ACCOUNTABILITY AND THE FOREIGN COMMERCE POWER: A CASE STUDY OF THE REGULATION OF EXPORTS

I. INTRODUCTION

Since the beginning of the Cold War the United States has sought to safeguard its national security and further its foreign policy by stifling the flow of selected goods to nations deemed to be unfriendly. In the post-war era, when American economic superiority was undoubted, the fear that exports of strategic goods and know-how might exhaust domestic supplies or be used by other nations in a manner contrary to United States interests predominated over the interests of free trade. Today, it is the failure to export enough goods and know-how that threatens the welfare of the United States. The weakening of the United States balance of trade has awakened the public to the need for active trade promotion. It is now apparent that national security depends on economic security as well as military security, and that trade cannot be used as a bargaining chip of foreign policy without damage to domestic interests. Since the decision whether or not to export carries a cost with either alternative, it is vital that this decision be made by responsible officials in a fair and reliable manner. What is required is an intelligent consideration

1 Until the enactment of the Export Control Act of 1949, Pub. L. No. 80-11, 63 Stat. 7 (1949) (repealed 1969), which subjected exports to continual restriction for economic and national security purposes, United States export controls were imposed only as a temporary measure during war and other emergencies. See Note, Export Controls, 58 Yale L.J. 1325, 1325-29 (1949). The Export Control Act was replaced by the Export Administration Act of 1969. See note 5 infra.


and balancing of competing interests, and a formulation of policy which is responsive to public needs.

The existing regulatory framework for the control of strategic exports has been widely criticized as misguided, irrational and overly restrictive. While government officials and private exporters alike agree that some regulation is necessary, the proper method of regulation has been the subject of continuing debate. Under the Export Administration Act of 1969 (EAA), the President has been authorized to screen exports and prevent the overseas sale of goods or know-how which might contribute to the military potential of hostile nations, or which might usefully be withheld for purposes of foreign policy. The exports regulated under the EAA are not intrinsically dangerous. Armaments, nuclear technology and other exports which might pose an immediate threat to security are regulated under other legislation and are not within the scope of this note. The EAA subjects exports of every type to the possibility of a limited restriction or embargo. Every businessman who contemplates entering the export market must first consult the extensive regulations which have been promulgated pursuant to the EAA.

Although the administration of the EAA is centralized in the Commerce Department, the authority to make judgments affecting the regulation of exports is scattered throughout the executive branch. This diffusion of authority has led to a sense of indirection and internal conflict within the regulatory structure. Coupled with the lack of precise legislative guidelines, the failure of executive officials to provide centralized policy-making has impeded the normal processes by which administrative government is made accountable. Neither the Congress nor the President have demonstrated the capacity to provide the necessary oversight of export regulation in the face of these organizational difficulties.

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6 For a summary of legislation related to these special problems, see Archibald, Arms Transfers by the United States, 10 Vand. J. Transnat'l L. 249 (1977); Bauser, United States Nuclear Export Policy: Developing the Peaceful Atom as a Commodity in International Trade, 18 Harv. Int'l L. J. 227 (1977); Hoya, The Changing U.S. Regulation of East-West Trade, 12 Colum. J. Transnat'l L. 1, 6 n. 30 (1973).
The problem of making government accountable in this field is made more difficult by the special character of the authority to regulate exports. Foreign affairs and national security powers have often been treated as special exceptions to the normal principles of democratic government. The result has been a relaxation of certain constitutional requirements of procedure. Export regulation, like other matters of foreign policy and national security, presents a problem of accommodating the exigencies of the modern world with old but fundamental constitutional values. The undue sacrifice of constitutional principles is an additional factor in the loss of accountability in the regulation of exports. The truncated form of due process pervasive in the regulatory structure, and the misallocation of power therein, have defeated the basic tenet of constitutional democracy, that governmental authority must be accountable to the public.

The purpose of this note is to provide a legal analysis of the EAA and to propose a new accommodation of the international relations powers and constitutional values. Two principles will serve as the basis for this analysis: separation of power, and due process of law. Both of these principles serve to achieve the goal of accountable government, the former through the oversight of elected officials, and the latter by the participation of individual members of the public in the administrative process by which they are regulated. By suggesting a reexamination of these principles and their applicability to the regulation of exports, it is hoped that the direction of United States trade policy may be properly reoriented and more effectively executed.

II. THE REGULATORY FRAMEWORK

The EAA posits three facts of international trade. First, the availability in the world market of certain materials exported by the United States "may have an important bearing upon fulfillment of the foreign policy of the United States."7 Second, certain exports, if unrestricted, may contribute to the military potential of other nations and endanger the national security of the United

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7 50 U.S.C.A. App. § 2401(1). This section also states that the availability of certain supplies may affect domestic economic conditions, and lays the foundation for short supply commodity controls. The use of export controls to protect the domestic economy, however, is not considered in this Note.
Third, despite these compelling reasons for the regulation of exports, the EAA recognizes that "[t]he unwarranted restriction of exports from the United States has a serious adverse effect on our balance of payments..." These three Congressional findings state the dilemma of export regulation. Against the free trade policy of the United States must be weighed the need to safeguard other critical national interests.

The dilemma is restated in the declaration of policy of the EAA, but as the EAA is an act to restrict, rather than promote, United States exports, the policy statement is slanted in favor of export control. Only brief and passing mention is made of a free trade policy. Though trade generally is to be encouraged, an exception is made for trade with certain nations or of certain products which the President deems "against the national interest" or "detrimental to the national security of the United States." It is unclear in the EAA how the President is to make such distinctions, except as a matter of broad presidential discretion. If there is a primary policy emphasized in the EAA, it is the policy of export restriction, but the encouragement of exports is an objective of at least secondary and possibly equal importance.

Two general grounds for the restriction of exports are provided. The President may use controls "to the extent necessary to further significantly the foreign policy of the United States and to fulfill its international responsibilities." Alternatively, the President may impose controls "to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States." More specifically, the President may use export controls as leverage to

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8 Id. § 2401(2).
9 Id. § 2401(3).
10 Id. § 2402(1).
11 The objectives of trade promotion and trade restriction are again juxtaposed in section 2402(4), which states that "It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives." This policy declaration only repeats in more general terms the statement of section 2402(1). Although section 2402(4) states the policy of trade promotion more as an equal to the policy of trade restriction, section 2402(4) might also be seized upon as a much broader authorization for control, since its direction to use trade restrictions to further national security and foreign policy is not qualified as in section 2402(1), by the proviso that restrictions must be imposed only to the extent necessary to achieve these purposes.
12 Id. § 2402(B).
13 Id. § 2402(C).
force the removal of restrictions of supplies imposed by other nations," or to prevent the encouragement by other nations of "international terrorism." These specific directions do not enlarge the power of the President but only provide examples of how controls might be used for purposes of foreign policy.

The administration of the EAA is centralized in the Office of Export Administration (OEA) of the Department of Commerce, but the authority to determine what exports shall be prohibited is delegated to the President, who is further authorized to delegate his powers as he deems appropriate. The President may empower the officials of other executive departments to participate in the decision to prohibit certain exports. Authority under the EAA is now shared by several departments, each of which represents a special government interest or expertise in any given export. The President, however, has reserved the authority to intervene in the export regulation process and prescribe new rules and regulations at any time.

Exports to particular nations may be approved by either of two means. When the Department of Commerce issues a *general license*, published as a regulation applicable to all exporters, the listed commodity may be exported to the approved destinations without the prior approval of the OEA. Any export not yet listed under a general license or which is restricted by the Commodity Control List (CCL) is prohibited until the OEA has granted its approval. Exporters must then apply for a *validated license*, which is a document of specific applicability that is effective only for the transaction described in the document. Both general and validated licenses are subject to revocation at any time without notice, and the Department of Commerce may order the return of any shipment that is en route when a license is suddenly revoked.

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14 Id. § 2402(7).
15 Id. § 2402(8).
16 Id. § 2403(a)(1); Exec. Order No. 12,002, 42 Fed. Reg. 35623 (1977).
17 Id. § 2403(b)(1).
18 Id. § 2403(e).
21 Id. § 370.3(a).
22 Id. §§ 372.2, 372.9(a).
23 Id. § 370.3(b).
24 Id.
Exports requiring a validated license may be divided into two categories. Some restrictions are the result of international negotiations between the United States and its allies. In 1949, the members of NATO (excluding Iceland but including Japan) joined efforts to prevent the export of strategic goods to communist nations and formed the Coordinating Committee known as COCOM. COCOM has maintained a list of controlled commodities which may not be exported to certain designated nations by any member nation. The United States requires a validated license for any export on the COCOM control list. Applications tentatively approved by the OEA must then be granted an exception by COCOM. Since the organization has never been formalized in a treaty, adherence to the multilateral control list is voluntary. Over the years COCOM has become increasingly reluctant to restrict exports because of the growing pro-trade attitude of most of the member nations. The effectiveness of COCOM is also diminished by the export trade of highly sophisticated neutral nations such as Sweden and Switzerland, which provide unrestricted sources of advanced technology. The United States remains the dominant force in COCOM, but its resistance to a more rapid relaxation of controls has drawn criticism from other members.

The United States supplements the COCOM list with restrictions that are unilaterally imposed. These additional restrictions are more controversial than the multilateral controls because they place American exporters at a competitive disadvantage against exporters in more liberal Western nations. The unilateral restrictions of the United States have been cited by some observers as a significant factor in the comparatively low volume of trade between the United States and Eastern nations.

The decision whether to require a validated license for any particular export is based on six factors concerning the commodity:

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25 The history and operation of CoCom is detailed in Berman & Garson, supra note 2, at 834-42. See also Comptroller General, Report to Congress on Export Controls: Need to Clarify Policy and Simplify Administration 7-18 (1979).


27 Wolf, A Note on the Restrictive Effect of Unilateral United States Export Controls, 81 J. POL. ECON. 219 (1973); Hoya, Changing U.S. Regulation of East-West Trade, 12 COLUM. J. TRANSNAT'L L. 1, 9-10 (1973). Hoya also notes that many American businesses prefer to manufacture and export from overseas subsidiaries rather than from the domestic parent in an effort to avoid United States restrictions. Id.
(i) Its essential features (distinguishing physical or operating characteristics; variations between types, models, grade, etc.; and the technical and strategic significance of these differences).
(ii) Its civilian uses.
(iii) Its military or military-support uses.
(iv) Its end-use pattern in the United States.
(v) Its technological state of development. (Whether it involves a new product and represents the current state of the art. Whether it contains advanced technology that can feasibly be extracted.)
(vi) Its availability abroad (whether the same or a comparable commodity is available from other non-Communist countries and where and by whom. Whether the foreign product is manufactured abroad with U.S.-origin technology or components). 28

The foreign availability finding is mandated by the EAA, which states that export controls based on national security shall not be imposed on commodities which are available without restriction from sources outside the United States. 29 The point of this provision is to avoid the needless restriction of United States exports where foreign availability nullifies the effect of an embargo. 30 The President is authorized, however, to find that despite foreign availability the export "would prove detrimental to the national security of the United States." 31 Theoretically, a presumption arises against restriction upon a showing of foreign availability. 32 Because of the wide discretion exercised by the executive branch and the secrecy of the regulatory process as it now exists, it is doubtful whether this presumption is taken literally by the responsible government agencies. Curiously, the regulations emphasize consideration of availability in non-Communist countries only. 33 Yet the availability of a commodity in Communist countries is equally important to the effectiveness of export controls where the purpose of the controls is to keep the commodity out of Communist hands. The EAA adopts the broader view by speaking of the importance of availability in the entire world market. The nar-

row availability standard expressed in the Department's regulations is therefore out of line with Congressional intent.

More important is the absence in the regulations of a consideration of the economic impact of export restrictions. While the EAA is unfortunately vague on the weight to be accorded to economic interests, the need to expand United States trade and strengthen the balance of payments has been recognized by Congress and integrated into the EAA declarations of policy. The failure of the Department of Commerce to add the economic value of exportation to its list of relevant factors emasculates the trade promotion policy as a counter-weight to trade restriction.

The EAA directs the Department of Commerce to consult with other interested executive departments and independent agencies in its determination of what commodities must be controlled. Private exporters are encouraged to submit recommendations concerning any commodity, but by virtue of the EAA's exemption from the requirements of the Administrative Procedure Act, the Department is not required to give public notice of what commodities are scheduled for consideration. A more valuable avenue for the participation of exporters in the rulemaking process is through the Technical Advisory Committees established by the Department, and composed of representatives from government and industry.

