Act of 1977.⁹³ The amendments drafted by Congress “sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.”⁹⁴

Ultimately, the Court found that “[p]arsing the general terms in the text of the amended Clean Air Act—particularly the provisions of §§ 302(j) and 111(a)(3) pertaining to the definition of “source”—d[id] not reveal any actual intent of Congress as to the issue in these cases.”⁹⁵ The Court summarized the relevant portion of the statute:

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for

⁹¹ *Id.* at 844.

⁹² *Id.* at 840.

⁹³ *Id.* at 841; *see* Requirements for Preparation, Adoption, and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981) (to be codified at 40 C.F.R. pt. 51) (promulgating EPA regulations and definitions of key terms such as “stationary source” of pollutants).

⁹⁴ *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984) (finding that prior to the 1977 Amendments, the EPA had used a plantwide definition of the term “source,” but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the “bubble concept” in nonattainment States’ programs designed to enhance air quality. However, when a new administration took office in 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term “source” and concluded that the term should be given the plantwide definition in nonattainment areas.).

⁹⁵ *Id.*

15 N.C. J.L. & TECH. ON. 65, 81
Export Control Reform

reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER).⁹⁶

Accordingly, the Court found the “1977 Amendments contain no specific reference to the ‘bubble concept.’ Nor do they contain a specific definition of the term ‘stationary source.’”⁹⁷ If Congress leaves any gap, “implicitly or explicitly,” when formulating the policy or rules governing a congressionally created program, the agency charged with administering the program is inherently required to fill these gaps.⁹⁸ Because the Court found Congress had not spoken directly on the precise definition of the “source” of pollutants, it determined that the agency could permissibly enact rules consistent with policy objectives so long as these rules were not “arbitrary or capricious.”⁹⁹ The Court next determined that Congress intended to accommodate both environmental and economic interests, but did not do so with the level of specificity presented by previously decided cases wherein Congress left no “gap.”¹⁰⁰ Therefore, because the Environmental Protection Agency’s application of a plantwide definition of “source” was a carefully considered attempt to reconcile competing interests under a

⁹⁶ *Id.* at 850.

⁹⁷ *Id.* at 851.

⁹⁸ *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁹⁹ *Id.* at 845.

¹⁰⁰ *Id.* at 844 (citing *Aluminum Co. of Am. v. Cent. Lincoln Peoples’ Util. Dist.*, 467 U.S. 380, 389–90 (1984) (dealing with the highly complex and technical regulatory scheme involved with the marketing of hydroelectric power to the Pacific Northwest)); *see also* *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700 (1980) (analyzing preemption of state ban on cable television advertising for alcoholic beverages by FCC regulations); *Sec. & Exch. Comm’n v. Sloan*, 436 U.S. 103, 117 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (discerning the meaning of “hazardous air pollutant” within the meaning of the Clean Air Act 40 C.F.R. § 61 (1975)); *United States v. Shimer*, 367 U.S. 374, 382 (1961) (reconciling conflicting statutes); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (examining agency approaches to resolving statutory ambiguity);.

15 N.C. J.L. & TECH. ON. 65, 82
Export Control Reform

technical and complex regulatory scheme, the Court found it to be a reasonable interpretation and, thus, entitled to deference.¹⁰¹

As in *Chevron*, the departments charged with the ECR's implementation face a highly complex, technical scheme that seeks to balance the competing policy interests of robust defense export growth and national security. Unlike the amendments to the Clean Air Act in *Chevron*, however, Congress has left no gap to fill in the statutory requirements for an export licensing exemption.¹⁰² The President may exempt a foreign country from the licensing requirements of the AECA, as the strategic license reforms would, "only if the United States Government has concluded a binding bilateral agreement with the foreign country."¹⁰³

Bilateral agreements differ distinctly from broader, multilateral or regional trade agreements such as those adopted in the creation of the World Trade Organization and the North American Free Trade Agreement.¹⁰⁴ Generally, bilateral agreements possess several characteristics that better position them to function as a control method in the international arena.¹⁰⁵ First, bilateral agreements facilitate the reaching and monitoring of reciprocal concessions more effectively than multilateral agreements because they require compromise between fewer parties during the negotiation process.¹⁰⁶ Conversely, in a multilateral agreement, extraneous parties may "influence its outcomes without ultimately joining the regime."¹⁰⁷ In the arms export context, this means that additional parties covered by a broader international arrangement

¹⁰¹ *Chevron*, 467 U.S. at 845.

¹⁰² 22 U.S.C. § 2778(j)(1)(A) (2012) (making binding, bilateral agreements a prerequisite for export license exceptions).

¹⁰³ *Id.*

¹⁰⁴ Office of the U.S. Trade Representative, *Enforcement*, EXEC. OFFICE OF THE PRESIDENT, <http://www.ustr.gov/trade-topics/enforcement> (last visited Oct. 28, 2013).

¹⁰⁵ See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 2, 323, 351 (2008) (depending on context of the situation, such as directly affected parties and cost concerns).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 352.

