Export Control Reform 2010: Transforming the Legal Architecture of Dual-Use and Defense Trade Controls

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Abstract

This paper proposes reforms to the legal framework of the U.S. export control system. By examining the existing legal structure of dual-use and defense trade controls and its shortcomings, the paper considers how other U.S. legal regimes could provide models for ongoing reform efforts being undertaken by the Obama Administration and Congress. The paper proposes certain reforms, including the institution of added administrative safeguards and limited judicial review, to improve the current system.

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I. Introduction

The principal goals of the U.S. export control system are to protect U.S. national security and promote U.S. technological leadership. However, the system is an over 50 year old piecemeal framework which no longer structurally or substantively serves its purposes. So, how can the U.S. export control system be reformed to be more effective and achieve its desired ends? This question is currently occupying the White House, Congress, and industry in the latest efforts to reform the system. In August 2009, the White House announced the commencement of a full scale review of the dual-use and defense trade export controls to be led by the National Economic Council/National Security Council.[1] President Obama even mentioned the export control reform initiative in his State of the Union speech.[2] The House of Representatives is also contemplating potential legislative action early this year.

No successful reform effort would be complete without paring down the lists of products controlled, curtailing turf battles between cabinet agencies, and bolstering efforts to ensure that sensitive technologies are kept out of the hands of adversaries, among other high-profile priorities. However, there are other arguably fundamental problems with the legal architecture of the U.S. export control system that go to the heart of its effectiveness. Export controls are considered an essential national security function of the U.S. Government. As such, the system lacks many of the basic legal and procedural safeguards which are hallmarks of the U.S. legal system. National security must be a paramount concern in licensing and other decisions in the export control context. However, this does not mean that exporters should have to face

[1] Statement of the Press Secretary, The White House (Aug. 13, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-the-Press-Secretary/.
[2] President Barack Obama, State of the Union Address (Jan. 27, 2010) (available at http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address).

unfettered discretion by government officials or decisions inconsistent with governing statutes and regulations that are unreviewable – that is, all unsubstantiated, in the name of national security. An export control system that is a moving target actually damages national security by stifling U.S. business, undermining U.S. high-tech manufacturing, and in turn driving research and development and manufacturing abroad beyond the reach of the U.S. regulatory regime. Legal reforms of the export control system are needed both to ensure that agencies interpret and follow their governing laws and regulations in a predictable and transparent manner, and to provide recourse when the agencies do not. Added procedural safeguards need not disturb the critical national security calculus in these determinations.

This paper argues that national security and due process should not be mutually exclusive in this context. Improvements in the export control system's legal architecture, namely enacting robust administrative procedural safeguards and limited judicial review while simultaneously protecting classified information and national security determinations, will improve the workings of the system. This paper examines the current legal framework of U.S. export controls and the shortcomings of the existing legal regime, and considers how sister legal regimes under U.S. law could provide models for the reform efforts. Finally, the paper proposes certain reforms to improve the system, including the publication of redacted agency decisions to promote transparency, the creation of administrative records to substantiate agency decisions, and the institution of limited judicial review to create a robust corpus of export control law.

II. Existing Legal Regime

U.S. export controls today are administered primarily by the Departments of State and Commerce, the cabinet agencies which license defense and dual-use items, respectively. The

Departments of Defense, Energy, and other cabinet agencies as well as the intelligence community are also involved in the export control policy and licensing process.

The statutory basis for export controls has a long history. Although prior statutes existed, the precursor to the modern day export control statutes was the Export Control Act of 1949 (ECA) enacted in the early days of the Cold War.[3] The ECA was regarded as a temporary statute and thus was exempt from procedures required under the Administrative Procedures Act (APA) of 1946.[4] The APA,[5] the statute undergirding U.S. administrative law, provides for notice-and-comment safeguards for most rulemaking functions, establishes elaborate procedural requirements for agency adjudication, and also specifies an "arbitrary and capricious" standard[6] for judicial review of agency actions, but exempts from its procedures those agency actions concerning a "military or foreign affairs function of the United States."[7] It is important to note that the ECA was not exempt from APA procedures because Congress believed that export controls fell within the APA's military and foreign affairs exclusion.[8] The ECA was renewed several times and has served as the basis for the export control system in force today. Yet, the operative statutes remain exempt from the APA.