Applications for validated licenses are processed by the OEA, which may by itself approve or deny applications or refer them to other consulting departments. Applications are subject to review by the Department of Defense if the commodity is one listed by the Secretary of Defense as an item that "will make a significant contribution . . . to the military potential" of certain countries, and "would prove detrimental to the national security of the United States." The Department of Defense thus holds a

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25 Id. § 2404(a).
28 Id. § 2404(c); 15 C.F.R. § 390.1 (1978). But see text accompanying notes 234-41 infra.
statutory veto power in this review procedure.\textsuperscript{42} The Department of Defense also serves as a consulting department in the review of other licenses. Additional consulting departments include the Department of State, the Department of Energy, NASA and the CIA.\textsuperscript{43} The agencies and departments to which the OEA refers an application are largely determined by the nature of the interests affected by the application, or by the technical expertise required to review the application. As each department or agency receives an export application, the application may be forwarded to more specialized offices.\textsuperscript{44} Representatives from each of these departments and agencies meet periodically as an Operating Committee to consider and vote on license applications.\textsuperscript{45} The members of the Operating Committee strive to achieve unanimity on every licensing decision, a practice that has vested a veto power in each of the voting departments.\textsuperscript{46} The Commerce Department has resisted pressure to move toward a majority vote rule with the assertion that only a unanimity requirement will adequately protect national security or foreign policy interests.\textsuperscript{47}

Most applications not resolved at the administrative level of the OEA are resolved by the Operating Committee, but those that are unusually controversial may be referred to the Sub-Advisory Committee on Export Policy, consisting of deputy assistant secretaries of each of the participating departments. From that level of review applications may be referred upward to the Advisory Committee on Export Policy (ACEP), consisting of the assistant secretaries, and then to the Export Administration Review Board, consisting of the Secretaries of Defense, State and Treasury. Ultimately, the application may reach the desk of the President, who

\textsuperscript{42} Id. § 2403(n)(2). The President, however, is authorized to override any veto by the Secretary of Defense under this provision. \textit{Id.}

\textsuperscript{43} Comptroller General, \textit{Report to Congress on Export Controls: Need to Clarify Policy and Simplify Administration} 34 (1979). The OEA may request the aid of other agencies as the need arises. \textit{Id.}

\textsuperscript{44} \textit{Id.} at 37-42.

\textsuperscript{45} \textit{Id.} at 35-36.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} 1976 \textit{House Hearings, supra} note 4, at 315-16 (Statement of the Domestic and International Business Administration).
holds the power to make the final decision. Despite this elaborate review system, license applications seldom pass beyond the Sub-ACEP level.

Export license applicants are not afforded an adjudicative hearing on the merits of their application, since the export regulation process is wholly exempt from the Administrative Procedure Act's hearing requirements. The exclusion of the exporter from the proceedings is an especially severe measure since applications reach OEA with a presumption against approval. General information about the possible grounds for denial of the license, however, is available on request to the applicant, who may then submit relevant evidence and documentation. The most frequent questions which arise are those considered initially in the classification of the commodity on the Commodity Control List: 1) availability from Free World sources, 2) potential strategic uses, and 3) destination. License approval procedures are essentially a reconsideration of the merits of an export on a case-by-case basis, but at any point new arguments or evidence might be raised in favor of or against the export; or a shift in policy may change the grounds for the control of the export.

Delay in the approval of licenses has been chronic under the EAA despite periodic efforts by Congress to impose time limits...

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49 Comptroller General, supra note 46, at 4-5; G. Bertsch, Export Controls and East-West Trade: Comprehensive Strategy or Ad Hoc Responses? 7-8 (1978) (unpublished paper on file at the Dean Rusk Center for International and Comparative Law, University of Georgia School of Law, Athens, Georgia).

50 Comptroller General, supra note 46, at 4-5. In 1977, only five applications reached the sub-ACEP level, and none reached the ACEP or EARB. Id. The sub-ACEP is now used more frequently, but the ACEP and EARB remain in disuse. Bertsch, supra note 48, at 8.

51 Bassiouni & Bandau, Presidential Discretion in Foreign Trade and its Effect on East-West Trade, 14 WAYNE L. REV. 494, 521 (1968); Bingham & Johnson, A Rational Approach to Export Controls, 57 FOREIGN AFF. 894, 902-03 (1979); H.R. REP. No. 190, supra note 30, at 362, 364. In the 1977 Amendments to the EAA, Publ. L. 95-52, § 103, 91 Stat. 235 (amending 50 U.S.C.A. App. § 2403(b)(2)(B)) Congress made a limited effort to reverse the presumption, but this reversal of the presumption takes effect only on a showing of foreign availability. Moreover, once a commodity is placed on the Commodity Control List, the reversal of presumption sought by Congress is no longer in effect, and the burden of proof returns to the exporter. This is because exports requiring a validated license have already been determined to pose a threat to national security or foreign policy.


on the licensing process. The EAA now states that any application shall be approved or disapproved within ninety days, unless the Department of Commerce determines that additional time is needed and notifies the applicant of the circumstances of the delay. After ninety days the applicant must also be informed of "questions raised and negative considerations or recommendations made by any agency or department," although the precision with which the issues must be stated is doubtful. The applicant may then respond to the questions raised, and the deciding authorities are directed to "take fully into account the applicant's response."

Whenever a license application is disapproved, the applicant must be informed of the specific statutory basis for the denial. Since the reason for denial need state only its statutory basis, a recitation of the EAA's policy objectives (reasons of "national security" or "foreign policy") will qualify without further elaboration. Administrative appeals from the denial of a license application are confined to very narrow grounds. The Department of Commerce will hear appeals based only on "exceptional and unreasonable hardship" or discriminatory impact.

III. AUTHORITY TO REGULATE EXPORTS

A. Sources of Authority

The administration of export restrictions under the EAA by the executive branch is premised on a delegation of Congressional authority to the President. This authority has an original source in the constitutional responsibility of Congress to regulate commerce with foreign nations. The power to regulate commerce includes the power to prohibit absolutely those transactions which

56 Id. § 2403(g)(2).
57 Id.
58 Id. § 2403(g)(3).
61 U.S. CONST. art. I, § 8, cl. 3.
are detrimental to the public interest. Viewed exclusively as an exercise of the commerce power, the authority of the executive branch to restrict exports would be wholly dependent on the Congressional grant, and it follows that Congressional policy would be preeminent in the administration of export regulations. The international commerce power, however, cannot be segregated from other, independent bases of constitutional authority. Foreign trade is inescapably intertwined with foreign affairs and national security, and the power of the federal government to make and implement foreign policy and protect the nation from external threats may serve as alternative sources of power to regulate exports. That the foreign affairs and national security powers were contemplated by Congress as sources of authority is evident in the form of the EAA. Only the means of export regulation are set out in the Act. The policies which impel regulation are the general foreign policies which are made apart from the institutions or mandate of the EAA, and there is no limit to what foreign policies may be considered as requiring the regulation of exports. The EAA is thus a versatile tool for the use of the government in achieving an unrestricted range of legitimate foreign policy objectives. Viewed as a "necessary and proper" means of exercising the foreign affairs power, any constitutional limitations on the breadth of the authority to regulate exports would be determined from the character of the foreign affairs power.

A general power to conduct foreign affairs is implied by the Constitution. Specific attributes of the foreign affairs power are allocated by the Constitution among the federal branches and between the states and federal government, but the interstitial area of the foreign affairs power is neither granted to the United States nor distributed among its parts. The foreign affairs power might also be conceived as something existing apart from the Constitution. The primary authority for such a proposition is United States v. Curtiss Wright Corp., which upheld a broad delegation

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4 United States v. Darby, 312 U.S. 100 (1941).
4* In addition to the power to regulate foreign commerce, Congress is authorized to define and punish crimes against "the Law of Nations," U.S. CONST. art. I, § 8, cl. 10, to declare war, id. cl. 11, to approve agreements and compacts between states and foreign nations, id. § 10, cl. 3. The President is authorized to make treaties with the advice and consent of the Senate and to appoint ambassadors, id. art. II, § 2, cl. 2. Each grant of authority supplies the government with specific means for carrying out its foreign policy.
4* 299 U.S. 304 (1936).
of authority by Congress to the President to embargo arms exports to belligerent nations involved in the Chaco conflict. In a sweeping dictum, Justice Sutherland’s majority opinion described the foreign affairs power as an extra-constitutional authority arising as an inherent characteristic of sovereignty, rather than by constitutional grant.\(^\text{67}\) A disturbing implication of *Curtiss Wright* is that the exercise of foreign affairs powers is unbounded by the constitution, and that the President or Congress might run roughshod over individual rights on the assertion of a “foreign affairs” objective.\(^\text{68}\) Subsequent scholarly criticism has rebutted the historical basis of Sutherland’s theory.\(^\text{69}\) The analytical basis of the theory is equally unsound. It may well be assumed that a people can speak effectively as a nation in world affairs only through a central government, but it does not follow that the people *must* authorize the central government to do and say what it pleases. National foreign policy is formulated and implemented by national institutions, not by an imagined national entity. The people may certainly limit the authority of those institutions, as the American people have limited their federal government in internal affairs by the constitution.\(^\text{70}\) A theory which creates an authority above the constitution does violence to the intended distribution and limitation of government power. Nor is a theory of extra-constitutional authority necessary to enable the Federal government to administer foreign affairs. The expansive modern reading of the Commerce Clause provides one very broad constitutional base for much foreign affairs activity. The constitutional authority to make treaties, appoint and receive ambassadors, and declare war provides the essential tools of foreign policy, from which other needed but incidental tools may be implied. A theory of implied foreign affairs powers, however, would gravitate toward specific grants of

\(^{67}\) Id. at 318. The foreign affairs power was vested in the federal government, according to Sutherland, but the passage of external sovereignty directly from Great Britain to the Union. *Id.* at 316-317. The constitution, in his view, was intended primarily to allocate *internal* powers possessed by each state individually prior to the creation of the federal government. The failure of the constitution to enumerate and delegate a general foreign affairs power was therefore deemed by Sutherland to be of no consequence. *Id.* at 315.


\(^{70}\) See Reid v. Covert, 354 U.S. 1, 5-6 (1957); M. Beloff, *Foreign Policy and the Democratic Process* 16-18 (1955).
authority, and would be limited by the rights reserved to states and individuals. In accordance with a theory of implied foreign affairs powers, the Supreme Court since *Curtiss Wright* has repudiated the notion that an exercise of foreign policy is not restrained by the provisions of the constitution. The constitutionality of export restrictions on technological know-how was sustained by the Ninth Circuit Court of Appeals against a First Amendment challenge in *United States v. Edler Industries, Inc.* but the court held only that the First Amendment was not violated and conceded that in the case of a true conflict between constitutional rights and trade restrictions, constitutional rights should prevail.

A theory of constitutionally implied foreign affairs powers is not without its own difficulties. There has been a tendency on the part of the courts to speak of the foreign affairs powers generically, so that the precise basis for any foreign power may be obscured. As a result, the distribution of many of the foreign affairs powers among the federal branches remains unclear. There is also the danger that the special weight and urgency accorded to the government interest in some foreign affairs cases will spill over into all cases tainted by foreign affairs, with a consequent devaluation of state or individual rights. A discriminating

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72 579 F.2d 516 (9th Cir. 1978).

73 See, e.g., United States v. Pink, 315 U.S. 203 (1941), which was decided on the basis of a Presidential power to recognize foreign governments and make executive agreements. The Court failed to tie these foreign affairs powers to any constitutional provision, although it might have found specific support in the President's power to appoint and receive ambassadors. The categorical treatment of the foreign affairs powers was taken to an extreme in Sutherland's theory of extraconstitutional authority. United States v. Curtis Wright Corp., 299 U.S. 304 (1936). See also Henkin, *The Treaty Makers: The Law of the Land and Foreign Relations*, 107 U. Pa. L. Rev. 903, 920-22 (1959).

74 See, e.g., Hirabayaski v. United States, 320 U.S. 81, 100-01 (1943).

75 See, e.g., Perez v. Brownwell, 356 U.S. 44 (1957) where the Court upheld the withdrawal of citizenship and deportation of a person who had voted in a Mexican political election and remained outside the United States to avoid the draft. The source of Congressional authority was "its power to deal with foreign affairs." *Id.* at 59. Perez was later overruled by Afroyim v. Rusk, 387 U.S. 253 (1966). See also United States v. California, 332 U.S. 19 (1947) where the foreign affairs powers served as an argument in favor of the Court's decision to reject state territorial claims in the United States territorial sea. For a criticism
analysis is therefore required if the limits and organization of the foreign affairs powers are not to be blurred. In the case of export regulation, the most tenable constitutional provision which stands as a source of authority is the Commerce Clause. To cast the issue as one of foreign commerce reveals the lines of division between Congressional and Presidential powers.

B. Distribution of Authority

By its assignment of some foreign affairs powers to both Congress and the President, the Constitution dispels any thought that foreign affairs should be conducted exclusively by one or the other branch. The precise balance between the President and Congress has teetered through history. Curtiss Wright represents one extreme in endowing the President with preeminence in foreign policy. Except where guided by express foreign affairs provisions of the constitution, such as the treaty-making procedure, the foreign affairs power was, to Sutherland, refined only by principles of pragmatism. Since the executive branch, in Sutherland's eyes, was the most effective institution in making and achieving foreign policy objectives, he regarded the President as possessing primary authority in this realm, with or without Congressional grants of power:

[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Under Sutherland's theory of Presidential preeminence in foreign affairs, the Congressional delegation of power under the EAA might be regarded as superfluous. In describing the President as the "sole organ" of the government in international relations, Sutherland suggested that the President was more than a

of the opinion, see M. BALL, LAW OF THE SEA: FEDERAL-STATE RELATIONS AND THE EXTENSION OF THE TERRITORIAL SEA 59-60 (Dean Rusk Center Monograph No. 1, 1978).

76 In time of war, however, the regulation of exports might also be recognized as an exercise of the war powers. United States v. Barenbo, 50 F. Supp. 520 (D. Md. 1943).

77 299 U.S. at 319-322.

78 Id. at 320.
spokesman of the United States. Sutherland's second judicial pronouncement on Presidential affairs powers, *United States v. Belmont*,79 made clear that the President was not limited to making policy but was also entitled to *implement* policy by actions having the effect of domestic law. *Belmont* upheld the validity of an executive agreement by which the Soviet Union assigned all its outstanding claims against United States nationals to the United States government. A New York bank resisted a United States action for Russian funds deposited in the bank on the grounds that the agreement was not ratified by the Senate, and that New York law gave no validity to the Soviet Union's original ownership and assignment.

