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## Inadequate Checks and Balances: Critiquing the Imbalance of Power in Arms Export Regulation

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# Inadequate Checks and Balances: Critiquing the Imbalance of Power in Arms Export Regulation<sup>†</sup>

Charles L. Capito III\*

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### I. Introduction

The Afghan mujahideen waged an impassioned and surprisingly successful jihad against the Soviets in the early to mid 1980s. Much of that success was due to the mujahideen's ability to neutralize the Soviet's Hind helicopter with the versatile Oerlikon anti-aircraft gun.<sup>1</sup> The Oerlikon was a \$100,000 Swiss-made gun, purchased with Egyptian, Saudi, and American money, channeled into Afghanistan by the Pakistanis, perched atop mountains by Afghani mules—and negotiated for by Congressman Charlie Wilson of

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1. GEORGE CRILE, CHARLIE WILSON'S WAR 438 (2003) (noting the effectiveness of the mujahideen's weapons against Soviet aircraft).

Texas.<sup>2</sup> Congressman Wilson's righteous disregard for the rules, his network of CIA insiders and international powerbrokers and his seat on the Defense Appropriations Subcommittee allowed him to circumvent the usual legislative channels through which arms exports are executed. In fact, in many circles the Afghan War came to be known as "Charlie's War":<sup>3</sup>

Wilson was operating behind the lines like a bandit. He was . . . engaged in the kind of sensitive diplomacy that is technically illegal for anyone other than the White House to conduct: cutting arms deals with the defense minister of Egypt; commissioning Israel to design weapons for the CIA; negotiating all manner of extraordinarily controversial matters with the all-important U.S. ally [Pakistani] General Zia.<sup>4</sup>

Simultaneously, Lieutenant Colonel Oliver North, along with a few other high-ranking executive officials within President Ronald Reagan's administration, secretly orchestrated aid to the Contra effort in Nicaragua and the delivery of weapons into hostile Iran.<sup>5</sup> This usurpation of arms export control by the Executive became known as the "Iran-Contra Affair."<sup>6</sup> It was an episode in which "Congress, the Cabinet, and the Joint Chiefs of Staff were denied information and excluded from the decision-making process."<sup>7</sup> These unilateral initiatives were in direct conflict with U.S. public policy as defined by the Secretaries of Defense and State<sup>8</sup> and in violation of the Arms Export Control Act (AECA).<sup>9</sup> The balance of power between the Executive branch and Congress that is designed to safeguard against potentially harmful foreign policies was ignored to further the agenda of unelected administration officials.<sup>10</sup>

The power to define and implement the foreign policy of the United States is divided between the President and Congress.<sup>11</sup> The events described above

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2. *Id.* at 246.

3. *Id.* at 376.

4. *Id.* at 374-75.

5. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, at 5-8 (1987) [hereinafter Iran-Contra Report] (chronicling the events that led to the congressional investigation of the Executive's conduct towards Iran and Nicaragua).

6. *Id.* at xv.

7. *Id.* at 16.

8. *See id.* (noting the administration's behavior was contrary to the foreign policy goals of the Defense Department and State Department).

9. 22 U.S.C. § 2778 (2000). This statute controls the export of arms.

10. *See* Iran-Contra Report, *supra* note 5, at 19 (describing the consequences of the administration's unilateral action).

11. Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, in CONGRESS OF THE UNITED STATES: POWERS, STRUCTURE AND PROCEDURES 15, 15 (N.O. Kura

demonstrate the consequences when either branch circumvents constitutional channels to act unilaterally. In one instance, a Democratic congressman dominated the United States' strategy on the Afghan war, leading to the transfer of arms to a group who, fifteen years later, would become an enemy of the United States.<sup>12</sup> In another instance, several executive officials from a Republican administration dishonestly and secretly coordinated two controversial schemes "which undermined the credibility of the United States."<sup>13</sup> These are extreme examples, but they illustrate perfectly why the American system of governmental checks and balances extends beyond the borders of the United States and into the realm of foreign policy. Whether pertaining to international trade or negotiating treaties, "the roles and relative influence of the two branches in making foreign policy differ from time to time according to such factors as the personalities of the President and Members of Congress."<sup>14</sup> At the same time, these branches "constantly interact and influence each other."<sup>15</sup>

This Note will argue that an absence of effective checks in the current structure of arms export regulation tilts the balance of power much too far in the Executive branch's favor. The State Department, a key executive agency, recently has taken a position on a regulation requiring the registration of arms brokers that is contrary to the language of the regulation, Congress's intent, and a judicial interpretation of the regulation. The checks and balances that were designed to remedy such situations are either ineffective or inapplicable, thus rendering the Executive's creation and execution of arms export controls unrestrained. This imbalance has caused uncertainty and inconsistency within the defense industry and threatens important policy objectives abroad.

In general, this argument is timely because it questions the unrestrained use of executive power at a time when the Executive's use of constitutional powers in matters such as warrantless surveillance and detainees' habeas status is being widely criticized.<sup>16</sup> This Note will make the argument by exploring the

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ed., 2001).

12. See CRILE, *supra* note 1, at 507 (noting that the mujahideen from the Soviet-Afghan war attacked a new enemy, the United States, on September 11, 2001).

13. Iran-Contra Report, *supra* note 5, at 11.

14. Grimmett, *supra* note 11, at 17.

15. *Id.*

16. See, e.g., George F. Will, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27 (chronicling the administration's circumvention of congressional intent in justifying the use of warrantless surveillance); Drake Bennett, *Can Congress Matter?*, BOSTON GLOBE, Jan. 15, 2006, at K1 (describing the administration's use of "Caesar-like proclivities" to further its agenda); Richard A. Epstein, *Executive Power on Steroids*, WALL ST. J., Feb. 13, 2006, at A16 (discussing the constitutional limits of executive power and questioning whether the current

friction between Congress's power "[t]o regulate Commerce with foreign Nations"<sup>17</sup> and "the . . . exclusive power of the President as the sole organ of the federal government in the field of international relations,"<sup>18</sup> specifically in regards to arms export control. It will do this by examining § 129.3 of the International Traffic in Arms Regulations (ITAR),<sup>19</sup> a provision that requires "persons"<sup>20</sup> who engage in brokering activities to register with the State Department's Directorate of Defense Trade Controls (DDTC). Section 129.3 is ideal for this analysis for two reasons. First, the provision is narrow and new enough that this Note will not become bogged down with a voluminous discussion of its nuances or its legislative and administrative history.<sup>21</sup> The provision does not, however, stand alone. Its history and implementation reflect broader foreign policies of both Congress and the Executive. The conflict between congressional intent and agency interpretation of the brokering registration requirement allows for an analysis of traditional tenets of administrative procedure as well as a structurally-oriented outlook for the future.

Second, § 129.3 is in a period of transition and uncertainty. Early in 2005, defense contractors began to notice that applications for licenses to export defense articles were being rejected by the State Department because the applications listed foreign "brokers"<sup>22</sup> who were not registered with the Department.<sup>23</sup> Having never received formal guidance from DDTC, defense contractors have traditionally interpreted the regulation's language to exclude foreign persons located in foreign nations and have thus continued to work through those brokers regardless of whether they are registered with DDTC.<sup>24</sup>

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administration, in light of current events, has exceeded those powers).

17. U.S. CONST. art. I, § 8, cl. 3.

18. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also* U.S. CONST. art II, § 2, cl. 1 ("The President shall be Commander in Chief . . . of the United States.").

19. 22 C.F.R. § 129.3 (2006).

20. The question of who is included under the term "persons" is at the heart of the debate over the registration of brokers.

21. *See infra* Part V.A.1 (discussing the legislative history of the brokering amendment).

22. *See* 22 C.F.R. § 129.2(a) (2006) (defining a broker as "any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration").

23. Client Alert, Powell Goldstein LLP, DDTC Begins Returning License Applications Based on New Interpretation of Part 129 (June 28, 2005), *available at* [http://www.pogolaw.com/files/news-alerts/1565/ICA\\_6.20.05.pdf](http://www.pogolaw.com/files/news-alerts/1565/ICA_6.20.05.pdf) (notifying clients, especially defense contractors, of the State Department's recent trend denying license applications).

24. *See id.* (observing that "virtually all" contractors use local brokers, some of whom are not registered with the State Department).

Until recently, that approach seemed to have met with DDTC's approval. DDTC's recent interpretation of the brokering requirement, however, expanded the scope of the "otherwise subject to" language arguably to include foreign persons in foreign nations.<sup>25</sup>

This Note is designed to tell the story of the troubling lack of checks and balances that allows the State Department to proceed unfettered in its interpretation of § 129. First, Part II of the Note will explain the structure in which arms export controls are implemented from their beginnings in Congress, to their adaptations in the State Department, and finally to their interaction with private industry and trade. Also, Part II will explore how, since the AECA's inception in 1976, administrations have viewed the use of arms export policy as a tool to implement their broader foreign policy goals. Within the framework outlined in Part II, Part III will delve more deeply into the current problem—namely the State Department's changed interpretation of § 129. It will argue that DDTC first interpreted § 129 as having a limited scope based on the broker's "contacts"<sup>26</sup> with the United States but now reads it to have a much more expansive application.

Part IV steps back and analyzes basic notions of checks and balances as they exist in today's four branch system of government.<sup>27</sup> It argues that the checks usually relied upon to counter the Executive's use or abuse of delegated legislative authority, like the State Department's power under the AECA, are either nonexistent or inapplicable to the current situation. This leaves the State Department, for all practical purposes, unchecked in its interpretation of § 129. Unchecked power of this kind runs contrary to the Framers' reliance on checks and balances.<sup>28</sup> Part V argues that the absence of traditional checks is not only troublesome to a formal understanding of separation of powers but is

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25. See *id.* (noting the greatly expanded approach DDTC is now taking on the brokering registration requirement).

26. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (developing the "contacts" test based on due process concepts). The Court explained this due process concept as follows:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.* (citations omitted).

27. Independent and executive agencies are often thought of as comprising a fourth branch of government. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("[Agencies] have become a veritable fourth branch of the Government . . .").

28. See THE FEDERALIST NO. 47 (James Madison) ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . .") (quoting Montesquieu).

functionally harmful in the present situation because the State Department's interpretation contravenes congressional intent and would not withstand review by a court. Part V concludes that if such checks were available Congress and the courts would act to remedy the situation.

Part VI sketches out a possible solution to the political imbalance. It acknowledges that there are a variety of potential solutions, including a "wait and see" approach and a judicial response, but it advocates a legislative solution. More specifically, Part VI suggests that a thoughtfully designed, narrowly applied legislative veto provision is the most appropriate response to the imbalance of power. Part VI argues that the international trade of defense articles occupies a unique niche in the constitutional division of powers such that the current situation allows for an exception to the general rule precluding legislative vetoes.<sup>29</sup>

## *II. An Overview of Arms Exports Processes, Regulations and Foreign Policy Implications*

The regulation of arms exports mirrors the structure in which most foreign policy is implemented: Power is shared by Congress and the President.<sup>30</sup> Although arms export regulation spans many decades, the Arms Export Control Act passed by Congress in 1976 became the default organic statute and has since "set the environment in which the State Department exercises its licensing authority."<sup>31</sup> The AECA begins by asserting that:

In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.<sup>32</sup>

The AECA authorizes two types of arms transfers: government-to-government transactions and commercial transactions.<sup>33</sup> This Note will concern itself only

29. See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that congressional veto provisions are unconstitutional).

30. See IAN ANTHONY, *ARMS EXPORT REGULATIONS 188-92* (1991) (noting that "the State Department is the primary arms-export licensing authority" while "Congress has given itself an important role in the arms export decision-making process").

31. *Id.* at 192.

32. 22 U.S.C. § 2778(a)(1) (2000).

33. Kendall Stockholm & Gerald McBeath, *The Reasons Why: Examination of Three Countries in the Business, in THE INTERNATIONAL LEGAL AND ILLEGAL TRAFFICKING OF ARMS* 21, 28 (Peter C. Unsinger & Harry W. More eds., 1989).



with the latter because the ITAR, specifically Part 129, are designed "to clarify for industry the licensing procedures required."<sup>34</sup> Furthermore, the commercial manufacturers of defense articles are the groups being harmed by DDTC's current interpretation.<sup>35</sup>

The State Department implements licensing requirements and procedures under the authority that the AECA vests in the President.<sup>36</sup> Each commercial exporter must register with DDTC as a manufacturer and must subsequently apply for written approval for each order it receives and plans to accept.<sup>37</sup> These applications and licenses may be suspended or revoked at any time by DDTC and are subject to strict expiration dates.<sup>38</sup> After a manufacturer submits an application, the Office of Defense Trade Controls reviews it. Once the application is through this initial step it is sent to other reviewing agencies for comments and recommendations (for instance, the Defense Department for national security review).<sup>39</sup> The application is then returned to DDTC for final approval. That decision takes into account all interests, including U.S. foreign policy considerations.<sup>40</sup> A more detailed analysis of the ITAR is beyond the scope of this Note.<sup>41</sup>

The procedures outlined above reflect the foreign policy considerations of Congress and the President. For example, when Congress passed the AECA in 1976, it reasoned:

Every nation, large or small, is concerned with its ability to defend itself. If weapons must be obtained from abroad, nations will take the necessary steps to get them. The United States cannot stand aside from this process.

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34. ANTHONY, *supra* note 30, at 195. Approximately eighty percent of U.S. arms exports are transferred by the U.S. government. Commercial outfits account for the remaining twenty percent. PAUL L. FERRARI ET AL., U.S. ARMS EXPORTS: POLICIES AND CONTRACTORS 46 (1987).

35. See Client Alert, *supra* note 23, at 1 ("This new and more expansive definition has led to the increased returns of license applications.").

36. Allan E. Suchinsky, *The Lawful Trafficking in Arms*, in THE INTERNATIONAL LEGAL AND ILLEGAL TRAFFICKING OF ARMS 73, 76 (Peter C. Unsinger & Harry W. More eds., 1989).

37. See ANTHONY, *supra* note 30, at 188–89 (outlining DDTC's approval process).

38. *Id.* at 190.

39. See Suchinsky, *supra* note 36, at 86 (charting the internal controls used by the DDTC in reviewing export applications).

40. *Id.*

41. Many other sources provide a detailed analysis of arms export regulations. See, e.g., ANTHONY, *supra* note 30, at 188–95 (outlining the various roles played by the State Department, the Commerce Department, the Defense Department, and Congress in arms export control); FERRARI ET AL., *supra* note 34, at 45–53 (same); Suchinsky, *supra* note 36, at 75–91 (outlining the same process with an emphasis on the interagency relationships in the licensing process).

