

# THE ENHANCED PROLIFERATION CONTROL INITIATIVE: NATIONAL SECURITY NECESSITY OR UNCONSTITUTIONALLY VAGUE?

*Daniel H. Joyner\**

As the international community struggles to come to grips with chilling modern realities of the proliferation of weapons of mass destruction (WMD) and related technology to both state and non-state actors of concern, governments worldwide are reminded of the imperative of creating and maintaining sound and comprehensive regulatory frameworks for controlling trade in sensitive technologies, both at the national and multilateral levels.

On the domestic front, governments of states possessing such technologies at significant levels (supplier states) turn naturally to an appraisal of their domestic frameworks for regulating exports of such technologies in order to restrain their diversion to uses perceived inimical to international peace and security. In such a climate of security concerns, the inclination of policymakers is to conduct a thorough re-examination of the tools at their disposal to tighten perceived loopholes and inefficiencies in their export control systems. Their internal analysis will at some point, however, inevitably address tensions between regulating the private behavior of exporters for purposes of national security and foreign affairs policy concern, and the protection of individual civil rights as enshrined in the constitutional documents and processes particularly of liberal democratic states.

This Comment will examine one element of the regulatory framework of one such supplier state, the United States, relative to export controls—the end user or “catch-all” controls established by the Export Administration Regulations’ Enhanced Proliferation Control Initiative (EPCI). This examination will focus on the legal implications of the EPCI’s provisions as currently drawn and applied to U.S. exporters, and will attempt to provide an analysis of the harmony of those provisions with fundamental principles of U.S. constitutional law.

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\* Lecturer in Law, University of Warwick; Senior Research Fellow, University of Georgia Center for International Trade and Security. The author wishes particularly to thank Mike Beck, Gary Bertsch, Matthew Borman, and Scott Jones for advice and helpful review of drafts of this Comment.

## I. EXPORT ADMINISTRATION ACT AND EXPORT ADMINISTRATION REGULATIONS

In the U.S. Constitution, Congress is entrusted with the authority to "regulate Commerce with foreign nations. . . ."<sup>1</sup> This authority, traditionally primarily exercised through the establishment of tariffs and other import regulations, has taken on renewed modern significance as technological advances have placed in the stream of international commerce items some potential uses of which are of significant national security concern to the United States. Particularly since the end of the Second World War, the attention of U.S. government officials has turned to the creation and maintenance of a comprehensive legislative and regulatory framework for controlling the export from the United States of items and technologies which can be used in the manufacture and maintenance of WMD with the purpose of restricting the supply of such technologies to suspected WMD development programs in countries of concern.

In 1979, Congress passed the Export Administration Act (EAA) to replace the provisions of the earlier 1949 Export Control Act. The purpose of the EAA was to restrict the export of goods and technology, including nuclear non-proliferation items, which would make a significant contribution to the military capacities of nations posing a threat to the United States. Particularly, the EAA sought to regulate so called "dual-use" items, i.e., those items with both legitimate civilian and potential military application. The regulation of such items is an especially sensitive area of any export control regime for the obvious reason that there are entirely legitimate civilian intended uses for such goods and technologies, and thus there is an understandable tension flowing from the desire of government, and even more poignantly the desire of industry, to craft an export control regime which does not excessively burden the ordinary flow of these goods in the international market. Thus, the EAA sought to strike a compromise between the valid interests and concerns of industry in keeping sufficiently open access to international demand for dual-use goods and technologies, and concerns over their diversion to uses which threaten U.S. national security.

The EAA's provisions delegated a degree of discretionary authority to the executive branch to craft regulations for the implementation of its goals and policies, and specifically for the implementation of a licensing system for goods of dual-use character. The resulting Export Administration Regulations

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3.