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[3] Ian F. Fergusson, *The Export Administration Act: Evolution, Provisions, and Debate*, Congressional Research Service 7-5700 (July 15, 2009) at 1-2.

[4] Paul H. Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U.Penn. L. Rev. 331, 333 (1959).

[5] Administrative Procedures Act, 5 U.S.C. 500 et seq. (2006).

[6] Id. § 706(2)(A). The Supreme Court has spoken on how the "arbitrary and capricious" standard must be treated by courts: "The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.' In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

[7] See 5 U.S.C. §§ 553(a)(1), 554(a)(4).

[8] Silverstone, supra note 4, at 333.

The primary statutory bases of the current U.S. export control system are the Arms Export Control Act (AECA) of 1976[9] and the Export Administration Act (EAA) of 1979.[10] The AECA is administered by the Department of State's Directorate of Defense Trade Controls (DDTC) and authorizes control over the import and export of defense articles and services.[11] The AECA has been implemented through the International Trafficking in Arms Regulations (ITAR), which contains the U.S. Munitions List (USML), the list of controlled defense articles and services.[12] DDTC processes licenses for these defense items in consultation with the Department of Defense.

The AECA states that the Department of State's designation of defense articles and services is exempt from judicial review[13] and the ITAR explicitly elaborates that the administration of the AECA is exempt from APA procedures as "a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the [APA]."[14] This means that DDTC has full discretion to grant, deny, revoke, suspend or amend licenses for defense articles and services without any form of review.[15] Moreover, none of these decisions are on the public record. Certain DDTC actions, including debarments, interim suspensions, and civil penalties, are granted perfunctory administrative review under the ITAR only within the Department of State where the Under Secretary for Arms Control and International Security

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[9] Arms Export Control Act, 22 U.S.C. §§ 2751-2994 (2006).
[10] Export Administration Act, 50 U.S.C. app. §§ 2401-2420.
[11] See 22 U.S.C. § 2778(a)(1).
[12] International Trafficking in Arms Regulations, 22 C.F.R. §§ 120-130 (2009).
[13] 22 U.S.C. § 2778(h).
[14] 22 C.F.R. § 128.1.
[15] Id.

makes the final decision.[16] Criminal enforcement actions enjoy full procedural protections of the U.S. federal courts.[17]

The EAA governs the export of U.S. dual-use commodities, i.e. those items that have both commercial and military applications, and is administered by the Department of Commerce's Bureau of Industry & Security (BIS). The EAA, which first expired in 1989, has been in lapse since 2001 and is continued by the President annually under the International Emergency Economic Powers Act.[18] Efforts to write a new EAA are currently underway in Congress. The EAA is implemented through the Export Administration Regulations (EAR) which contain the list of controlled items, the Commerce Control List (CCL).[19] BIS processes licenses through an interagency process which includes the Departments of State, Defense, Energy, and others (depending on the item to be licensed). In addition, exporters who want an official classification of their product or technology for BIS licensing purposes can submit a commodity classification request referred to as a "CCATS" (Commodity Classification Automated Tracking System).[20] The results of CCATS are not public and have no precedential value.

The EAA exempts BIS activities from the administrative process and judicial review provisions of the APA.[21] The EAA also protects information considered in license applications,

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[16] Id. § 128.13.
[17] 22 U.S.C. § 2778(c), (e).
[18] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (2006); see Exec. Order No. 13222, 66 Fed. Reg. 44205 (Aug. 22, 2001), most recently extended by Notice of Aug. 13, 2009, 74 Fed. Reg. 41325 (Aug. 14, 2009).
[19] Export Administration Regulations, 15 C.F.R. §§ 730-774 (2009).
[20] See Id. § 748.3; Guidelines for Requesting a Commodity Classification, http://www.bis.doc.gov/licensing/cclrequestguidance.html (last visited Jan. 25, 2010).
[21] 50 U.S.C. app. § 2412(a).

