FEDERALLY MANDATED DISCRIMINATION: THE IRRECONCILABILITY OF CIVIL RIGHTS AND EXPORT CONTROL

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Although Title VII has protected employees from discrimination since 1964, the International Traffic in Arms Regulations and Export Administration Regulations create startling liability for businesses dealing in "export-controlled technology"—strategically important technology, services, and information that are safeguarded for foreign policy reasons and national security concerns. By requiring employers to verify whether an employee is a "foreign person" before being employed to work with export-controlled technology, employers must ask about national origin under the ITAR and EAR, but they must not inquire about employees' national origin under the IRCA and Title VII.

After outlining the legal foundations of this problem, this Note examines the implications of these contradictory laws by applying them to a hypothetical company producing export-controlled technology. Upon demonstrating that current scholarly suggestions are insufficient to solve this problem, this Note recommends that antidiscrimination laws must govern. To ameliorate the tension between antidiscrimination laws and the protection of foreign policy reasons and national security concerns, this Note advocates for third-party background and security clearances in instances of classified technology.

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I. INTRODUCTION

In the vast expanse of federal statutes, it is only natural that regulations with competing interests often compete for compliance as well. In certain circumstances, however, it is not merely difficult but impossible to reconcile and comply with both or all laws. One such instance within employment law is creating startling liability for businesses working with export-controlled technology, meaning strategically important technology, services, and information that are safeguarded for foreign policy reasons and national security concerns.[1] Under the International Traffic in Arms Regulations[2] ("ITAR") and Export Administration Regulations[3] ("EAR"), disclosure or release of certain technology to a "foreign person" is unlawful without an appropriate export license.[4] For export-control purposes, a "foreign person" is, to an extent, determined by national origin.[5] Additionally, "exports" are not necessarily tangible goods, and "foreign" does not necessarily denote location. Rather, "an illegal export happens when particular controlled technology or software [or data] is released to certain individuals, even if the exchange happens within the United States."[6]

1. U.S. STATE DEP'T, *A Resource on Strategic Trade Management and Export Controls*, http://www.state.gov/strategictrade/overview/ (last visited Oct. 1, 2015).
2. 22 C.F.R. § 120 (2014).
3. 15 C.F.R. § 734 (2015).
4. 22 C.F.R. § 120.17(a); *accord* 15 C.F.R. § 736.2.
5. 22 C.F.R. § 120.16; *accord* 15 C.F.R. § 734.2(b)(2)(ii).
6. Sandra F. Sperino, *Complying with Export Laws Without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules*, 52 ST. LOUIS U. L.J. 375, 377 (2008) (citing 15 C.F.R. § 734.2(b)(2)(ii)); *accord* 22 C.F.R. § 120.17(a)(3)–(4).

Under ITAR, "foreign person means any natural person who is not a lawful permanent resident . . . or who is not a protected individual as defined by [the Immigration and Naturalization Act]."[7] Professor Sandra Sperino points out the problem this definition of "foreign person" creates: "'foreign nationals who have been granted H-B1 visas and other work authorizations,' including student visas and fiancé visas, may lawfully be employed within the United States; however, their presence in certain positions may at the same time violate deemed export rules."[8] For example, if a technology is controlled for Iran,[9] it is controlled for all Iranians. Under export-control regulations, employers dealing in export-controlled technology must know their employees' national origins in order to staff individuals on projects or clients according to the technology at issue.[10]

At the same time, generally, employers should not ask whether or not a job applicant is a U.S. citizen before making an offer of employment as the Employment Eligibility Verification ("I-9") Form provides the exclusive list of information employers may require prior to hire.[11] The Immigration Reform and Control Act ("IRCA") prohibits discrimination with respect to hiring, firing, or recruitment or referral for a fee based on an individual's citizenship or immigration status.[12] Employers who ask for more information than the I-9 form requires also risk violating Title VII of the Civil Rights Act of 1964, which prohibits, among other things, refusal to hire "or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin."[13]

As such, employers *must* know and have documentation of their employees' national origin in order to comply with export control regula-

7. 22 C.F.R. § 120.16. The U.S. Code governs "lawful permanent resident" under both ITAR and EAR: "'[L]awfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (2012). A "protected individual" means "an individual who (A) is a citizen or national of the United States, or (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence . . . ." *Id.* § 1324b(a)(3).