(EAR) of the Department of Commerce established a comprehensive regime for the licensing of dual use goods to be administered by the department's Bureau of Export Administration (now the Bureau of Industry and Security (BIS)). The basic structure of the EAR provisions governing dual-use items consists of a Commerce Control List (CCL), which provides detailed specifications for approximately 2400 dual-use items, including equipment, materials, software, and technology (including data and know-how), the export of which is likely to require a license from BIS.<sup>2</sup> Often, items on the CCL will require a license only if being exported to a particular country of concern, although some items, even if directed to a non-sensitive location, will yet require a license due to the significant risk of diversion to a destination of concern or because of the inherently sensitive nature of the item itself. The CCL is updated periodically to decontrol items broadly available in the market and to target restrictions on those critical technology items of particular proliferation concern.

Thus, when contemplating the export of a good or technology item, an individual or business in the United States must first classify the commodity to be exported by reference to the description of items on the CCL and thereby determine the commodity's Export Control Classification Number (ECCN). From there, the individual or entity must examine the country charts included in Section 738.1 of the EAR and find the country to which its item is destined. By comparing the item's ECCN to the list of ECCNs corresponding to the subject country, an exporter can determine whether or not a license must be first obtained from BIS before the item can in fact be exported. This process, while time-consuming and complex, does provide a fairly systematic and predictable method for the classification of items and determination of the necessity of a license application.

However, due to concerns about the dynamic nature of the development and demand for dual-use goods and technologies, the EAR also established in Sections 744.1-744.6 a set of regulations known as the Enhanced Proliferation Control Initiative (EPCI). The EPCI, rather than being based on a set control list specifying sensitive items to be monitored by exporters, places its emphasis on exporters' knowledge of the activities and characteristics of end users, or final recipients, of their commodity and the uses to which their commodity will be put once in the hands of its destined recipient, including the potential for diversion of the export from its stated end uses to uses of WMD proliferation

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<sup>2</sup> 15 C.F.R. § 774 (2003).

concern. Section 744.6(a)(1) places obligations on U.S. exporters with regard to their knowledge of such facts and their efforts at acquiring such knowledge.

In pertinent part, the regulations state:

(i) No U.S. person . . . may, without a license from BIS, export, reexport, or transfer to or in any country any item where that person knows that such items:

(A) Will be used in the design, development, production, or use of nuclear explosive devices in or by a country listed in Country Group D:2 . . . ;

(B) Will be used in the design, development, production, or use of missiles in or by a country listed in Country Group D:4 . . . ; or

(C) Will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Country Group D:3 . . . .

(ii) No U.S. person shall, without a license from BIS, knowingly support an export, reexport, or transfer that does not have a license as required by this section. Support means any action, including financing, transportation, and freight forwarding, by which a person facilitates an export, reexport, or transfer without being the actual exporter or reexporter.<sup>3</sup>

The regulations continue in the same section to forbid any U.S. person from “perform[ing] any contract, service, or employment that the U.S. person knows will directly assist” in the development, production or use of the aforementioned items in the specified nations of concern. They further define the term “know” and its derivations in the context of the regulation as

not only positive knowledge that [a] circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.<sup>4</sup>

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<sup>3</sup> *Id.* § 744.6(a)(1)(i), (ii) (2003).

<sup>4</sup> *Id.* § 772.1 (2003).

The obvious purpose of the EPCI provisions is to supplement the inherently limited quality of an enumerated list-based system of regulation with a more inclusive or "catch-all" normative framework that places positive obligations upon U.S. exporters to make themselves aware not only of the characteristics of their particular items and their potential for use in WMD programs, but also of the particulars of the specific uses to which the items are to be put in their place of destination and of the likelihood of their diversion by either primary or secondary parties and potential use in the manufacture of WMD.

The utility of such a regulatory policy is easy to understand. Placing such obligations upon exporters creates, in effect, an entirely new first line of defense in elements of the private sector in the war on dual-use goods proliferation. This argument, of course, is supported by the government's ever-present scarcity of enforcement resources and the efficiency of having those in closest connection with sources of information on goods and technologies, as well as end users, accountable for their negligent use of the same.