CCATS, and other BIS determinations.[22] Thus, in addition to national security concerns over making these agency documents public, BIS is prohibited from doing so under law. The appeal of a denied BIS license can take two distinct administrative processes, depending on the circumstances. Where there is interagency disagreement on a licensing decision, an agency can appeal the determination to the staff level interagency committee, the Operating Committee; subsequently to the Assistant Secretary level Advisory Committee on Export Policy (ACEP); through to the cabinet level Export Administration Review Board (EARB); and finally to the President.[23] There is no judicial review of OC, ACEP, EARB, or Presidential decisions.[24] License applicants do not formally participate in this interagency appeal process, although they often communicate informally with and provide supplemental information to agency officials. Where there is no interagency disagreement, those applicants who have had their licenses denied can appeal their case directly to the Under Secretary for Industry and Security (BIS Under Secretary) whose decision is final and not subject to judicial review.[25] Administrative enforcement actions allow appeals to an Administrative Law Judge and the BIS Under Secretary through to the Court of Appeals for the District of Colombia.[26] Criminal enforcement proceedings are granted the full procedural protections of the U.S. federal courts.[27]

There are situations where an exporter may not know whether the EAA or AECA is the applicable statute and, in turn, whether the item to be exported requires a State or Commerce license. In such cases, the exporter customarily requests a commodity jurisdiction (CJ).

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[22] Id. § 2411(c).
[23] Exec. Order No. 12981, 60 Fed. Reg. 62981 (Dec. 8, 1995). In reality, appeals rarely progress beyond the ACEP.
[24] Id. at 62985.
[25] 15 C.F.R. §§ 756.1-.2.
[26] Id. §§ 761.1-.25.
[27] 50 U.S.C. app. § 2410-12.

Processed by DDTC, a CJ request is used to determine whether an item or service is subject to the USML and/or the export licensing authority of BIS or DDTC.[28] An exporter can request a CJ determination, if unsure which agency has export licensing jurisdiction over an item or believes that the jurisdiction of an item has been incorrectly assigned. Agencies can also request CJs. CJ's are decided by DDTC with technical input from the Department of Defense and often, in practice, with informal input from BIS. The Departments of State, Commerce, and Defense can each, respectively, escalate a decision interagency. Perfunctory appeal processes exist for CJ applicants whereby a CJ decision can be appealed to the Managing Director of DDTC through to the Assistant Secretary for Political-Military Affairs.[29] CJ decisions rarely provide any details of the basis of DDTC's decision, are not public, can be retroactively changed or altered, and are not subject to judicial review.

III. Why an Improved Legal Architecture Is Critical

Based on the statutory framework, the administration of dual-use and defense export controls may appear relatively straightforward. However, Chief Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit in a recent opinion succinctly identified the system's Achilles heel.[30] In *Palungun*, Defendant Doli Palungun was convicted of violating the AECA for attempting to export Leupold Mark 4 CQ/T riflescopes without the requisite DDTC license. Judge Easterbrook reversed the District Court's decision and chastened the Department

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[28] 22 C.F.R. § 120.4; see Commodity Jurisdiction, http://www.pmddtc.state.gov/commodity_jurisdiction/index.html (last visited Jan. 25, 2010).
[29] 22 C.F.R. § 120.4(g).
[30] *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009).

of State for presenting the designation of the riflescopes as defense items as a *fait accompli* with no substantiation or notice:[31]

> The Directorate's claim of authority to classify any item as a "defense article," without revealing the basis of the decision and without allowing any inquiry by the jury, would create serious constitutional problems. It would allow the sort of secret law that *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), condemned. (That case dealt with an unpublished regulation that remained "in the hip pocket of the administrator," a serious problem apart from the nondelegation holding usually associated with Panama Refining.) A regulation is published for all to see. People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian régimes. Government must operate through public laws and regulations. *See United States v. Farinella,* 558 F.3d 695 (7th Cir. 2009). Thus the United States must prove, and not just assert, that the Leupold Mark 4 CQ/T riflescope is "manufactured to military specifications."