15 N.C. J.L. & TECH. ON. 65, 83
Export Control Reform

without the force of law—e.g., the Wassenaar Arrangement¹⁰⁸—may be able to reap the benefits of access to American defense technologies by utilizing and subsequently conveying these or derivative items to markets prohibited to U.S. manufacturers.¹⁰⁹ Indeed, bilateral agreements have historical roots in “protectionism” of sensitive or critical national capabilities, resources, and technologies.¹¹⁰ It was likely for this reason that Congress sought to protect “all generic parts, components, [and] accessories . . . for a defense article”¹¹¹ that provide the United

¹⁰⁸ See JANE KAUFMAN WINN & BENJAMIN WRIGHT, CCH LAW OF ELECTRONIC COMMERCE § 17.04, *International Regulation of Cryptography* (2013), 2013 WL 4285633 (explaining that the Wassenaar Arrangement is not a treaty; therefore, it does not have the force of law); *Introduction*, in WASSENAAR ARRANGEMENT ON EXPORT CONTROLS FOR CONVENTIONAL ARMS AND DUAL-USE GOODS AND TECHNOLOGIES, <http://www.wassenaar.org/introduction/index.html> (last visited Nov. 23, 2013) (enumerating forty-one current participating member states including the STA-36). There is a general tendency to apply the term “agreement” to bilateral or restricted multilateral treaties. It is employed especially for instruments of a technical or administrative character, which are signed by the representatives of government departments, but are not subject to ratification. UNITED NATIONS, *Definition of key terms used in the UN Treaty Collection*, in UNITED NATIONS TREATY COLLECTION (2013), available at http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml.

¹⁰⁹ Nicholas Watt, *Europe Doubles China Arms Sale Licenses*, THE GUARDIAN (Jan. 19, 2005, 7:01 PM), <http://www.theguardian.com/world/2005/jan/20/armstrade.china> (reporting on the 100% increase of arms sales approvals to China from European Union countries even after adoption of Wassenaar Arrangement); Michael S. Schmidt, *Military Contractors Are Fined Over Aid to China*, THE NEW YORK TIMES (Jun. 28, 2012), available at <http://www.nytimes.com/2012/06/29/business/global/arms-contractor-pleads-guilty-on-china-exports.html> (reporting on Canadian subsidiary of Pratt and Whitney pleading guilty to violations of AECA for selling billions of dollars worth of attack helicopter technology to China to avoid prosecution).

¹¹⁰ Douglas A. Irwin, *Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Approach*, in NEW DIMENSIONS IN REGIONAL INTEGRATION 90, 94 (Jaime de Melo & Arvind Panagariya, eds., 1993).

¹¹¹ Amendment to the International Traffic In Arms Regulations; Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740, 22,741 (Apr. 16, 2013) (to be codified at 22 C.F.R. pts. 120, 121, 123).

15 N.C. J.L. & TECH. ON. 65, 84
Export Control Reform

States with a “critical military or intelligence advantage”¹¹² by specifically including the language “binding bilateral agreement” in the AECA section governing executively granted license exemptions.¹¹³ By speaking directly on this precise issue, Congress ensured the first *Chevron* prong was satisfied and that the ECR’s licensing exemptions should not survive judicial review.¹¹⁴

Should a court alternatively find that Congress has not directly addressed the requirements for export license exemption, the ECR’s substitution of multilateral agreements is not a reasonable construction of statutory authority. Bilateral agreements require the foreign country to, “at a minimum, . . . revise its policies and practices, and promulgate or enact necessary modifications to its laws and regulations to establish an export control regime that is at least comparable to United States law, regulation, and policy.”¹¹⁵ To meet this requirement, foreign export countries must (i) meet conditions comparable to U.S. law on the handling of U.S. defense technologies and receive prior written U.S. Government approval before re-exporting any U.S.-origin defense items to third countries¹¹⁶ and (ii) provide “end-use and retransfer control commitments, including securing binding end-use and retransfer control commitments from all end-users.”¹¹⁷

Many STA countries failed to enact the “necessary modifications to its laws and regulations” required for a bilateral agreement.¹¹⁸ Sweden, an STA country, relies heavily on the re-exportation of arms technologies to third parties to maintain its defense infrastructure.¹¹⁹ Even the United Kingdom has rejected

¹¹² Proposed Revision to the Export Administration Regulations: Implementation of Export Control Reform; Revisions to License Exceptions After Retrospective Review, 77 Fed. Reg. 37,524, 37,524 (Jun. 21, 2012) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742–44, 750, 758, 762, 764, 774) [hereinafter *Proposed Revision to the EAR*].

¹¹³ 22 U.S.C. § 2778(j)(1)(A) (2006).

¹¹⁴ *See id.*

¹¹⁵ *Id.* § 2778(j)(2)(A).

¹¹⁶ *Id.* § 2778(j)(2)(A)(i).

¹¹⁷ *Id.* § 2778(j)(2)(A)(ii).

¹¹⁸ *Id.* § 2778(j)(2)(A).

¹¹⁹ Tushe, *supra* note 11, at 68.

extraterritorial U.S. re-export license requirements as an “infringement of its sovereignty.”¹²⁰ The United States currently has bilateral agreements with only twenty countries.¹²¹ In fact, only two of the countries, Australia and Canada, authorized for strategic license exceptions under the ECR currently have binding bilateral agreements with the United States.¹²² However, these two countries are already statutorily exempted from the bilateral agreement requirement, along with the other U.K. countries.¹²³ The remaining STA countries, even if allied through NATO or the European Union, currently have no such statutory exemption from binding bilateral agreements.¹²⁴ Despite this, the ECR is moving forward with its strategic licensing exemption rule in effect.