8. Sperino, *supra* note 6, at 380.

9. Iran is used here only as an example, but represents a unique illustration because Iran is a "controlled country" under both ITAR and EAR. 22 C.F.R. § 126.1(a); 15 C.F.R. § 746.7. Moreover, the U.S. Department of State deemed Iran (alongside Cuba, Syria, and the Republic of Sudan) to have "repeatedly provided support for acts of international terrorism [that] are contrary to the foreign policy of the United States and are thus subject to . . . section 40 of the Arms Export Control Act (22 U.S.C. § 2780) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (22 U.S.C. § 4801)." 22 CFR § 126.1(d). Iran represents the "hard line" of U.S. export control regulations in this Note.

10. *See supra* note 7 and accompanying text.

11. U.S. EQUAL EMP'T OPPORTUNITY COMM., *Pre-employment Inquiries and Citizenship,* http://www.eeoc.gov/laws/practices/inquiries_citizenship.cfm (last visited Oct. 1, 2015) [hereinafter EEOC, *Pre-employment Inquiries*].

12. Immigration Reform and Control Act amended the Immigration and Nationality Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

13. Civil Rights Act of 1964, 42 U.S.C.§2000e-2(c)(2) (2012).

tions,[14] but they *must not* inquire about employees' national origin under the IRCA and Title VII.[15] Violations of export control could result in, *inter alia*, loss of all government contracts.[16] Violations of Title VII and the IRCA, however, may constitute prima facie discrimination, leading to sanctions from the National Labor Relations Board, various federal fines,[17] and, once again, loss of government contracts.[18]

Professor Sperino's article suggests that export-control regulations are written to be "over-complied" with and, as such, recommends an implied exception to the antidiscrimination provisions of Title VII and the IRCA.[19] This Note argues that Professor Sperino's interpretation contradicts U.S. Supreme Court jurisprudence on the appropriate approach to safeguarding individual rights.[20] Specifically, in a manner similar to the famous "footnote 4" of *Carolene Products*,[21] this Note suggests that regulations safeguarding individual rights must take precedent in employment practices. Moreover, although exceptions for classified defense technology can and do exist, this Note argues that export-control regulations for generally unclassified technology are an overreach of national security, particularly following the September 11, 2001, attacks.

Another article examining the relationship between export control and employment discrimination authored by Professor Debra Burke agrees that individual rights must be afforded appropriate weight.[22] Professor Burke recommends changes to the export-control regulations and licensing process to ensure individuals, particularly nonimmigrant foreign nationals, are afforded equal employment opportunities.[23] This Note will argue that, alternatively, considering a practical view of the current political landscape, this issue should be resolved through the judicial system. As a result, this Note will recommend that (1) no exception should be made to Title VII or the IRCA and (2) no amendment is necessary to export-control statutes. Instead, this Note will recommend that export-control regulations requiring violation of antidiscrimination laws are invalid and preempted by Title VII and the IRCA.

Part II of this Note will introduce the four laws at issue: Title VII of the Civil Rights Act of 1964, the IRCA, the International Traffic in Arms Regulations, and the Export Administration Regulations.[24] Additionally,

14. 15 C.F.R. § 736.2 (2015); 22 C.F.R. § 120.17(a) (2014).
15. 8 U.S.C. § 1324b; 42 U.S.C.§ 2000e-2.
16. 15 C.F.R. § 764.3; 22 C.F.R. § 127.3.
17. 42 U.S.C.§2000e-5.
18. *Id.* § 2000e-17.
19. *See* Sperino, *supra* note 6, at 426, 428.
20. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
21. *See id.*
22. Debra Burke, *At the Intersection of Export Control Regulations and Employment Discrimination Law*, 45 AM. BUS. L.J. 565, 608 (2008).
23. *Id.* at 608–09.
24. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012) (Title VII); 8 U.S.C. § 1324b (2012) (IRCA); Export Administration Regulations, 15 C.F.R. § 736 (2015); International Traffic in Arms Regulations, 22 C.F.R. § 120 (2014).