Judge Easterbrook appears to believe that DDTC's action in this case was a single, isolated incident. Unfortunately, this is far from the case. In fact, the lack of transparency, accountability and predictability in the U.S. export control system writ large is commonplace. The system allows administrators of the export control laws to operate without sufficient checks and balances, discourages the need for the creation of administrative records documenting the bases for decisions, and importantly prevents users of the system from challenging agency decisions even if blatantly inconsistent with the governing statutes and regulations. While Mr. Pulungun was fortunate to have had his day in court (because enforcement actions are granted judicial review), judicial review for licensing, CCATS, and CJ decisions is precluded by statute and regulation for national security reasons. As a result, those affected by often arbitrary and unsubstantiated agency decisions are usually left without recourse.

The significant problems with the administration of the U.S. export control system are cogently described in the National Academies' 2009 report entitled *Beyond "Fortress America":*

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[31] Id. at 328.

National Security Controls on Science and Technology in a Globalized World.[32] The report declares that the U.S. export control system is "broken" and advocates a full overhaul of the system. As the report indicates and users of the system are well aware, the uncertainty and unpredictability that surround U.S. export control processes damage U.S. economic competitiveness by stifling the U.S. industrial base and have the effect of hurting U.S. national security. U.S. high-tech and military industries – those in which the U.S. has a comparative advantage – must make business decisions in a system where they cannot be sure of the interpretation of laws and regulations from one day to the next and across agencies. When trying to do business abroad, they must face unreviewable agency decisions based fully on the discretion of administrators and a crippling interagency review process. U.S. industry must also contend with foreign customers who are trying to source their products without American products and technologies solely for the purpose of avoiding the uncertainties caused by U.S. export controls. The nature of the export control system has already and will continue to drive high-tech research and development and manufacturing off-shore so that U.S. export controls no longer govern and the U.S. government no longer has visibility into the export of these products. In simply appealing to national security, the administration of the U.S. export control system is a system of "secret law," in the words of Judge Easterbrook, which is contrary to the basic principles of the U.S. legal system.

To remedy this lack of transparency and predictability while maintaining national security protections, more rigorous administrative procedures and limited judicial review should be introduced into the system. A strengthened legal framework will compel the export control

[32] Committee on Science, Security, and Prosperity, National Research Council of the National Academies, *Beyond "Fortress America": National Security Controls on Science and Technology in a Globalized World* (2009).

agencies to both provide sufficient legal bases for their decisions, grant users the right to challenge outcomes contrary to law, and begin the compilation of jurisprudence in the export control area which will provide guidance and precedent to the government agencies and users of the system alike. The judicial review envisioned here is narrow in which at issue would be whether the deciding agency followed the law and has provided sufficient evidence for its decision under an "arbitrary and capricious" standard; national security determinations would not be subject to review except in very limited circumstances.

Enhanced administrative procedures and limited judicial review cannot be established without statutory and regulatory reforms. Past efforts to reform the system have received little traction due to vested interests and insufficient political will. A meaningful outcome from the current reform efforts discussed above is far from certain and only time will tell if there is sufficient political will at the highest levels to ensure a positive result. If the efforts do move forward in the Obama Administration and Congress, no reforms can be complete without improving the U.S. export control system's legal architecture.

IV. Other U.S. Legal Regimes That May Serve As Models

As discussed, the dual-use and defense control statutory and regulatory frameworks do not contain sufficient administrative procedures and specifically exempt judicial review of BIS and DDTC decisions, respectively. Therefore, these export control agencies are almost fully exempt from the requirement of uniform, explained decisions with which other federal government agencies must comply. While export controls are unique, there are other U.S. legal regimes which effectively deal with similar concerns and could serve as models for reforms of the export control system:

- the administration of export controls of nuclear products by the Nuclear Regulatory Commission (NRC);
- the administration of the U.S. trade remedy laws., i.e. antidumping (AD) and countervailing duty (CVD) proceedings;
- the administration of the U.S. customs laws; and
- the treatment of information protected from disclosure for national security reasons pursuant to the Freedom of Information Act (FOIA).