In point of fact, however, the provisions of the EPCI have been used in prosecutions by the Department of Commerce only very rarely. Within the standard enforcement procedures of the BIS is a trail of notification and negotiation with charged exporters that, almost without exception, leads to a settlement of the case before it is brought before an administrative tribunal. The initial rendering of a charge under the EPCI is itself a comparative rarity, with only a handful having been brought in the past decade. Thus, the precise contours of the EPCI regulations and their application to particular cases, including their effectiveness in supplementing the basic list-based structure of the EAR, is largely a matter for speculation.

However, the current national security climate in the United States following the terrorist attacks of September 11, 2001, and the continuing war on terrorism both at home and abroad, as well as heightened international concern over the spread of WMD to countries posing significant perceived threats to international peace and security, suggest that expanded use of the provisions of the EPCI to supplement the EAR's control list procedures for regulation of U.S. persons' trade in dual-use goods in coming years is a distinct possibility. As written, the EPCI has the potential to serve as a useful instrument in the hands of government regulators frustrated by perceived loopholes in the CCL system, as well as a means by which to shift a significant proportion of the burden of regulation of trade in dual-use goods to the resources of the private sector who, according to innumerable documents issued by the BIS, are thereby placed under obligation to "know your end

user.” Thus, an examination of the EPCI’s provisions and their harmony with settled principles of constitutional law is by no means an exercise in mootness, as such issues will without doubt be raised by defendants in future administrative actions based thereon. Indeed, the tensions which will be examined between the national security exigencies of the EPCI and principles of individual rights protection embodied in the U.S. Constitution are but a subset of the larger current national debate on these issues in a variety of legislative and regulatory contexts.

## II. ANALOGOUS INTERNATIONAL REGULATIONS<sup>5</sup>

It should be noted with interest that a number of other states have instituted regulations establishing end-user export controls of a character comparable to those in the EPCI. The Belgian government, for example, requires an End-Use Certificate (EUC) for exports to non-NATO countries, including an explicit assurance from the importing government that the subject commodities will not be re-exported without the prior consent of the Belgian government. The EUCs are delivered directly to the importing country’s embassy for verification purposes and to minimize the danger of false documentation. Three months after the export of the commodities, the Belgian government requires proof of delivery, including details of transit routes and travel plans.

Sweden also has a variety of forms of end-user certification specific to the particular circumstances involved, including a “tailor-made” end-user statement issued in cases in which none of the standard forms provided fits. While Sweden does not refer explicitly to follow-up provisions in its export

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<sup>5</sup> See generally UK House of Commons Trade and Industry Committee, Minutes of Evidence, Annex, printed December 2, 1998, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmtrdind/1138/8110401.htm>. For a review of literature relevant to the subject of EU export controls, see EUROPEAN UNION AND ARMS EXPORTS 65-67 (Bernard Adams, ed., 1995); Geoffrey Van Orden, *European Arms Export Controls, in EUROPE AND THE CHALLENGE OF PROLIFERATION*, Challiot Papers 24 WEU Institute for Security Studies (Paul Cornish et al. eds., 1996), at 68, available at <http://www.iss-en.org>; Communication from the Commission—Challenges Facing the European Defense-Related Industry: A Contribution for Action at a European Level, COM (96) 0010 final at 14; PAUL CORNISH, *THE ARMS TRADE AND EUROPE* 17-19, 37-38 (1995); Burkard Schmitt, *A COMMON EUROPEAN EXPORT POLICY FOR DEFENCE AND DUAL-USE ITEMS?*, Occasional Paper 25 WEU Institute for Security Studies (2001), available at <http://www.iss-en.org>; and Nathalie Prouvez, *Implementation and Enforcement of an EC Arms and Dual-Use Goods Export Policy, in ARMS AND DUAL-USE EXPORTS FROM THE EC: A COMMON POLICY FOR REGULATION AND CONTROL* (1992).

licensing, investigations regarding reexport have taken place, with on-site inspections having been performed in at least one instance.