to better illustrate the nuanced complications for businesses dealing in export-controlled technology, Part II will introduce a hypothetical business. Company Blue is an international corporation that manufactures various parts used in the cooling systems of internal combustion engines. Company Blue and its employees will then be used throughout the rest of this Note.

Part III of this Note will outline the most obvious conflicts, namely the pre-employment verification requirements and internal recordkeeping procedures, and analyze cost-benefit decisions for businesses that work with export-controlled technology. Part III will also address the recommendations of Professors Sperino and Burke in light of the individual-rights protections guaranteed in *Carolene Products* footnote four. This section will also note the post-9/11 implications of export control (background for which is given in Part II) in order to critique the overreaching nature of export control shrouded as national security.

Finally, Part IV of this Note will recommend a judicial approach that would impliedly repeal export-control requirements that force employment inquiries that violate Title VII and the IRCA. In other words, this Note will recommend an approach that holds the antidiscrimination statutes as controlling. So as to satisfy the intent and purpose of the ITAR and EAR, this Note will advocate for third-party background and security clearances in instances of classified technology.

II. BACKGROUND

This Part presents Title VII, the IRCA, ITAR, and EAR in order to outline the irreconcilable portions creating liability for businesses that deal with export-controlled technology. It will provide an overview of their subject matter, discuss the legislative history and penalties for violations, and note the licensing process for export controls.

A. Safeguarding Against Workplace Discrimination

A host of federal laws are in place to protect workers from employment discrimination.[25] For the purposes of examining the relationship with export-control regulations, this Note will only address federal laws concerning national origin discrimination.[26]

25. *See, e.g.*, Equal Pay Act of 1963, Pub. L. No. 88-3829, 77 Stat. 56 (codified 29 U.S.C. § 206(d) (2012)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified 29 U.S.C. §§ 621–34 (2012)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified 42 U.S.C. § 12101 et seq. (2012)).

26. *National Origin Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM., http://www.eeoc.gov/laws/types/nationalorigin.cfm (last visited Sept. 25, 2015) ("National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world.").

1. Landmark Legislation: The Civil Rights Act of 1964

On June 11, 1963, President John F. Kennedy called for legislation that would ensure the opportunity "for every American to enjoy the rights and privileges of America, regardless of race or color."[27] He was, of course, calling for the passage of the Civil Rights Act of 1964. Although President Kennedy was assassinated before the bill was passed,[28] and although its passage required the "longest continuous debate in Senate history,"[29] it remains lauded today, fifty years later, as one of the most important pieces of legislation in American history.[30]

Title VII of that Act prohibits an employer from discriminating against its employees based on several protected traits, including national origin and race.[31] The statute prohibits a broad range of discriminatory conduct by the employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[32] Even if administered to all applicants or employees, an employer cannot use an employment practice that has a disparate impact on people of a certain national origin—or only a few national origins—unless it is necessary to the operation of the business.[33] Thus, discriminatory intent on the part of the employer need not be shown in all circumstances for an employee to have a valid discrimination claim.[34]

As noted, Title VII specifically permits discrimination on the basis of religion, sex, or national origin (not race) "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business."[35] Courts across all jurisdictions agree on the existence of the business necessity exception to standard Title VII employment concerns.[36] Courts do not, however, agree or even define what constitutes the exception.[37] In general, courts have narrowly defined the doctrine, noting that "business convenience" does

27. John F. Kennedy, Radio and television address on civil rights, 11 June 1963 (June 11, 1963) (on file with John F. Kennedy Presidential Library and Museum), *available at* http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-045-005.aspx.

28. *Landmark Legislation: The Civil Rights Act of 1964*, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm (last visited Oct. 1, 2015).