All of these listed areas operate within statutory frameworks with foreign affairs and national security dimensions. They include the handling of classified and/or business proprietary information and agency determinations based on that information. Yet, these areas of law have statutes and regulations which contain fulsome administrative procedures and allow judicial review through APA procedures or respective governing statutes. Relevant elements of these systems could be adapted for use in reforming the legal architecture of the export control system. Each will be examined briefly.

Nuclear Export Control Regime: There are many facets to the nuclear export control regime – including licensing by the Departments of Energy, Commerce, and State; however, most instructive for purposes of this discussion is the administration of export licensing activities by the NRC. Governed primarily by the Atomic Energy Act of 1954 (AEA) and implementing regulations, the NRC is authorized to control the export of nuclear components, equipment, and materials.[33] All actions taken pursuant to the AEA are subject to the procedures of the APA, and classified and business proprietary information are given full protections from disclosure.[34]

[33] Atomic Energy Act, 42 U.S.C. §§ 2011-2297h-r3 (2006); 10 C.F.R. § 110 (2010).
[34] Id. § 2231.

Exporters who require a specific license to import or export NRC controlled items must file an application: the application is subsequently posted on the NRC website (with redactions of confidential material, if requested) and a public hearing can be requested on the application by anyone.[35] Upon consideration of the application at the NRC and in consultation with other agencies including the Departments of State and Commerce, the NRC publicly issues its export licensing decision.[36] Applicants who have had their applications denied or existing licenses revoked, suspended or modified have the right to request an administrative hearing to contest the NRC's determination.[37] The regulations contain detailed procedures which allow counsel and parties to request security clearances and be granted access to classified information in specific situations dealing with their cases.[38] Because the APA applies, applicants subsequently have recourse to judicial review in federal court whereby the NRC's decisions are reviewed under an "arbitrary and capricious" standard of review.[39]

Trade Remedy Law Regime: The administration of the U.S. trade remedy laws, particularly of the AD and CVD laws, is governed by the Tariff Act of 1930.[40] The trade remedy laws provide U.S. industry with an avenue to seek redress of unfair trade practices abroad. Trade remedy proceedings conducted at the Department of Commerce and International Trade Commission (ITC) are governed by a mix of APA and statutorily defined administrative procedures which provide for the creation of an administrative record as the basis for published decisions.[41] Business proprietary information which is incorporated into the record is protected by

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[35] 10 C.F.R. §§ 110.70, .82.
[36] Id. § 110.45.
[37] Id. § 110.52.
[38] Id. § 110.121.
[39] 42 U.S.C. § 2231; see 5 U.S.C. § 706.
[40] Tariff Act of 1930, 19 U.S.C. §§ 1671-1677n (2006).
[41] 19 C.F.R. § 351 (2009).

administrative protective order (APO) procedures.[42] In fact, proprietary information submitted by companies in the process of investigations and administrative reviews can only be viewed by authorized counsel and cannot be shared with their clients. Filings by parties to proceedings as well as DOC and ITC decisions are issued in APO form – only available to counsel participating in the case – and redacted public versions.

Upon exhaustion of administrative remedies, judicial review of Department of Commerce and ITC decisions is also provided by statute at the U.S. Court of International Trade (CIT), an Article III federal court, with further appeals to the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court permitted.[43] Depending on the proceedings, the CIT reviews these cases to decide whether the determination was unsupported by substantial evidence on the record or otherwise not in accordance with law;[44] or, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[45] The APO information from the underlying record is protected under a judicial protective order (JPO) and is only available to be viewed by counsel involved in the case.[46] During courtroom proceedings, if information protected under JPO is to be discussed, the hearing is closed to the public and is considered a confidential hearing. Judicial opinions are issued in confidential and public versions where counsel in the case are granted the opportunity to redact confidential information. Administrative determinations and judicial opinions have precedential value for future cases.

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[42] Id. § 351.105, .304-.305; see 19 U.S.C. § 1677f.
[43] 28 U.S.C. § 1581 (2006).
[44] The substantial evidence standards requires the CIT to review whether the DOC's or ITC's actions are authorized by statute and consistent with the regulations as well as whether the underlying administrative record created by the agencies contains such relevant evidence as a reasonable mind might accept as adequate to support their conclusions. See *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).
[45] 19 U.S.C. § 1516a(b) (2006).
[46] See 28 U.S.C. § 2635 (2006); Ct. Int'l Trade R. 5, 5.2 (2010).