Perhaps the most analogous example of end-user controls to the U.S. model is to be found in Germany, where investigations into the violation of German export control laws in the 1980s led to the institution of a number of reforms to the legal and administrative structure of end-use controls. A "catch-all" clause was introduced in 1990 pertinent to exports under the Foreign Trade Act. Although the catch-all language regulating chemical, biological, and nuclear weapons, as well as that regulating missile technologies, subsequently became subject to and subsumed under Article 4 of the European Community's Regulation on Dual-Use Goods, the catch-all legislative language in relation to conventional weapons remains in German national law and is a unique feature of the German export control model. Under this provision, exports of goods not on a specified Export List (comparable to the CCL) require a license when destined for use in the production of conventional weapons or armaments in thirteen listed countries of concern and the exporter has prior knowledge of this intended use. In effect, this requires companies to exercise comparable due diligence in confirming that all proposed exports to these destinations are for legitimate civilian use only.

These supplements to the traditional list-based export control system have been used extensively internationally as a common consensus has grown among governments that the dynamic character of both technological development, particularly in the dual-use area, and evaluations of geopolitical threats demand more flexible tools in the hands of national regulators to implement effective export control systems.

### III. NATIONAL SECURITY AND THE APPLICATION OF THE EPCI

In the recently published United States National Security Strategy document, the president states that

[t]he gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed . . . We will

cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies.<sup>6</sup>

The same document includes export controls as among the integral elements in the president's comprehensive strategy to combat WMD proliferation. Control of dual-use goods particularly has taken on increased urgency and importance in the minds of policymakers, following revelations in the late 1990s that much of Iraq's stockpile, particularly of chemical weapons, was supplied to it prior to the Gulf War by foreign companies in the form of civilian-use-intended chemical commodities, the sale of which was unimpeded by loose governmental controls on such dual-use character goods.<sup>7</sup> Thus, a tightening of export controls for dual-use goods has been an issue of increasing priority for U.S. policymakers, who may soon find in the provisions of the EPCI a source of regulation already on the books which offers increased breadth and flexibility to their efforts in this regard.

However, despite their theoretical and practical utilities, the EPCI provisions, by the same token, exemplify some typical problems always present when more standardized methods of regulation are supplemented by, or abandoned and replaced by, broadly drawn positive obligations of due diligence imposed upon private individuals. Questions which would be raised in the EPCI context would undoubtedly include these queries: What does it really mean on the ground for an exporter to, in essence, "know or should have known" in the context of circumstances indicating an end use in WMD related programs? How much knowledge and what kinds of facts should be enough to send up a red flag? How far does an exporter have to go to obtain sufficient information to exculpate themselves? What about the resource differentiation between exporters? Are smaller entities under the same due diligence obligations as large multinational entities? Who gets to decide what the parameters of inquiry and fact finding must be, and what are the standards for deciding?

This last query is in fact the most problematic. As written, the EPCI regulations arguably provide little in the way of standards to guide a Department of Commerce lawyer or an administrative law judge in determining whether a requisite level of due diligence has been exerted in finding out information on end users and potential uses of an export, as well as what

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<sup>6</sup> National Security Strategy of the United States of America, Sept. 2002, available at <http://www.whitehouse.gov/nsc/nssintro.html>.

<sup>7</sup> James Holmes & Gary Bertsch, *Tighten Export Controls*, DEFENSE NEWS, May 5, 2003.

knowledge will suffice to trigger the EPCI's application in a particular case. In fact, the knowledge standard itself in the EPCI regulations is drawn so broadly that it, in effect, could be argued to cover the same breadth of states of mind and conditions of awareness which the American Law Institute's Model Penal Code uses four separate categories to describe. A comparison of the definitional terminology used for "knowledge" in the EPCI context, and that used for the categories "purposely," "knowingly," "recklessly," and even "negligently" in the context of the Model Penal Code, reveals similarities in each category indicating that the potential breadth of use of the concept of knowledge in the EPCI context is conceivably as broad as that covered by all four Model Penal Code categories put together.<sup>8</sup>

The material problem is that, without clear standards to guide both regulators and, more importantly, the private subjects of the law, the regulations are in danger of becoming an arbitrary exercise of enforcement by government officials given excessive discretion in applying overly-broad norms, something the Due Process Clause of the Fifth Amendment to the U.S. Constitution cannot countenance. As previously mentioned, a significant body of case law has not yet formed by which to discern standards not present in the regulations themselves, so at present the observer is left with only the contours of the regulations as drawn and to speculate about the scope of their potential application. However, as noted, the time may come and may not be far distant when the harmony of the EPCI provisions with bedrock principles of due process jurisprudence will be central to their continued usefulness as tools in the United States' efforts to combat illicit trade in dual-use goods and the resulting threat of proliferation of WMD.