It should be willing to help, so far as its assistance is consistent with our own security and foreign policy interests.<sup>42</sup>

This excerpt implies that if U.S. defense contractors are substantially obstructed in trading with foreign nations, then those nations will go elsewhere to obtain the weapons.

The foreign policy considerations inherent in the Executive's treatment of arms export control are quite fluid and tend to ebb and flow with changing administrations.<sup>43</sup> Until 1989, a recurrent rationale for arms export control was the Cold War and the spread of communism.<sup>44</sup> The Carter administration, which was the first Administration to execute arms export controls under the AECA, asserted a more restrictive view of arms exports. "Arms transfers were to be an 'exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interest.'<sup>45</sup> Following the Carter administration, the Reagan administration, as one can imagine from the narrative in Part I, expanded the role of arms exports into "'an essential element of its global defense posture and an indispensable component of its foreign policy.'<sup>46</sup>

Since the Cold War's end, the sale of U.S.-made arms has remained an integral part of U.S. foreign policy, but now for economic as well as political reasons.<sup>47</sup> President George H. W. Bush's policy was defined by the first Gulf War.<sup>48</sup> Assistant Secretary of State for Politico-Military Affairs H. Allen Holmes stated that the Bush policy was one that relied on U.S.-arms exports to further the Middle East peace process.<sup>49</sup> Despite President Clinton's stance on

42. H.R. REP. NO. 94-1144, at 12 (1976). The House Report outlines the fundamental justifications for passing a statute regulating and accommodating the import and export of arms.

43. See Stockholm & McBeath, *supra* note 33, at 31 ("[T]he politics of different administrations have significantly influenced the direction . . . of arms transfers."); see also Grimmert, *supra* note 11, at 17-18 ("Throughout American history there have been ebbs and flows of Presidential and congressional dominance in making foreign policy. . .").

44. See Stockholm & McBeath, *supra* note 33, at 31 (noting that countering the spread of communism stabilized the strategic motive of arms export control).

45. *Id.* (quoting President Carter).

46. *Id.* at 32 (quoting the preamble of President Reagan's arms transfer policy directive).

47. See Janne E. Nolan, *United States, in* CASCADE OF ARMS: MANAGING CONVENTIONAL WEAPONS PROLIFERATION 131, 139 (Andrew J. Pierre ed., 1997) (summarizing the post-Cold War perceptions of the George H. W. Bush and Clinton administrations towards arms sales).

48. See ANTHONY, *supra* note 30, at 201 (noting that after Iraq's invasion of Kuwait in 1990, President Bush reevaluated arms export policy).

49. See *id.* ("[S]ecurity assistance . . . continues to . . . support important U.S. interests throughout all geographic regions, responding to an ever-changing world environment.") (quoting Assistant Secretary Holmes).

the larger issue of global weapons proliferation, his administration did "not produce[] any discernible change in U.S. arms transfer policy."<sup>50</sup>

Following the terrorist attacks of September 11, 2001, much of President George W. Bush's administration has focused on the proliferation of nuclear technology and weapons of mass destruction,<sup>51</sup> but the traditional trade of defense articles still plays a critical role.<sup>52</sup> The administration recognizes "the sale, export, and re-transfer of defense articles and defense services as an integral part of safeguarding U.S. national security and furthering U.S. foreign policy objectives."<sup>53</sup> A study by the Government Accountability Office, however, concluded that since 2001, the administration has not made legislative recommendations nor have they revised export control regulations.<sup>54</sup>

The administration's goal, since 2001, is to balance the "urgent needs of our battlefield allies"<sup>55</sup> in Afghanistan and Iraq with the threat of American defense articles and technology falling in the wrong hands.<sup>56</sup> For example, the State Department has made some efforts to "streamline and expedite" the processing of license applications.<sup>57</sup> At the same time, however, the State Department has adopted "more aggressive compliance standards"<sup>58</sup> in order to deal with the complicated and technologically sophisticated global "strategic

50. Nolan, *supra* note 47, at 139. President Clinton's Assistant Secretary of State for Political-Military Affairs Robert Gallucci explained that "exports are essential to a strong state for a strong economy . . . there's no question we hope to promote exports." *Id.*

51. See, e.g., *New Initiatives in Cooperative Threat Reduction: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. (forthcoming 2006) (statement of Robert G. Joseph, Under-Sec'y for Arms Control and Int'l Security, Dep't of State) ("President Bush has given the highest priority to combating WMD and missile proliferation . . ."), available at <http://www.state.gov/t/us/rm/60894.htm>.

52. See John Hillen, Assistant Sec'y for Political-Military Affairs, Dep't of State, Address to the 18th Annual Global Trade Controls Conference 4 (Nov. 3, 2005) ("Defense export controls are an integral part of our broader security agenda . . ."), available at <http://www.pmdtc.org/docs/Hillen%20Speech.pdf>.

53. U.S. DEPARTMENT OF STATE, THE DIRECTORATE OF DEFENSE TRADE CONTROLS AND THE DEFENSE TRADE FUNCTION—AN OVERVIEW 1 (2006) [hereinafter DDTC Overview], available at <http://www.pmdtc.org/reference.htm#misc> (on file with the Washington and Lee Law Review).

54. U.S. GOV. ACCOUNTABILITY OFFICE, GAO-05-234, DEFENSE TRADE: ARMS EXPORT CONTROL SYSTEM IN THE POST-9/11 ENVIRONMENT 12 (2005), available at <http://www.fas.org/asmp/resources/govern/109th/GAO05234.pdf>.

55. Hillen, *supra* note 52, at 5. For example, DDTC has implemented an expedited licensing process for allies in Afghanistan and Iraq. *Id.*

56. See *id.* at 4 ("If defense cooperation is to be successful, it is imperative that shared technology does not fall into the hands of those who would use it against us or our friends and allies.").

57. U.S. GOV. ACCOUNTABILITY OFFICE, *supra* note 54, at 3.

58. Hillen, *supra* note 52, at 4.

environment."<sup>59</sup> Whatever specific initiatives the administration takes, President Bush's policy is consistent with prior administrations' policies in that "[a]uthorizations to transfer defense articles . . . , if applied judiciously, can help meet the legitimate needs of friendly countries, deter aggression, foster regional stability, and promote the peaceful resolution of disputes."<sup>60</sup>

### III. The Problem: A Changed Interpretation

The regulation of arms exports under the AECA and the ITAR is different from other areas of trade control in that the "definitions are key to every issue . . . [and] are not always intuitive."<sup>61</sup> The clarity and consistency of the definitions of the terms in § 129.3 are very important to the manufacturers of defense articles. The contested portion of § 129 is the language that establishes the scope of the provision, which requires "[a]ny U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States" to register with DDTC.<sup>62</sup> Section 120.15 defines "U.S. person" and § 120.16 defines "foreign person," but "[persons] otherwise subject to the jurisdiction of the United States" is not explicitly defined within ITAR.<sup>63</sup> Therefore, practitioners and defense manufacturers rely on their experiences with DDTC to formulate the meaning of this language.<sup>64</sup>

This Part explains the State Department's recent reversal of its longstanding interpretation of the ITAR's broker registration provision. Subpart A describes the previous interpretation and subpart B the current one. As Parts IV and V will argue, the State Department's new interpretation violates congressional intent and judicial precedent, but because of the absence of checks on the Executive branch, it is immune to correction.

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59. *Id.*

60. DDTC Overview, *supra* note 53, at 1–2.

61. Peter D. Trooboff, *A Brief Primer on the International Traffic in Arms Regulations ("ITAR")*, in *COPING WITH U.S. EXPORT CONTROLS* 317, 319 (Evan R. Berlack & Cecil Hunt co-chairs, 2000).

62. 22 C.F.R. § 129.3(a) (2006).

63. Trooboff, *supra* note 61, at 323.

64. *See id.* (noting the "apparent[]" meaning of the brokering requirement that has developed in the defense industry); Client Alert, *supra* note 23, at 1 (explaining that exporters rely on their own interpretations and experiences in defining the brokering amendment's scope).

### A. Previous Interpretation

In 1996, Congress passed an amendment to AECA requiring the registration of arms brokers known as the brokering amendment.<sup>65</sup> DDTC implemented the new statutory requirement in 1997.<sup>66</sup> As a result, § 129 does not have as long a history of interpretation as other provisions of ITAR, which were implemented shortly after the AECA became law in 1976. Between 1997 and early 2005, however, the definition of the "otherwise subject to" language was interpreted by practitioners to encompass foreign persons who had some minimum contact with the United States.<sup>67</sup> A handbook published by the Practising Law Institute in 2000<sup>68</sup> contains a primer designed to help a "company or lawyer who is new [to] the ITAR . . . to see [the] general approach taken by [the] regulations."<sup>69</sup> The primer notes that there has been no formal guidance from DDTC on the issue and that "[p]erson subject' is not defined but it is apparently intended to be interpreted under personal jurisdiction principles developed under the 'due process' requirements of the U.S. Constitution, i.e., sufficient nexus with the United States based on the activities in question."<sup>70</sup>

An in-depth discussion of the minimum contacts test and its extraterritorial application to foreign brokers is beyond the scope of this Note. In short, the language was thought to apply to brokers who, for example, were employed by U.S. companies, or had an unrelated business in the United States, but not to foreign brokers whose "only contacts with the United States consisted of telephone, facsimile and email communications."<sup>71</sup> DDTC seemed to acquiesce

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65. See *infra* Part V.A (discussing the legislative history of the brokering amendment).

66. See *infra* Part V.A (detailing the legislative history of the brokering amendment).

67. See Trooboff, *supra* note 61, at 323 (suggesting the apparent scope of "otherwise subject to the jurisdiction of the United States"); see also Client Alert, *supra* note 23, at 1 (noting that "many [defense] exporters applied some form of a 'contact' analysis" to determine the scope of § 129.3); cf. Philips S. Rhoads, *The International Traffic in Arms Regulations: Compliance and Enforcement at the Office of Defense Trade Controls, U.S. Department of State*, in COPING WITH U.S. EXPORT CONTROLS 813, 821 (Evan R. Berlach & Cecil Hunt co-chairs, 2000) (acknowledging that the brokering amendment broadened the reach of the AECA and ITAR, but it was unclear how far).

68. COPING WITH U.S. EXPORT CONTROLS 317, 319 (Practising Law Institute, 2000). This collection of practice guides is designed to "serve as an educational supplement" and as a "reference manual" for attorneys. *Id.* at foreword.

69. Trooboff, *supra* note 61, at 321.

70. *Id.* at 323.

71. Client Alert, *supra* note 23, at 1 (noting that many approaches were used but most included some sort of contact analysis). Another uncertainty was whether, when defining a broker as one "who acts as an *agent* for others," 22 C.F.R. § 129.2(a) (2006) (emphasis added), the requirement included independent contractors or applied the "common-law distinction

to this interpretation by accepting license applications from exporters who had submitted the application using the "contact" analysis.<sup>72</sup> Thus, until 2005, "otherwise subject to the jurisdiction of the United States" was read, quite literally, to apply to those foreign persons over whom the United States could claim jurisdiction in a hypothetical legal dispute.<sup>73</sup>

### B. Current Interpretation

As previously mentioned, in early 2005, exporters of defense articles began to notice that license applications were being rejected because they did not comply with § 129.3.<sup>74</sup> DDTC has never issued any formal guidance on the "otherwise subject to the jurisdiction of the United States" language before or since these observations were made, but DDTC has clearly taken a broader view.<sup>75</sup> Not only is there empirical evidence observed by practitioners that previously acceptable license applications have been rejected, but there is also direct evidence that DDTC has broadened the scope of § 129.3. DDTC's website provides a comprehensive resource center for exporters of defense articles and lawyers in the field of defense trade.<sup>76</sup> On a document intended to provide an overview of DDTC's export requirements including the registration of brokers, § 129.3 is read as requiring "U.S. and foreign persons engaged in

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between an agent and an independent contractor." Trooboff, *supra* note 61, at 322.

72. See Client Alert, *supra* note 23, at 1 (suggesting that the exporters' contacts analysis had previously been acceptable); Trooboff, *supra* note 61, at 323 (stating that the "otherwise subject to" language was "apparently intended to be interpreted under personal jurisdiction principles").

73. Another international trade practice guide, published in March 2005, suggests that the original interpretation of "otherwise subject to the jurisdiction of the United States" was valid when the authors wrote the article. Eric L. Hirshhorn, *Controls on Exports*, in 1 LAW & PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE booklet 9, 125 (Charles R. Johnston ed., 2005). Hirshhorn's discussion of the registration of brokers limits the requirement to U.S. persons and foreign persons located in the United States. *Id.* Although the article contemplates that the provision will apply to business activities outside of the United States, Hirshhorn limits this extraterritorial application to United States citizens and does not mention foreign persons in foreign countries. *Id.* at 125–26; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 873, 902 (2001) (quoting former Under Secretary of State John Bolton, "Our brokering law is comprehensive, extending over citizens and foreign nationals in the United States, and also U.S. citizens operating abroad").

74. Client Alert, *supra* note 23, at 1 (notifying clients of DDTC's trend).

75. *Id.*

76. U.S. DEPARTMENT OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS (2006), <http://www.pmdtc.org> (last visited Oct. 23, 2006) (on file with the Washington and Lee Law Review).

arms brokering" to register with DDTC.<sup>77</sup> This overview seems to read out the limiting clauses "foreign person *located in the United States*"<sup>78</sup> and "otherwise subject to the jurisdiction of the United States."<sup>79</sup> Instead, the State Department applies the provision to all persons, wherever located, who are engaged in brokering. The questions of whether this interpretation is legal and whether it is correct will be explored in Parts IV and V, respectively. This Part simply illustrates DDTC's change in course from a literal, more limited, interpretation of § 129 to an interpretation which expands the scope of the language to include anyone engaged in brokering activities.

#### *IV. Executive Authority in Arms Export Regulation is Effectively Unchecked*

The previous Part explained the State Department's sudden about-face in its interpretation of § 129.3 of the ITAR. This Part argues that this shift could be made unilaterally and persist unchallenged because of an alarming lack of checks on executive action. Subpart A deals with the general expansion of executive power in recent decades. Subpart B argues that executive autonomy is even more pronounced in the context of arms export regulation.

The system of government designed by the Framers relies on a system of checks and balances.<sup>80</sup> Every civics student learns, for instance, that the President may veto legislation from Congress<sup>81</sup> and that the courts may declare acts of the Executive and Legislature unconstitutional.<sup>82</sup> This Note examines the State Department's treatment of congressionally delegated power; therefore, it will focus on Congress's and the Judiciary's ability (or lack thereof) to check the Executive's interpretation and execution of its delegated duties.