Sutherland regarded the executive agreement as a federal law superior to all state law.80 It might be inferred, therefore, that the President could unilaterally impose embargoes or lesser restrictions on exports when needed to protect United States interests in international relations. Yet there is enough qualifying language in both *Curtiss Wright* and *Belmont* to suggest that such Presidential action would require Congressional acquiescence at a minimum. Broad as the Presidential foreign affairs power may be, Sutherland conceded that Presidential power "must be exercised in subordination to the applicable provisions of the Constitution."81 The express constitutional allocation of the authority to regulate foreign commerce to Congress might therefore require obedience to a Congressional mandate to regulate exports only in a particular fashion. Moreover, *Belmont* left unclear the extent of the President's power to take actions having the effect of domestic law, since the executive agreement in that case did not impair any recognized property right of United States nationals. The Court was able to avoid a Fifth Amendment taking challenge to the assignment because the defendant bank had no interest in the funds beyond that of a custodian.82 Whether Presidential action could affect the rights and property interests of Americans without supporting Congressional legislation was not decided.

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79 301 U.S. 324 (1937).
80 Id. at 331-32.
81 299 U.S. at 320. The "applicable provisions," however, may include only those provisions of the constitution specifically directed at foreign affairs, such as the treaty making procedure. Levitan, supra note 69, at 490. Hence, individual rights such as due process would not necessarily limit foreign affairs powers under Sutherland's view.
82 301 U.S. at 322.
The broadest implications of *Curtiss Wright* and *Belmont* have since been pared by a more balanced view of the respective roles of Congress and the President. The prevailing theory is that the foreign affairs powers are shared by the President and Congress in a relationship in which Congress is preeminent. Although it may appear from time to time that the President exerts dominant authority in foreign affairs, the appearance results from a temporary failure of Congressional action, rather than Congressional powerlessness. This modern view may be traced to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.

The majority opinion in that case denied that the inherent power of the President enabled him to seize property in the interest of national security without legislative authorization. Jackson, however, admitted that under certain circumstances the seizure of private property might be accomplished by unilateral Presidential action. There exist, wrote Jackson, areas of overlapping Congressional and Presidential authority. Drastic measures taken to protect the nation from external threats may fall within a region of shared responsibility. Where Congress has neither acted nor expressed its will in a matter of shared responsibility, the President may act in accordance with the outermost limits of his authority. If Congress has legislated against Presidential action, or expressed its disapproval by voting down authorizing legislation, presidential power is at low ebb, consisting only of the constitutional power of the President minus Congressional authority over the same matter. On the other hand, the President's power is at its zenith where he acts in cooperation with Congress.

Following the Congressional-dominance theory of Jackson, Congressional statements of policy and procedure regarding export regulation, enacted into legislation, are fully binding on the President. As an exercise of the commerce power, export regulation is primarily a Congressional function. Even if export regulation was tied to a general foreign affairs power free of any specific constitutional provision, the Commerce Clause would give Congress a

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343 U.S. 579 (1952).

4 *Id.* at 635-38 (Jackson, J. concurring). See also Kent v. Dulles, 357 U.S. 116, 128-29 (1958), suggesting that what the President may not do alone in the interest of national security might be accomplished by the combined actions of the President and Congress.
share of the authority. Without the concurrence or acquiescence of Congress, the President could not restrict American exports by any Presidential foreign affairs power.66

Nor may the President supplement the regulatory scheme by taking action not in direct conflict with the EAA but inconsistent with the general intent of the Act. It is a corollary to Jackson's theory of Congressional preeminence that Congressional action preempts all inconsistent Presidential action.67 The issue of Congressional preemption poses many of the same questions long faced by the courts when asked to determine whether federal commerce power enactments preempt state law. A useful standard is suggested by *Hines v. Davidowitz,*68 where the Court framed the preemption issue as whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."69 Thus, in the administration of export restrictions, the President is bound by the procedural safeguards and policy objectives enacted by Congress. Any deviation by the President from the EAA which tended to frustrate Congressional objectives would be an unconstitutional usurpation of power. By the same delegation of authority which enhances the President's power, his power is also restricted.

C. Separation of Powers

To speak of one or the other political branches as being "dominant" in regulating strategic exports is of use only in resolving isolated points of conflict between the President and Congress. Though their functions may be separate and their interests often in conflict, the Congress and the President are interdependent. Sustained opposition between branches would immobilize the government. This interdependency arises from the separation of powers principle whereby the essential functions of government are allocated to separate organs. The separation of powers doc-

67 Id. But see Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), where the court upheld an executive agreement restricting imports from Japan although the agreement bypassed procedures for trade adjustments authorized by Congressional legislation. The agreement was a voluntary arrangement between the United States and Japan and was not domestically enforceable. Because it lacked the power of law, the agreement was not a legislative action in conflict with Congressional authority.
68 312 U.S. 52 (1940).
69 Id. at 67.
trine serves two purposes. First, it ensures that each government function is exercised primarily by the institution that is peculiarly suited to perform the function in a fair and efficient manner. Declarations of policy are the function of Congress, which alone of the three branches is representative of many diverse national interests and is most responsive to the public. Execution of the law is the function of the President, whose efficiency and singleness of mind are needed to implement the policy declared by Congress. Where the government undertakes focused deprivations of individual interests, the procedural safeguards characteristic of the courts qualify the judicial branch as the most appropriate forum to hear complaints against the government action.

Second, the separation of powers guards against the abuse of government power and invasion of state or individual rights by preventing a combination of each needed function within a single institution. Montesquieu, who is credited with first developing the theory of separation of powers, was primarily concerned with the danger of concentrated power:

When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch . . . should enact tyrannical laws, to execute them in a tyrannical manner.

A pure separation of powers, however, was not intended by the drafters of the constitution, and the overlap of functions between the three branches grew as the nation confronted new and unforeseen needs for which the three branches in their pure, original form were ill-equipped. Perhaps the most useful technique devised to tackle especially complex problems has been the delegation of Congressional authority.

By assigning its law-making function to a more specialized body, Congress promotes a more educated law-making process in areas where expertise is vitally important, and a more continuous, penetrating vigilance where rapidly changing circumstances require constant attention. The power to legislate may also be delegated to the President, to be exercised by him or his officers.

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* Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J. dissenting); The Federalist No. 70 (A. Hamilton).
* The Federalist No. 70 (A. Hamilton).
* The Federalist No. 47 (J. Madison).
The advantage of delegations to the executive branch rather than to an independent body may lie in the capacity of the President to coordinate the objectives of the delegation with other government operations. Indeed, the coordinating function of the President, including the responsibility to resolve conflicting legislation, is arguably one facet of the President's powers under the Constitution.95

In the field of international relations, there is a special need to anchor delegated authority to the President. Since international relations are far too complicated and mercurial to be approached with only a legislated foreign policy, Presidential policy-making is an essential complement to Congressional policy. The EAA illustrates the practical deference of Congress to the President in foreign policy. In its declaration of policy, the EAA asserts two objectives formulated by Congressional deliberations—to use export restraints as leverage to force the removal of trade restrictions of other nations, and to discourage support for "international terrorism." Even these Congressional objectives are too vague as mere policy statements to be implemented without substantial rulemaking and discretion by the Executive branch. To sweep in all other foreign policy objectives, of whatever branch, the EAA declares that export controls are to be used "to further significantly the foreign policy of the United States and fulfill its international responsibilities. . ." and to protect "the national security of the United States." These latter objectives are not Congressional policy statements at all but a license to the President to use export controls to implement a Presidential policy.

Very broad assignments of legislative authority pose a challenge to the separation of powers doctrine—a challenge which has not gone unnoticed by the courts. Especially when combined with an authorization to adjudicate, the delegation to the executive branch of the power to legislate yields the concentration of power which is the antithesis of separation of powers. The early response of the Supreme Court was that such a delegation is unconstitutional. In Field v. Clark,96 the Court declared, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and main-

95 "The constitution directs the President to take care that the laws be faithfully executed. . ." U.S. Const. art. II, § 3. The theory of the president's authority to harmonize federal law is advanced but rejected in Buff, Presidential Power and Administrative Rule-making, 88 YALE L. J. 451, 462-69 (1979).
96 143 U.S. 649 (1892).
tenance of the system of government ordained by the Constitution." Nevertheless, the Court upheld a statute which authorized the President to levy specified duties upon his finding that the nation of origin had applied inequitable duties against American products. "The true distinction," the Court reasoned, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution. . . . The first cannot be done; to the latter no valid objection can be made." Portending Sutherland's Curtiss Wright opinion, the Court also reviewed the long history of broad Congressional authorization to the President to use his discretion in the regulation of international commerce, and indicated a possible exception to the nondelegation principle in the field of foreign affairs.

While some of these [legislative] precedents are stronger than others, in their application of the case before us, they all show that, in the judgment of the legislative branch of government, it is often desirable, if not essential, for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.

Despite numerous subsequent intonations of the nondelegation doctrine, only two delegations of legislative authority have been invalidated by the Court. Strict adherence to the nondelegation doctrine would have blocked the growth of modern regulatory institutions which today are generally regarded as essential to the economic and social life of the nation. The technical distinction of Field v. Clark, that mere discretion in the manner of executing a law is not an authorization to make law, was insufficient in itself to save the rulemaking administrative agencies created by Congress in the twentieth century. Authorizations to regulate an industry "in the public interest" necessarily required the agency to make law if regulation was to occur in any principled, rational fashion. For a time the judicial response was to look the other way.

97 Id. at 650.
98 Id. at 693-94, quoting Cincinnati, Wilmington R.R. v. Commissioners, 1 Ohio St. 88.
99 Id. at 690-91 (emphasis added).
"The authority to make administrative rules is not a delegation of legislative power," was the answer of one court. Judicial reluctance to state the issue in more realistic and precise terms led first to uncertainty, and then to public outcry when the Supreme Court used the nondelegation doctrine to strike down two cornerstones of Roosevelt’s New Deal legislation in the course of a single year.

A new approach to the problem of delegated authority was signaled in *Yakus v. United States*, a case which upheld the Emergency Price Control Act of 1942 and its authorization to a Price Administrator to fix maximum prices and rents. Discarding the legislation versus execution distinction of *Field*, the Court turned its attention to a new and decisive consideration—the accountability of the agent responsible for the delegated authority. Congress need retain only the essence of the legislative function, which is "the determination of the legislative policy and its formulation as a defined and binding rule of conduct. . . ." The necessary details of the policy, the rules by which the policy is translated into enforceable law, may be provided by the agents of the Congress.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

Beyond the principle that the "essentials" of legislative action are constitutionally reserved to Congress, there is a standard of precision of delegation which assures that the legislative policy will be respected and enforced by the administrator. That standard is met when the facts and conditions on which administrative action must be based are so well defined that the administrator can know the bounds of his legal authority and be reviewed for com-

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101 Sawyer v. United States, 10 F.2d 416 (2d Cir. 1926).
103 321 U.S. 414 (1943).
104 Id. at 425.
105 Id. at 424.
pliance with his legal authority by Congress, the courts and the public. In this manner, the legislative process is never passed beyond Congressional control, and the constitutional responsibility of Congress for the resulting body of law is preserved.

The rule of Yakus might have been reserved for delegations of foreign affairs powers, resting as it did on an exercise of the war power. Nevertheless, the standard for delegation of legislative authority has served to greatly broaden the limits within which agencies of all types may be permitted to act. The special distinction of foreign affairs powers, however, persists. The Court has continued to recognize that in international relations, Congress may "paint with a brush broader than that it customarily wields in domestic areas." Since no Congressional delegation of authority since Yakus has been invalidated it can only be guessed whether a delegation too indefinite in terms to survive in the domestic field could in fact prevail for purposes of foreign affairs. There are reasons for such a distinction beyond mere administrative necessity. While the separation of powers doctrine suggests that it is for Congress alone to declare domestic policy with the force of law, international policy is subject to the concurrent authority of Congress and the President. Except to the extent that Congressional approval is needed to provide the President with authority to regulate the liberty and property of Americans, Congressional policies in international relations act more as restraints on Presidential action than as grants of authority. In many instances, an independent basis for Presidential action may be found in the President's enumerated constitutional powers.

The EAA achieves the minimum standards of the modern nondelegation doctrine only if it is conceded that a lesser degree of precision is allowed in matters of international relations. The direction that export controls be used to promote the national security of the United States is arguably within the standard of Yakus, for the EAA further states that the guiding policy for this purpose is that exports which may contribute to the military

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106 Id. at 426.
108 Zemel v. Rusk, 381 U.S. 1, 17 (1965).
109 In his responsibilities as Commander in Chief, U.S. CONST. art. 2, §2, cl. 1, and as treaty negotiator, id., the President is often required to make very broad judgments of foreign policy.
potential of any nation threatening the security of the United States must be restricted. The identification of unfriendly nations or the possibility that an export may contribute to the military potential of those nations necessarily involves very wide discretion, but not a discretion greater than that presently vested in some domestic regulators. The direction that export controls be used to promote the foreign policy of the United States, however, does not identify United States policy. Only on the strength of the President's independent authority to make policy ab initio can this delegation be supported.

If the President enjoys an independent authority to make foreign policy, it might well be asked whether any Congressional policy standards are necessary in a delegation of foreign affairs powers. Considering the natural weaknesses of Congress in foreign affairs, too much Congressional involvement may be destructive of an intelligent, coordinated foreign policy commanded by a single executive officer. The unmanageable size of Congress and its lack of leadership and confidentiality are frequently cited by critics of Congressional foreign policy making. Alexis de Tocqueville doubted the wisdom of democratic foreign policy-making long before the age of push-button wars.