#### IV. DUE PROCESS CONCERNS

There are many cases likely to be brought in the future on the basis of the EPCIs in which the ambiguity in the knowledge standard, as drawn in the regulations, will not be a major concern. In many such cases, it will be clear that there was actual knowledge of salient and dangerous facts of intended or understood risk of diversion to WMD uses by end users on the part of an exporter, and willful violation of the EAR's proscriptions on exporting nevertheless. But, in many imaginable contexts, particularly involving less sophisticated and smaller resource exporters, the provisions of the EPCI could conceivably be applied in a manner that would raise serious concerns of

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<sup>8</sup> MODEL PENAL CODE § 2.02 (1985).

injustice having been done. Personal and/or business liability might be seen to arise from failure to act on information held, or insufficient efforts expended to find out facts, in circumstances in which the defendant exporter had little basis on which to expect that its conduct was in any way contrary to established law.

While executive agencies have been honored by the federal courts with a great deal of deference in both their rulemaking and adjudicatory processes through such decisions as the landmark *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* case,<sup>9</sup> administrative regulations, as sources of law flowing from duly delegated original grants of authority to Congress under the U.S. Constitution, are still subject in the final analysis to the substantive limitations on all lawmaking prescribed in that document. One of the foremost of these is that no U.S. citizen (or juridical person) is to be deprived of "life, liberty, or property, without due process of law."<sup>10</sup>

Most pertinently in a consideration of the EPCI regulations, administrative agencies at the state and federal levels are required by the due process jurisprudence of the federal courts, as other lawmaking organs, to prescribe rules which are not excessively vague or standardless. As Supreme Court Justice William Brennan has explained:

By demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions.<sup>11</sup>

Specifically in the administrative context, the federal courts have fashioned a doctrine of vagueness which is applied to an administrative regulation to test it for soundness under the Due Process Clause. In *Soglin v. Kaufman* the administration of the University of Wisconsin had expelled a number of students pursuant to a standard proscribing "misconduct."<sup>12</sup> At trial, the

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<sup>9</sup> 467 U.S. 837 (1984).

<sup>10</sup> U.S. CONST. amend. V and XIV. Due process with regard to property interests has been held to attach when, as in the case of the EPCI, the property interest at issue is in the form of a license and the regulation at issue is a part of a licensing regime. See *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Clark v. City of Fremont*, 377 F. Supp. 327 (D. Neb. 1974).

<sup>11</sup> *Whisenhunt v. Spradlin*, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting).

<sup>12</sup> 418 F.2d 163, 165 (7th Cir. 1969).

university's action was overturned on the basis that "misconduct" was too vague a standard to be a useful rule of conduct. As the Court explained:

No one disputes the power of the University to protect itself by means of disciplinary actions against disruptive students. Power to punish and the rules defining the power are not, however, identical. Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of "misconduct."<sup>13</sup>

Perhaps even more analogous to the EPCI context is the decision of a federal district court in *Clark v. City of Fremont*.<sup>14</sup> In that case, the court struck down a city ordinance providing for the revocation and suspension of retail licenses, in this case a liquor license, on the basis that the grounds for revocation of the licenses "are based upon words incapable of intelligible or precise meaning" such that "these provisions subject . . . licensees to possible arbitrary, and wholly discretionary, administrative decisions as to what constitutes a ground for revocation," and due to the absence of "ascertainable standards" within the ordinance by which a licensee could assess their "contemplated conduct."<sup>15</sup> Thus, even when regulation is based on the licensing of privileged, and not rights-based conduct, the strictures of the Due Process Clause will serve to invalidate a regulation which is drawn vaguely and without sufficient criteria on which notice may be reasonably obtained by subjects of the regulation of the parameters of proscribed action or inaction.