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77. DDTC Overview, *supra* note 53, at 3.

78. 22 C.F.R. § 129.3(a) (2006) (emphasis added).

79. *Id.*

80. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); THE FEDERALIST NO. 47 (James Madison) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct."). *But see* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.1 (2002) ("Articles I, II, and III establish three Branches of government, but they say little about the powers of each. Many of the powers overlap functionally.").

81. See U.S. CONST. art. I, § 7, cl. 2 ("Every bill which shall have passed the House of Representatives and the Senate, shall . . . be presented to the President of the United States.").

82. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

*A. The Rise of the Administrative State and the Demise of the Nondelegation Doctrine Eroded Constraints on the Executive Branch*

Fifty years ago, Justice Jackson observed "The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . ." <sup>83</sup> How does this "fourth branch" fit into a system that originally contemplated the interrelationships of three branches of government? <sup>84</sup> The answer to this question has spawned volumes of scholarship, <sup>85</sup> and though a thorough analysis is far beyond the scope of this Note, most answers probably include a discussion of the delegation of legislative power from Congress to administrative bodies, and the Supreme Court's willingness to defer to such delegations. <sup>86</sup>

The doctrine that "Congress is not permitted . . . to transfer to others the essential legislative functions with which it is thus vested," <sup>87</sup> also known as the nondelegation doctrine, has not been used to invalidate a delegation of legislative power since 1935, <sup>88</sup> and there is no sign that today's Supreme Court is willing to resuscitate such a rule. <sup>89</sup> In fact, the Court endorses such delegations, stating that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job

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83. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

84. *See INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . ."); *see also* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 *CORNELL L. REV.* 1, 1–2 (1994) (questioning how a fourth branch of government can fit into our original constitutional structure).

85. *See, e.g.*, KENNETH CULP DAVIS, 1 *ADMINISTRATIVE LAW TREATISE* ch. 2 (1958) (contemplating the role of administrative bodies in the constitutional system).

86. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 1.1 (2d ed. 2001) (discussing the nondelegation doctrine); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 49–61 (4th ed. 2004) (same).

87. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

88. *See id.* at 551 (holding "the attempted delegation of legislative power . . . to be invalid"); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.").

89. *See* WILLIAM F. FOX, *UNDERSTANDING ADMINISTRATIVE LAW* 42–43 (2000) ("The Supreme Court has shown no particular affection for the doctrine."). *But see id.* at 31 (noting that as an Associate Justice, William Rehnquist, suggested that the Court bring back the nondelegation doctrine).



absent an ability to delegate power under broad general directives.<sup>90</sup> The Court's "practical understanding"<sup>91</sup> recognizes the need for the delegation of power to competent agencies since Congress has neither the expertise nor the resources to deal with every solution to every problem.<sup>92</sup> Nonetheless, under a *formalist* approach, the delegation of legislative powers to executive agencies is, as Justice Scalia put it, an "unconstitutional delegation."<sup>93</sup> However, even Justice Scalia concedes, "that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."<sup>94</sup> Whether through a formalist or a functionalist perspective, congressional delegations of power are here to stay,<sup>95</sup> but questions about how to compensate for such delegations remain.

To accommodate the "somewhat confused posture"<sup>96</sup> of the separation of powers doctrine and rebalance the lopsided powers among the three branches, the Supreme Court and scholars of administrative law rely on several structural checks. This subpart explores several of the checks as they apply generally to administrative bodies; subpart B will analyze the checks as they apply to international arms trade and specifically to the State Department and DDTC.

Justices and scholars often cite the judiciary as the most fundamental check on the potential abuse of executive power.<sup>97</sup> In a sense, the courts act—albeit only in cases or controversies—to ensure that agency decisions are within the boundaries set by Congress.<sup>98</sup> For example, in *INS v. Chadha*, Chief Justice

90. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

91. *Id.* (emphasis added).

92. See FOX, *supra* note 89, at 32 ("Congress cannot legislate with precision in all areas of public interest.").

93. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting); see McCutchen, *supra* note 84, at 36 ("Under the formalist paradigm, open-ended delegations of legislative powers are unconstitutional."); see also U.S. CONST. art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .") (emphasis added); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted . . . to transfer to others the essential legislative functions with which it is thus vested."). But see PIERCE, *supra* note 80, at 86 ("The Court probably was mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power.").

94. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

95. See McCutchen, *supra* note 84, at 36 ("Open ended delegations of legislative power are here to stay.").

96. FOX, *supra* note 89, at 41.

97. See, e.g., *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (citing the ability of the court to review an agency's decision or interpretation made pursuant to congressionally delegated power).

98. See PIERCE ET AL., *supra* note 86, at 119 (summarizing the judicial control of agency

Burger relied on the limits set forth in the governing statute and the potential for judicial review as sufficient checks on the delegation of legislative powers to the Executive.<sup>99</sup>

[A]dministrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to [Art. I, § 7]. The constitutionality of the [agency's] execution of the authority delegated to [it] . . . involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," and can enforce adherence to statutory standards.<sup>100</sup>

The scope of judicial review, however, is often limited by standards of review either in the agency's governing statute or the Administrative Procedure Act (APA).<sup>101</sup> Even considering the numerous limitations on judicial review of agency action, the process does further "the dual goals of assuring that agencies act within constitutional limits and assuring that agency actions are consistent with policy decisions made by the legislature."<sup>102</sup>

Because Congress was the branch that surrendered the "quasi-legislative"<sup>103</sup> power to the Executive, Congress should have some meaningful devices with which to check that power, and it does.<sup>104</sup> First and foremost, if Congress is unhappy with the way a particular agency is interpreting a provision of a statute, the most obvious and sweeping solution is to rewrite the legislation.<sup>105</sup> Second, if Congress does not feel full scale legislation is necessary or possible, then it may issue a fast-tracked "resolution of disapproval" (not subject to many procedural formalities such as the filibuster in the Senate) to obtain a quick vote on a proposed rule.<sup>106</sup> Because the

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discretion).

99. *Chadha*, 462 U.S. at 953 n.16.

100. *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)); *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

101. *See* *PIERCE ET AL.*, *supra* note 86, at 122–23 (noting the limited scope of judicial review regarding certain types of agency action).

102. *Id.* at 119.

103. *Chadha*, 462 U.S. at 953 n.16 (quoting *Humphrey's Ex. v. United States*, 295 U.S. 602, 628 (1935)).

104. *See* *FOX*, *supra* note 89, at 43–44 (outlining the congressional devices used to police agency discretion).

105. *See* *PIERCE ET AL.*, *supra* note 86, at 41 ("[A]gency decisions can be overruled by passing legislation . . ."); *FOX*, *supra* note 89, at 43 ("Congress has the ability to write elaborate enabling acts, prescribing minute standards of agency behavior.").

106. *See* *PIERCE ET AL.*, *supra* note 86, at 515 (describing the process, adopted in 1996, by

resolution does not require the President's signature, however, it neither amends the proposed rule nor has the force of law.<sup>107</sup>

The Legislative branch has various other checks on executive power in the context of delegated authority; two powerful tools are Congress's political oversight<sup>108</sup> and budgetary control.<sup>109</sup> Congress's political oversight includes the power to investigate agencies by calling agency witnesses pursuant to Congress's subpoena power.<sup>110</sup> Political oversight also includes more informal monitoring such as day-to-day contact between agency employees and members of Congress or committee staff.<sup>111</sup> Budgetary controls "are often preferred because . . . [they] need not undergo the lengthy committee process."<sup>112</sup> Agencies cannot function without money,<sup>113</sup> and Congress can (and does) increase or decrease an agency's budget depending on whether Congress approves of the agency's behavior.<sup>114</sup>

One potentially efficient legislative check on the Executive's use of delegated authority is the legislative veto.<sup>115</sup> The Supreme Court, however, prohibited the use of this tool in 1983.<sup>116</sup> This Part of the Note explores the

which Congress may review proposed rules).

107. *See id.* (outlining the strengths and weaknesses of congressional "resolutions of disapprovals").

108. *See id.* at 41 (describing various ways in which Congress can "indirectly" shape administrative decisions). Congress's structural oversight includes budgetary restraints, oversight hearings, the ability to control the bureaucratic structure of agencies, and informal contacts between members of Congress and the State Department. William N. Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 539–40 (1992).

109. *See* MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 27 (2001) (noting the ability of Congress to influence administrative decisions with its funding power).

110. *See* FOX, *supra* note 89, at 44 (outlining the power of Congress to subpoena witnesses and compel testimony).

111. *See id.* at 46 (discussing the day-to-day ways that Congress keeps tabs on agency conduct).

112. *Id.* at 45.

113. *Id.* at 47.

114. *See id.* ("The power to set an agency's budget may be as important as all the other controls combined.").

115. *See* INS v. Chadha, 462 U.S. 919, 967–68 (1983) (White, J., dissenting) ("[The legislative veto is] a central means by which Congress secures the accountability of executive and independent agencies."). The legislative veto was an extremely popular congressional tool before the *Chadha* decision. Prior to 1983, "Congress had included 295 veto provisions in 196 different statutes." PIERCE ET AL., *supra* note 86, at 44; *see also* *Chadha*, 462 U.S. at 968 (White, J., dissenting) ("[T]he legislative veto [was] placed in nearly 200 statutes. The device [was] known in every field of governmental concern.").

116. *See* *Chadha*, 462 U.S. at 954–59 (holding that a provision mandating legislative approval of decisions made by the Attorney General regarding the deportation of aliens was unconstitutional because Congress failed to act in conformity with the constitutional

status quo, and, therefore, does not consider the legislative veto as a current check. Part VI of the Note will revisit the legislative veto as a potential solution to the dearth of checks against Executive power.

*B. Executive Constraints Are Weakest in Arms Export Regulation*

This subpart argues that constraints on executive action are especially weak in the area of arms export regulation. It first contends that traditional judicial restraints on the Executive are ineffective in this context. It then shows why the usual congressional checks are likewise inadequate.

International trade law is unique in that two of the three branches (the Executive and the Legislative) derive their powers to influence international trade from the Constitution itself.<sup>117</sup> "This constitutional division [of power] is resolved in practice by Congress delegating certain power to the President."<sup>118</sup> The preamble to the AECA explicitly delegates to the President the power to control the export of arms pursuant to the limitations within the statute.<sup>119</sup> "[T]he President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services."<sup>120</sup>

Such a delegation is valid if Congress has: (1) not left "important choices of social policy" up to the agency, (2) provided the agency with an "intelligible principle," and (3) "ensure[d] that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."<sup>121</sup> Once Congress appropriately delegates control to the Executive, any agency decision made under the delegated authority is susceptible to judicial review, but it is also entitled to *Chevron* deference.<sup>122</sup>

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requirements for enacting legislation).

117. See *supra* notes 11–18 and accompanying text (noting the congressional power explicit in Art. I, § 8, cl. 3 and the executive power explicit in Art. II, § 2, cl. 1).

118. YOUNG, *supra* note 109, at 28.

119. See *supra* note 32 and accompanying text (acknowledging the statutory language that delegates the power to regulate arms exports to the President). The President further delegated this power to the Secretary of State by Exec. Order No. 11,958, 3 C.F.R. 79 (1977).

120. 22 U.S.C. § 2778(a)(1) (2000).

121. *AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

122. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that an agency's implementation of a statutory provision is entitled to *Chevron* deference if Congress intended that agency action "carry the force of law," as is the case with Congress's explicit delegation in the preamble to the AECA).

The initial question under *Chevron* is "whether Congress has directly spoken to the precise question at issue."<sup>123</sup> If so, then the matter is over for the court and the agency; Congress's intent must be followed.<sup>124</sup> If, however, Congress has not directly addressed the question, the final step asks whether the agency's construction is "arbitrary, capricious, or manifestly contrary to the statute."<sup>125</sup> If the agency's decision passes this low hurdle, then the court will give deference to the agency's construction of the statutory provision.<sup>126</sup>

### 1. Judicial Review is Foreclosed

The preceding analysis presumes that judicial review of the administrative action is available. The discretion given to the Executive in the AECA, however, is bolstered because the delegation of the power to control the export of defense articles is within the realm of international relations and has national security implications.<sup>127</sup> This raises two separate and equally challenging hurdles to meaningful judicial review. First, as discussed above, the regulation of arms exports is a component, to one extent or another, of a President's overall foreign policy,<sup>128</sup> and in matters of foreign policy "[t]he President is the sole organ of the nation."<sup>129</sup> Thus, the President and his or her executive agencies are given more deference than would be appropriate "were domestic affairs alone involved."<sup>130</sup>

Second, under § 554(a)(4) of the APA, "the conduct of military or foreign affairs functions"<sup>131</sup> is precluded from APA review.<sup>132</sup> In fact, the ITAR and

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123. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

124. *Id.* at 842–43.

125. *Id.* at 844.

126. *Id.*

127. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom . . .").

128. *See supra* notes 42–60 and accompanying text (discussing the ways in which arms exports fit into administrations' general foreign policy goals).

129. *Curtiss-Wright Export Corp.*, 299 U.S. at 319 (quoting John Marshall).

130. *Id.* at 320.

131. 5 U.S.C. § 554(a)(4) (2004).

132. *Id.* DDTC's interpretation of § 129.3 has, thus far, been informal and is therefore excluded from review and the procedural requirements of the APA because of the reasons stated above. This Note does not explore whether a formal interpretation from DDTC would be reviewable.

DDTC explicitly exclude agency action from APA review, relying on the discretion given to the Executive in matters of foreign affairs.<sup>133</sup>

Procedures for amending and revising ITAR . . . [and the] administration of [AECA] is a "foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the [APA]"; [DDTC] takes [the] position that exercise of this foreign affairs discretion is "highly discretionary" and, therefore, excluded from [APA] review.<sup>134</sup>

Because of the insurmountable obstacles inherent in arms export regulation, one of the fundamental checks on executive power—judicial review—and thus one of the branches of government—the Judiciary—are useless.

## 2. Congressional Controls Are Inadequate

Subpart A described four devices that Congress can use to counter executive action.<sup>135</sup> This section argues that none of those tools is an adequate check on executive autonomy in arms export regulation, and in particular on the State Department's interpretation at issue here. First, although congressional amendment of the AECA would certainly be an effective check on the State Department's incorrect interpretation of § 129, it is neither a timely nor reliable one. The process by which Article I legislation is enacted is cumbersome and unpredictable.<sup>136</sup> The path by which a bill becomes law is fraught with pitfalls

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133. See ITAR, 22 C.F.R. § 128.1 (2006) ("Because the exercising of the foreign affairs function, including the decisions required to implement the [AECA], is highly discretionary, it is excluded from review under the [APA]."); Amendments to the International Traffic in Arms Regulations, 62 Fed. Reg. 67,275 (Dep't of State Dec. 24, 1997) (final rule) ("These amendments involve a foreign affairs function of the United States. They are excluded from review under Executive Order 12866 (69 Fed. Reg. 51,735) and 9 U.S.C. § 553 and § 554, but have been reviewed internally by the Department to ensure consistency with the purposes thereof.").