Foreign politics demand scarcely any of those qualities which a democracy possess; and they require, on the contrary, the perfect use of almost all those faculties in which it is deficient. A democracy is unable to regulate the details of an important undertaking, to persevere in a design, and to work out its execution in the presence of serious obstacles. It cannot combine its measures with secrecy, and it will not await their consequences with patience. These are qualities which more especially belong to an individual or to an aristocracy; and they are precisely the means by which an individual people attains to a predominant position.

Nevertheless, Congress has special strengths not possessed by the President. Congress is more broadly representative of the

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110 See, e.g., New York Central Securities Corp. v. United States, 287 U.S. 12 (1932), decided under the narrower, pre-Yakus nondelegation rule but upholding the authority of the Interstate Commerce Commission to approve the acquisition of one railroad by another whenever it “will be in the public interest.” But see United States v. Robel, 389 U.S. 258, 272-73 (1967) (Brennan, J. dissenting). Justice Brennan found insufficient for lack of legislative standards a delegation of authority to the Secretary of Defense to determine what is “a defense facility.”

111 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 236-37 (H. Reeve trans. 1835).
people and hence more likely to reflect public values. Consultation between the President and Congress may be impractical for crises requiring immediate action, or for the details of foreign policy administration, but when a continuing regulatory device such as the EAA is established to attain foreign policy objectives, Congress can make a positive contribution in setting the bearings of policy. It will often be necessary for the President to exercise his power of initiative to take immediately needed military or diplomatic action. Export restrictions, however, will seldom be required as a tool for new Presidential policies before the consent of Congress can be gained. The weaknesses of Congress as an institution call for Congressional flexibility, but not abdication.

Congressional participation in the making of the policies governing the use of export restrictions may be especially useful in several respects. If the purpose of an export restriction against a particular nation is to serve as a demonstration of national will, Congressional approval of the restriction would add strength to the message. Moreover, policy decisions which have a direct impact on domestic interests must not be made by an executive branch oblivious to the internal repercussions of its actions. Foreign affairs actions having domestic effect require the lawmaking authority of Congress to assure that the affected interests will have some reasonable chance to be heard.

IV. ACCOUNTABILITY BY OVERSIGHT

A. Congressional Review

1. The need for congressional review. The principles of separation of powers require that each branch maintain vigilance over the others. The role of Congress on this scheme of checks and balances is to be watchful over the execution of its laws to insure that its mandate is followed properly. When Congress assigns its legislative authority to the executive branch, the need for continuous oversight is of even greater importance. If the law leaves no great discretion in the executive branch, only the integrity of the law is at stake. As executive discretion becomes broader, the very balance of power between the three branches is threatened. The standard of accountability announced in Yakus

seeks to restore Congressional preeminence by requiring measuring sticks of executive performance. Apart from the duty of oversight which follows from the separation of powers, there is an obligation of Congress as a public forum to remain responsive to the public welfare, and to correct, strengthen or repeal laws which the public observes to be weak or contrary to the public interest. This obligation is no less if the authority to make law is exercised in fact by independent or executive agencies rather than Congress. The modern tendency of Congress to delegate lawmaking authority as well as executive authority casts that branch more and more in the role of an overseer of the lawmaking functions of other bodies. The broadened oversight role has been commended by some writers. John Stuart Mill prophesied this development in representative democracies in his treatise, Representative Government:

Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors.\(^3\)

As Congress moves ever nearer to Mill's vision of the modern representative assembly, new questions are posed concerning the ability of Congress as an overseer of the making and execution of law. In order to preserve the values of separation of powers, Congress must retrieve its ultimate responsibility for the state of the law, whether promulgated by it or its created agencies. This responsibility cannot be maintained if the agency, armed with a far reaching mandate, is set adrift with no substantial ties back to Congress. Unfortunately, Congress lacks the attentiveness of an executive administrator. Its habit, described by one Senator, is to react from one imminent crisis to the next.\(^4\) Yet the oversight function may require much of the learning and circumspection which Congress first sought to avoid by delegating authority, and

\(^3\) J. S. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 239 (1910).

as the number of broadly empowered agencies proliferates, the resources and competence of Congress are spread thin.

Certainly Congress is not alone in the oversight role; it is joined by the courts, the President and the public. The effectiveness of these other overseers, however, is confined by the limits of their power and zealousness, and these limits are felt most in the foreign affairs and national security areas. The courts are least zealous in their review of agency action where the foreign affairs or national security powers are concerned, and in any event can only correct a transgression of the authority described in the Act. The President, like Congress, is unlikely to possess the energy needed for general surveillance of the agency, and may be situated in a policy position antagonistic to Congress. The general public lacks any meaningful opportunity for participation, since information about the agency is easily accessible only to a small and sophisticated circle of government officials and industry representatives. Even the regulated public may be severely hampered in its efforts to evaluate the responsible agency. Since agencies charged with responsibility for foreign affairs and national security may dispense with procedures for public participation common to domestic regulatory processes, those members of the public who are most concerned with regulation are often deprived of the most important means of oversight. Only Congress has both the incentive to protect the integrity of its mandates and the power to redirect the course of agency action with new legislation.

2. The implements of oversight. In order to meet the demands of its extensive oversight duties, Congress is divided into specialized committees which are devoted to the review of those agencies that are within the range of the committees’ concern. 115 Committee oversight contributes greatly to the efficiency of Congress. In addition to allowing individual congressmen to specialize in particular fields and promote the competence of Congress as a whole, the division of Congress into committees permits simultaneous review of numerous government operations. The devolution of the oversight function to the committees, however, detracts from one of the chief values of Congressional oversight, which is the provision of a representative forum.

Even with the aid of the committees, a continuous dialogue between Congress and the agencies is impossible. Under the EAA,

115 For a general description and criticism of committee oversight, see Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L. J. 451, 456-57 (1979).
for example, there are four possible occasions for formal review by the Congressional committees. The first is the pending expiration of the President's authority under the Act.\textsuperscript{114} The authority generally must be renewed at three year intervals, and the hearings which are preparatory to a renewal of authority offer the most effective opportunity for review.\textsuperscript{117} The second occasion for committee hearings is the budgetary authorization process.\textsuperscript{118} Authorizations are made during two year intervals, but budgetary hearings are typically limited to the need for increments in agency spending. Only where the budgetary authorization is inseparable from policy, as in the case of foreign aid, are issues of policy and performance likely to be raised at this stage.\textsuperscript{119} The third occasion for committee hearings is the proposal of new legislation. In practice, however, amendments to the EAA have been enacted or seriously considered only during the renewal of authority stage, a pattern which suggests that the concerned committees prefer to reserve their energies for the intense renewal hearings occurring at three year intervals. Finally, hearings may be scheduled to consider the President's nomination of candidates to fill the official positions responsible for export licensing. This opportunity for review appears to have been of no consequence, and the record of Congressional confirmations in general displays more indifference than oversight.\textsuperscript{120} Moreover, the President may delegate authority to agencies whose chief officer is not subject to Senate confirmation. The growing involvement of the National Security Council in the export regulation system has already threatened to obscure oversight of the executive branch via the appointments process.\textsuperscript{121} In sum, the link of accountability between Congress and the OEA is effectively reconnected only at the three year intervals when renewal of the Act is again under consideration.


\textsuperscript{117} See, e.g., 1976 \textit{House Hearings}, supra note 4.


\textsuperscript{119} Bruff, supra note 115, at 437-58.

\textsuperscript{120} \textit{Id.} at 458.

In their frustration with the lack of responsiveness within the export regulatory system, exporters have occasionally sought redress through informal Congressional oversight. By enlisting the aid of individual Congressmen, exporters can mobilize political pressure for the approval of specific export transactions.122 While Congressional intercession is often salutary, intercession cannot take the place of formal oversight. For the many small exporters who lack influence in Washington, intercession is not an available strategy. When individual Congressmen do intercede on behalf of their constituents, the result is something unintended in either the legislative or administrative process. Congressmen are elected not to adjudicate but to represent the public in the lawmaking process. Congress acting as a body serves democratic principles. If Congressional oversight is left to individual action, however, the necessary accountability of government to a nationally distributed political base is lost. A growing discontent among the courts with ex parte communications between adversary parties or lobbyists and decision making bodies may also ultimately curtail the usefulness of Congressional intercession.123

3. The barriers to oversight. Congressional oversight of OEA activities is made more difficult by the poorly defined policy objectives of strategic export regulation and the secrecy of the regulatory process. By authorizing the President to use regulation to achieve foreign policy goals of his own making, Congress has left itself without any standard by which to measure compliance with the Act. Oversight of the President's objectives and performance can only amount to an after the fact questioning of the wisdom of his established policy. Without standards, Congress must judge the success of the administration's regulation of exports according to the administration's objectives. Meaningful oversight of regulations based on foreign policy requires the involvement of Congress in the making of foreign policy. The EAA in itself provides no avenue for this involvement.

Many of the difficulties of Congressional oversight lie not


within Congress but in the structure of the executive branch. Although the administration of the EAA is centralized in the OEA, the authority to intervene and affect the outcome of any regulatory decision is scattered throughout the executive branch. The EAA itself grants to the Secretary of Defense a virtual veto power over any export license application which is of any potential military significance. The State Department holds a vote in the Operating Committee, and by reason of the customary unanimity requirement, also wields a veto power. Of more uncertain authority are those executive branch agencies and departments which stand at the periphery of the strategic licensing process. The Operating Committee consults freely with any government agency having a legitimate interest in the particular export item. Both the National Security Council and the Department of Energy have recently enjoyed increasing influence. Occasionally these outside agencies intervene with great political force. The mode of consultation and intervention takes no formal or regularized form, and the view of outsiders is that the regulatory process is apparently a chaos where the issues are hotly contested. In one controversial case, an application to export oil drilling equipment to the U.S.S.R. reached the President's desk after a failure of the interagency group to achieve unanimity. Following the President's "final" approval of the license—and after the exporter had begun to execute the contract—the objecting federal agencies intervened again and were successful in gaining a revocation of the license. A second review by the President resulted in yet another license approval and opposition to the export subsided. In the numerous contested cases which never reach the Presidential level, the veto power of the principal agency participants delays licensing decisions and prevents a rational balancing of national interests.

The dispersal of authority among these assorted departments of the government frustrates Congressional oversight by obscuring responsibility for the administration of the Act. The very purposes of concentrating authority in the President—coordination of operations and focused accountability—are lost by the assignment of authority to separate agencies. If the President were to hold

124 See text at notes 17-19 and 41-47, supra.
125 See UNITED STATES EXPORT WEEKLY, August 12, 1978, at A-1.
tight reins over the administration of the Act, these diffused powers might be held in check. However, only a small fraction of licenses receive significant Presidential consideration, and it is doubtful that the President could reasonably devote greater personal energies to the problem. The human limitations of the office compel the President to adopt the compromises worked out below in the bulk of all cases.

The result, in terms of accountability, is what Alexander Hamilton described as the problem of "magistrates of equal dignity":

> It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or a series of pernicious measures ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.\(^{127}\)

The difficulty of tracing the source of delays and erroneous judgment within the export licensing process attests to these observations. A number of departments bear responsibility for each decision. Neither the indecisiveness and unpredictability of the process, nor the potentially distorted compromises which the process produces can be blamed on any single actor.

The difficulty of Congressional supervision in this situation is compounded by the fragmentation of Congress into oversight committees. Those committees vested with responsibility for oversight of the OEA may have only marginal influence over other intervening agencies. The policies which each agency seeks to implement through export regulation may be developed apart from the export regulation process in offices which respond to different Congressional committees. Since these policies are often developed in advance of any consideration of export regulation possibilities, the committees concerned with export regulation may be cut off from the most critical stage of review.

\(^{127}\) The Federalist No. 70 (A. Hamilton).
4. **Enforcement of congressional policy.** If oversight is not to be a meaningless exercise, Congress must make its stated policies effective within the administrative system. Experience with the EAA demonstrates that law is not easily translated into action in the bureaucracy. After twice amending the EAA to establish time limits on the processing of license applications, delay in the approval of licenses continues to grow. In part this is due to the weak statutory language used by Congress. Any remedy for the aggrieved parties is precluded by the wide discretionary powers granted to the responsible agencies to ignore the time limits.

One lesson from the delay problem is that Congress cannot rely on its spoken word to be self-executing. Oversight is a joint operation between Congress and the public, but unless the regulated public is armed with a remedy, the enforcement side of the oversight function is likely to fail. As will be seen, the traditional principles of due process may provide an effective means of enforcing Congressional intent and restoring accountability directly from the agency to the public.

**B. Presidential Oversight**

The delegation of authority to the President to regulate strategic exports carries with it the responsibility for the manner in which that authority is exercised. Whether the powers conferred by the EAA are exercised directly by the President or through his subordinates, the delegation envisions that the President shall serve as the central locus of executive authority under the Act. Presidential responsibility facilitates congressional oversight, since supervision of a single officer having command of an entire operation is likely to be more rational and less confused than supervision of numerous independent officers of equal stature and inconsistent goals. Moreover, Presidential oversight adds a second layer of accountability which may compensate for the failure of effective oversight by Congress. As the President, like Congress, must appeal to the voting public, his office may be viewed as a surrogate forum for the weighing of national interests.