In the context of the EPCI, one justification for end-user focused treatment of export control is the truly dynamic character of technological innovation in the area of dual-use goods and the near impossibility of providing timely and relevant updates to the CCL to cover all items of concern. However, the utility of the EPCI in handling such "fine tuning" issues of dual-use items control would not seem to present a compelling justification for over-broad administrative regulation. As explained by Professors Aman and Mayton:

[t]he courts have usually rejected arguments that a discretion to proceed by *ad hoc* orders rather than by rules is necessary to permit an agency to make decisions finely tuned to the facts and

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<sup>13</sup> *Id.* at 167.

<sup>14</sup> 377 F. Supp. 327, 335 (D. Neb. 1974).

<sup>15</sup> *Id.*

circumstances of an individual case. As stated by one court, this interest in fine tuning does not "outweigh the individual's interest in being protected from arbitrary and capricious decision making."<sup>16</sup>

#### V. NATIONAL SECURITY OVERRIDE?

However, none of the examples of unconstitutional vagueness presented thus far in the jurisprudence of the federal courts presents the countervailing claims to national security necessity and the conduct of foreign affairs policy presented by proponents of the legitimate applicability of the EPCI in the context of regulation of trade in dual-use goods and technologies. It is true that, in some cases, federal court jurisprudence has recognized that national security and foreign affairs concerns can hold sway to legitimize governmental actions and policies that would otherwise be unconstitutional breaches of Americans' fundamental individual civil rights. Although now quite infamous, the 1944 *Korematsu* decision of the Supreme Court, by which the internment of thousands of American citizens of Japanese ancestry during the Second World War was premised on just such a balancing of national security concerns and individual constitutional protections. In that case, the national security exigencies perceivedly compelling the deprivation of liberty of American citizens for an extended period of time carried the day.<sup>17</sup>

In a less precedentially suspect, and perhaps more fact-analogous case, the Court in 1936 upheld the prosecution of the Curtiss-Wright Corporation for conspiring to sell fifteen machine guns to Bolivia during a period in which an embargo on the sale of munitions to the country had been put in place by an executive order of President Roosevelt.<sup>18</sup> The order had been authorized by a broadly-drawn joint resolution of Congress, passed in May 1934, empowering the president to establish the embargo with such limitations and exceptions as he should deem proper. Here, the property interests of the U.S. corporation to conduct international business transactions were held to be subject to the

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<sup>16</sup> ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 78 (1992) (quoting *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976)). The court in *Baker-Chaput* further noted that "to require the agency to formulate standards 'will neither force unrealistic rigidity in the content of these standards nor bring about administrative inefficiency.'" *Baker-Chaput*, 406 F. Supp. at 1140 (quoting *Hill v. Fed. Power Comm'n*, 335 F.2d 355, 363 (5th Cir. 1964)).

<sup>17</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>18</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

interests of the nation and the power of the president to conduct foreign affairs policy. A distinct differentiation was made by the Court between the president's (and one could by extrapolation argue an executive agency's) powers in conducting purely internal affairs and in conducting the affairs of the nation in respect of foreign or external affairs. It is highly likely that the U.S. administration would argue that such a foreign affairs interest, as well as a national security interest, is decidedly present in the field of export controls such as to trigger more deference by the courts to discretionary administrative regulation. In fact, in 1990, the Ninth Circuit Court of Appeals held in *United States v. Mandel* that

[t]he EAA requires the Secretary to consider such things as whether the imposition of export controls would be detrimental to the foreign policy or national security interests of the United States, whether restrictions on a given commodity would fulfill declared international obligations of this country, and whether the export of a given commodity would make a significant contribution to the military potential of other countries. These are quintessentially matters of policy entrusted by the Constitution to the Congress and the President, for which there are no meaningful standards of judicial review.<sup>19</sup>