By moving defense technologies from the USML to the CCL many “items with military applications will be de-controlled altogether, thereby making it more likely that they will reach dangerous buyers, either directly or indirectly.”¹²⁵ Additionally, putting items under the control of the CCL will put them “beyond the reach of existing statutory constraints” imposed by the USML and eliminate the need for compliance with ITAR’s reporting requirements for significant military sales.¹²⁶ This negates the possibility of Congressional action to prevent the transfer of certain technologies to the CCL. While 22 U.S.C. § 2278(f)(1)

¹²⁰ Tushe, *supra* note 11, at 61 (citing U.K. MINISTRY OF DEF., PROCUREMENT FROM THE USA—FULL GUIDANCE ¶ 96 (2010)).

¹²¹ *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Oct. 30, 2013) (listing Australia, Bahrain, Canada, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore as bilateral trade countries).

¹²² *Id.*

¹²³ 22 U.S.C. § 2778(j)(1)(C)(i) (2006) (excluding specified countries, namely, U.K. countries, with whom the United States has a cooperative defense treaty in effect from licensing requirements for arms exports).

¹²⁴ *See id.*

¹²⁵ HARTUNG, *supra* note 3, at 5; *see also* AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 7 (discussing the implications of removing items previously considered “significant military equipment,” like small-arms, from USML control).

¹²⁶ *Id.*

15 N.C. J.L. & TECH. ON. 65, 86
Export Control Reform

imbues the President with the power to “periodically review the items on the USML to determine what items, if any, no longer warrant controls,” Congress has made it clear that “significant military equipment” is to be subject to stricter controls under the USML.¹²⁷ Viewed through the *Chevron* prism, these departures from national security policy are “manifestly contrary to the [AECA].”¹²⁸

Essentially, these aspects of the ECR attempt to replace longstanding statutory prescriptions and prohibitions governing arms-related technology exports with administrative regulations.¹²⁹ As the American Bar Association has acknowledged, however, “regulations are easy to amend and are not an adequate substitute for [laws] enacted by Congress.”¹³⁰ The administration’s attempt to circumvent Congress by unilaterally moving items long considered SME, such as small arms and ammunition, from the USML greatly increases the likelihood of these technologies reaching individuals, organizations, and countries fundamentally threatening to U.S. security and interests.¹³¹ Specifically, by removing heightened scrutiny on a wider array of arms-related technology, increasing the number of destinations not requiring an export license, and narrowing reporting requirements and Congressional oversight, the ECR eviscerates the clear intent of laws like the AECA.¹³² Thus, while the Administration clearly believes the ECR has no *Chevron* implications,¹³³ the ECR would likely fail either prong of the *Chevron* analysis.

¹²⁷ See Pub. L. No. 104-164, § 144, 110 Stat. 1421, 1134 (1996) (codified as amended at 22 U.S.C. § 2794(9)) (amending the AECA to adopt the ITAR definition of “significant military equipment”).

¹²⁸ *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹²⁹ See HARTUNG, *supra* note 3, at 5.

¹³⁰ Am. Bar Ass’n Ctr. for Human Rights, *supra* note 85.

¹³¹ Am. Bar Ass’n Ctr. for Human Rights, *supra* note 85, at 8.

¹³² See Control of arms exports and imports, 22 U.S.C. § 2778 (2006); *see also* Missile systems designed to destroy aircraft, 18 U.S.C. § 2332g (2006); Prohibitions against furnishing assistance, 22 U.S.C. § 2370.

¹³³ Amendment to the International Traffic In Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740, 22,751 (Apr. 16, 2013) (to be codified at 22 C.F.R. pts. 120, 121, 123); *Proposed Revision to*

B. *The ECR's Current Proposals Critically Undermine National Security Policy*

The Obama Administration has unequivocally stated that “keeping the American people safe” is its highest policy priority, ranking even ahead of U.S. economic interests.¹³⁴ Yet, the Administration ultimately seems to have been persuaded these two interests are one in the same.¹³⁵ By pursuing expanded international trade agreements that “advance our shared prosperity, while accelerating investments in development . . . expand markets, and support . . . state capacity abroad” as the means of achieving security,¹³⁶ the Administration hopes to simultaneously double U.S. exports by the end of 2014.¹³⁷

This version of the ECR’s stated goals more closely echoes the concerns of the commercial entities driving reform efforts than the language of national security statutes.¹³⁸ More revealingly, it hints at the ultimate economic motivations behind the ECR that are typically “cloak[ed]” behind the veil of national security.¹³⁹ The effort to reform export controls began in earnest in March 2007 “under the aegis of the Coalition for Security and Competitiveness.”¹⁴⁰ The two main objectives of this organization of defense manufacturers was to reduce the number of items

the EAR, 77 Fed. Reg. 37,524, 37,528 (June 21, 2012) (assessing the proposed rules have no federalism implications).

¹³⁴ OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 7 (May 2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [hereinafter *National Security Strategy*].

¹³⁵ *See id.* at 9 (identifying our economy as the wellspring of our national power and security as “[i]t pays for our military, underwrites our diplomacy and development efforts, and serves as a leading source of our influence in the world.”); HARTUNG, *supra* note 3, at 4.

¹³⁶ *National Security Strategy*, *supra* note 134, at 4.

¹³⁷ *National Security Strategy*, *supra* note 134, at 32.

¹³⁸ *See* HARTUNG, *supra* note 3, at 3.