Customs Law Regime: U.S. customs law is governed by the Customs Modernization Act of 1993 (Mod Act) and administered by U.S. Customs and Border Protection (CBP) situated in the Department of Homeland Security. As the Mod Act places the legal burden on importers to classify and value products, importers can request pre-importation rulings from CBP if they are unable to do so.[47] If importers disagree with CBP's rulings, they can appeal decisions internally within CBP. Adverse pre-importation rulings can then be challenged at the CIT if the importer can demonstrate irreparable harm.[48]

When an importer brings merchandise into the United States, the administrative process is begun by filing an entry with CBP which then determines the amount of duties owed.[49] When the importer or relevant party disputes certain decisions by CBP with respect to the entry, reconsideration of CBP's decision is done through filing a protest.[50] Upon CBP's review of the protest and further internal appeal processes permitted at CBP,[51] importers can appeal CBP's decision to the CIT which reviews CBP's decision *de novo*.[5253] Appeals to the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court are also possible.

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[47] 19 C.F.R. 177 (2009).
[48] 28 U.S.C. § 1581(h).
[49] 19 C.F.R. § 152.
[50] Id. § 174.
[51] Id. § 174.23-28.
[52] 28 U.S.C. § 1581(a).
[53] *De novo* review requires that the court determine the facts and the law and that the scope of review is the record made by the court not the agency. Despite conducting a *de novo* review, the CIT is required to provide an appropriate degree of deference to CBP's determinations. Where CBP has officially and reasonably construed an ambiguous statute, the Court affords such construction a high-level of deference, referred to as *Chevron* deference. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In such cases, *Chevron* deference requires the court to undertake a two-step review process: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

All materials in customs cases including pre-importation rulings and protest decisions are public except if parties assert that the information contained in the documents is business propriety.[54] In such cases, business proprietary information is redacted and the documents are then made publicly available. Just as in the AD/CVD context, business propriety information is protected under JPO at the CIT.[55] Confidential opinions are issued to counsel involved in the litigation and public versions of the opinions are also issued. Customs rulings are published and have precedential value insofar as the articles at issue are identical to those described in a ruling.[56] In practice, the rulings have "soft precedential" value in that past rulings can provide guidance on how CBP may decide future rulings. Judicial opinions are precedential.

FOIA Regime: FOIA mandates broad disclosure of government records to the public, subject to certain exemptions.[57] Exemption 1 protects matters that are required to be "kept secret in the interest of national defense or foreign policy," and are classified.[58] If someone makes a FOIA request, an agency can prevent disclosure of the agency records pursuant to Exemption 1 which can then be challenged in federal court whereby the court reviews *de novo* the agency's

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agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. (internal footnotes omitted). Customs' rulings or interpretations that do not qualify as official statutory constructions nevertheless receive a measure of deference proportional to their persuasiveness, called *Skidmore* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). It should be also noted that CBP's classifications determinations are entitled to a presumption of correctness by the CIT, meaning that the burden of proving otherwise rests with the party challenging the decision. See 28 U.SC. § 2639(a)(1).

[54] 19 C.F.R. §§ 103, 174.32, 177.2(7).

[55] See 28 U.S.C. § 2635; Ct. Int'l Trade R. 5, 5.2.

[56] 19 C.F.R. § 177.9.

[57] 5 U.S.C. § 552 (2006).

[58] Id. § 552(b)(1).

justifications for withholding the information.[59] In court proceedings, the agency then needs to provide an affidavit concerning the details of the classified status of the disputed record, which is accorded substantial weight because of the foreign policy implications involved.[60] If the agency's affidavit contains "reasonable specificity of detail" to support the agency's position and the evidence on the record does not suggest otherwise, the court will not test the agency's judgment and expertise or evaluate whether the court agrees with the agency's opinions.[61] However, if the court determines that the agency improperly appealed to Exemption 1 in withholding records, FOIA permits the court to review the classified information *in camera* to make a *de novo* determination on the agency's decision.[62] Such *in camera* reviews are regarded by courts as a last resort option and are not routinely done.[63] Nevertheless, Congress granted the courts the power to review classified information in the FOIA context to ensure that agencies are sufficiently meeting their FOIA obligations.