Following the Supreme Court's 1965 ruling in *Zemel v. Rusk* that "because of the changeable and explosive nature of contemporary international relations, . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas,"<sup>20</sup> the Ninth Circuit subsequently held in a pivotal case on the EAA that

[p]ermitting Congress broadly to delegate decisions about controlled exports to an agency makes sense; it would be impossible for Congress to revise the CCL quickly enough to respond to the fast-paced developments in the foreign policy arena. Moreover, the need for uniformity in the realm of foreign

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<sup>19</sup> 914 F.2d 1215, 1223 (9th Cir. 1990). See also *United States v. Gurrola-Garcia*, 547 F.2d 1075, 1078 (9th Cir. 1976) (emphasizing "the President's traditional dominance in and responsibility for foreign affairs").

<sup>20</sup> 381 U.S. 1, 17 (1965).

policy is particularly acute; it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports were not authorized by the EAA. Because the Supreme Court has consistently emphasized that broad delegations are appropriate in the foreign policy arena because of the political nature of the decisions and the compelling need for uniformity, the case for mandatory judicial review is even less compelling.<sup>21</sup>

## VI. PROTECTION OF CIVIL RIGHTS

The context of a U.S. federal agency is, in fact, an amalgam of authority, with the agencies themselves being located within the executive branch and answerable to the president, but deriving their authority to regulate from statutory authority given them by Congress. Thus, an examination of the claims of both executive and legislative branches to authority in matters of national security and foreign affairs could be relevant in any judicial review of the constitutionality of application of the EPCI. The outcome of such a review might, in fact, hinge on whether the application of the EPCI regulations was considered to legitimately draw its authority from the EAA, as the Commerce Department's counsel would allege, or, as defense counsel would maintain, is so outside the scope of the statutory authority granted to the Department of Commerce that it must be viewed as an unconstitutional exercise of legislative power by an administrative official.<sup>22</sup>

In such a forum, it would surely be pointed out by counsel for a defendant exporter that there is ample countervailing jurisprudence, establishing the rule of law and constitutional protections even in times of crisis and issues of foreign affairs and national security concern. Protection of private property rights against the power of governmental seizure was upheld by the Supreme Court's 1952 *Youngstown Sheet & Tube Co. v. Sawyer* decision.<sup>23</sup> At a critical point in the prosecution of the Korean conflict, a labor impasse in the nation's steel mills threatened to shut down steel production, potentially seriously hampering the war effort. In order to preserve steel production, President Truman signed an executive order transferring control over the steel mills to

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<sup>21</sup> *United States v. Bozarov*, 974 F.2d 1037, 1044 (9th Cir. 1992).

<sup>22</sup> *See id.*; *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988); *Leedom v. Kyne*, 358 U.S. 184 (1958).

<sup>23</sup> 343 U.S. 579 (1952).

the federal government. The case reached a decision in the Supreme Court two months later (quite a rapid timetable for a decision of such scale), with the majority issuing a relatively short, direct opinion holding the seizure order unconstitutional. The Court, in its majority opinion, examined each claim to executive power to seize the mills forwarded by the president and found none to be valid.

More interesting than the majority opinion, however, is the concurring opinion of Justice Jackson, in which he laid out, in a more comprehensive fashion, the authority of the president in three hypothetical contexts: the first when the president acts pursuant to either express or implied authorization of Congress, the second when the president acts in absence of such authorization, and the third when the president “takes measures incompatible with the expressed or implied will of Congress.”<sup>24</sup> Justice Jackson reasoned that, as analysis of executive action progressed from the first to the third contextual categories, the president’s authority to act waned correspondingly. He concurred with the majority that under the *Youngstown* facts the president’s action could be “justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject.”<sup>25</sup>

In the case of the EPCI, the EAA does clearly delegate to the executive branch authority to impose export controls for reasons of national security, foreign policy, and domestic short supply.<sup>26</sup> Thus, there is certainly a broad statutory basis for executive action in this area absent an unlikely finding that the particular characteristics of the EPCI regulations somehow remove its inclusion within this mandate. At first blush, therefore, executive action in the area of export controls under the EAA would seem to fall quite squarely under the first category of *Youngstown* analysis, in which the president’s power to regulate is at its zenith. However, there are of course substantive limits on the powers of Congress to make law even in the areas of national security and foreign affairs policy. For example, the Supreme Court has held that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. ‘Even the war power does not remove constitutional limitations safeguarding individual liberties.’ ”<sup>27</sup>

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<sup>24</sup> *Id.* at 637.