29. *Id.*

30. Ziatica Hoke, *Obama Praises Predecessor Lyndon Johnson's Civil Rights Legacy* (Apr. 11, 2014, 4:16 AM), http://www.voanews.com/content/obama-praises-predecessor-lyndon-johnsons-civil-rights-legacy/1891084.html.

31. 42 U.S.C. § 2000e-2(a) (2012).

32. *Id.*

33. *Id.* § 2000e-2(e)(1).

34. Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 496 (2003).

35. 42 U.S.C. § 2000e-2(a).

36. *See* Sperino, *supra* note 6, at 396.

37. *See, e.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232, 241 (3d Cir. 2007) ("[A]s numerous courts and commentators have noted, *Griggs* and its progeny did not provide a precise definition of business necessity.").

not constitute necessity, and for that reason is rarely invoked.[38] The bona fide occupational qualification ("BFOQ") classification, although also narrowly interpreted, remains the most commonly invoked exception to Title VII.[39]

The Equal Employment Opportunity Commission ("EEOC"), enforcing Title VII, forbids covered employers from discriminating against persons on the basis of their national origin, as well as other protected status.[40] Thus, an employer may not limit employment opportunities because of national origin unless it can show that national origin is a BFOQ reasonably necessary to the normal operation of an employer's particular business.[41] The Supreme Court has interpreted the BFOQ exception narrowly.[42] Accordingly, the refusal to hire an individual based on stereotyped characterizations of gender, for example, will not warrant the application of the BFOQ exception nor will "the preferences of coworkers, the employer, clients or customers."[43] Before recommending employers utilize the BFOQ affirmative defense if export control actions violate Title VII,[44] Professor Sperino notes that courts "for the most part, determined that reliance on a discriminatory state law will not justify a BFOQ."[45] She argues that the distinction between her recommendation and comparable case law is justified because the export control laws in question are federal, not state regulations, although there is no case law to support or attack that justification in the export control context.[46]

Employers are also permitted under Title VII to refuse to hire, refuse to refer, or terminate an applicant or employee "where an individual does not meet job requirements that are imposed in the interest of national security under any security program in effect pursuant to federal statute or Executive Order."[47] In fact, the EEOC may not review the substance of a security clearance determination or the security requirement if that clearance is necessary for the position.[48] Furthermore, the EEOC guidebook explicitly notes, "[e]mployer actions taken pursuant to requirements under U.S. export laws do not violate Title VII."[49] The Commission may, however, "review whether procedural require-

38. Dev. Servs. of Am. v. City of Seattle, 979 P.2d 387, 390 (Wash. 1999) ("[C]onvenience does not equate to necessity.").

39. Sperino, *supra* note 6, at 397.

40. 42 U.S.C. § 2000e-2(e)(1).

41. *Id.*

42. *See* Int'l Union, UAW v. Johnson Controls, 499 U.S. 187, 201 (1991).

43. 29 C.F.R. § 1604.2(a)(1)(iii) (2014).

44. Sperino, *supra* note 6, at 416.

45. *Id.* at 399.

46. *Id.*

47. 42 U.S.C. § 2000e-2(g)(1) (2012).

48. *EEOC Compliance Manual*, U.S. EQUAL EMP'T OPPORTUNITY COMM., http://www.eeoc.gov/policy/docs/national-origin.html (last modified Dec. 12, 2002).

49. *Id.*

ments . . . were followed without regard to an individual's protected status."[50]

Actions that do not qualify for an exception to Title VII are, of course, subject to the Act's constraints, but not all persons or companies are subject to the guidelines in Title VII. These provisions apply only to companies that have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[51] If an employer qualifies as such under Title VII and violates provisions of the law, they may be liable to both an aggrieved employee and the EEOC.[52] Privately, administrative procedures must be exhausted, and the employee must file a timely complaint with the EEOC and obtain a "Right-to-Sue" letter.[53] If those conditions are met, private employees may file a civil action to seek an injunction or a temporary restraining order,[54] monetary damages for lost wages and benefits,[55] front pay or reinstatement and/or promotion,[56] and punitive damages for intentional violations of Title VII.[57]