¹³⁹ HARTUNG, *supra* note 3, at 7.

¹⁴⁰ HARTUNG, *supra* note 3, at 3 (consisting of nineteen defense manufacturers including the Aerospace Industries Association, the Business Roundtable, the United States Chamber of Commerce, the National Association of Manufacturers, and the National Defense Industrial Association).

controlled by the USML and to increase the use of exemptions allowing exports without a license.¹⁴¹ Gen. Jim Jones (Ret), President Obama's first National Security Advisor, reiterated the Coalition's argument that export controls were actually harming national security by undermining the "health of the country's defense industrial base."¹⁴² The President's Export Council¹⁴³ likewise endorsed the proposals and urged immediate action.¹⁴⁴ Given that Gen. Jones (Ret) served on Boeing's Board of Directors immediately prior to assuming the role of National Security Advisor¹⁴⁵ and Boeing's CEO, W. James McNerney Jr.,¹⁴⁶ is the chairman of the President's Export Council, it is unsurprising that the Aerospace industry was announced as the first to begin product migration from the USML.¹⁴⁷ While leading private-sector companies should undoubtedly be consulted in this process, the ECR's current

¹⁴¹ HARTUNG, *supra* note 3, at 3.

¹⁴² HARTUNG, *supra* note 3, at 4; *see also* James L. Jones, *Export Controls for the 21st Century*, WALL ST. J. (Aug. 30, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703959704575454313481209990.html>; Stanley, *supra* note 61 (attributing domestic political pressure stemming from Obama's 2010 pledge to create two million new jobs by doubling U.S. exports as the main driving force behind the drastic ECRs being enacted by the Obama Administration after Bush and Clinton era reforms resulted in little change).

¹⁴³ The President's Export Council is a national advisory committee that includes both public and private sector representatives established by Executive Order of the President to advise the President on matters related to international trade. THE PRESIDENT'S EXPORT COUNCIL: COMPILATION OF THE COUNCIL'S RECOMMENDATIONS DURING THE FIRST TERM OF THE OBAMA ADMINISTRATION, 2010–2012, at 1 (2012), *available at* http://trade.gov/pec/docs/PEC_Term_Report_2010-2012_12062012.pdf [hereinafter *the President's Export Council*].

¹⁴⁴ HARTUNG, *supra* note 3, at 6–7.

¹⁴⁵ ETN Staff Writer, *Boeing Board Member James Jones Heads to the White House*, GLOBAL TRAVEL INDUS. NEWS (Dec. 16, 2008), <http://www.eturbonews.com/6773/boeing-board-member-james-jones-heads-white-house>.

¹⁴⁶ *The President's Export Council*, *supra* note 143.

¹⁴⁷ Amendment to the International Traffic In Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740, 22,752 (Apr. 16, 2013) (to be codified at 22 C.F.R. pts. 120, 121, 123); *Export Control Reform Is Here: Aerospace Industry is First, Others to Follow*, AKIN GUMP STRAUSS HAUER & FELD LLP (Apr. 19, 2013), <http://www.akingump.com/en/news-publications/export-control-reform-is-here-aerospace-industry-is-first-others.html>.

15 N.C. J.L. & TECH. ON. 65, 89
Export Control Reform

process reflects a one-sided approach with a questionable economic premise to a complex national security issue.¹⁴⁸

One member¹⁴⁹ of the Coalition for Security and Competitiveness commissioned a report detailing economic imperatives to support its claim that the ECR is desperately needed to avoid further harm to America's defense industrial base.¹⁵⁰ This analysis, conducted by the Milken Institute, asserts that reforming arm-export controls "could substantially increase U.S. market share in key countries and generate 340,000 new jobs in the United States" by the end of the decade.¹⁵¹ However, this report assumes—without evidentiary justification—that easing export controls on certain high-tech, commercially available products would triple market share in countries such as China, India, Pakistan, Russia, and Israel.¹⁵²

In 2011, the latest year for which full statistics are available, U.S. arms exporters enjoyed a 78.7% market share.¹⁵³ Russia—the nearest foreign competitor—had only a 5.6% share.¹⁵⁴ In the four preceding years, U.S. manufacturers similarly supplied 56% of the global arms market while Russia accounted for just 12.8%.¹⁵⁵ Moreover, CCL and USML controlled items combined to represent

¹⁴⁸ HARTUNG, *supra* note 3, at 3; *see also* Amendment to the International Traffic In Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. at 22,741–43 (responding to public comments of thirty-one parties revealing highly sophisticated, technically savvy, interested parties seeking to discern regulatory differences in items such as "turbofan- or turbojet-powered" aircraft platforms and "ramjets and scramjets").

¹⁴⁹ *See* HARTUNG, *supra* note 3, at 7 (citing report commissioned by The National Association of Manufacturers).

¹⁵⁰ HARTUNG, *supra* note 3, at 7.

¹⁵¹ HARTUNG, *supra* note 3, at 7.

¹⁵² HARTUNG, *supra* note 3, at 8 (stating that the report ignored multiple other factors of consideration in determining market share such as "quality and price to political relationships").

¹⁵³ HARTUNG, *supra* note 3, at 8 (citing a study by the Congressional Research Service); *see also* RICHARD F. GRIMMETT & PAUL K. KERR, CONG. RESEARCH SERV., R42678 CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2004–2011 7 (Aug. 24, 2012), *available at* <http://www.fas.org/sgp/crs/weapons/R42678.pdf>.