134. Trooboff, *supra* note 61, at 321.

135. See *supra* Part IV.A (explaining four congressional oversight devices: Article I legislation, "resolutions of disapproval," political oversight, and budgetary oversight). This list is not exhaustive. There are other congressional tools that affect agency discretion, such as changing an agency's jurisdiction. See, e.g., FOX, *supra* note 89, at 43–48 (describing a more complete list of congressional devices). The four devices in the text were chosen because of their relevance to international trade and the State Department.

136. See Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076 (2001) (describing the congressional devices for agency oversight that are less cumbersome than traditional legislation); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 508–09 (1989) (explaining "[t]he practical constraints that flow from the institutional structure of Congress"). But see *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse [associated with Art. I, § 7 legislation], we have not

and hurdles.<sup>137</sup> Not only must a bill survive the traditional obstacles associated with lawmaking, but it must also compete with other legislation for committee time and floor time, as well as meet with the approval of various individuals such as committee and subcommittee chairmen and the leadership of each House.<sup>138</sup> "The institutional obstacles to formal congressional response are likely to be overcome only when the agency's position has incited widespread or well-organized discontent, and most agencies are politically adept enough to avoid taking many such extremely provocative actions."<sup>139</sup> Without such widespread disapproval, many contested agency interpretations are left wanting.

The second congressional device, the "resolutions of disapproval" that Congress can issue regarding a proposed agency rule, are applicable only to proposed "rules."<sup>140</sup> Informal interpretations of a statutory provision, such as the State Department's current stance on the brokering provision of the AECA, will not qualify for this sort of congressional response. Furthermore, the State Department is an executive department with a Cabinet level secretary who serves at the behest of the President.<sup>141</sup> "Thus, when the President has a firm preference on the policy issue, that preference will often exercise a more powerful constraint on the agency than congressional monitoring."<sup>142</sup> In other words, even if Congress officially disapproved of the State Department's interpretation, it is unlikely to have any effect on that interpretation if the President and the Secretary of State feel strongly about the issue.

Congress's political oversight<sup>143</sup> is an "integral part of the on-going relationship between Congress and the agencies,"<sup>144</sup> but is often restricted by the interests of committee chairmen, leadership, and other individuals who have the power to organize widespread support.<sup>145</sup> Additionally, political oversight

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yet found a better way to preserve freedom . . .").

137. See, e.g., *Schoolhouse Rock!: America Rock, I'm Just a Bill* (Capital Cities/ABC Video Pub. 1995) (chronicling the process of how a bill becomes law).

138. See Seidenfeld, *supra* note 136, at 1076 (noting factors that may inhibit the progress of potential legislation).

139. Farina, *supra* note 136, at 509.

140. See PIERCE ET AL., *supra* note 86, at 516 (noting that because resolutions of disapprovals are only applicable to proposed rules they are "unlikely to have a significant impact").

141. Albeit with the advice and consent of the Senate. U.S. CONST., art. II, § 2, cl. 2.

142. Eskridge & Ferejohn, *supra* note 108, at 539.

143. See *supra* Part IV.A (noting that this oversight includes the ability to conduct hearings and investigations, as well as the informal contacts that occur between individual members of Congress and agency staff).

144. FOX, *supra* note 89, at 46.

145. See Farina, *supra* note 136, at 509 (noting the difficulties associated with oversight

is subject to constraints similar to those that affect "resolutions of disapproval." The State Department is at the heart of the Executive branch and deals with issues that heavily influence the President's foreign policy. Congress can have all the hearings it wants, but at the end of the day the Office of Defense Trade Controls answers to the Secretary of State who answers to the President.<sup>146</sup>

The final congressional device, budgetary constraints, is often an effective tool.<sup>147</sup> Even this traditional tool, however, has a limited effect on the current issue. The State Department performs such an integral role in foreign relations and national security that suggesting a reduction in the department's budget as a threat would be met with insurmountable disapproval—especially in the realm of weapons control. To illustrate, President Bush's 2007 proposed budget asks Congress to reduce spending in almost every area of government except those areas associated with national security.<sup>148</sup> Since September 11, suggesting cuts in programs with security implications is politically unwise. Thus Congress is highly unlikely to propose cuts in DDTC's budget as punishment for DDTC's inconsistent interpretation of § 129.<sup>149</sup>

In conclusion, the checks and balances that animate our system of government are absent in the context of arms export regulation. Judicial review is discouraged because of deference to the Executive and explicitly precluded by procedural safeguards in the APA and within DDTC. Congress's traditional oversight devices are also ineffective or limited. Article I legislation is cumbersome and unpredictable. Congress's "resolution of disapproval" is not applicable to informal interpretations and would probably fall on deaf ears at the executively controlled State Department if it were available.

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hearings and investigations); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2259 (2001) (discussing the "factional characteristics" of those congresspersons with the ability to organize hearings); Eskridge & Ferejohn, *supra* note 108, at 539–40 (noting that congressional oversight is often ineffective in swaying an agency).

146. *See* Eskridge & Ferejohn, *supra* note 108, at 539 (suggesting that the President's preference will often take precedence in an agency under executive control).

147. *See supra* notes 112–14 and accompanying text (discussing budgetary controls and their effectiveness).

148. *See* Amy Goldstein, *2007 Budget Favors Defense: Medicare Takes Biggest Hit in \$2.7 Trillion Plan*, WASH. POST, Feb. 5, 2006, at A01 ("President Bush plans to propose a \$2.7 trillion budget tomorrow that would shrink most parts of the government unrelated to the nation's security while slowing spending on Medicare by \$36 billion during the next five years . . ."); *see generally* OFFICE OF MANAGEMENT AND BUDGET, OVERVIEW OF THE PRESIDENT'S 2007 BUDGET 3 (2006), <http://www.whitehouse.gov/omb/pdf/overview-07.pdf> (outlining the President's budgetary agenda including the overarching emphasis on security issues).

149. *See, e.g.,* Ron Hutcherson, *Government Spending Soaring; Close Up*, SEATTLE TIMES, Feb. 7, 2006, at A3 ("In the post-Sept. 11 world, national-security spending is virtually sacrosanct in Congress.").



Congress's political oversight is not an adequate solution. And budgetary constraints are not likely to gain traction in a Congress that dare not suggest reducing the appropriations of an office with national security responsibilities. This set of ineffective restraints leaves the State Department unchecked in their recent interpretation of § 129. Such unfettered autonomy is a sharp departure from our government's fundamental principle of checks and balances.<sup>150</sup>

*V. The State Department's Interpretation Contravenes Congressional Intent and Would Fail Judicial Review*

Part IV of this Note examined the ineffective checks and balances of Congress and the judiciary against the Executive's use of delegated power in the field of foreign affairs, and specifically arms export regulation. This Part analyzes the deficiency as it relates to ITAR and § 129. As previously stated, the State Department's recent interpretation of § 129.3 and the language "otherwise subject to the jurisdiction of the United States" represents a change in course and has caused confusion for the manufacturers of defense articles as they apply for new and renewed licenses.<sup>151</sup>

The absence of such checks, however, is harmless if such an interpretation is consistent with congressional intent and able to withstand judicial review, for in that case, neither Congress nor the courts would object to or overrule DDTC's current interpretation. Therefore, an important part of this Note proves, or at least suggests, the opposite—the State Department's current interpretation is inconsistent with congressional intent and would not withstand judicial review if review were possible. In order to accomplish this, subpart A will examine the legislative history of the brokering amendment and the AECA. Subpart B will analyze DDTC's interpretation of § 129 as a reviewing court would.

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150. See THE FEDERALIST NO. 47 (James Madison) ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . . ." (quoting Montesquieu)).

151. See *supra* Part III (explaining the previous interpretation of Part 129 and the recent rejection of license applications due to unregistered consignees on the applications).

*A. The Congressional Intent and Legislative Purposes Are Contrary to the State Department's Interpretation*

DDTC promulgated § 129 in response to a congressional amendment to the AECA.<sup>152</sup> In July 1996, Congress amended § 38(b)(1)(A)(ii) of the AECA to require "every person who engages in the business of brokering activities" to register with the State Department.<sup>153</sup> This Note is concerned with the question of to whom the brokering amendment applies; thus the only language in the amendment that is pertinent to this analysis are the words "every person."<sup>154</sup> Admittedly, the statutory language "every person," read literally, suggests Congress intended to include any person, wherever located. However, the legislative history of the brokering amendment and the foreign policy objectives that guide arms export legislation in general suggest that Congress did not intend a literal interpretation of this language.

*1. The Legislative History of the Brokering Amendment Calls for a Narrower Reading*

The brokering amendment to the AECA passed in July of 1996.<sup>155</sup> The legislative history of the amendment provides what Professor Cass Sunstein calls "interpretative instructions" to determine congressional intent.<sup>156</sup> Little of the legislative history is devoted specifically to the brokering amendment,<sup>157</sup> but what the legislative history lacks in bulk, it makes up for in substance. The "instructions" that Congress did provide regarding the brokering amendment

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152. 22 C.F.R. § 129.1 (2006) (stating the purpose of § 129).

153. Defense and Security Assistance Programs Revision and Naval Vessels Transfer, Pub. L. No. 104-164, § 151, 110 Stat. 1421, 1437 (1996).

154. 22 U.S.C. § 2778 (b)(1)(A)(ii) (2000).

155. Defense and Security Assistance Programs Revision and Naval Vessels Transfer, Pub. L. No. 104-164, § 151, 110 Stat. 1421, 1437 (1996). An identical amendment first appeared as part of the American Overseas Interests Act of 1995. H.R. 1561, 104th Cong. § 3193 (1995). H.R. 1561 was vetoed by President Clinton for reasons unrelated to the issue at hand. H. DOC. No. 104-197 (April 15, 1996).

156. Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2109 (1990).

157. See Elise Keppler, *Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act*, 19 BERKELEY J. INT'L L. 381, 391 (2001) (finding that the legislative history of the brokering amendment is limited to the House Reports).

are quite telling. The House Reports<sup>158</sup> for both the 1995 and 1996 amendments gave identical reasons for the brokering amendment:

[Currently], the AECA does not authorize the Department to regulate the activities of U.S. persons (and foreign persons located in the U.S.) brokering defense transactions overseas . . . . Nor does the AECA authorize the Department to regulate the brokering of non-U.S. defense articles or technology.

This provision provides those new authorities to ensure that arms export support the furtherance of U.S. foreign policy objectives, national security interests and world peace. More specifically, in some instances U.S. persons are involved in arms deals that are inconsistent with U.S. policy. Certain of these transactions could fuel regional instability, lend support to terrorism or run counter to a U.S. policy decision not to sell arms to a specific country or area. The extension of U.S. legal authority under this provision to regulate brokering activities would help to curtail such transactions.<sup>159</sup>

The House Reports reveal that the brokering amendment's purpose was to close three loopholes that the AECA previously left open. The first goal was to allow the State Department to regulate the brokering activities of U.S. persons at home and abroad.<sup>160</sup> The State Department defines "U.S. person" as one who is a "lawful permanent resident . . . or who is a protected individual."<sup>161</sup> The House Report statement that "in some instances U.S. persons are involved in arms deals inconsistent with U.S. policy"<sup>162</sup> further supports the argument that the brokering amendment was principally concerned with regulating the brokering activities of U.S. persons.

Second, Congress wanted to enable the State Department to regulate the activities of "foreign persons *located in the United States*."<sup>163</sup> A foreign person is defined as a person who is not a "lawful permanent resident . . . or who is not a protected individual."<sup>164</sup> Third, Congress wanted to enable the State Department to regulate the brokering of non-U.S. defense articles and

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158. No Senate Report exists for the 1996 bill, and no Senate Report was found for the 1995 bill.

159. H.R. REP. NO. 104-519, pt. 1, at 11-12 (1996); H.R. REP. NO. 104-128, pt. 1, at 66-67 (1995).

160. See H.R. REP. NO. 104-519, at 11-12 ("[Currently], the AECA does not authorize the Department to regulate the activities of U.S. persons . . .").

161. 22 C.F.R. § 120.15 (2006).

162. H.R. REP. NO. 104-519, at 12.

163. *Id.* at 11 (emphasis added).

164. 22 C.F.R. § 120.16 (2006).

technology.<sup>165</sup> Foreign persons located outside of United States territory are conspicuously omitted from consideration. Most telling, however, is the first sentence of the portion of the Report addressing the brokering amendment, which explicitly limits the reach of the brokering requirement to U.S. persons and foreign persons located within the United States.<sup>166</sup> The reason that Congress omitted foreign persons abroad is unknown. Perhaps they are omitted because "[v]irtually all exporters of defense articles employ [foreign] local agents to assist in promoting and negotiating contracts with foreign governments,"<sup>167</sup> and the added burden of licensing their foreign brokers would have fatally crippled their ability to further important foreign policy goals abroad.<sup>168</sup>

## 2. *The Foreign Policy Objectives of Arms Export Control Support a Narrow Interpretation*

Congress's ultimate goal regarding the international proliferation of arms "continues to be a world which is free from the scourge of war and the dangers and burdens of armaments."<sup>169</sup> Normative arguments about how best to meet that goal and the appropriateness of arms exports as a tool for doing so are compelling but beyond the scope of this Note.<sup>170</sup> The fact remains that Congress continues to recognize the important (even if contradictory) role that arms exports play in the furtherance of its larger objective:

The Congress recognizes, however, that the United States and other free and independent countries continue to have valid requirements for effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to

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165. See H.R. REP. NO. 104-519, pt. 1, at 12 (1996) ("Nor does the AECA authorize the Department to regulate the brokering of non-U.S. defense articles or technology.").

166. See *id.* ("[Currently], the AECA does not authorize the Department to regulate the activities of U.S. persons (and foreign persons located in the U.S.) brokering defense transactions overseas . . .").

167. Client Alert, *supra* note 23, at 1.

168. See H.R. REP. NO. 94-1144, at 12 (1976) (stating that "[t]he United States cannot stand aside from [the international arms trade] process," implying that the United States should remain competitive in the international arms trade business).