What can be learned from these other legal regimes that may be applicable to the export control system?

- In all four of the regimes discussed, parties to issues arising in areas of law with foreign affairs and national security implications are able to seek judicial review of agency determinations whereby due process and classified and confidential information are simultaneously protected. Agencies are also required to compile administrative records in all of the discussed regimes to substantiate their decisions and provide a basis of review for the courts.

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[59] *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009).
[60] Id. at 864.
[61] Id. at 865.
[62] 5 U.S.C. § 552(a)(4)(B), § 552(b).
[63] *Larson*, 565 F.3d at 870.

- In the nuclear regulatory context, sensitive goods and technologies are licensed and exporters are entitled to the full procedural protections of the APA without compromising national security.

- In the trade remedy context, APOs and JPOs work to allow procedural safeguards to parties in administrative and judicial proceedings and protect confidential information. In addition, in the nuclear regulatory context, counsel and parties are granted security clearances in order to fully participate in NRC hearings and appeals.

- In the nuclear, trade remedy, and customs contexts, public, redacted versions of classified and business confidential documents are issued to promote transparency, and provide precedent for or give guidance on future agency actions and decisions.

- In the FOIA context, classified information can be responsibly viewed by courts in court proceedings without endangering national security.

V. Recommendations to Improve the U.S. Export Control System

The nuclear regulatory, trade remedy, customs, and FOIA legal regimes discussed above provide important examples of the types of safeguards which operate in legal regimes that share many of the same concerns as the export control legal framework. Adopting some key elements from these regimes could be beneficial to the U.S. export control system.

The AECA, EAA, EAR, and ITAR, respectively, should not necessarily default to APA procedures because export control determinations fall under the military and foreign affairs exclusion of the APA. However, the governing statutes and regulations should be reformed to set out detailed prescriptions for building administrative records to substantiate each agency's

decisions and authorizing judicial review for users of the system to challenge agency actions when they are inconsistent with the statutes and regulations. Generally, listed below are the policy prescriptions that should be followed in reforming the legal framework of the export control system.

- Parties applying for licenses at BIS and DDTC should be given detailed, written explanations of how the decisions meet the established regulatory criteria in cases of approval and denial. CCATS and CJ decisions should be similarly explained in writing.

- Public, redacted versions of all BIS' and DDTC's CCATS, CJ, and licensing decisions should be available on their respective websites. As in CBP rulings, the facts and circumstances in these export control determinations are each unique. Unless identical to a prior determination, these decisions should have "soft precedential" value in that the publicly issued versions of these determinations could provide guidance on future agency actions.

- Affected parties should be able to have the administrative record supporting the agency's decisions reviewed in a federal court, preferably the CIT, given its longstanding history of hearing cases under the U.S. trade laws.

- The standard of review used by the federal court should be a highly deferential, "arbitrary and capricious" standard.

- In federal court proceedings, BIS' and DDTC's national security determinations should be justified with affidavits akin to those employed under FOIA. The national security determinations should be similarly granted a high degree of deference by the court, except in situations where the agency is simply unable to provide a reasonable basis for

its decision and *in camera* review should be allowed as a last resort under an "arbitrary and capricious" standard. If necessary, the federal court should hold classified hearings, similar to the confidential hearings held by the CIT in trade remedy and customs proceedings.

- Counsel for parties to export control actions should be able to obtain the appropriate level of security clearances from the U.S. government to participate in administrative and federal court proceedings. It should be noted that a significant portion of classified information used in licensing and CJ determinations is at a Sensitive Compartmented Information (SCI) level. While those outside the government are granted Secret and Top Secret security clearances, SCI clearances are rarer. The level of security clearances granted to counsel in export control cases should be at a level sufficient to allow for adequate participation in the proceedings.

- All agency decisions, along with judicial opinions, with their respective levels of precedential value could be used to commence the construction of jurisprudence in the dual-use and defense controls areas. This will bring consistency, predictability, and transparency to the system for both administrators and users of the export control system.