¹⁵⁴ HARTUNG, *supra* note 3, at 8.

¹⁵⁵ HARTUNG, *supra* note 3, at 8.

15 N.C. J.L. & TECH. ON. 65, 90
Export Control Reform

just 3.2% of total U.S. exports in 2011.¹⁵⁶ This fact has led some analysts to question how beneficial the ECR's impact would be on the economy as a whole,¹⁵⁷ with one concluding it would be "infinitesimal."¹⁵⁸

The potential for the ECR to create hundreds of thousands of domestic jobs has likewise been questioned.¹⁵⁹ The nation's largest union representing employees of the U.S. arms industry, the International Association of Machinists and Aerospace Workers, has expressed alarm over the lack of studies analyzing the effect that looser controls would have on outsourcing technology production.¹⁶⁰ The rise of "offsets"¹⁶¹ in the defense industry and the Commerce Department's treatment of any U.S. end-product containing foreign manufacturer subcomponents as entirely American-made incentivizes manufacturers to maximize

¹⁵⁶ HARTUNG, *supra* note 3, at 8.

¹⁵⁷ HARTUNG, *supra* note 3, at 8.

¹⁵⁸ HARTUNG, *supra* note 3, at 8–9 (quoting an interview with Alan Tonelson, an economic, technology, and national security expert at the U.S. Business & Industrial Council Educational Foundation (Feb. 11, 2013)); *see also Proposed Revision to the EAR*, 77 Fed. Reg. 37,524, 37,537 (Jun. 21, 2012) (concluding that there is no way to determine the number of small entities that will be affected by rule changes).

¹⁵⁹ *See, e.g.*, HARTUNG, *supra* note 3, at 9.

¹⁶⁰ *See* HARTUNG, *supra* note 3, at 9. (quoting letter from IAM's president to the House Foreign Affairs Committee as "[i]n some cases, the less stringent controls provided under the CCL could lead to further transfers of technology or production from the U.S. to another country. The transfer of technology and production can have long-term consequences as other countries utilize that transferred technology and production to develop their own commercial and defense industries at our expense. These transfers have already decimated the shipbuilding, machine tool and electronics industries. They are also having a significant impact on both the commercial and defense aerospace and related industries.").

¹⁶¹ HARTUNG, *supra* note 3, at 9 (defining "offset" as "side deals intended to sweeten the pot and entice a buyer to preference one seller over another" and providing the example of Lockheed Martin which built components of its new F-35 combat aircraft in at least eight nations in exchange for their purchase of the plane); *see also* U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., OFFSETS IN DEFENSE TRADE, SIXTEENTH STUDY 4 (Jan. 2012) (providing statistics of offsets since 1993 as 61 U.S. firms reporting 11,353 offset transactions with 50 countries valued at over \$56 billion).

15 N.C. J.L. & TECH. ON. 65, 91
Export Control Reform

profitability by shifting production of all or part of a given item to regions with lower labor costs.¹⁶² This would stifle rather than bolster American job growth. The Bureau of Industry and Security, a Commerce Department subsidiary, noted “offset agreements and associated offset transactions can negate some of the potential economic and industrial base benefits accrued through defense exports if the offset activity displaces work that would otherwise have been conducted in the United States.”¹⁶³ The Department of Commerce has not yet undertaken a study of the ECR’s potential impact on job outsourcing.¹⁶⁴

Additionally, export controls under the current system apply U.S. laws to “U.S.-origin items (including foreign-origin items that have entered the United States) even after they are in the possession of an overseas company or have been incorporated into other products.”¹⁶⁵ For example, under the AECA the President must develop mechanisms to identify incompatibilities between ECR licensing requirements and national security focused legislation like the Prevention of Terrorist Access to Destructive Weapons Act of 2004¹⁶⁶ and the Foreign Assistance Act.¹⁶⁷ Shifting items to the CCL removes them from the USML’s “sophisticated statutory regime designed to protect sensitive weaponry.”¹⁶⁸ USML requirements for “registration of manufacturers, detailed licensing applications and significant penalties for

¹⁶² HARTUNG, *supra* note 3, at 9.

¹⁶³ U.S. DEP’T OF COMMERCE, BUREAU OF INDUS. & SEC., OFFSETS IN DEFENSE TRADE, SIXTEENTH STUDY i (Jan. 2012).

¹⁶⁴ HARTUNG, *supra* note 3, at 9.

¹⁶⁵ Nadine Tushe, *U.S. Export Controls: Do They Undermine the Competitiveness of U.S. Companies in the Transatlantic Defense Market?*, 41 PUB. CONT. L.J. 57, 61 (2011); see 22 C.F.R. § 127.1 (2010). Because this requirement applies to U.S. companies seeking to export technologies rather than to the foreign entities themselves, the power to regulate derives from the express Constitutional authority given to the legislature to regulate international commerce. U.S. CONST. art. 1, § 8, cl. 3.

¹⁶⁶ 18 U.S.C. § 2332g (2004) (making it unlawful to distribute, either directly or indirectly, any part or subcomponent designed or capable of enabling a missile to launch and/or track an aircraft).

¹⁶⁷ 22 U.S.C. § 2378 (1996).

¹⁶⁸ AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 2.