<sup>25</sup> *Id.* at 640.

<sup>26</sup> 50 U.S.C. §§ 2402(2), 2402(10) and 2404-06.

<sup>27</sup> *United States v. Robel*, 389 U.S. 258, 264-65 (1967) (quoting *Home Bldg. & Loan Ass’n*

Most poignantly and on point in the current analysis is another holding of the Ninth Circuit in the case of *Bozarov*. There the court held that, while the EAA expressly excludes judicial review of many agency decisions taken under its authority, the statute did not fail constitutional muster under the nondelegation doctrine because two types of judicial review under the EAA were available. One such category of review includes the aforementioned determination of "claims that the Secretary acted in excess of his delegated authority under the EAA."<sup>28</sup> The other includes "colorable constitutional claims."<sup>29</sup> The court in *Bozarov* went on to consider the merits of the claims of the defendant that his right to due process had been violated by a number of means, including importantly the character of the regulation in question as not giving "fair notice of the forbidden conduct."<sup>30</sup>

Although the court in *Bozarov* found the claims of the defendant on this point factually meritless, its holding that constitutional claims of violation of rights to due process can be reached in the specific context of an administrative prosecution under the EAA, and its actual consideration of such a claim arising from perceived regulatory vagueness, lend strong persuasive support to the adoption of a similar policy by other federal circuits and by the Supreme Court. Thus, vagueness alleged to be present by a defendant exporter in the context of a prosecution under the EPCI could, if properly placed as an issue before a federal court, be a successful candidate for judicial disposition, with the consequent possibility of use as a basis for a ruling of unconstitutionality of the EPCI's provisions.

## VII. IMPLICATIONS

When the constitutional jurisprudence of the federal courts and cases arguing for its respect even in times of national security crisis are weighed against the claims of national security and foreign affairs necessity of the provisions of the EPCI in the regulation of trade in dual-use goods particularly in light of the current and revolutionary context of threats of nuclear, chemical and biological weapons of mass destruction both by states and non-state terrorist actors, it is unclear in what direction an appropriately seized federal

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v. Blaisdell, 290 U.S. 398, 426 (1934)).

<sup>28</sup> United States v. Bozarov, 974 F.2d 1045 (9th Cir. 1992).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

court would rule on an appeal from agency determination brought to it by an exporter based on the Due Process Clause.

Indeed, as previously mentioned, this juncture of protected rights and national security concern is still being played out in a number of varying contexts in the United States today, as all the branches and levels of government wrestle with these competing claims of value in the regulation of private conduct post-September 11. The fate of the EPCI might well be determined by the jurisprudence which develops from its actual application, and substantive standards which may yet be imposed thereby upon its textual ambit. However, at present, and as the text of the EPCI regulations are currently drawn, it must be concluded at least that its constitutionality is subject to some considerable doubt. This doubt as to substantive legitimacy and enforceability of the EPCI's provisions of course casts a shadow over its usefulness in combating transfers of sensitive technologies by U.S. exporters.

It is hoped that this brief treatment of the EPCI regulations and the tensions presented thereby between national security and foreign affairs exigency and fundamental guarantees of individual rights under the U.S. Constitution will primarily aid in the identification of issues of law and policy surrounding these important interests and their competing claims to primacy in this context. It is further hoped that this analysis may be of some use to policymakers in determining the most prudent resolution of this fundamental conflict of values, whether to the eventual confirmation of overriding policy necessity in favor of the EPCI's broad application, or rather to the curtailing of regulatory purview through its substantive amendment or repeal.