Below are some of the specific BIS and DDTC functions – CCATS, CJs, and licensing – to which these prescriptions should be applied. Some of the proposed reforms, including judicial review, will require statutory changes, while others fall within the purview of the executive branch and can be accomplished through regulatory modifications:

- *Commodity Classifications*: As discussed above, the results of CCATS are not public and have no precedential value. BIS should issue CCATS with written explanations of the

decisions, publish the CCATS with any business confidential material redacted, and grant precedential value to CCATS with identical facts. In other situations, exporters should be able to utilize prior CCATS decisions for "soft precedential" value purposes. Publishing CCATS will promote consistency within BIS' commodity classifications and could even reduce the agency's workload as exporters will be able to compare the attributes of their products with those in past decisions. In addition, exporters who believe that BIS has incorrectly classified their products should have the opportunity to seek judicial review of the decision, based on the administrative record created by the agency. The case law could then also serve as guidance for administrators and exporters for future CCATS.

- *Commodity Jurisdictions:* The CJ process is one of the most complex parts of the U.S. export control system. The process is also hindered by the different policies applied by the Departments of Commerce, State, and Defense. CJs are considered by exporters to be moving targets as even once an exporter has a CJ decision in hand, the decision in practice can be changed or revoked at any time. Because CJs are not public, there is no guarantee that exporters of similar products are not being treated differently.

  The CJ process can be improved by making CJs public, with classified and confidential information redacted. The decisions issued should present detailed, written explanations of how the determinations meet the established regulatory criteria. Judicial review should also be a tool to provide uniformity and predictability to the system. If exporters could appeal CJs, they would have the ability to challenge whether the agencies' decisions were made in accordance with the governing statute and regulations.

- *Licensing:* Much of the discussion above regarding CCATSs and CJs is also applicable to the licensing process at both BIS and DDTC. When BIS denies a license, the EAR requires the agency to provide the statutory and regulatory basis for the denial; the extent consistent with the national security and foreign policy of the United States; the specific considerations that led to the decision to deny the license application; what, if any, modifications or restrictions to the license application would allow BIS to reconsider the license application; the name of the BIS representative in a position to discuss the issues with the applicant; and the availability of appeal procedures to the application.[64] In reality, licensing decisions rarely provide applicants with sufficient information regarding why the license was denied. BIS should provide a detailed, written explanation of its decision to the applicant in cases of approval and denial alike. Public, redacted versions of all licensing decisions should be made available. The licensing decisions should be granted precedential value under identical facts and circumstances and "soft precedential" value in other cases. As discussed above, applicants essentially have little recourse to address unsubstantiated licensing decisions. Judicial review should be available to aggrieved exporters based on an administrative record developed for each licensing decision to ensure that the agency has followed the law.

  The situation is even more opaque at DDTC. Currently, applicants whose licenses are denied have no ability to appeal the decision even internally at the Department of State. The ITAR provides that DDTC's authority to grant and deny licenses is fully

[64] 15 C.F.R. § 750.6(a).

discretionary and no explanation is required.[65] As at BIS, all DDTC licensing decisions should be issued with detailed explanations in writing to license applicants. And, the same rules on publication and precedent should apply to DDTC licensing decisions as to BIS decisions. Detailed administrative procedures granting applicants the right to internally appeal license decisions as well as judicial review of those licensing determinations should also be added to this process.

VI. Conclusion

As Supreme Court Justice Louis Brandeis famously observed, "Sunshine is the best disinfectant." The recommendations made in this paper, if implemented, would serve to ensure that the U.S. export control laws are administered in a fair, transparent, predictable, and accountable fashion, while simultaneously maintaining national security protections. Government officials and private sector actors involved in U.S. export control processes often express that adding judicial review and other procedural safeguards is impossible since this area of law is considered one of national security. However, as this paper argues, there are ample examples of U.S. legal regimes which deal with similar and related national security and foreign affairs issues, but have managed to maintain legal protections for those involved. Any prospective reforms of the U.S. export control system should do the same.

[65] 22 C.F.R. § 128.1.