15 N.C. J.L. & TECH. ON. 65, 92
Export Control Reform

violations” enable the monitoring of a significant volume of exports.¹⁶⁹ These provisions also “establish an evidentiary trail that is essential to detecting diversions and prosecuting violators.”¹⁷⁰ New controls under the ECR “remove any perceived obligation on the part of a manufacturer to monitor post-release sales.”¹⁷¹ This change eliminates much of the documentary evidence critical to detecting and successfully prosecuting violations, thereby severely frustrating the statutory goals of the USML and the stated objective of the ECRI.¹⁷²

Moving technologies nearing obsolescence and spare parts to the looser controls of the CCL signifies that the administration does not feel these items would pose a significant threat to the United States, or its forces abroad, should they fall into the hands of potential adversaries on rough parity with U.S. capabilities (i.e., nation-state antagonists).¹⁷³ This ignores the reality of the global threat to U.S. interests and personnel posed by lax exportation of relatively low-tech or dual-use items. The very nature of the asymmetric warfare being waged against the United States in places like Iraq and Afghanistan illustrates the problems even low-tech spare parts can cause the world’s most technologically advanced military. In a 2011 report, the Government Accountability Office (“GAO”) expressed serious concerns that “the deemed export licensing system did not provide adequate assurance that U.S. national security interests were protected from countries that gather information on dual-use technologies to build weapons systems.”¹⁷⁴

¹⁶⁹ AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 2.

¹⁷⁰ AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 2.

¹⁷¹ EAR Final Rule: Strategic Trade Authorization License Exception, 78 Fed. Reg. 22, 740-01 (Apr. 16, 2013) (revising ITAR § 120.3 to confirm this intention in response to public comment #5).

¹⁷² AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 2 (noting the State Department has not evaluated the impact of control list reform on its enforcement system).

¹⁷³ See HARTUNG, *supra* note 3, at 3.

¹⁷⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-354, EXPORT CONTROLS: IMPROVEMENTS NEEDED TO PREVENT TECHNOLOGY RELEASES TO FOREIGN NATIONALS IN THE UNITED STATES 37 (2011).

15 N.C. J.L. & TECH. ON. 65, 93
Export Control Reform

Improvised Explosive Devices (“IEDs”) are responsible for causing approximately sixty percent of the U.S. casualties in Iraq and Afghanistan.¹⁷⁵ At least sixteen unexploded IEDs, discovered by U.S. forces in Iraq in 2008, contained components manufactured in the United States.¹⁷⁶ These American-made components found their way into an active theater of war via Singapore, only to be used against American troops.¹⁷⁷ Singapore is one of the countries for which the ECR will relax export licensing requirements.¹⁷⁸ The U.S. manufacturer of the recovered components, Digi International, says it was “duped” into exporting its technology to an Iranian shell-company established in Singapore for the purpose of exploiting looser export controls.¹⁷⁹ Once in Iranian hands, many of these components were employed in Explosively Formed Penetrators, a subcategory of IEDs, which are far more lethal than conventional IEDs in their ability to penetrate heavy armor with jets of molten metal.¹⁸⁰

A Department of Justice review of major U.S. export enforcement cases reveals the prevalence of third-party or shell-company schemes to evade U.S. export control.¹⁸¹ Since 2007, seventy-eight cases “involved attempts to retransfer United States equipment to prohibited destinations via third parties. Of these, [thirty-one] of the successful or attempted retransfers involved

¹⁷⁵ Bob Orr, *U.S. Manufacturers’ Parts Found in Iraq IEDs*, CBS NEWS, (Oct. 25, 2011), http://www.cbsnews.com/8301-31727_162-20125552-10391_695/u.s.-manufacturers-parts-found-in-iraq-ieds/.

¹⁷⁶ *Id.* (explaining that there is no way of truly determining how many components were in bombs that actually detonated nor has the U.S. government discovered the location of the “overwhelming majority” of said parts).

¹⁷⁷ *Id.*

¹⁷⁸ 15 C.F.R. § 740.20(c)(2).

¹⁷⁹ *Id.* (clarifying the radio components were illegally resold by the Singapore firm to an Iranian conspirator and that Digi had no foreknowledge of the subsequent transaction).

¹⁸⁰ Associated Press, *U.S.: Large Cache of Weapons Discovered in Iraq Traceable to Iran*, FOX NEWS (Feb. 26, 2007), <http://www.foxnews.com/story/2007/02/26/us-large-cache-weapons-discovered-in-iraq-traceable-to-iran/>.

¹⁸¹ *Summary of Major U.S. Export Enforcement, Economic Espionage, and Trade Secret and Embargo-Related Cases*, DEP’T OF JUSTICE (Feb. 2013), <http://www.justice.gov/nsd/docs/export-case-fact-sheet-201302.pdf> [hereinafter *Major U.S. Export Enforcement*].