Unlike Congress, which simultaneously represents a great number of interests, the President serves a national constituency and therefore represents only the common denominator of

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128 See notes 55 and 56 supra.
130 Bruff, supra note 115, at 461-62.
the national interest. Congress is, for this reason, the preferred forum for the weighing of interests, but where Congress has delegated its authority to pronounce public policy, the President may serve as an acceptable delegate where an appointed official would not. It is at least questionable whether the courts would countenance a Congressional authorization to the Secretary of State to make foreign policy. A like authorization to the President under the EAA, however, has survived without challenge. The accountability of the President to the public is a basis for the courts' deference to his "political" decisions in matters of foreign relations and national security, for the President, much more than the courts, can claim to represent the public interest, and his policies are better tested by the voters than by appointed judges.

However well the political connection between the President and the public may work in the case of major issues of national interest, the President's accountability to the public in his administration of the EAA is minimal. Strategic export regulation is not likely to capture the public's attention. News coverage of export regulation is largely confined to a small number of services read only by specialists in the field. If the Act was administered personally by the President, the story might be different. Instead, the President manages only brief and infrequent forays into export regulation and leaves all other decisions to the bureaucracy. Nor will the public hold him accountable for actions taken at the lower levels of the executive branch. Only the actions of his closest subordinates are normally attributed to the President.

The lack of Presidential control of export regulation is all the more troubling because there is no single subordinate who exercises central authority. There are, rather, a series of agency advocates working toward different ends. While interagency conflict is sometimes desirable as a means of creating an adversarial setting for discussion of policy, it can also be destructive of rational
decision making. The balancing and accommodation of national interests which ought to occur in interagency deliberations under the EAA has been complicated by the unanimity rule, which allows any single interest to obstruct all competing interests. Effective policy leadership from the top might promote greater harmony in the export regulation process, but such leadership has not been provided. Hence, the coordination and accommodation of government regulatory objectives which was sought by delegation to the President has not been achieved.

C. Judicial Oversight

1. Review of authority. Judicial oversight of administrative agencies engaged in rulemaking and policy functions serves as the third leg of the Yakus accountability standard. Unlike Congress or the President, the courts normally do not concern themselves with the quality of agency action. Rather, they monitor the consistency of agency performance with agency authority. Agency authority is typically judged according to two statutory guidelines: 1) the legislative enactments which established and empowered the agency, and 2) the procedural requirements of the Administrative Procedure Act.\textsuperscript{135} Since the EAA exempts export regulation from the Administrative Procedure Act,\textsuperscript{136} however, one must look solely to the EAA for the measure of the Executive's statutory authority to control exports. The EAA is singularly inadequate for this purpose.

The bases of agency-formulated objectives under the EAA are immune from judicial review provided the Executive branch can present a colorable claim of foreign policy or national security. This result inheres in the foreign affairs character of export regulation, and in the EAA's declaration of goals that can be defined only in the ongoing political currents of the executive branch. Decisions about what nations are dangerous to our national security, or whether governments engaged in human rights violations should be punished are classic examples of issues that the courts have found to be "nonjusticiable" under the political question doctrine.\textsuperscript{137}

Action taken by the executive based on foreign affairs powers may be challenged as unauthorized by law where statu-


\textsuperscript{136} 50 U.S.C.A. App. §2407 exempts the EAA from all but section 552, dealing with public access to agency documents.

tory limitations are clearly exceeded, or where the action has a necessary factual foundation that is plainly missing. The EAA, however, imposes no effective limits on the purposes for which export controls might be used because it permits the use of controls for any foreign policy. Nor do the national security objectives of the EAA require any specific factual basis for the imposition of controls, since any amount of trade with a foreign nation may enhance the economic strength of the importer or allow it to shift its economic resources toward the production of military equipment. As long as American goods are superior in quality to those of competing foreign goods, or overriding national security interests are asserted, the requirement that the restricted commodity must not be one which is freely available may be overcome by the Executive Branch. The decision to restrict exports of oil drilling equipment to the Soviet Union, for example, may have been founded on the thought that any technology contributing to the economic growth of the Soviet Union would indirectly benefit Soviet military forces. Exporters may reasonably question whether an oil-hungry Soviet Union will be more pacific than an energy rich Soviet Union, but such a challenge will not succeed in overcoming the minimum rationality required of political or policy judgments. Congress apparently hoped that restricted exports would bear more than a slight and indirect relationship to military potential, since it directed that export controls should be applied to "goods and technology which would make a significant contribution to the military potential of any other nation." The courts, however, are likely to choose not to make independent judgments about what is "significant" in matters of national security.

Some scholars have urged that more rigorous judicial review may be appropriate where policy decisions are made by politically anonymous officials in the bureaucracy. As Presidential oversight

139 A required factual basis may be found underlying even independent constitutional powers of the executive branch. Certain actions taken by the exercise of war powers, for example, must be based on a finding of active hostilities. Charleston Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924), quoted in Baker v. Carr, 369 U.S. 186, 214 (1962); Sterling v. Constantin, 267 U.S. 378, 399-401 (1922).
140 Bertsch, supra note 48, at 11-12.
becomes increasingly ineffective, the argument that the courts must defer to the politically accountable branch in matters of policy becomes less compelling. But the political question doctrine also rests on the difficulty of finding judicial standards by which to judge questions of policy. Judicial review must therefore be limited to the procedural adequacy and authority of executive branch decisions.

2. Review of findings of fact. Judicial review of the administration of the EAA might be made more effective if the factual foundation of each agency decision could be separated from the policy foundation. For example, the availability of foreign sources of supply that would negate the effect of United States controls is not a political question but a question of fact. Similarly, the issue of the military usefulness of a commodity must have a basis in fact. If these issues could be clearly defined as the essential foundation of agency action, or were required as a foundation for any agency action, the courts could then test the evidentiary support for the decision to restrict a particular export. Substantive review of the decision under the statutory, “unsupported by substantial evidence” standard ordinarily appropriate in judicial review of administrative adjudications is precluded by a special exemption for the EAA, but the rationality of the agency decision must nonetheless pass constitutional muster under the rule that agency action must not be arbitrary or capricious.

Unfortunately, no record of the administrative process leading to the decision and no statement of the particular reasons for decision are available for review under the EAA. The difficulties faced by the challenging exporter in supporting a claim of arbitrariness are therefore virtually insurmountable. In Daedalus Enterprises, Inc. v. Kreps, a manufacturer of remote sensing equipment sought an order to compel the Department of Commerce to issue a validated license for an export to the People’s Republic of China. Since the specific basis for the decision was unknown, Daedalus also asked the court to require the Department to disclose the

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reasons for the decision to Daedalus, or in the alternative, to the court for in camera inspection. Due to the pendency of a hardship appeal by Daedalus to the Department, the court invoked the rule for preliminary relief that the plaintiff must demonstrate substantial likelihood of success on the merits, irreparable injury, and the absence of substantial harm to the public interest. Considering the last two factors, the court observed:

This court is a court of limited jurisdiction being asked in this instance to grant extraordinary relief. The sale of remote sensing equipment and technology to the People's Republic of China and the impact thereof upon the national security of the United States raises a political question entrusted to the jurisdiction of the Executive Branch of the United States. . . .

* * *

The public interest mandates that the Executive Branch of the Government adjudicate and determine the question of what constitutes national security.\(^{150}\)

Though the court in *Daedalus* may have been correct in assuming that "what constitutes national security" is in part a political question, the decision that the particular devices are dangerous also requires a judgment that is based on fact. But the case demonstrates the helplessness of the courts in reviewing agency action when agency procedures and legislative guidelines allow political judgments to serve as an absolute cover for determinations of fact. If policy judgments are not broken down into the factual conclusions upon which they rest, the political question doctrine will sweep aside any opportunity for judicial review.

3. *Review of agency procedures.* In addition to limitations on the authority of agencies, enabling legislation typically lays down specific procedures for agency rulemaking or adjudication, or applies the procedural rules of the Administrative Procedure Act. Procedural rules make the agency process more visible, and therefore better exposed to the oversight of Congress and the courts. Lacking the supplementary law of the Administrative Procedure Act, the EAA offers little guidance for procedural review.\(^{151}\) In place of the public notice and participation provisions typical of domestic rulemaking schemes,\(^{152}\) the EAA requires only

\(^{150}\) Id. (emphasis added)

\(^{151}\) See text at notes 135-36, *supra.*

that "the Secretary of Commerce shall use all practicable means available to him to keep the business sector of the nation fully apprised of changes in export control policy and procedures." No particular procedure is mandated by the legislation, and the procedure adopted by the Department of Commerce is without any formal hearing of either the rulemaking or adjudicative models.

Although a minimum of procedural safeguards have been introduced for the approval or denial of individual license applications, the process by which policy is made and the manner in which it is applied is not outlined by law or regulation. In denying license applications, the agency need state only the statutory basis for the decision. Laconic statements explaining that the application has been rejected for reasons of national security or foreign policy suffice under this statutory requirement. Additional procedural rules are triggered only when the Department fails to approve or deny a license within ninety days. The most important of these rules, that the applicant must be informed of the questions which have been raised by any government agency or department with regard to the application, allows only written communication between the applicant and the agency and does not guarantee an opportunity to examine the opposing evidence.

4. Review of agency effectiveness. The frustration of judicial oversight via statutory authority and procedure standards is not unique to the EAA. The inadequacy of these tools for review of other agencies has led some courts to rely on alternative techniques of review which look to the effectiveness of agency behavior. In reviewing agency effectiveness, the court may ask what result Congress intended by enacting certain legislation, and whether the agency has acted in a manner which, though not in violation of its statutory authority, has thwarted Congressional objectives. The remedy in such a case is not invalidation of agency action but the prescription of new procedures which are "implied" by the Congressional objectives. In White v. Mathews, for example, the Second Circuit ordered the Social Security Administration to decide, or accept without further consideration, applications for disability benefits within a stated time limit, since delays in the administration of the Act had undermined the very purpose of the disability program. The court imposed its time limit notwithstanding-

154 559 F.2d 852 (2d Cir. 1977).
ing strong evidence of a Congressional intent not to bind the agency to time limits.

The agency effectiveness standard might be applied to the export regulation system on the ground that the economic interests set forth in the EAA have been undermined by delays in the processing of license applications. The delays in the approval of licenses may present an even stronger case than White, since Congress has, in the EAA, expressed its intent that applications be decided within a stated time limit. If circumstances prevent a decision within ninety days, the Department may so inform the applicant and supply the reasons for the Department's hesitancy. Congress intended that exceptions to the time limit should be used responsibly, and delays not based on legitimate uncertainty would violate the purpose of the time limit provision. It is equally clear, however, that Congress intended to leave the executive branch with a flexible time frame in which to make its decisions. To the extent that delay is caused by policy conflict within the Department of Commerce or the Operating Committee, the statutory language tends to foreclose any judicial remedy. Moreover, the courts may be hesitant to apply the remedy suggested by White (automatic approval after expiration of time limit) where any policy conflict is demonstrated, since uncertainty in a decision affecting national security might be too high a price to pay for speedy disposition of export licenses. The effect of a court imposed time limit might be to force the Department of Commerce to summarily deny all applications not yet approved at the deadline.

5. Judicial review and due process. The possibilities for judicial intervention in the regulatory process are not exhausted by these statute-based standards of review. Even before the delegation theory of Yakus unfolded the courts had begun to wrestle with administrative government from the different perspective of due process.155 As the old restraints on delegation of legislative authority have loosened, many courts and commentators have noted that the accountability standard often malfunctions. Neither Congressional nor judicial review has succeeded in effectively controlling agency behavior. In order to restore ac-

155 See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) where the Court invalidated an overbroad delegation of authority, distinguishing earlier cases of approved broad delegation in which strict procedural rules served to prevent arbitrary agency action.
countability in the absence of precise legislative standards of authority, the courts have experimented with constitutional standards of review based on due process. Judge Bazelon, a chief spokesman for the new common law of administrative procedure, has pointed to the need for rules by which agencies may be made self-regulating:

"[J]udicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought."

The concluding section of this paper will examine the basic principles of due process and the manner in which these principles might be applied in the field of export regulation.

V. ACCOUNTABILITY THROUGH DUE PROCESS

A. The Character of Agency Action

Like the separation of powers principles which limit the delegation of Congressional authority, due process serves to reenforce the values of democratic accountability. At its core, due process demands that individuals directly and peculiarly affected by government action must be accorded timely notice of the prospective action, and an opportunity to present evidence and arguments on their own behalf. Due process treats accountability primarily as an individual matter, by creating an individual right to participate. But the individualized hearing requirement is not applied across the board to all government action. Lawmaking activity must of necessity be conducted in an informal manner, with no right of participation except for that of the elected representatives of the people. When government proceedings are ad-

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157 L. Tribe, supra note 92 at 512.
judicatory in nature, however, due process requirements attach with the greatest force. The use of individualized hearings at the adjudicatory level reflects the thought that responsible government can be guaranteed only by effective checks against abuse of discretion in the application of the law as well as the making of the law. While the nondelegation principle maintains accountability where law is made, procedural due process maintains accountability where law is applied. The due process clause of the constitution can also be explained as an expression of separation of powers: where government action is essentially adjudicatory, as opposed to legislative, the action must be carried out in a manner which corresponds to the procedures of the judicial branch. Thus, in defining the content of the due process clause, as it applies to administrative agency action, the courts have considered that the rules of procedure fundamental to the courtroom must, in varying degrees, be practiced by any arm of the government engaged in an adjudicatory action.