169. Foreign and National Security Objectives and Restraints, 22 U.S.C. § 2751 (2000).

170. For discussions regarding the policy arguments for and against the use of arms exports as a foreign policy tool of the United States, see, e.g., Nolan, *supra* note 47, at 131-48 (critiquing recent administrations' use of arms exports as a foreign policy tool); ANTHONY, *supra* note 30, at 183-204 (chronicling the process and historic policy objectives of the United States' international trade of defense articles).

social, economic, and political progress. Because of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomic for any country, particularly a developing country, to fill all of its legitimate defense requirements from its own design and production base. The need for international defense cooperation among the United States and those friendly countries to which it is allied by mutual defense treaties is especially important, since the effectiveness of their armed forces to act in concert to deter or defeat aggression is directly related to the operational compatibility of their defense equipment.

Accordingly, it remains the policy of the United States to facilitate the common defense by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of cooperative exchange of data, research, development, production, procurement, and logistics support to achieve specific national defense requirements and objectives of mutual concern.<sup>171</sup>

If the State Department and DDTC take a position that unreasonably restricts the ability of United States manufacturers to engage friendly nations in otherwise sanctioned trade deals, then that position is contrary to Congress's intent.<sup>172</sup>

DDTC's informal interpretation of § 129 has produced not only confusion in the defense industry but also a backlog in the registration process.<sup>173</sup> Because Congress presumes that nations in need of arms will "take the necessary steps to get them,"<sup>174</sup> the increased processing time due to broader licensing standards<sup>175</sup> could cause nations to go elsewhere for their arms. In addition, foreign brokers (now required to register) would be less likely to agree to register with DDTC knowing they would, in essence, be availing themselves to the jurisdiction of the United States. If defense companies lost the ability to

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171. 22 U.S.C. § 2751 (2000); *see also* H.R. REP. NO. 94-1144, at 12 (1976) (maintaining that the United States should take an active role in the international trade of arms). The Report states:

Every nation, large or small, is concerned with its ability to defend itself. If weapons must be obtained from abroad, nations will take the necessary steps to get them. The United States cannot stand aside from this process. It should be willing to help, so long as its assistance is consistent with our security and foreign policy interests.

*Id.*

172. H.R. Rep. No. 94-1144, at 12.

173. *See* U.S. Gov. Accountability Office, *supra* note 54, at 2-4 (acknowledging that the processing time for applications has increased since 2003).

174. H.R. Rep. No. 94-1144, at 12.

175. *See* Hillen, *supra* note 52, at 4 (acknowledging "more aggressive compliance efforts" in the DDTC's review of license applications).

promote and negotiate contracts through these local mediators,<sup>176</sup> then the United States' position in the global arms market would be disadvantaged—contrary to Congress's foreign policy objectives.

Strains on the United States' defense industry are felt around the globe, for the United States is the world's largest exporter of arms.<sup>177</sup> In fact, from 1999 to 2000, the United States exported more than six times the amount of defense articles exported by the United Kingdom (the world's second leading exporter).<sup>178</sup> The United States' role in the global trade of defense articles cannot be overstated. Egypt, Saudi Arabia, Israel, the United Kingdom, and South Korea are among the leading purchasers of U.S. defense articles.<sup>179</sup> Whether a nation is the United States' oldest ally or a critical component to a region's stability, Congress and the State Department have determined that it is in the United States' interest to negotiate arms agreements with that nation.<sup>180</sup> Many of the U.S. trade partners are key players in some of the most delicate situations around the globe. If Congress deems it necessary to engage (politically or militarily) in these delicate situations, then our regulatory processes must operate with maximum efficiency and clarity. Therefore, the confusion, unpredictability, and delay caused by DDTTC's informal interpretation of § 129 threaten the ability of the United States to maintain its role in the preservation of regional and global balances of power.

### *B. Judicial Review Would Reject the Current Interpretation*

Part IV.B.1, above, discussed the doctrinal<sup>181</sup> and statutory<sup>182</sup> impediments to meaningful judicial review of DDTTC's interpretations of the AECA. Judicial review, however, would be neither necessary nor missed if DDTTC's interpretation would meet with a court's approval. This section demonstrates

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176. See Client Alert, *supra* note 23, at 1 ("Virtually all exporters of defense articles employ such local agents . . .").

177. See U.S. Dep't of State, World Military Expenditures and Arms Transfers, 1999–2000 at 39 (2002), available at <http://www.fas.org/asmp/profiles/wmeat/WMEAT99-00/WMEAT99-00.pdf> (ranking countries by value of arms exported in 1999 (the most recent survey)).

178. *Id.*

179. Cong. Research Serv., U.S. Arms Sales: Agreements with and Deliveries to Major Clients, 1997–2004, CRS 7 (2005), available at <http://www.fas.org/asmp/resources/govern/109th/CRSRL33217.pdf>.

180. See *id.* at CRS 1–7 (charting the dollar value of U.S. arms exports around the globe).

181. See *supra* Part IV.B.1 (discussing the judicial deference to the Executive in matters of foreign policy).

182. See *supra* Part IV.B.1 (explaining the APA (5 U.S.C. § 554) and ITAR (22 C.F.R. § 128.1) provisions which exclude the possibility of judicial review).

that it would not. Because DDTC's regulation interprets a federal statute, *Chevron U.S.A., Inc. v. Natural Resource Defense Council*<sup>183</sup> would govern its review.<sup>184</sup> A court properly applying *Chevron* would find the interpretation unlawful.

### 1. *Chevron, Step One: Has Congress Spoken to the Precise Question at Issue?*

The first question under the *Chevron* analysis is whether Congress's intent in the statute is clear.<sup>185</sup> If congressional intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>186</sup> A court will use a variety of tools to ascertain congressional intent.<sup>187</sup> Several of those tools (the statutory text of the statute, the legislative

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183. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) (holding that the Environmental Protection Agency's (EPA) interpretation of permit requirements regarding pollution emitting devices was reasonable and entitled to deference). In *Chevron*, the Supreme Court addressed whether the "EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term 'stationary source.'" *Id.* at 840. Various environmental groups filed petitions alleging that the EPA's interpretation of the regulation allowing pollution causing devices to be consolidated into one "bubble" was inconsistent with the overall goal of the Clean Air Act. *Id.* at 837.

The Court developed a two-step test to be used where, as here, a court reviews an agency construction of a statute. *Id.* at 842. Step one asks whether Congress has directly spoken "to the precise question at issue." *Id.* If so, then the court and the agency must acquiesce to Congress's expressed intention. *Id.* at 842-43. If Congress has not directly addressed the issue, then the courts move to step two which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Court noted that an agency's interpretation is given "considerable weight" because Congress delegated the authority "to elucidate a specific provision." *Id.* at 844.

The Court found that Congress had not expressed a specific intention regarding the meaning of the specific statutory provision. *Id.* at 845. Therefore, the EPA's interpretation was entitled to "controlling weight" unless it was "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The Court concluded that the EPA's interpretation was "a reasonable accommodation of manifestly competing interests and is entitled to deference." *Id.* at 865.

184. See *supra* notes 121-25 and accompanying text (providing a brief discussion of the *Chevron* doctrine and its role in maintaining the checks and balances between the three branches).

185. *Chevron*, 467 U.S. at 842.

186. *Id.* at 842-43.

187. See MICHAEL F. DUFFY, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 57 (2005) ("The court should use the 'traditional tools of statutory construction' to determine whether the meaning of the statute is clear . . ."). These tools include: (1) the text of the statute, (2) dictionary definitions, (3) canons of construction, (4) statutory structure, (5) legislative purpose, and (6) legislative history. *Id.*

history and the legislative purpose)<sup>188</sup> were analyzed in the preceding section. That analysis strongly suggested that the intent of the brokering amendment is clear—foreign persons located outside the jurisdiction of the United States are beyond the reach of the statute.<sup>189</sup>

This conclusion is strengthened by the doctrine that a reviewing court presumes that "Congress legislates against the backdrop of the presumption against extraterritoriality."<sup>190</sup> Courts require "affirmative evidence" of Congress's intent before they will apply a statute extraterritorially.<sup>191</sup> Unless there is "'clearly expressed'"<sup>192</sup> evidence that Congress intended the statute to apply extraterritorially, then a reviewing court will assume that the statute applies only domestically.<sup>193</sup>

DDTC's current interpretation of "otherwise subject to the jurisdiction of the United States" evidences a belief that the AECA can apply extraterritorially to foreign persons in foreign nations who are not subject to the jurisdiction of the United States.<sup>194</sup> This interpretation, in order to be valid, must be based upon a "clearly expressed" indication from Congress that the brokering provision is to apply extraterritorially.<sup>195</sup> The AECA does not provide the type of explicit reference to extraterritoriality that the Supreme Court requires.

One could argue that the language "every person"<sup>196</sup> expresses Congress's desire that the statute apply extraterritorially. This reference, however, falls short of the "clearly expressed" intent required, especially considering the

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188. *Id.*

189. *See supra* Part V.A (concluding that the Congress intended a narrower reading of "otherwise subject to the jurisdiction of the United States" consistent with the previous interpretation discussed in Part III.A).

190. *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991) (concluding that the petitioner did not overcome the presumption against extraterritorial jurisdiction); *see also* *United States v. Yakou*, 393 F.3d 231, 242–43 (D.C. Cir. 2005) (citing *Arabian American Oil Co.* and the assumption against extraterritoriality as it applies to the AECA).

191. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 176 (1993); *see also* *Arabian Am. Oil Co.*, 499 U.S. at 249 (requiring explicit congressional intent to apply a statute extraterritorially).

192. *Arabian Am. Oil Co.*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

193. *Id.*

194. *See supra* Part III.B (discussing the jurisdictional implications of DDTC's current interpretation).

195. *See Arabian Am. Oil Co.*, 499 U.S. at 248 ("[W]e look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949))).

196. 22 U.S.C. § 2778(b)(1)(A)(ii)(I) (2000).



legislative history that limits the reach of the amendment to U.S. persons and foreign persons in the territorial United States.<sup>197</sup> Another counterargument is that Part IV of the statute implies a borderless application of the AECA with the language "non-United States defense articles . . . regardless of whether such article or service is of United States origin."<sup>198</sup> This provision, however, simply defines what constitutes a "foreign defense article" and has no bearing on the class of persons (domestic, foreign, or both) to whom the statute applies.<sup>199</sup> Given that the only indication of the jurisdictional reach of the brokering amendment in the statute and its legislative history expresses Congress's intent to *exclude* foreign persons in foreign nations,<sup>200</sup> a reviewing court would likely sustain Congress's presumption against extraterritoriality. Therefore, DDTC's extraterritorial application of the brokering amendment is contrary to Congress's expressed intent against extraterritoriality.

Step two of *Chevron* assumes that if Congress has not addressed the issue directly, then it has delegated the power to "elucidate a specific provision of the statute."<sup>201</sup> A court will defer to an agency's interpretation if it is not "arbitrary, capricious, or manifestly contrary to the statute."<sup>202</sup> This Note argues that DDTC's interpretation would fail step one, thereby eliminating any analysis under step two. For the sake of being comprehensive, however, this Note concludes that the result under a step two analysis is unclear. On the one hand, DDTC's interpretation may be "manifestly contrary to the statute" and invalid under step two because it conflicts with Congress's implicit policy of encouraging a competitive defense industry.<sup>203</sup> On the other hand, in step two, a court will give an agency's construction "considerable weight."<sup>204</sup> That deference coupled with the general "discretion and freedom from statutory restriction"<sup>205</sup> given to the Executive in international matters<sup>206</sup> seems to suggest that DDTC's interpretation would survive step two of *Chevron*.

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197. See *supra* Part V.A.1 (discussing the legislative history of the brokering amendment).

198. 22 U.S.C. § 2778(b)(1)(a)(ii)(IV) (2000).

199. *Id.*

200. See *supra* notes 158–168 and accompanying text (describing Congress's intention to limit the scope of the brokering amendment).

201. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1986).

202. *Id.*

203. See *supra* notes 169–172 and accompanying text (examining congressional objectives explicit and implicit in the AECA).

204. *Chevron*, 467 U.S. at 844.

205. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

206. See *id.* (identifying the Executive as the "sole organ" of the United States in foreign affairs).

## 2. *United States v. Yakou Reinforces a Narrow Interpretation of the Brokering Amendment*

A hypothetical analysis using the traditional tenets of judicial review of administrative action is worthwhile because it exposes many of the inconsistencies between Congress's intent and DDTC's interpretation of the brokering amendment.<sup>207</sup> Even more convincing, however, is an actual judicial review of the brokering amendment's scope. In May 2005,<sup>208</sup> the D.C. Circuit decided *United States v. Yakou*,<sup>209</sup> which offered an examination of the brokering amendment consistent with the analysis above. *Yakou* adds further support to the argument that DDTC's current interpretation fails step one of the *Chevron* analysis because it is contrary to the expressed intent of Congress.<sup>210</sup>

In *Yakou*, the D.C. Circuit considered whether the defendant, Sabri Yakou, violated the AECA and the ITAR's requirement that anyone engaged in brokering activities register with DDTC.<sup>211</sup> The defendant was an Iraqi citizen who lived in the United States from 1986 until 1993, when he moved back to Iraq.<sup>212</sup> Despite severing all ties to the United States, the defendant never formally renounced his status as a Lawful Permanent Resident (LPR).<sup>213</sup> In 2003, federal agents arrested the defendant's son and notified the defendant that he should come to the United States to assist his son.<sup>214</sup> When Mr. Yakou arrived in the United States he was arrested for brokering arms sales without a license from DDTC.<sup>215</sup>

The court looked to the language of § 129.3 as well as the legislative history of the brokering amendment and reasoned that "Congress had expressed its intent to limit the extraterritorial reach of the Brokering Amendment and thus the ITAR to 'U.S. persons.'"<sup>216</sup> The Court went on to find that Congress

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207. See *supra* Part V.B.1 (using the analysis from *Chevron* step one to examine DDTC's current interpretation of § 129).

208. The case was decided on January 4, 2005, but an amended opinion was submitted May 9, 2005.

209. *United States v. Yakou*, 393 F.3d 231, 244 (D.C. Cir. 2005) (holding that the defendant was not in violation of the brokering registration requirement because ITAR limits extraterritorial jurisdiction to "U.S. persons").

210. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter . . .").

211. *Yakou*, 393 F.3d at 233.