[countries] that are now on the list to receive a wide variety of items without a license as part of the [strategic license] program.”¹⁸²

In January 2013, British businessman Christopher Tappin was convicted of exporting U.S. manufactured Air Defense Missiles to Iran.¹⁸³ Tappin initially imported the missile technology to the United Kingdom—one of the countries included in strategic licenses—for re-export to Iran.¹⁸⁴ Similarly, Richard Ammar Chichakli was convicted in the Southern District of New York for exporting U.S. technologies he acquired through his Australian—another strategic license country—company to sell to belligerents in Africa, South America, and even Taliban fighters in Afghanistan.¹⁸⁵ Mark Henry, a self-employed New York businessman, was convicted of selling coatings for rocket nozzles to China.¹⁸⁶ In the Henry case, Taiwan was used as the intermediary before ultimate shipment to China.¹⁸⁷ These schemes reveal a pattern of exporting to a shell-company in a country authorized for strategic licenses or other lax export control by the ECR before re-export to the ultimate prohibited end-user. Even Canada, the only country exempt from the strategic licensing scheme, was scrutinized in a GAO report over misuse of its lenient trade arrangement with the United States.¹⁸⁸ The report cited nineteen cases of unauthorized re-export of defense technologies to third parties.¹⁸⁹

These cases not only illustrate the importance of statutory requirements for bilateral agreements between the United States

¹⁸² HARTUNG, *supra* note 3, at 6.

¹⁸³ *Major U.S. Export Enforcement*, *supra* note 180, at 3.

¹⁸⁴ *Major U.S. Export Enforcement*, *supra* note 180, at 2–3.

¹⁸⁵ *Major U.S. Export Enforcement*, *supra* note 180, at 2–3.

¹⁸⁶ *Major U.S. Export Enforcement*, *supra* note 180, at 6.

¹⁸⁷ *Major U.S. Export Enforcement*, *supra* note 180, at 6.

¹⁸⁸ HARTUNG, *supra* note 3, at 6.

¹⁸⁹ HARTUNG, *supra* note 3, at 6 (citing U.S. Gov’t Accountability Office, *Export Controls: Compliance and Enforcement Activities and Congressional Notification Requirements under Country-Based License Exemptions* (Nov. 16, 2012) (detailing the shipping of items, ranging from communications equipment to armored personnel carriers, to countries like Pakistan and Iran)).

15 N.C. J.L. & TECH. ON. 65, 95
Export Control Reform

and countries eligible for strategic licenses but also point to a more troubling conclusion: high-tech end products are not necessarily required for America's enemies to achieve their desired results. For example, Iran needs only spare parts and subcomponents to keep its "aged American-made fighter jets and attack helicopters flying."¹⁹⁰ China consistently seeks to acquire older models of various defense technologies to reverse engineer, copy, and mass-produce.¹⁹¹ Countless regimes and despots seek small arms, surveillance equipment, and communication capabilities as tools of repression.¹⁹² None of these items would be kept behind the "higher fences" of the ECR.¹⁹³

Additionally, the Administration itself has acknowledged that the risk of nuclear, biological, or chemical attack has actually increased since the end of the Cold War by virtue of the wide availability of many necessary materials and manufacturing secrets on the Black Market.¹⁹⁴ Contrary to the Administration's re-affirmance of its commitment to countering the proliferation of conventional and unconventional weapons,¹⁹⁵ "loosening export controls would create loopholes that might make it easier for arms dealers, terrorist organizations, and proliferators of nuclear technology to obtain goods that are militarily useful,"¹⁹⁶ while

¹⁹⁰ HARTUNG, *supra* note 3, at 4.

¹⁹¹ HARTUNG, *supra* note 3, at 4; *see also* The Local, *Swedish Arms Exports Keep Booming*, (Mar. 19, 2012), <http://www.thelocal.se/39746/20120319/> (attributing China's drop from the largest to fourth largest importer of arms technology to "improvements in China's arms industry and rising arms exports"); Ward Carroll, *China Debuts Homegrown C-17 Clone*, MILITARY.COM (Jan. 28, 2013), <http://defensetech.org/2013/01/28/china-debuts-homegrown-c-17-clone/> (discussing China's attempt to reverse engineer Boeing C-17 Globemaster III strategic lift aircraft).

¹⁹² HARTUNG, *supra* note 3, at 4.

¹⁹³ HARTUNG, *supra* note 3, at 4.

¹⁹⁴ OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 23 (Feb. 2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹⁹⁵ *Id.*

¹⁹⁶ HARTUNG, *supra* note 3, at 5 (citing GAO and Former Director of the Office of Defense Control Policy concerns over implications of the ECR).

15 N.C. J.L. & TECH. ON. 65, 96
Export Control Reform

failing to definitively ensure the policy objective of robust economic growth for domestic industries.¹⁹⁷

V. CORRECTIVE COURSES OF ACTION

In order to actually achieve a balance between the ECR's stated goals of ensuring national security and maximizing the competitiveness of U.S. defense industries without contradicting the statutory authority under which the reforms are being enacted, the Administration needs to work closely with military, intelligence, and law enforcement entities.

As mentioned, the responses provided during the comment and answer period for proposed changes were overwhelmingly one-sided in favor of defense manufacturers.¹⁹⁸ Incorporating input from the breadth of concerned entities, such as human rights groups in addition to military, intelligence, and law enforcement agencies, would help ensure no gaps are left in the new framework simply due to omission of input. While the ECR unquestionably followed a standard open comment format, the average citizen likely has little interest in a highly complicated matter that ostensibly affects only massive defense contractors. Thus, increasing general Congressional buy-in through statutory provisions and amendments to existing law could considerably increase the visibility of these reforms, and their potential consequences, among the American public at large.

Export licensing will almost invariably include an element of over-inclusiveness with regard to defense technologies. In the issuance of such licenses, the Administration should continue, as have past regimes, to err on the side of over-inclusivity. It is important to note that nothing in the current licensing regulations

¹⁹⁷ See generally HARTUNG, *supra* note 3 (arguing that no conclusive evidence exists that the ECR will ultimately achieve national security through proposed economic benefits).