In determining what procedural safeguards might be constitutionally required in the regulation of exports, it is first necessary to classify the government action involved as either legislative or adjudicative. The character of administrative action is not always readily apparent. Agencies often take actions which are neither purely legislative nor purely adjudicative, but combine the attributes of both government functions. The courts have relied from time to time on any of three different tests to classify agency action. A distinction between forward looking declarations (legislative) and backward looking declarations (adjudicative) has been drawn by some courts. If the agency declaration affects only future conduct, it may be said that the agency is acting as a legislature and should not be bound by the rules of the courtroom. On the other hand, a declaration which defines the legal consequences of past conduct is much the same as the judgment of a court, and the fact that the judgment is rendered by an agency rather than a court should not release the government from its obligation to provide a fair hearing.

158 Sinaiko, supra note 158, at 237; Tribe, supra note 92 at 475-77.
161 E.g., Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). The past versus future test is also reflected in the constitutional ban against ex post facto laws by act of Congress. U.S. CONST. art. I, § 9, cl. 3.
While the past versus future dichotomy generally corresponds to the legal consequences of legislative action versus judicial action, it often produces absurd results. The fair hearing requirement has never been relaxed for judicial proceedings leading to injunctions or other orders having prospective effect, yet the past versus future test, if applied to courts, would result in the conclusion that a fair hearing might be denied in such cases. Prospective orders also may be issued by an agency where a denial of a fair hearing would still seem to violate the heart of due process. Should the past versus future test be applied to export licensing, for example, any argument for due process would be foreclosed, since license approval or denial has only prospective effect. Nevertheless, the approval of licenses to engage in various other regulated enterprises is normally subjected to the full panoply of administrative due process. This exception to the past versus future test is based on the conviction that government proceedings which are aimed at particular parties are inherently unfair if the parties singled out are not granted significant participatory rights. The right to a hearing, to present evidence and to cross-examine witnesses helps to mitigate the imbalance of strength where the government chooses to confront select individuals rather than declaring universal law which must be explained to the public as a whole. Thus, some courts have stated that agency action which has a general effect may be taken without a formal hearing, while action which affects specific parties is adjudicative and must follow a due process fair hearing.

This second test of the character of government action, resting on a distinction between declarations of general versus specific applicability, avoids the pitfalls of the past versus future test, but has limitations of its own. Again, the actual role of the courts and legislatures in our society belies any mechanical test of what is a judicial function. Some civil actions may result in judgments affecting thousands, and yet it is established that the proceedings must follow the rules of a due process fair hearing. Legislative enact-

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182 The Administrative Procedure Act provides that licensing hearings shall be treated as adjudicative. 5 U.S.C. § 551(6) (1976).
183 TRIBE, supra note 92, at 476-77; Sinaiko, supra note 158, at 888; Note, The Supreme Court, 1964 Term, 79 HARV. L. REV. 105, 121 (1965).
184 E.g., Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915). The general versus specific test is also reflected in the constitutional ban against bills of attainder, which prevents trial by legislative method. U.S. CONST. art. I, § 9, cl. 3.
ments affecting a much smaller number of parties are valid despite the absence of any elements of procedural due process.166

If the general versus specific test did reflect the essential differences between the legislative and adjudicative functions, it would still be necessary to determine what number of affected parties should trigger due process requirements. Any line-drawing for the application of due process principles based on numbers of affected parties would necessarily be arbitrary. The licensing of particular export transactions under the EAA would fit easily into the adjudicatory class if the general versus specific test were applied. The placement of types of exports on the Commodity Control List, however, may affect a very small number of manufacturers—possibly only one—or the number of manufacturers affected may be very large.

A third test that has gained considerable currency complements the past versus future and general versus specific tests by looking at the decision making process with particular regard for the nature of the “facts” on which the declaration is based.167 The adjudicative versus legislative facts test illuminates the fundamental principle of due process that some kinds of judgments should not be left to mere speculation after informal debate. Decisions which are based on a finding of particular facts or occurrences must be made as accurately as possible if the law is to be applied in a fair and rational manner. Adversary proceedings, with the full participation of those persons most directly concerned with the outcome, provide the best insurance for rational judgments where a truly scientific method of inquiry is impossible.168

Legislative proceedings, on the other hand, generally result in a declaration of principles for all situations of a class. A legislature cannot make laws which are fine-tuned for each citizen. Legislative declarations are therefore based on generalizations about what is probably best for all. To make a fair generalization, the legislature can only draw a sampling of relevant data or allow for informal debate by the political representatives of very broad interests. A due process adversarial hearing would not be ap-

166 See, e.g. Nixon v. Administrator of General Services, 433 U.S. 425 (1977), where the Court upheld legislation placing the presidential papers and tapes of Richard Nixon in the custody of the General Services Administration.
167 See B. SCHWARTZ, ADMINISTRATIVE LAW 201-03 (1976).
appropriate for this purpose. Moreover, legislative findings may represent little more than value judgments which might be debated but which are in the end impossible to verify empirically.

As laws become more specific in impact, and therefore based on more particular data, it becomes increasingly difficult to differentiate legislative facts versus adjudicative facts. Nor does the legislative facts versus adjudicative facts distinction work consistently well even in the judicial context. A judge or jury is often called upon to make generalizations and value judgments in order to give content to such legal abstractions as the "reasonable man standard." Nevertheless, a legislative facts versus adjudicative facts analysis of the export regulation system reveals some clear instances in which adjudicative procedures would be appropriate. The military usefulness or foreign availability of a commodity are two adjudicative issues; other adjudicative issues might appear depending on the particular basis for the agency's decision. Foreign policy judgments, however, even when made with respect to a single export license, are generally value laden and cannot be subjected to a full due process hearing.

The legislative versus adjudicative facts test is merely an additional tool in determining what due process requires. No single test or combination of tests can always lead to a precise result. The Administrative Procedure Act relies primarily on the past versus future test with a special exception for licensing procedures, which must always be adjudicatory. Where strict application of the past versus future test would not comport with basic notions of due process, the courts have shown a willingness to rely on the alternative tests. That some decisions must be relegated to informal, legislative forums, however, does not require a complete sacrifice of the adversarial ideal. Earnest debate is still the best means of obtaining rational decisions compatible with national values, and representation of affected interests is the surest stimulus to earnest debate.

171 Id. § 551(6), (7), (9).
172 See, e.g. Geneva Towers Tenants Organization v. Federated Mortgage Inv., 504 F.2d 483 (9th Cir. 1974); D.C. Federation of Civic Association, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). The freedom of the courts to "add" due process procedures was curtailed by Vermont Yankee Nuclear Power v. National Resources Defense Council, 98 S.Ct. 1197 (1978), but the Court also indicated that requirements beyond those of the APA might be mandated where rules affected a very small number.
Between the extreme situations, where there can exist no doubt whether or not due process principles should be applied, there exists a continuum in which administrative action is best described as a hybrid of varying measures of legislative and adjudicative character. Within this range, due process need not be an all or nothing requirement.

Many actions taken by the OEA and other federal agencies under the EAA are distinctly adjudicative despite the lack of fundamental procedural safeguards. Each proceeding to approve or deny a license is adjudicative in the classic sense. The effect of the ruling is prospective, but it is binding on one party and one application only, and many of the conclusions upon which it is based rest on a consideration of adjudicative facts. Even the decision to place certain types of exports on or off the Commodities Control List may be adjudicative in nature, especially where the number of producers actually affected by the ruling is very small. In the Oshkosh truck case, \(^{173}\) for example, the Department of Commerce published new regulations of immediate effect just prior to the export by Oshkosh of heavy duty trucks to Libya. The new regulations required a validated license for the export of “off-highway wheel tractors of carriage capacity ten tons or more, and parts, to Libya,” which was a fairly precise description of Oshkosh’s pending deal. Neither trucks of a smaller size nor jeeps were covered by the regulations. Although the revision of the Commodities Control List was motivated primarily by the particular transaction between Oshkosh and Libya, the Department of Commerce imposed the restriction by the promulgation of a rule of general applicability.

B. Due Process and the National Interest

Defenders of the export regulation process have raised numerous public interest arguments against the use of due process hearings for the approval of exports. Of greatest concern has been the fear that hearings would overburden the agency\(^{174}\) and jeopardize national security by publicizing military and foreign policy secrets and restraining freedom of action.\(^{175}\) Yet the due process clause has been applied in the past in the face of compelling public interests in a conciliatory fashion. The introduction of


\(^{174}\) See e.g., 1976 House Hearings, supra note 4, at 523 (statement of A. Downey).

\(^{175}\) Id. at 521.
principles of due process does not require the use of courtroom trial procedures in every instance.

Procedural due process was originally thought to guarantee only the right to a trial in accordance with the common law tradition.\textsuperscript{176} As the government grew and experimented with new means of regulation, the principles of due process were extended to administrative actions to deny Congress and the legislatures the power to enact any procedure which they might choose.\textsuperscript{177} Even while due process was being applied to introduce new procedural requirements, the common law elements of due process were being discarded where an overriding contemporary need could be established. In holding against the common law requirement of indictment by a grand jury, the Supreme Court spoke in \textit{Hurtado v. California}\textsuperscript{178} of the variability of the due process clause:

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.\textsuperscript{179}

The applicability of the various elements of due process in the administrative setting has been largely mooted in most fields of regulation where the Administrative Procedure Act has established the Congressional standard for fair proceedings. The Administrative Procedure Act divides administrative actions into rulemaking actions and adjudicative actions, and prescribes separate procedures to assure fairness in each kind of proceeding. Adjudicative proceedings require notice to the affected parties, an opportunity to present evidence and cross-examine witnesses, and a decision based on the record of the proceedings.\textsuperscript{180} Rulemaking proceedings are less formal, requiring only general notice in the Federal Register and an opportunity for written or

\begin{itemize}
\item \textsuperscript{176} Linde, \textit{supra} note 158, at 237.
\item \textsuperscript{177} \textit{Id}; \textit{Hurtado v. California}, 110 U.S. 516, 531 (1884).
\item \textsuperscript{178} 110 U.S. 516 (1884).
\item \textsuperscript{179} \textit{Id.} at 531.
\item \textsuperscript{180} 5 U.S.C. \textsection 554 (1976).
\end{itemize}
oral comment by the public. Agency rules need not be based exclusively on the record.181

Despite this statutory standard for procedure, numerous exceptions to the coverage of the Administrative Procedure Act have produced a substantial amount of litigation testing the minimum judicially acceptable requirements of administrative due process. In *Mathews v. Eldridge*,182 the Supreme Court identified three factors to be weighed in establishing minimum procedural safeguards in any given administrative action:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.183

In the regulation of exports, the first two factors cited in *Eldridge*—the private interest affected and the risk of error under existing proceedings—weigh heavily in favor of a formal hearing for the approval of licenses. Although there can be no vested constitutional right to trade with foreign nations,184 due process rights attach whenever the government acts to deprive a person of the enjoyment of a substantial property interest, even if the deprivation is only an economic regulation of the use of the property interest.185 The private interest at stake in a single export transaction may range in value of up to hundreds of millions of dollars. Denial or revocation of an export license after substantial investment by the applicant may cause a severe financial strain or even bankruptcy for the enterprise.186 Of equal importance is the economic livelihood of local communities dependent on the manufacture of the export and of the nation as a whole in its

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184 United States v. Yoshida International, Inc. v. 526 F. 2d 560, 580 (C.C.P.A. 1975); Moon v. Freeman, 379 F. 2d 382 (9th Cir. 1967).
185 *See* TRIBE, *supra* note 92, at 509, 511.
186 *1978 House Hearings, supra* note 121, at 34 (statement of J. Gray). In Daedalus Enterprises, Inc. v. Kreps, No. 78-983 (D.D.C. May 18, 1978), the exporter was exposed to the loss of a multi-million dollar deal which would have exceeded its entire sales for the prior year, and was threatened with the loss of $140,000 in penalties to the importer.
effort to strengthen its balance of payments.\textsuperscript{187} The possibility of an error in judgment is substantial where the applicant is denied a meaningful opportunity to contest the challenges raised by government agencies against the license, and the continuing disaffection of Congress and industry with the results of export regulation indicates the need for a more rational and predictable procedure.

Also in the government's interest is the need to dispose of a great volume of license applications quickly. Both the cost of administration and the need of exporters to have a quick determination of their applications weigh in favor of a system that is highly efficient. The actual cost and delay of a shift to due process hearings, however, is easily overestimated. The total number of applications is substantial,\textsuperscript{188} but only those licenses not readily approved would require hearings.\textsuperscript{189} Unless the administrative burden proves to be overwhelming, the cost of due process cannot serve as a justification for the absolute denial of a fair hearing. In \textit{Goldberg v. Kelley},\textsuperscript{190} the Court ordered that the right to a hearing be extended to state actions terminating eligibility for welfare, despite substantial evidence of the great administrative burden that would ensue.\textsuperscript{191}

It is the weight of the government interest in national security and foreign policy which has been adduced most often to justify the OEA's departure from the traditional due process model.\textsuperscript{192} But the importance of these governmental interests should not be permitted to negate all due process protections if a reasonable ac-

\textsuperscript{187} See generally note 3 \textit{supra}. Export regulation may have its greatest impact as a deterrent to small technical enterprises that cannot afford the risk of investment in transactions which may finally be disapproved by the Department of Commerce. For a discussion of the importance of these enterprises in the United States economy, see Flender & Morse, \textit{The Role of New Technical Enterprises in the United States Economy}, reprinted in \textit{Export Policy Joint Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, and the Subcomm. on Science, Technology and Space of the Senate Comm. on Commerce, Science and Transportation}, 95th Cong., 2d Sess., pt. 7, at 179 (1978). See also id. at 41-42 (statement of Bardos).