212. *Id.* at 235.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Yakou*, 393 F.3d at 243.

was not concerned "with foreign brokers located outside the United States."<sup>217</sup> The court did not consider Mr. Yakou's LPR status sufficient to qualify him as a "U.S. person" under the ITAR and ruled that he was outside the scope of the statute.<sup>218</sup>

The D.C. Circuit's examination of the brokering amendment carries great weight because black letter administrative law states that "the courts are the final authorities on issues of statutory construction."<sup>219</sup> The court's analysis of the brokering amendment and its scope confirms, in three ways, that DDTC's current expansive interpretation is contrary to congressional intent and would likely not pass *Chevron* review if review were available.<sup>220</sup> First, the court reinforces the argument that the "every person" language in the AECA should not be read literally but more narrowly to include only U.S. persons and foreign persons located within the United States (and persons "otherwise subject to the jurisdiction of the United States").<sup>221</sup> The court found that, "[i]n so construing the Brokering Amendment's reference to 'every person,' the ITAR reflects the legislative history revealing that in enacting the Brokering Amendment Congress was focusing on 'U.S. persons' and 'foreign persons located in the [United States].'"<sup>222</sup>

Second, the court found that Congress had not "clearly expressed" its intention that the brokering amendment be applied extraterritorially. This supports the proposition<sup>223</sup> that there is nothing in the AECA or its legislative history to suggest that the brokering requirement is to apply to foreign persons in foreign nations.<sup>224</sup> Third, the court's analysis of the legislative history reveals, similar to the analysis in the preceding section, that Congress conspicuously omitted foreign persons in foreign nations from the brokering

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217. *Id.*

218. *Id.* at 244.

219. *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745–46 (1973) (quoting *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968)).

220. *See id.* (finding that the courts have the final say on matters of statutory construction, implying that any interpretation contrary to a judicial determination of congressional intent would be overruled).

221. *United States v. Yakou*, 393 F.3d 231, 234 (D.C. Cir. 2005).

222. *Id.*

223. *See supra* notes 190–200 and accompanying text (discussing the judicial presumption that Congress legislates against extraterritoriality).

224. *See Yakou*, 393 F.3d at 243 ("Congress has not expressed with the requisite clarity that it sought to apply the Brokering Amendment outside the United States [jurisdiction] . . . . [T]he Brokering Amendment and the ITAR have extraterritorial effect for 'U.S. persons,' they *do not* have such effect for 'foreign persons' . . . whose conduct occurs outside the United States.") (emphasis added).

amendment's reach.<sup>225</sup> Citing the House Reports,<sup>226</sup> the court states: "In the Brokering Amendment, then, Congress was concerned with both United States brokers of arms and foreign brokers of arms located in the United States, but not with foreign brokers located outside the United States."<sup>227</sup>

The aftermath of *Yakou* and DDTC's position on the opinion warrant a few additional comments. Not surprisingly, DDTC indicated initially that it would not follow the *Yakou* interpretation as it stood when the decision was handed down on January 9, 2005, and would continue to adhere to its own interpretation of § 129.<sup>228</sup> Furthermore, in response to an appeal by the U.S. Government, the D.C. Circuit amended its opinion to clarify its findings concerning the scope of the brokering amendment.<sup>229</sup>

Among the several changes, a significant amendment to the opinion noted that the government did not argue that Mr. Yakou was "otherwise subject to the jurisdiction of the United States."<sup>230</sup> Because the court did not rule on this issue, the amended opinion effectively reopened the question of whether Mr. Yakou, and similarly situated foreign persons, would be "otherwise subject to the jurisdiction of the United States."<sup>231</sup> Thus, the holding in *Yakou* does not go so far as to foreclose any alternative interpretation of the brokering amendment. In fact, one could argue that the opinion, as amended, has no bearing on the meaning of "otherwise subject to the jurisdiction of the United States."<sup>232</sup>

However, the court's narrow interpretation of "every person," its adherence to the presumption against extraterritoriality, and its reading of the legislative history<sup>233</sup> should not be ignored.<sup>234</sup> Therefore, despite the amended

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225. See *id.* (citing the legislative history).

226. H.R. REP. NO. 104-519, pt. 1, at 11-12 (1996); see *supra* note 159 and accompanying text (examining the House Report and its meaning).

227. *United States v. Yakou*, 393 F.3d 231, 243 (D.C. Cir. 2005).

228. See Client Alert, *supra* note 23, at 2 (explaining DDTC's position on the *Yakou* decision).

229. See *United States v. Yakou*, 428 F.3d 241, 241 (D.C. Cir. 2005) (order granting in part and denying in part the government's motion to clarify the opinion); see also Client Alert, *supra* note 23, at 2 (noting the purpose of the D.C. Circuit's amendments).

230. *Yakou*, 428 F.3d at 253.

231. *Id.* (noting that the government did not argue that Mr. Yakou was "otherwise subject to the jurisdiction of the United States," and therefore implying that the court did not address that issue).

232. See Client Alert, *supra* note 23, at 2 ("[A]s amended, the *Yakou* decision no longer has any bearing on interpretation of the scope of the phrase 'otherwise subject to' . . .").

233. See *supra* notes 221-27 and accompanying text (explaining the three ways in which *Yakou* supports a narrow interpretation of the brokering amendment).

234. See *supra* note 219 and accompanying text (noting that judicial interpretations of

opinion and DDTC's predictable opposition to the case, *Yakou* significantly reinforces the argument reiterated throughout this subpart—that DDTC's current interpretation is contrary to Congress's clear intention of a narrow interpretation of the brokering amendment and would fail step one of *Chevron* if judicial review were possible.

#### VI. *Toward a Solution: A Legislative Tool Can Adequately Address the Political Imbalance*

DDTC's current interpretation of § 129 expands its earlier interpretation and hinders the defense industry's ability to compete in the worldwide arms trade.<sup>235</sup> Such a controversy should have an adequate remedy in our system, which was established upon a foundation of checks and balances.<sup>236</sup> There is, however, no adequate check because judicial review is precluded<sup>237</sup> and congressional mechanisms are either inadequate or ineffective.<sup>238</sup> The frustrating imbalance is exacerbated by the conclusion reached in Part V—that the Legislative branch and the Judicial branch both have incentives to use any potential check on the Executive because DDTC's interpretation is contrary to Congress's clear intention.<sup>239</sup> This Note's primary goal is to demonstrate that the absence of effective checks on executive action in arms export regulation is a serious problem. This Part complements that project by sketching the contours of a possible solution.

##### A. *The Status Quo Is Not an Option*

Is there an adequate solution to this problem? Several possibilities present themselves. The easiest option is to tolerate the status quo and hope for the

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statutory language are authoritative).

235. See *supra* Part III (noting DDTC's previous and current interpretations of § 129 and the consequences of the current interpretation).

236. See *supra* Part IV.A (describing our system of checks and balances and the current state of this system in light of the rise of the administrative state).

237. See *supra* Part IV.B.1 (exploring the doctrinal and statutory barriers to judicial review).

238. See *supra* Part IV.B.2 (discussing the troubles associated with relying on congressional remedies to solve the problem).

239. See *supra* Part V.A (examining the legislative history and legislative purposes of the AECA and the brokering amendment in order to discern the congressional intent); Part V.B.1 (concluding that DDTC's interpretation would fail step one of *Chevron* because Congress has already spoken to the issue at hand).

best: That the State Department will alter its perspective independently, or a future administration will restore the correct interpretation, or the persuasive powers of non-governmental organizations will move Congress to address the situation by way of legislation. The easiest solution is not always the correct one. The discussion in Parts III, IV, and V highlighted the reasons why tolerating the status quo, while an option, is not a solution.<sup>240</sup> The first two options—waiting for independent action by the State Department or waiting until the next election—may eventually lead to the correct interpretation of § 129, but neither option effectively addresses the underlying structural problem. Even if the State Department independently were to realign its interpretation with Congress's original intent, there is still no institutional check that prevents it from unilaterally adopting another view. The problem is not the misinterpretation of § 129 standing alone. The problem is the imbalance of power that allows the State Department to take that view with impunity, and neither of the wait-and-see options provides a solution to the imbalance.

The third option—to rely on the persuasive powers of non-governmental organizations—warrants some discussion because it addresses the industry's lobbying power. That factor is not discussed in this Note but is an important part of the story.<sup>241</sup> Defense trade policy might not inspire the same emotion across America that traditional trade policy does,<sup>242</sup> but it is certainly a high stakes game.<sup>243</sup> Much scholarship has been devoted to the campaign

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240. See *supra* Part V (explaining why DDTC's current interpretation is incorrect and inconsistent with congressional intent); Part V.A.2 (discussing the negative ramifications of DDTC's current interpretation).

241. Interestingly, one study of the legislative history of the brokering amendment argues that the reason there is so little in the congressional record concerning the 1996 amendment is that Senate staff and other drafters intentionally kept the amendment below the radar to avoid political opposition from the defense industry. See Keppler, *supra* note 157, at 392 ("Notably, the non-governmental community was not involved. Non-governmental organizations (NGOs) in the United States had not commenced legislative advocacy on obtaining increased regulation of brokers at that time, suggesting that advocacy related to the problems posed by unregulated brokering had not yet emerged.").

242. See Young, *supra* note 109, at 22 ("Trade policy, in particular, often hits a very personal note for Americans, and lately has been closely associated with both the loss and creation of jobs for blue collar workers, as well as profit margins for business in general."); see, e.g., Paul Blustein & Mike Allen, *Trade Pact Approved By House; GOP Struggles to Eke Out 217-215 Victory on CAFTA*, WASH. POST, July, 28, 2005, at A01 (discussing the intense struggle on Capitol Hill and across America involved in the passage of free trade agreements).

243. See, e.g., *Commercialization of Space: Commercial Space Launch Amendments Act of 2004*, 17 HARV. J.L. & TECH. 619, 623 (noting that two of the largest defense contractors "devote more than \$19 million annually to lobbying").

contributions and lobbying expenditures of major defense contractors and the political clout that results from those efforts.<sup>244</sup>

With such a strong voice in the legislative process,<sup>245</sup> perhaps defense contractors could effectively lobby congressional leadership to overrule DDTC's interpretation of § 129. This would certainly be an effective solution to the particular problem, but this Note addresses a broader structural imbalance among the three branches that is not limited to DDTC's current reading of the § 129.<sup>246</sup> For example, what if DDTC, instead of its current broad interpretation imposed an extremely narrow interpretation of § 129 under which foreign persons within the United States were not required to register? This interpretation would lead to the same imbalance of power because there would still be no adequate congressional remedy and no judicial review. The defense industry, however, is unlikely to oppose such an interpretation because it eliminates the harm associated with DDTC's broader view.<sup>247</sup> There may be political opposition to a narrower interpretation of § 129, but it would lack the financial and political clout that the defense industry offers. Without the resources to garner the widespread support necessary to generate legislative change,<sup>248</sup> opposition to a narrower interpretation of § 129 is unlikely to effectuate change.

Relying on the public or on private interest groups does not adequately address the problem because of the shortcomings highlighted in the preceding example. This Note uses the interpretation of § 129 to argue that a structural problem exists among the three branches, but the problem is by no means limited to § 129. Therefore, relying on the persuasive ability of the defense industry does not address the broader implications of the problem—namely

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244. See, e.g., Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1022–23 (2005) (discussing the effects and influence of the increasingly powerful private military contractors on foreign policy objectives); Sheryl Fred, *The Best Defense: A Guide to the Interests Driving the FY2004 Defense Budget*, OPENSECRETS.ORG, Oct. 1, 2003, <http://www.opensecrets.org/news/defensebudget/index1.asp> (last visited Nov. 27, 2006) (describing the effectiveness of the defense contractors' campaign contributions and lobbying efforts in securing millions of dollars worth of contracts in the FY 2004 federal budget) (on file with the Washington and Lee Law Review).

245. See Fred, *supra* note 244 (noting the influence of campaign and lobbying expenditures on the appropriations process).

246. See *supra* Part IV (explaining generally the failure of checks and balances regarding executive agencies' interpretations of statutes involving elements of national security).

247. See *supra* Parts I & V.A.2 (discussing the administrative and competitive harm suffered by the defense manufacturing industry as a result of DDTC's current interpretation).

248. See *supra* notes 138–39 (observing the broad-based support needed to effectuate legislative change).

unchecked executive power. This Note advocates a structural solution to a structural problem.

*B. A Congressional Solution Is Preferable to a Judicial Remedy*

There are legislative and judicial approaches that may compensate for the current imbalance of power. This Note advocates a legislative solution because "[f]oreign relations are political relations conducted by the political branches of the federal government."<sup>249</sup> The judiciary is ill-equipped<sup>250</sup> and often unwilling<sup>251</sup> to settle separation of powers conflicts between the President and Congress, especially in the realm of foreign affairs.<sup>252</sup> The power to conduct the international trade of defense articles is vested both in Congress's authority to regulate trade with foreign nations<sup>253</sup> and the President's power to design and execute foreign policy.<sup>254</sup> Justice Jackson once wrote that "only Congress itself

249. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 131 (2d ed. 1996).

250. *See id.* at 141 ("Thanks to both constitutional, legislative, and political limitations on the business of the courts, the paramount judicial prerogative of invalidating acts of the political branches has not loomed large in the conduct of foreign relations.").

251. *See id.* at 316 (commenting that courts are hesitant to settle separation of powers disputes in matters of foreign policy). Renowned scholar of constitutional and international law, Louis Henkin, notes:

The courts . . . are not likely to step into intense confrontations between President and Congress, or to inhibit either branch when the other does not object. Whether from a sense that the boundary between Congress and President . . . cannot be defined by law, whether from realization of the inherent limitations of judicial power or from prudence, whether under a doctrine of 'political questions' or by other judicial devices and formulae for abstention, courts will not rush to make certain what was left uncertain, to curtail the power of the political branches, to arbitrate their differences.

*Id.*

252. *See id.* at 134 ("In principle, judicial review applies to foreign affairs as elsewhere, but practice reflects differences."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (citing the absolute powers vested in the federal government, which are "'necessary to maintain an effective control of international relations'" (quoting *Burnet v. Brooks*, 288 U.S. 378, 396 (1933))); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the 'political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *see also* 5 U.S.C. § 554(a)(4) (2004) (excluding "foreign affairs functions" from administrative adjudications).

253. U.S. CONST. art. 1, § 8, cl. 3.

254. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (quoting John Marshall)).



can prevent power from slipping through its fingers.<sup>255</sup> Consequently, in order adequately to address the imbalance of power that began with a delegation of legislative power,<sup>256</sup> Congress must step forward and assert its role not only as the branch with the power "[t]o regulate Commerce with foreign Nations,"<sup>257</sup> but also as the only constitutional counterpoint to the Executive's use or abuse of delegated authority in foreign relations.<sup>258</sup>

*C. A Limited Legislative Veto Is an Effective and Doctrinally Defensible Solution*

A thoughtfully designed legislative veto is the most effective and constitutionally tolerable legislative tool to combat the unchecked power of the Executive in the area of arms trade.<sup>259</sup> *INS v. Chadha*<sup>260</sup> presents a general

255. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

256. See 22 U.S.C. § 2778(a)(1) (2000) ("[T]he President is authorized to control the import and the export of defense articles . . .").