¹⁹⁸ HARTUNG, *supra* note 3, at 3. See generally 78 Fed. Reg. at 22741-43 (responding to public comments of thirty-one parties revealing highly sophisticated, technically savvy, interested parties seeking to discern regulatory differences in items such as "turbofan- or turbojet-powered" aircraft platforms and "ramjets and scramjets").

15 N.C. J.L. & TECH. ON. 65, 97
Export Control Reform

bars exports to STA countries; licensing requirements simply help ensure technologies developed to bolster American security do not ultimately undermine it.

Moreover, the Administration needs to work especially closely with Congress. Many of the items being removed from the USML have longstanding statuses as SME under ITAR.¹⁹⁹ Simply moving such items to the CCL may alleviate ambiguity over export control jurisdiction, but where exactly the ECR fits into the overarching framework of laws guarding against weapons proliferation, human rights abuses, and terrorist attacks must be clearly established. Congress should clarify that existing provisions of national security law—from the AECA and Foreign Assistance Act—would continue to apply to all defense articles regardless of their inclusion on the USML.²⁰⁰ This intent should correspondingly be incorporated into any new regulations governing the export of defense articles listed on the CCL or future variants of a control list. Prohibiting transfer of SME, regardless of its migration to the CCL, to private parties in countries whose governments are forbidden assistance by the FAA would likewise help prevent illicit third-party transfers. Congressional buy-in is particularly relevant with respect to licensing exemptions. Clarifying preferences for bilateral as opposed to multilateral trade agreements would do much to alleviate ambiguity over Congress' view of the link between increased arms-exportation and national security.

Channels and criteria for Congressional notification of exports of specified dual-use items are currently being developed.²⁰¹ As of now, the new reporting policy “will include only those items whose sale requires reporting under the Wassenaar arrangement, a multilateral agreement on conventional arms transfers, as well as

¹⁹⁹ AM. BAR ASS'N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 8.

²⁰⁰ AM. BAR ASS'N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 3.

²⁰¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-119R, EXPORT CONTROLS: COMPLIANCE AND ENFORCEMENT ACTIVITIES AND CONGRESSIONAL NOTIFICATION REQUIREMENTS UNDER COUNTRY-BASED LICENSE EXEMPTIONS 4-5 (2012), available at <http://www.gao.gov/assets/660/650167.pdf> (reporting Commerce Department is attempting to reconcile ITAR reporting requirements with its proposals for reporting requirements under the new “600 Series”).

15 N.C. J.L. & TECH. ON. 65, 98
Export Control Reform

certain items of Major Defense Equipment.”²⁰² To prevent the unwitting proliferation of critical technologies as well as safeguarding against frustration of Congressional national security policy, common sense would dictate that the reporting requirements regarding the export of newly redefined CCL technologies should be the same as they were under the USML. Thus, Congress should continue to be notified of any exportation of defense articles, as per requirements of the AECA, even if such articles are migrated to the CCL.²⁰³ Until this reporting policy is definitively established, a “moratorium” should be imposed on the USML to CCL migration.²⁰⁴ Additionally, the heightened security restrictions placed upon the 600 Series technologies, if acceptable to Congress, should be incorporated into law rather than remaining susceptible to shifting political winds under administrative regulations.

Lastly, the Departments of State and Commerce need to conduct studies into the precise benefits stood to be gained by the American economy as a whole. Rough estimates and unfounded projections provide little persuasive value to the argument that such reforms are critical to enabling American competitiveness in the international market given the historical U.S. domination of said market. Without such concrete findings, any measures taken to correct this perceived emergency are simply conjectures based upon traditional military-industrial interests. While such reforms will undoubtedly boost bottom lines for defense manufacturers, there is currently little hard evidence of exactly how such reforms will quantifiably improve national security or the economy.

VI. CONCLUSION

The efforts and intentions of the Obama Administration to reform and clarify the U.S. export control system are laudable and

²⁰² HARTUNG, *supra* note 3, at 5. MDE is defined as “any item of significant military equipment on the USML having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.” *Id.*

²⁰³ AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 3.

²⁰⁴ AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, *supra* note 85, at 3.

15 N.C. J.L. & TECH. ON. 65, 99
Export Control Reform

necessary. Defense manufacturers need to be able to realize a return on their considerable investments in research and development, lest these primary sources of innovation languish. However, several of the ECRI's key tenets—particularly USML to CCL migration and the proposed licensing policy—appear to err on the side of deregulation. This is likely in response to the demands of the primary proponents of the ECR, defense technology manufacturers themselves. Without any conclusive, objective reports as to the veracity of the economic claims made by the administration, it is premature to assume such revisions will have any positive impact on national security beyond boosting profits for a select group of defense manufacturers. Such a course of action may help realize the goals of maintaining the decisive technological advantage of the United States by maximizing the free-market opportunities of key private sector developers, but it does little to ensure comprehensive national security objectives are satisfied. As the GAO, human rights advocates, and various policy experts agree, reform must be tempered with appropriate deference to statutory protections of national security. By eviscerating the same legislation pursuant to which it was enacted, the ECR frustrates the very goal that it professes to accomplish—securing the American people. It therefore necessitates a closer look by Congress to ensure the Administration is not simply sacrificing the long-term security of America and her personnel abroad upon the altar of short-term commercial interests.