\textsuperscript{188} In 1979, export license applications were predicted to total 70,000 for the year. Bingham & Johnson, supra note 51, at 902.

\textsuperscript{189} In 1975, for example, only about one percent of all applications were formally rejected. \textit{Export Licensing of Advanced Technology: Hearings Before the House Subcomm. in Int'l Trade and Commerce of the Comm. on Int'l Relations}, 94th Cong., 2d Sess. 71 (1976) (statement of A. Downey) [hereinafter 1976 \textit{Export Licensing Hearings}].

\textsuperscript{190} 397 U.S. 254 (1970).

\textsuperscript{191} See also Goss v. Lopez, 419 U.S. 565, 580 (1975).

\textsuperscript{192} See note 175 \textit{supra}.
commodation is possible. The history of the due process clause and its repeated clashes with national security interest supports the conclusion that the government is obligated to seek such an accommodation.

The Court has consistently held that the due process clause does not melt away in the face of a crisis of national security or foreign policy. Every exercise of Congressional authority, including the war-power, is accompanied by the constitutional demand that legislation be administered in accordance with due process of law. Instead of scrapping due process altogether where the need for discretion and speedy action are unusually great, the Court has adjusted its due process demands. "The requirements of due process," the Court noted in Zemel v. Rusk, "are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." In setting the proper balance between national emergency and due process the Court has often expressed a special deference to the judgment of Congress, but has not abdicated its responsibility to guard against unjustified encroachments upon the basic tenets of fairness. No particular formula has been followed by the Court in resolving conflicts between national security and due process, but a plausible solution is suggested by Ex Parte Milligan. First, the necessity for abbreviated procedures must be "actual and present," and second, due process must yield only as far as needed. "As necessity creates the rule, so it limits its duration."

The legitimate security interests in the restriction of exports necessitates a treatment unlike that accorded government interests in the orderly administration of welfare or other domestic programs. The procedures for export regulation must be styled to safeguard national security interests without eroding the most basic tenets of due process. It remains only to ask what procedures may be required.

195 Id. at 14.
197 71 U.S. (4 Wall.) 2 (1866).
198 Id. at 127. See also United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871).
VI. THE REQUIREMENTS OF DUE PROCESS

A. Due Process and Executive Policy

Just as due process has traditionally not been applied to legislative action, due process has also been denied as a rule of procedure in adjudication and the administration of law where a decision of the executive branch is made within its political discretion. The occasions for executive discretion in matters of foreign policy and national security are many, since the executive branch will often benefit from its independent political authority in the field of international relations. Thus, in reviewing executive branch administration of foreign policy based regulations, the Court has distinguished considerations of foreign policy from the manner in which policy is executed.\(^{199}\)

This conceptual division between policy, and the application of principles already formulated to particular parties and circumstances, parallels the division between legislative and adjudicative functions which marks the theoretical boundary of administrative due process. The argument against due process in the making of policy is more compelling where government action involves an exercise of its foreign policy discretion, if the executive branch is truly imbued with an independent foreign policy power.

But, having set the direction and course of policy, agencies and executive officials can only implement that policy by due process of law, regardless of the national security or foreign policy interests which are the basis of the policy. What due process demands in the absence of a ready-made procedure such as that provided by the Administrative Procedure Act cannot be answered with a single solution good for all circumstances. Rules of procedural fairness must reflect the essential values of due process, yet be structured to properly safeguard legitimate security needs. In the administrative context, three values may be distilled from the procedural rules now associated with due process. First, the administrative process must be visible. Decisions and rules made in secrecy undermine public confidence and destroy the necessary certainty of government policy. Second, the administrative process must be rational, for it is fundamental to the

\(^{199}\) Zemel v. Rusk, 381 U.S. 1 (1965); cf. The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903).
meaning of “fair” government that decisions must be based on an accurate portrayal of the facts, followed by a principled application of the law. Third, the administrative process must be responsive to the public, not only indirectly through the political institutions established by the constitution, but also directly to the public by encouraging broader, more meaningful public participation in the making and execution of the law.

B. Procedural Elements

1. Visibility. “A popular Government,” wrote James Madison, “without Popular information or the means of acquiring it is but a Prologue to a Farce or Tragedy; or perhaps both.” The appeal for a visible government permeates the constitution. It appears in the First Amendment demand for a free press and open communication between citizens; in the creation of a popularly elected legislative body; in the command that every criminal trial shall be public, with the right to a jury drawn from the local community; and in the due process requirement that no person shall be deprived of life, liberty or property without the benefit of a fair hearing. Visibility is that quality of government by which the public may comprehend the objectives, processes and limits of government authority.

If government action is to be confined by law, the principles by which the government shall operate must be publicized with sufficient clarity that the public can reasonably predict what the government will do under certain circumstances. Visible government enables the public to regulate its own affairs with some certainty

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200 Letter from James Madison to W. Barry, August 4, 1822, reprinted in 9 Writings of James Madison 103 (Hunt ed. 1910).

201 The void for vagueness doctrine is applied to invalidate statutes which would leave a reasonable man in doubt about what action might provoke government action. Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939). Exporters have prior notice, through the Commodity Control List, of what transactions must have prior approval, and are therefore sufficiently informed of what actions would lead to criminal liability.

The due process standard for precision of rules, however, is also applicable to government programs which dispense benefits or privileges. In Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) the court held invalid the debarrment of a government contractor because there were no published standards for debarrment. In Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968), the court ordered a government housing authority to draft standards to govern the allocation of 10,000 housing units to 90,000 applicants. Accord, White v. Roughton, 530 F.2d 750 (7th Cir. 1976); Baker-Chaput v. Cammet, 406 F. Supp. 1134, 1137 (D.N.H. 1976); Quad City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).
of what they may expect of the government in return. Predictable government is also essential to the democratic ideal, for it is a corollary to the rule of law that the law must be ascertainable. Unbridled discretion, exercised without principle, or by a secret principle, is a power without responsibility. Ascertainable standards of law must also be administered through processes that are visible to the public, so that principles of law will be properly applied, government authority will not be abused, and public and private rights may be enforced. An open process of administration builds public confidence in the government, and reinforces the legitimacy of our legal system through the intelligent participation and consent of the people.

The lack of ascertainable standards in the regulation of exports has drawn loud complaints by those who must "predict" how the government will view a particular transaction. One industry spokesman protested:

We cannot predict what it is we can and can't do. We cannot guarantee things to customers. We cannot assure customers of deliveries in any kind of time scale. We cannot plan our factory, our production. We cannot realistically as business people know what we are going to do. Predictability is the problem.

The absence of ascertainable standards is pervasive on the broad policy level as well as the technical level. United States foreign policy at any particular moment can often be determined only from unofficial pronouncements by the President or his advisors. The failure of the government to publish in rule form foreign trade objectives, and how those objectives are to be attained through the use of export controls, can seldom be justified by the need for secrecy. If export controls are imposed as a demonstration of national resolve, publication of the restrictions to be applied will normally be consistent with the foreign policy objective. Where expeditious action is necessary, nondisclosure of new policy or delayed disclosure should be the exception rather than

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203 See Bruff & Gelhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1377 (1977).

204 1978 House Hearings, supra note 121, at 41 (statement of G. Bardos).
the rule. The Administrative Procedure Act now contains a proper compromise between the public interest in rapid action to deal with truly urgent problems, and private interests in notification where summary action is unnecessary. Section 553 provides an exception to the notice and hearing requirements for rulemaking where notice would be "contrary to the public interest." Under the Administrative Procedure Act, however, the agency is held to account for its decision not to provide prior notice, since a "brief statement" of the need for summary action must accompany the new rule.

At a more technical level, the classification of commodities under the EAA fails to disclose the likelihood of approval. The Commerce Department has recently published a list of controlled commodities most likely to be granted export licenses, but the list includes only technological goods which have not been significantly upgraded within ten years. Since it is the American technological lead which promises most to restore the balance of United States trade, this concession is not likely to significantly improve the competitiveness of United States exporters. The general standards for approval published in the regulations provide some guidance, but leave very wide discretion in the agency, especially where applications are denied as a demonstration of policy rather than because of the military usefulness of the export.

Equally as disturbing as the lack of clearly defined standards is the invisibility of the processes by which exports are classified on the CCL and licenses approved or denied. Rulemaking procedures have traditionally not been subjected to the due process requirement of openness in adjudicative hearings. Only recently have some courts seriously questioned the immunity of rulemaking proceedings from the openness requirement. Procedures under the Administrative Procedure Act assure some public participation in rulemaking and require the agency to publish a reasoned basis for its decision.

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206 Id.
208 See text at notes 28-33, supra.
210 See, e.g., D.C. Federation of Civic Assoc., Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). See also note 172, supra; Hazard, supra note 158, at 94, arguing for a constitutional right to participate in rulemaking.
cedure Act for security reasons are generally free to promulgate rules out of public view. In addition to preventing any public check on the authority of the Commerce Department and Defense Department to classify exports, the lack of any public information on the basis of the classification makes a challenge of the classification difficult if not impossible, and leaves exporters uncertain about how the restriction might be applied against future transactions.

The secrecy of the license approval process can only be defended as a matter of national security and government convenience, since the licensing process is distinctively adjudicative. Only casual meetings between the applicant and government officials have been allowed in practice. The usefulness of these meetings, however, is impaired by the diffusion of authority among other federal agencies. The challenges raised or considered by these agencies cannot always be assembled in a single orderly presentation. As other agencies and departments become involved, the line of communication between the applicant and government becomes confused and even detached. Even exporters with a large and steady business and a familiarity with the OEA may lose any means of observing the progress of their applications when unfamiliar government agencies intervene. Without a formal hearing procedure, where objections can be raised and responses made in an orderly fashion, businesses with infrequent export experience are likely to be left in a state of confusion or ignorance. Because of the invisibility of the process, business cannot offer responsive information to the government or renegotiate the deal to assuage whatever doubts the government may have. Nor can business reassure the foreign importer as to when or even whether the license will be granted.

The secrecy of the process might be cured in part by reasoned explanations by the OEA for the extended consideration of export licenses beyond the ninety day period, as is required under the Act. Unfortunately, the OEA has often abused this procedure,

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See text at notes 232-33, infra. See also Timberg, Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation, 17 Ad. L. Rev. 159, 169 (1965), discussing the use of informal meetings by the State Department in the administration of other regulations.

See, e.g., 1978 House Hearings, supra note 121, at 43 (statement of G. Bardos).

Comptroller General, Report to Congress, supra note 46, at 1.

See text at notes 55-59, supra.
either by sending no explanation for the delay at all, or by sending only a very brief explanation which does little to enlighten the applicant.21

The OEA is also required to inform applicants of the reason for the denial of any export license, but only the “statutory basis” for the denial is needed. A rejection based simply “on grounds of national security” is common.218

The need to protect secret information or the integrity of the policymaking function does not require the shroud that has been placed over the export regulation process. Evidence which must be classified can be protected without obscuring the entire process as well. The Commerce Department now provides a fair hearing, complete with all Administrative Procedure Act safeguards, before the imposition of penalties for violations of the regulations.219 The adequacy of traditional means of protecting sensitive material is not more dubious where the proceeding is one for the approval of a license rather than the imposition of a civil penalty.

The invisibility of the export licensing procedure has implications beyond due process. Accountability under the delegation of authority principle is impeded because Congress as well as the public is left in the dark. The lack of coordinated oversight within the executive branch might also be attributed to the lack of any definite, formal procedure for combining the efforts of all interested federal agencies. Judicial oversight too is hampered by the absence of reviewable criteria.

2. Responsiveness. In its most rudimentary form, due process requires the right to be heard before a deprivation of life, liberty or property.220 Whether by oral argument, confrontation or written submission, it is essential to the accountability and fundamental fairness of the law that persons immediately and directly affected by government action be allowed to present their own case. The formality of the hearing and the extent of the petitioner’s role in the proceedings depends on the particularity of the proposed government action221 and the significance of the private and public

21 United States Export Weekly. supra note 122, at M-2 (statement of T. Christiansen); id. at M-6 (statement of Loeffler); 1978 House Hearings, supra note 121, at 30 (statement of J. Gray).

218 See text at notes 60-61, supra; 1978 House Hearings, supra note 121, at 20 (statement of J. Gray).


221 See text at notes 157-73, supra.
Rulemaking actions of appointed bodies are generally required by statute to allow written comment by the public after notice of the proposed action. On occasion the courts and Congress have required an opportunity for oral comment as the number of affected parties becomes smaller. In the adjudicatory setting, an oral hearing is the rule rather than the exception, and because the issues in an adjudication are highly focused, the right to confront and cross-examine adverse witnesses is also extended.

The primary function of the right to a hearing is to provide for an exchange of ideas and information upon which a decision may be based. As the impact of the agency action becomes more specific, the affected parties are more likely to possess unique knowledge and understanding of the problem. Participation by the affected parties then improves the accuracy and fairness of the final decision. Issues of international relations are likely to be based on information largely, if not exclusively, in the hands of the government. Only rarely could a formal adjudicative hearing gather broader or more reliable evidence. Yet export licensing decisions typically involve questions of the technical capacity and adaptability of equipment or know-how, of the availability of foreign sources of supply, and of the probable economic impact of a restricting regulation or a rejection of a license application. The government will often lack independent, technical expertise to intelligently evaluate complex and sophisticated goods. In these circumstances the participation of exporters is essential. If the regulatory system is closed to the regulated public, there is a danger that bureaucratic intransigence will set in, and the agency will become complacent with its own obsolescent information.