257. U.S. CONST. art. 1, § 8, cl. 3.

258. See HENKIN, *supra* note 249, at 321 (describing the beneficial effects that result from the coordination between "Presidential expertise and some inexpert Congressional wisdom").

259. See McCutchen, *supra* note 84, at 3 (1994) ("Allowing the legislature to veto a regulation enacted by an agency pursuant to such an open-ended delegation serves constitutional objectives by imposing a check on agency power.").

260. See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding the congressional veto used in the Immigration and Nationality Act (Act) unconstitutional). In *Chadha*, the Supreme Court considered a provision in the Act which allowed one house of Congress to invalidate decisions made by the Attorney General regarding deportable aliens in the United States. *Id.* at 923. Chadha was in the United States on an expired student visa in 1974 when an Immigration Judge within the INS suspended his scheduled deportation. *Id.* at 923–24. Pursuant to the Act, INS submitted a detailed report of the proceedings to Congress. *Id.* at 924. Congress, using its veto power, reversed the Attorney General's suspension order, thus prompting the INS to initiate deportation proceedings against Chadha. *Id.* at 928. Chadha challenged the congressional order as a violation of the constitutional doctrine of separation of powers. *Id.* The Supreme Court agreed, reasoning that the congressional veto was inconsistent with the constitutional design of the Framers. *Id.* at 945–46.

First, Article I requires that Congress present all legislation to the President for approval. *Id.* The congressional veto in the Act is legislative in nature, but does not provide for executive approval, and therefore violates the Presentment Clause. *Id.* The provision also required that only one house of Congress was necessary to veto a deportation decision by the Attorney General. *Id.* at 952. This, the Court said, was contrary to the requirement that all legislation pass both houses before becoming law. *Id.* at 951. Finally, the Court noted that "not every action taken by either House is subject to the bicameralism and presentment requirements." *Id.* at 952. The Constitution, however, "precisely defined" the situations in which one House may act alone, and the provision in the Act does not fall under one of those exceptions. *Id.* at 955–56. The Court noted that the congressional veto was unnecessary as a check on executive power

objection to the use of the legislative veto,<sup>261</sup> but as subpart C.2 will argue, these circumstances are distinguishable from the situation in *Chadha*. The legislative veto effectively compensates for the delegation of law-making powers from Congress to the President because it "secures the accountability of executive and independent agencies."<sup>262</sup> Agency decisions that are exposed to congressional scrutiny can only help to "improve the quality of that action."<sup>263</sup> The legislative veto is especially applicable in this situation because DDTC's interpretation is not open to judicial review,<sup>264</sup> and the interpretation directly interferes with Congress's power to "regulate Commerce with foreign Nations."<sup>265</sup>

### 1. *The Legislative Tool Is Appropriate Because It Gives Congress a Seat at the Table*

Following the *Chadha* decision, Congress was forced to reevaluate the dozens of statutes that contained veto provisions,<sup>266</sup> including the AECA.<sup>267</sup>

because the "administrative activity cannot reach beyond the limits of the statute that created it . . . . [I]f that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Id.* at 953–54 n.16.

261. *See id.* at 959 (holding the use of the congressional veto unconstitutional).

262. *Id.* at 968 (White, J., dissenting).

263. McCutchen, *supra* note 84, at 38 (quoting Alexander Hamilton's statement in Federalist Paper number 73, "The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation").

264. *See supra* Part IV.B.1 (explaining the impossibility of judicial review due to the APA and general judicial deference to the Executive in foreign affairs).

265. U.S. CONST. art. 1, § 8, cl. 3.

266. *But see* LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 102 (4th ed. 1998) ("*Chadha* has not stopped Congress from placing legislative vetoes in public laws. These bills are regularly signed into law . . . . From the day that *Chadha* was issued, on June 23, 1983, to the end of 1997, more than four hundred new legislative vetoes have been enacted into law.")

267. *See Legislative Veto: Arms Export Control Act: Hearing Before the Committee on Foreign Relations United States Senate Ninety-Eighth Congress First Session on S. 1050*, 98th Cong. 1 (1983) [hereinafter *Legislative Veto Hearing*] (statement of Sen. Mathias, Member, Sen. Comm. on Foreign Relations) (considering the "legal impact of the decision of the Supreme Court in declaring that the so-called legislative veto is an unconstitutional procedure").

For an overview of the veto provisions that were in the AECA, see *id.* at 50–52. Congress's most powerful veto power in the AECA was its ability to issue a concurrent resolution of disapproval (basically a two-house veto). FISHER, *supra* note 266, at 213–14. Congress never exercised this power, "but the threat of disapproval forced the president a number of times to make compromises that restricted the use of weapons." *Id.* at 213.

One of the recurring concerns in the reevaluation process was creating an imbalance of power between the President and Congress. Sen. Robert C. Byrd articulated the concern:

If our "veto" power has been removed, and if that "veto" power is "separable" from the rest of the statute, then that would mean that the Executive has now total, unrestricted authority . . . . And Congress would be without any role whatsoever.

On the other hand, an argument could be made that our invalid "veto" powers cannot be "separated" from the rest of the Arms Export Control law. If that were so, then that would mean that the entire statute is invalid. And that, in turn, would mean that the President is now without *any* authority to engage in *any* arms transfers.

It seems to me that either of these results is intolerable.<sup>268</sup>

Twenty-three years later, Sen. Byrd's concern has become a reality, at least with respect to the Executive's interpretation of § 129. Congress currently has no role or recourse<sup>269</sup> against DDTC's current interpretation of § 129.

The proposition articulated above, that Congress is required to have a seat at the table in matters of arms exports, has been reiterated numerous times.<sup>270</sup> One notable expression is the AECA itself, for its chief concern was "to establish procedures which will help insure congressional oversight of arms transfers."<sup>271</sup> Another is found in the text of Article I of the Constitution which provides that Congress has the power to regulate "Commerce with foreign Nations."<sup>272</sup> The troubling realization that Congress has no seat at the table is further evidence of the need for a compensating tool which restores or at least tips the scales back to a balanced relationship between Congress and the Executive in arms exports.

268. Legislative Veto Hearing, *supra* note 267, at 11 (statement of Sen. Byrd, Member, Sen. Comm. on Foreign Relations) (emphasis in original); *see also id.* at 1 (statement of Sen. Mathias, Member, Sen. Comm. on Foreign Relations) (focusing the hearing on the justification for congressional involvement in arms export decisions).

269. *See supra* Part IV.B.2 (discussing the ineffective and inadequate congressional checks).

270. *See also* Legislative Veto Hearing, *supra* note 267, at 11 (statement of Sen. Byrd, Member, Sen. Comm. on Foreign Relations) (stating that Article I, section 8, clause 3 clearly provides a role for Congress in arms sales decisions).

271. H.R. REP. NO. 94-1144, at 13 (1976) ("Too often in the past decisions have been made with respect to security assistance without the knowledge or concurrence of the Congress.").

272. U.S. CONST. art. I, § 8, cl. 3.

The problem is particularly important today because it is one issue in an increasing number of issues where the Executive is accused of overstepping its power in matters of foreign policy. For example, newspaper headlines from across the nation have drawn attention to the President's use of warrantless wiretapping and the Executive's contention that detainees be removed from the jurisdiction of the federal courts.<sup>273</sup> Like the State Department's perceived scope of the brokering amendment, "the key legal struggles over domestic spying [and other issues] go not to its wisdom, but to the thorny issue of whether the [P]resident has exceeded his constitutional powers in disregarding" statutory limits.<sup>274</sup> The AECA, like the Foreign Intelligence Surveillance Act,<sup>275</sup> confers upon the Executive wide discretion to implement the statute, but the Executive "cannot choose to flout or ignore"<sup>276</sup> Congress's mandate in doing so.

In the case of the President's use of warrantless wiretapping, the Senate has quickly "reassert[ed] congressional responsibility and oversight."<sup>277</sup> The creative solution calls for the formation of a "terrorist surveillance subcommittee" that will have access to the details of the Executive's surveillance program.<sup>278</sup> The agreement requires the Attorney General to seek a warrant whenever possible, and to report to the subcommittee every forty-five days on cases where the administration has not sought a warrant.<sup>279</sup> The plan has its critics<sup>280</sup> and it may or may not go far enough to curtail the President's use of warrantless wiretapping, but the prudence of the plan is irrelevant to this Note. The plan is important to this Note because it is recent evidence of the ability of Congress to structurally respond to an imbalance of power. This subpart argues that Congress must reassert itself in matters of arms export

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273. See, e.g., Bennett, *supra* note 16, at K1 (reflecting on the increasing concerns in Congress and across the country that the President is "pushing the envelope of presidential power").

274. Epstein, *supra* note 16, at A16; see also Will, *supra* note 16, at A27 ("Arguably [President Bush] should have begun surveillance of domestic-to-domestic calls—the kind the Sept. 11 terrorists made. But 53 months later, Congress should make all necessary actions lawful by authorizing the [P]resident to take those actions.").

275. 50 U.S.C. § 1802(a)(1) (2004) (granting the President the power to authorize surveillance without a court order).

276. Epstein, *supra* note 16, at A16.

277. David D. Kirkpatrick & Scott Shane, *G.O.P. Senators Say Accord Is Set on Wiretapping*, N.Y. TIMES, Mar. 8, 2006, at A1 (late ed.) (quoting Sen. Olympia Snowe).

278. *Id.*

279. *Id.*

280. See, e.g., *id.* (quoting Sen. John D. Rockefeller IV, "[t]he committee is, to put it bluntly, basically under the control of the White House").

regulation, just as it has done with the Executive's use of foreign intelligence. The remainder of this Note sketches out why the legislative veto is an appropriate vessel for Congress to reassert itself.

## 2. *Chadha Did Not Contemplate a Situation in Which Executive Authority Is Left Unchecked*

In *Chadha*, Chief Justice Burger held that the legislative veto in the Immigration and Nationality Act was unconstitutional because it did not adhere to the "presentment" and "bicameralism" requirements of Article I legislation.<sup>281</sup> Congress argued, in opposition, that the legislative veto was a necessary check on the Executive's use of congressionally delegated authority.<sup>282</sup> Essentially, Congress believed that without such a legislative check the Executive could engage in lawmaking in violation of Article I, which grants all legislative powers to Congress.<sup>283</sup> The majority rebutted that assertion by finding that the Executive's authority is limited by the text of the statute, and there are mechanisms available to ensure that the limits of the language are not breached.<sup>284</sup>

The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by [the statute] involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed" and can enforce adherence to statutory standards.<sup>285</sup>

The reliance on the availability of judicial review as a check on the Executive's use of delegated authority is explicit in the Court's analysis.<sup>286</sup> Also explicit in the Court's reasoning is its reliance on Congress's ability to check the

281. *INS v. Chadha*, 462 U.S. 919, 955–59 (1983).

282. *See id.* at 953 n.16 (summarizing Congress's arguments in favor of the legislative veto).

283. *See id.* ("Congress protests that affirming the Court of Appeals in these cases will sanction lawmaking by the Attorney General . . .").

284. *Id.*

285. *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)).

286. *See Chadha*, 462 U.S. at 953 n.16 ("The courts, when a case or controversy arises, can always ascertain whether the will of Congress has been obeyed, and can enforce adherence to statutory standards.").

Executive. Not only do the courts act as a check, but the majority found that Congress may step in as well to "modify or revoke the authority entirely."<sup>287</sup>

This Note does not argue that *Chadha* was wrongly decided.<sup>288</sup> It simply suggests that the majority in *Chadha* did not contemplate a situation like the one explored in this Note. The *Chadha* majority presumes that judicial and legislative checks are always available to compensate for the delegation of legislative authority to the Executive.<sup>289</sup> But what if they are not available?<sup>290</sup> Part IV concluded that those presumptive checks do not apply to the State Department's interpretation of the AECA. Judicial review is not available.<sup>291</sup> A congressional response is also ineffective.<sup>292</sup> Admittedly, Congress may legislate using Article I processes, but that process is long, arduous, and unpredictable.<sup>293</sup> Moreover, pursuant to Article I, § 7, cl. 2, such a legislative reaction must get past the President's desk, whether with his signature or a two-thirds congressional majority. Assuming the President would veto a legislative reaction,<sup>294</sup> the only conceivable check on DDTC's current interpretation, under the *Chadha* majority's analysis, is a super-majority<sup>295</sup> vote in Congress. Without the presumptive checks that the Court relies on in *Chadha*, this Note contends that there is room for the reintroduction of a thoughtfully designed, narrowly applied legislative veto.

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287. *Id.* at 953 n.16.

288. *See infra* Part VI.C.3 (agreeing that *Chadha* is applied appropriately to situations where political checks are effective but not in situations that mirror the political imbalance in the regulation of arms exports).

289. *See Chadha*, 462 U.S. at 953–54 n.16 ("That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.").

290. *See FISHER*, *supra* note 266, at 99 ("Even with *Chadha*, the need for a quid pro quo between Congress and the Executive branch remains.").

291. *See supra* Part IV.B.1 (explaining the doctrinal and statutory preclusions to judicial review).

292. *See supra* Part IV.B.2 (discussing the ineffectiveness of traditional congressional controls as a check on executive authority).

293. *See supra* notes 136–39 and accompanying text (discussing the cumbersome Article I process and the unlikelihood that many agency interpretations will inspire the widespread opposition necessary to pass a bill and overcome the President's veto).

294. *See* Nick Smith, *Restoration of Congressional Authority and Responsibility Over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 326 (1996) ("Since the President's appointees have endorsed the regulation, presumably the President does as well. Therefore, to enact a legislative override would almost certainly require two-thirds majorities in both houses.").

295. A super-majority is a two-thirds majority in both Houses.

### 3. *The Legislative Veto's Viability Is Enhanced Because It Applies Only to This Narrow Situation*

The argument that the legislative veto should be resuscitated twenty-three years after its death is not made lightly. Subsection 1 argued that Congress's role in arms exports must be structurally strengthened. Subsection 2 argued that the *Chadha* majority did not contemplate a situation in which an administrative agency's discretion is left unchecked, thereby opening up room for a discussion of the legislative veto in such situations. This subsection's purpose is to describe the narrow situation in which this legislative veto<sup>296</sup> will apply and to refute the slippery slope counterargument that allowing one legislative veto will open the door to the institution's widespread use.