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222 See text at notes 176-81, supra.

223 E.g., Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971). The freedom of the courts to add new due process elements to the provisions of the APA was greatly curtailed by Vermont Yankee Nuclear Power v. National Resources Defense Council, 98 S.Ct. 1197 (1978), which equated minimum due process standards with the APA. The Court did observe, however, that in a rulemaking proceeding, safeguards might be required beyond those of the APA if very few parties were affected by the action.

224 Wilner v. Committee on Character & Fitness, 373 U.S. 96 (1963); see also 5 U.S.C. § 554(c) (1976).


226 Bonfield, supra note 212, at 229-30.
Complaints from the exporting industry suggest that the OEA suffers from this defect today.\textsuperscript{227}

A secondary function of the right to be heard is to lend greater legitimacy to government action in the eyes of those immediately affected and of the observing public. This emotive element of the right to be heard has seldom been expressly cited by the courts,\textsuperscript{228} but is widely accepted among scholars.\textsuperscript{229} Laurence Tribe has described this function of the right to a hearing as the "intrinsic" value of due process:

Whatever its outcome, such a hearing represents a valued human interaction in which the person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way; these rights to interchange express the elementary idea that to be a person rather than a thing, is at least to be consulted about what is done with one.\textsuperscript{230}

Even if individual decisions cause some dissatisfaction in the losing parties, in the long run the guarantee of a fair hearing is more likely to be perceived as "just" by the public, and to instill in the public greater confidence in the system. The lack of confidence of United States exporters in the regulatory process is symptomatic of the failure of the government to provide for any meaningful participation of exporters in the system. There is a widespread belief among exporters that they are afforded no opportunity to communicate effectively with the government, and that their arguments are ignored.\textsuperscript{231}

The informal meetings arranged by the OEA between its staff and license applicants have failed to provide the systematic interaction which is necessary to an orderly delineation of issues and presentation of evidence. Because of administrative difficulties and the policy of secrecy, the OEA is either not always fully aware of what arguments are circulating in other offices of the government or it is unwilling to reveal the arguments to the

\textsuperscript{227} E.g., 1978 Senate Hearings, supra note 121, at 19 (statement of J. Gray).
\textsuperscript{228} E.g., Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).
\textsuperscript{230} Tribe, supra note 92, at 503.
\textsuperscript{231} See 1976 Export Licensing Hearings, supra note 189, at 103-208.
As the parties dispose of one issue, resisting government agencies may periodically raise one new challenge after another, until the exporter has lost his contract by the passage of time. The right to confrontation, ordinarily deemed essential to adjudicative proceedings, may or may not be granted by the OEA. Because the OEA is exempt from all hearing requirements, any concessions toward a hearing are a matter of grace.

In order to draw on the technical knowledge of the export industry, the Commerce Department has established a number of Technical Advisory Committees composed of individuals drawn from various technology industries and government agencies. These committees contribute their expertise toward the development of general principles and the classification of exported technologies. Limited public participation in the meetings of the Technical Advisory Committees is permitted by the Department of Commerce regulations. But the Advisory Committees suffer numerous defects which impair their usefulness to either the government or the private sector. Committee members have asserted that they have only one-way communication with government officials. When committee reports are submitted pursuant to the specific request of the government, the results of the committees' labors receive little or no government comment. If the report is ignored or rejected, no reasons or criticisms are sent back to the committee. Many committee members believe that their effect on agency decisions is minimal.

The committees serve only to furnish the government with professional advice. They do not act as a medium for interaction between the government and industry. Committee members sit as individuals rather than as representatives of particular companies.

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234 See text at note 38, supra.


236 United States Export Weekly, June 20, 1978, at M-6 (statement of E. Loeffler); id., at M-7 (statement of V. Henriques); 1978 House Hearings, supra note 4 at 601 (statement of Western Electrical Manuf. Assoc.).

237 Senate Hearings, supra note 122, at M-2 (statement of Christiansen); id., at M-7 (statement of V. Henriques); 1976 House Hearings, supra note 4, at 353 (statement of Christiansen).
or industries. The deliberations and reports of the committees are often classified and removed from the view of private exporters. This cloak of secrecy has been thrown over the committees notwithstanding the more liberal but successful practices in other sensitive areas of government activity, such as defense contracting, where individuals within each company are granted clearance to examine classified documents. The secretive treatment of the Technical Advisory Committees isolates the committees from their respective industries and prevents them from serving as a communicative link. It is especially needed that committee members be allowed to refer problems back to their own companies to gather more specialized information when unique and difficult issues are raised.

Procedures following the model of the Administrative Procedure Act can be structured to safeguard national security and foreign policy while at the same time allowing exporters a useful role in the proceedings. The formulation and review of the Commodities Control List should normally be preceded by public notice of the exports to be considered and a hearing open to interested businesses. The Administrative Procedure Act already leaves sufficient discretion with agencies to allow the OEA to limit participation to written comment if necessary. Regulations finally issued should be accompanied by a statement of their purpose and basis, so that industries may come forward with new and relevant information as market conditions change. In the approval of licenses, applicants should be allowed a formal hearing before the rejection of their licenses. The challenges by all government agencies should be presented in an orderly fashion with a right to examine the adverse documents or witnesses. New objections should not be permitted after the hearing without a showing of good cause for the delinquency or a threat to national security.


256 United States Export Weekly, June 20, 1978, at M-7 (statement of V. Henriques); 1976 House Hearings, supra note 4, at 623 (statement of Computer and Business Equip. Manufacturers' Assoc.).


258 Id.

3. **Rationality.** The due process guarantee of openness and participation in administrative proceedings would be of limited value if some means was not provided to assure that the *results* of the proceedings corresponded to the authorized goal of the agency and the evidence presented before it. If the proceedings are to be fair, they must be structured to minimize as far as reasonably possible the chance of an erroneous or inequitable decision. Irrational decisions are injurious to the affected parties, who are denied what the law guarantees, and also to the public, which has directed the agency to achieve some public good and is entitled to decisions consistent with that objective.

Open procedures with an opportunity to respond are only an intermediate stage toward rational decision making. In the end, the officer responsible for the decision must assimilate the information and make his judgment. What transpires within the mind of the decision maker is largely beyond the review or control of any person or court, but a few due process principles have evolved to prevent conditions likely to lead to an irrational decision. At least in adjudicatory proceedings, the decision maker must be impartial, and must not engage in off the record *ex parte* communications with either side of the dispute. Although the thought processes of the decision maker are immune from examination, a written reason for the decision provides some basis for review.

The problem of *ex parte* communication and unreviewable decisions, however, is acute within the export regulation process. This problem stems from the interagency consulting procedures of the system and the exclusion of the exporter from interagency meetings. Exporters should be allowed to examine the record on which the decision is based to the maximum extent consistent with national security, and *ex parte* conferences with officials of consulting agencies should be used only to transmit security sensitive information. Reasoned opinions would help to assure rationality by making possible meaningful review by the courts and the public.

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243 In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court held that a financial interest of the decision-maker in the case caused a bias of sufficient magnitude to violate due process. In the administrative setting, however, bias must be more than a predilection or even prejudiced outlook before a court will presume that the decision is tainted. *FTC v. Cement Institute*, 333 U.S. 683 (1948).


Finally, it is necessary to the rational administration of the law that there is personal responsibility for the decisions that are made within the agency. This principle stems from the first of a series of Supreme Court cases known as Morgan v. United States. In Morgan I, the plaintiffs charged that the Secretary of Agriculture had signed a department order without having personally read or heard any of the evidence or arguments of the proceedings. The sole basis for the Secretary's decision was his consultation with department employees out of the presence of the plaintiffs. The Court reversed the order.

It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings — their conclusiveness when made within the sphere of the authority conferred — rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

More accurately, as the Court later conceded, the one who decides must at least be familiar with the written record taken by agency employees. Nevertheless, the rule of Morgan I is more valuable as an expression of an administrative ideal than as an enforceable standard of law. The ideal is that administrative decisions gain their legitimacy from a legal authorization to the particular persons who make the decisions. Morgan I was partially disarmed by Morgan IV, which held that administrative officials could not be questioned at trial concerning the processes by which they reached their conclusions or the manner and extent of their consideration of the record. What remains is the hope that administrative decisions will be made by accountable persons rather than impersonal bureaucratic institutions.

The immediate object of Morgan I was to assure that agency orders would be issued by one having legal authority to make the decision and a reasonable acquaintance with the facts of the case.

246 298 U.S. 468 (1936).
247 Id. at 481 (emphasis added).
248 313 U.S. 409 (1941).
249 Id.
This "personalization" of the fair hearing requirement has an importance beyond the legal and political accountability of the deciding official. It lays the foundation for rational government action. The centralization of decision making authority in a single, publicly known body or individual provides the parties with a single responsible judge to whom they may address their arguments. If the authority to decide is scattered or institutionalized, the danger is magnified that some arguments will pass unobserved by one or another deciding official. The export license application procedure is illustrative of this problem. Applications are sent to a variable assortment of departments and offices in a pattern that is unknown to exporters. The good rapport which some exporters have with the Department of Commerce is of little use when the application is laid before a more antagonistic agency. The OEA has attempted to familiarize applicants with the challenges that have been or will be raised by other Departments, but this information is often erroneous, incomplete or misleading.

If the issues raised by a license application are departmentalized and farmed out to specialized offices, there must at some point be a general review of all the evidence and proposed conclusions of fact. Especially where a balancing of interests is required, or where the issues are interrelated, the case must be considered in its entirety. The balance of interests will be upset if the final decision is made by those who view the case from a single vantage. Review by a single independent officer or board, or a majority vote of the interested departments tends to restore the equipoise of the decision making process, but export licensing decisions are presently subject to the veto of any voting department. Conclusions made by one department or agency, based on its own special concern and perspective, become overriding.

When a favorable decision is rendered on an export application, the exporter also has an interest in the finality of the decision. Where a single person or body has committed itself to a position, a reversal is likely only in the case of an unexpected turn of events. But if authority is widely scattered among disjointed agencies, conclusions reached at any point in the process may represent only momentary political victories of one or another faction, whose influence may ebb or flow with the next day. Since export licenses are subject to revocation at any time without notice, the stability

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250 See notes 232 and 233, supra.
of licensing decisions is of great importance. Decisions should be made by an independent body, or by a majority vote of the participating departments, whose votes could be weighted according the policies and objectives of the EAA. The result would be a more rational balancing of interests, and a greater finality of judgments. If one department objects that a vital national interest has not been adequately considered, an appeal to the next higher level of government, eventually as far as the President, would assure that each interest is accorded due significance, and would have the further benefit of leading to a more coherent application of government policies.

VII. CONCLUSION

The broad discretion vested in the executive branch by the EAA has failed to produce the coherence of policy that might have been expected for a regulatory system dominated by the President. In many respects, the executive branch has come to resemble the diffuseness of Congress, and the disadvantages of Presidential control remain prominent. Lacking the broad representation of domestic interests characteristic of Congress, the executive provides no public forum for the balancing of long range national goals. What remains for the President as an asset in foreign policy is his access to immediate information and his ability to decide quickly and act expeditiously. To combine the virtues of Congress and the President, it is necessary to return general policymaking to the Congressional forum, so that continuing policies may be forged in a democratic manner. In addition, a reasonable measure of discretion for urgent action may be reserved to the President within guidelines established by Congress for national security controls. Foreign policy objectives of a more general nature should be created in Congress with the support of the President.

It is very doubtful, however, that accountability can any longer be achieved by a simple calculus of separtion of powers. Congress must enlist the regulated public and affected communities as associate watchdogs through the extension of administrative due process. The responsibility for setting the new balance between fairness and foreign policy necessarily lies in Congress. The courts are unlikely to initiate the move toward due process in foreign commerce regulation until they are confronted with the most egregious cases of executive indifference to rights, and they
will be understandably reluctant to move beyond minimum administrative due process. A more exacting procedure, consistent with constitutional demands and the value of maximum accountability, must originate in Congress. The proposed increased role of Congress will infringe no constitutional prerogative of the President. The preeminence of Congress in making foreign policy and especially in the regulation of foreign commerce assures the power of Congress to link foreign commerce powers to a machinery that is tuned for the full implementation of Congressional policies.

The proposal of this Note should not be regarded as a radical idea. Extension of the Administrative Procedure Act to export regulation was early discussed by Congress but rejected principally because pervasive export regulation was at first viewed as a temporary measure.\(^\text{251}\) The lack of administrative due process in other fields of foreign relations regulation has been persuasively decried by other writers.\(^\text{252}\) The Administrative Procedure Act offers a workable model with built-in safeguards for national security, and could with slight adjustment be applied to export regulation. The national interest in accountable government, which is equal to the interest in security, will not be served by other than fair and open procedures.

\textit{Richard R. Carlson}

**ADDENDUM**

On September 29, 1979, Congress enacted the Export Administration Act of 1979. The new act follows the 1969 Act in many respects, but has also implemented some important changes. The statement of a policy of export promotion has been strengthened, and the President is required to report to Congress regularly on the necessity for any existing foreign policy controls.

New avenues have been opened for the participation of exporters in the composition and review of the Commodity Control List, and the responsible agencies are directed to attach more informative explanations to the denial of any export application. While much remains to be done, the new act represents a salutary move toward accountable government.

\(^{251}\) Berman & Garson, supra note 2, at 797-98.

\(^{252}\) See Bonfield, supra note 212; Timberg, supra note 213.