The argument begins by asserting that *Chadha* is good law and any legislative veto is presumptively invalid.<sup>297</sup> However, a more urgent problem surfaces in a situation that "raises the very danger the Framers sought to avoid—the exercise of unchecked power."<sup>298</sup> When such a situation arises and institutional checks are ineffective, "common sense and the inherent necessities of the governmental co-ordination"<sup>299</sup> should require that formalistic rules<sup>300</sup> yield in situations that strike at the heart of the American constitutional system, such as instances of unchecked power. Chief Justice John Marshall recognized the need for a practical and innovative approach to government when he said, "It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."<sup>301</sup> Such exigent circumstances exist today where the executive power to regulate arms transfers is effectively unchecked, and "[t]he Constitution . . . authorizes Congress and the President to try novel methods"<sup>302</sup> to rebalance the powers. If the rebalancing involves constitutionally suspect mechanisms, such as the veto provisions this Note

296. The general structure of the veto itself will be described *infra* Part VI.C.4.

297. See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding the congressional veto provision unconstitutional).

298. *Id.* at 966 (Powell, J., concurring).

299. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

300. The formalistic prohibition against legislative vetoes is an example of such a rule. See McCutchen, *supra* note 84, at 38 (conceding that, under a formal reading of Article I, legislative vetoes are unconstitutional, but should be viewed as a practical "compensating institution" for the delegation of legislative power (also literally unconstitutional)).

301. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 316 (1819).

302. *Clinton v. New York*, 524 U.S. 417, 497 (1998) (Breyer, J., dissenting) (disagreeing with the majority's rejection of Congress's Line Item Veto Act, 2 U.S.C. § 691 (2004)).

suggests, then it should be implemented as narrowly as possible and along definite lines.<sup>303</sup>

Part II discussed the unique niche that the international trade of defense articles occupies in the separation of powers. On one hand, arms transfers are an integral piece of the President's foreign policy and fall under the Executive's power as the "sole organ" of the United States in foreign affairs.<sup>304</sup> On the other hand, arms sales are also clearly "Commerce with foreign Nations" and fall under Congress's Article I, Section 8 commerce power. The international trade of defense articles is also unique because it represents the only one of Congress's enumerated foreign affairs powers to which the legislative veto can and should apply.

The Constitution bestows upon Congress four powers directly related to foreign affairs.<sup>305</sup> These powers are: "regulate Commerce with foreign Nations;"<sup>306</sup> "define and punish Piracies and Felonies on the high Seas, and Offenses against the Law of Nations;"<sup>307</sup> "declare War,"<sup>308</sup> and "establish an uniform Rule of Naturalization."<sup>309</sup> The power that is implicated in this Note—the power to regulate foreign commerce—is distinguishable from the other enumerated foreign affairs powers. A legislative veto to protect those other powers is unnecessary and therefore unconstitutional under *Chadha*.

The power "to define and punish Piracies" and the power "to declare War" are distinguishable from Congress's foreign commerce power because these powers seem still to reside entirely with Congress.<sup>310</sup> In other words, there are no delegation issues associated with clauses ten and eleven because Congress has not delegated its power as it has in the AECA. Obviously, a tool that compensates for the executive use of delegated authority is unnecessary where Congress has made no delegation.<sup>311</sup>

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303. See *Morrison v. Olson*, 487 U.S. 654, 682 (1988) (reasoning that a narrow construction of a statute is necessary to save it from potential "constitutional infirmities").

304. See *supra* Part II (describing the use of arms exports as a policy tool in various administrations).

305. See HENKIN, *supra* note 249, at 63 (describing the "generous" powers conferred upon Congress in the Constitution).

306. U.S. CONST. art. I, § 8, cl. 3.

307. *Id.* at cl. 10.

308. *Id.* at cl. 11.

309. *Id.* at cl. 4.

310. See HENKIN, *supra* note 249, at 68 ("The power of Congress over war and peace is plenary."). But see *id.* (noting that the War Powers Resolution of 1973 raises some issues about the President's war-making ability).

311. Another distinguishing characteristic of the power "to define and punish Piracies" is that it "has been little used" in recent history, unlike Congress's foreign commerce power.



The power "to establish an uniform rule of naturalization," however, is an area in which some legislative powers are delegated to the Executive.<sup>312</sup> Even if this power cannot be distinguished in this respect, it can be distinguished from the foreign commerce power because most decisions made pursuant to the delegated "naturalization" powers are subject to judicial review.<sup>313</sup> The Executive has argued that "there is no judicial forum"<sup>314</sup> for review of habeas cases because there are several immigration statutes that explicitly preclude review.<sup>315</sup> The Supreme Court, however, held that there is a "strong presumption in favor of judicial review of administrative action . . . [and] a clear statement of congressional intent"<sup>316</sup> is necessary to overcome this presumption.<sup>317</sup>

A legislative veto is unnecessary (and unconstitutional) in the context of "naturalization" powers because there is a presumption that the Executive's discretion is checked by the judiciary.<sup>318</sup> The presence of one of the presumptive checks from the *Chadha* majority distinguishes Congress's power over immigration from its delegated power to regulate the international trade of defense articles. Therefore, of the four enumerated foreign affairs powers in the Constitution, only the power "to regulate Commerce with foreign Nations" (more specifically, the power to regulate arms transfers), has been (1) delegated to the Executive and (2) precluded from meaningful judicial review. As a result, the hypothetical legislative veto is appropriate only for situations implicating Congress's power to regulate arms transfers.

Not only can a definite line be drawn between Congress's power over foreign commerce and its other enumerated powers but this Note contends that another line can be drawn generally between foreign and domestic affairs.

HENKIN, *supra* note 249, at 68.

312. See 8 U.S.C. § 1103(a)(1) (2006) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this Chapter and all other laws relating to the immigration and naturalization of aliens . . .").

313. See *id.* at § 1103 ("The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1) . . .").

314. *INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

315. *Id.* at 297–98. Congress itself made the decision to preclude review in these statutes, not the courts or an agency as is the case with ITAR.

316. *Id.* at 298.

317. See *id.* at 326 (holding that the district court retained habeas jurisdiction, in part because there was insufficient evidence to overcome the presumption of reviewability).

318. 8 U.S.C. § 1103 (2004); see *St. Cyr*, 533 U.S. at 298 ("For the INS to prevail it must overcome . . . the strong presumption in favor of judicial review of administrative action . . .").

Admittedly the line between the two is sometimes hazy,<sup>319</sup> but in most cases the distinction is clear. Congress delegates much of its power in domestic affairs,<sup>320</sup> but the difference between delegated domestic authority and foreign affairs power is that agency decisions made pursuant to domestic authority are presumably reviewable.<sup>321</sup> Once again, the availability of the judicial check on executive discretion renders the legislative veto unnecessary in matters of delegated domestic affairs.

To summarize, this section argues that *Chadha* generally precludes the use of the legislative veto. In instances, however, where power goes unchecked, as is the case with DDTC's interpretation of § 129, "common sense and the inherent necessities of the governmental co-ordination"<sup>322</sup> require a departure from the formalistic rules prohibiting the legislative veto. The veto's use must be judicious. It can apply only to the narrow situations that implicate Congress's power to regulate arms transfers because all other decisions made pursuant to delegated domestic powers are susceptible to judicial review, and Congress's other foreign affairs powers have either not been delegated or are reviewable by the courts. Therefore, the argument that one exception will inevitably lead to the veto's wholesale reintroduction is a non-starter because the legislative veto may apply only to the narrow and defined area of congressional power described above.

#### *4. The Veto Legislation Can Be Thoughtfully Designed to Avoid a Presentment Problem*

This Note's main purpose is to critique the political imbalance regarding DDTC's interpretation of ITAR § 129, and the ineffectiveness of the checks and balances designed to remedy similar situations.<sup>323</sup> This Part's purpose is to suggest that a legislative remedy, possibly in the form of a narrowly applied

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319. See HENKIN, *supra* note 249, at 63 n.\* (noting that some congressional foreign affairs powers are thought to be both domestic and foreign, such as the power "to establish an uniform Rule of Naturalization") (quoting U.S. CONST. art. I, § 8, cl. 4).

320. See, e.g., 47 U.S.C. § 151 (2004) (vesting the power to regulate radio and wire communications in the Federal Communications Commission (FCC)); *id.* § 402(a) (allowing for judicial review of the FCC's orders and decisions).

321. Agency decisions made pursuant to delegated domestic powers are presumably reviewable because they are not subject to the APA exception excluding from review "foreign affairs function of the United States," nor will the majority of domestic affairs be subject to the other exclusions in 5 U.S.C. §§ 553(a)(1), 554(a) (2004).

322. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

323. See *supra* Part I (outlining the thesis of this Note).

legislative veto, is the most appropriate solution, but the exact specifications and structure of the legislative veto are beyond the scope of this Note. Before concluding, however, a brief discussion of the legislative veto's construction is worthwhile.

Because the general use of the legislative veto is at odds with constitutional formalities, the mechanism should be used only as a last resort. Thus, any use of the veto should be subsequent to committee hearings whose purpose is to inform the appropriate officials of Congress's disapproval of the State Department's misinterpretation. Congress already has the power to do this, but lacks the significant threat of a veto in its back pocket. Perhaps the mere threat of the veto will be enough to steer the State Department's interpretations back on track.<sup>324</sup>

To remedy the case at hand, the legislative veto provision must give Congress the ability to object to statutory language it observes being interpreted or used in a manner that is inconsistent with Congress's wishes. Louis Fisher, a renowned scholar of presidential and congressional powers, defines legislative vetoes as "statutory provisions that delay an administrative action . . . during which time Congress may approve or disapprove without further presidential involvement."<sup>325</sup> Using this definition as a framework, this Note suggests that the AECA have a veto provision that requires DDTC to submit its regulations (along with formal guidance as to how the regulation is applied) to the foreign affairs oversight committee in Congress. The committee, at that point, could choose to accept or veto DDTC's interpretation. If Congress chose not to act within a short period of time, then the agency's view would become binding. This structure (as opposed to a veto provision that allows Congress to *amend* regulations) does not threaten the Executive's independence because the Executive retains control over the regulation's contents.<sup>326</sup> The veto, if exercised, would simply send the State Department and DDTC back to the drawing board.<sup>327</sup>

The unicameral legislative veto in *Chadha* was struck down because it violated the "presentment" and "bicameralism" requirements of Article I.<sup>328</sup> Any revived version of the legislative veto must address those two deficiencies.

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324. See FISHER, *supra* note 266, at 212 (noting that Congress never used the veto power in the AECA, but it was the threat of the veto that forced the Executive to reconsider the trade of weapons).

325. *Id.* at 91.

326. See FISHER, *supra* note 266, at 98 (criticizing the *Chadha* court's argument that the legislative veto threatens the Executive's independence).

327. See *id.* ("[A] legislative veto merely restored the status quo.").

328. *INS v. Chadha*, 462 U.S. 919, 946–52 (1983).

The "bicameralism" requirement<sup>329</sup> is the easiest deficiency to address. Any viable legislative veto must ensure that its execution involve a vote in both Houses. The Presentment Clause,<sup>330</sup> on the other hand, is the requirement that cut "the ground out from under all legislative vetoes."<sup>331</sup> Any legislative mechanism that will effectively remedy the political imbalance must, however, avoid the presidential veto or else the legislative veto becomes simply Article I legislation.<sup>332</sup>

This Note raises a novel idea that is as fair as it is untested. Essentially, the AECA would be amended in two ways. First, Congress would be granted the legislative veto described above to execute in situations in which an agency is effectively unchecked by the other two branches. Second, veto provisions would include sunset clauses requiring reauthorization every four to six years. The reauthorization process, obviously, would be subject to the Presentment Clause and all other Article I requirements. This scheme would give Congress the necessary check on DDTC's interpretation of statutory language, while also providing the Executive its constitutionally required veto power (lest Congress stray too far from the Executive's foreign policy objectives).

## VII. Conclusion

Thirty years ago, Congress reasserted its constitutional authority to regulate arms transfers<sup>333</sup> because "[t]oo often in the past decisions [were] made with respect to security assistance without the . . . concurrence of the Congress."<sup>334</sup> Today, our arms export policy has once again become unmoored from its

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329. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill . . . shall have passed the House of Representatives and the Senate . . .").

330. *Id.* ("Every Bill . . . [shall] before it become a Law, be presented to the President of the United States . . .").

331. Legislative Veto Committee Hearing, *supra* note 267, at 54.

332. For an example of why an effective solution must avoid presentment in the context of arms control, see, e.g., FISHER, *supra* note 266, at 214. After *Chadha*, the AECA provided only for a joint resolution of disapproval, which does not have the force of law unless it is signed by the President. *Id.* In 1986, Congress disapproved with a super-majority of an arms sale to Saudi Arabia proposed by President Reagan. *Id.* Despite the widespread disapproval, the President vetoed the resolution. *Id.* When the proposal went back to Congress (with a few changes), it was met again with widespread disapproval, but it was one vote short in the Senate of the two-thirds majority needed to override the veto. *Id.* As a result, the sale was executed over the objections of nearly two-thirds of the members of Congress. *Id.*

333. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations").

334. See H.R. REP. NO. 94-1144, at 13 (1976).

constitutional foundations and unresponsive to congressional influence. An absence of effective checks in the structure of arms export regulation allows the Executive branch to operate unilaterally and with impunity. The lack of fundamental constraints is particularly regrettable in the case of the State Department's interpretation of § 129.3, which perverts congressional intent and would likely fail judicial review if review were available.

This imbalance of power not only flouts the basic principle that no branch of government should go unchecked,<sup>335</sup> but it has also caused uncertainty within the defense industry, delayed the licensing process, and threatened important policy objectives abroad. Strains on the United States' defense industry significantly affect some of the most volatile situations around the globe: It is vital that the processes that control arms exports work with maximum efficiency and clarity. Congress must, as it did thirty years ago, reassert its power over the regulation and policy of arms exports. Recent events, such as the creation of a Senate subcommittee to oversee the President's use of warrantless surveillance<sup>336</sup> and the failure of the administration's plan to handover port security to a Dubai firm,<sup>337</sup> evidence Congress's ability and newfound willingness to respond to the Executive's unilateral decision-making. Will the political imbalance that plagues arms export control be next?

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335. See THE FEDERALIST NO. 47 (James Madison) ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . .") (quoting Montesquieu).

336. See *supra* notes 277–80 and accompanying text (describing the congressional response to the President's use of warrantless surveillance).

337. See Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations: Move to End Three-Week Dispute Comes After GOP Lawmakers, Defying Bush, Vowed to Kill Deal*, WASH. POST, Mar. 10, 2006, at A01 (chronicling the breakdown of the President's plan to handover management of six U.S. ports).