In addition, the EEOC may bring civil action against a private employer.[58] Penalties under such a civil action mirror that of employee-initiated litigation with one important distinction: criminal penalty. An employer that "willfully makes a false statement on the annual report can be subjected to fines of up to $10,000.00 and/or imprisonment of up to five (5) years."[59] Companies with existing government contracts also stand to lose those contracts or the ability to compete for future contracts for repeated violations of Title VII.[60]

The Civil Rights Act, particularly Title VII, was enacted in an attempt not only to right the wrongs of historical, American prejudice,[61] but also to shape a future in which men would not say "that he will respect another man as his equal only if he has '*my* race, *my* religion, *my* political views, *my* social position.'"[62] The Civil Rights Act has molded the American workforce since its passage fifty years ago and continues to guide employers to this day.

50. *Id.*; *see* Tenenbaum v. Caldera, 45 F. Appx. 416, 418 (6th Cir. 2002) (noting courts may review cases in which an agency violates its own regulations in making a security clearance determination but *may not review* the substance of the clearance determination) (emphasis added).

51. 42 U.S.C. § 2000e(b).

52. *Id.* §§ 2000e-5(f)(1)–(2).

53. *Id.* § 2000e-5(f)(1).

54. *Id.* §§ 2000e-5(f)(2), (g).

55. *Id.* § 2000e-5(e)(3)(B).

56. *Id.* § 2000e-5(g)(1).

57. *Id.* § 1981a(a).

58. *Id.* § 2000e-5(f)(1).

59. 18 U.S.C. § 1001 (2012); 29 C.F.R. § 1602.8 (2014).

60. U.S. EQUAL EMP'T OPPORTUNITY COMM., *Enforcement Guidance: Compensatory and Punitive Damages*, http://www.eeoc.gov/policy/docs/damages.html (last modified July 6, 2000).

61. *See* Juan F. Perera, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 858 (1994).

62. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 4 (1947) (emphasis added), *available at* http://www.trumanlibrary.org/civilrights/srights1.htm#3.

2. *Document Your Huddled Masses: The Immigration Reform and Control Act*

Congress passed the Immigration Reform and Control Act ("IRCA") for very different reasons than the Civil Rights Act. To better monitor and control the employment of undocumented immigrants, the IRCA forbids an employer to hire undocumented workers and, in doing so, requires employers to verify an employee's status to work legally.[63] Generally, employers should not ask whether a job applicant is a U.S. citizen before making an offer of employment as the Employment Eligibility Verificaiton ("I-9") Form, authorized by the IRCA,[64] provides the exclusive list of information employers may require prior to hire.[65] Asking for any verification outside of the documents required by the IRCA and I-9 process is an unlawful practice.[66]

Importantly in the export-control context, "an individual may be legally entitled to work within the United States, and yet, not be a protected person within the citizenship discrimination provisions of IRCA."[67] As Professor Sperino notes, the IRCA contains an exception allowing an employer to discriminate because of citizenship if such discrimination is otherwise required to "comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government."[68]

The IRCA prohibits discrimination in hiring or discharge "(A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status."[69] Penalties under the IRCA vary from criminal to civil and from injunction to monetary fine.[70] Fines increase according to the number and severity of violations.[71] For example, the first "unlawful discrimination against an employment-authorized individual in hiring, firing, or recruitment or referral for a fee" carries fines ranging from $375–$3,200; a third violation would result in fines ranging from $4,300–$16,000."[72] Just as in Title VII, violations of the IRCA may result in "debarment from government contracts."[73]

63. 8 U.S.C. § 1324a (2012).
64. 8 C.F.R. § 274a.2(a)(2) (2014).
65. EEOC, *Pre-employment Inquiries*, *supra* note 11.
66. 8 U.S.C. § 1324b(a)(6).
67. Sperino, *supra* note 6, at 403 (citing 8 U.S.C. §1324b(a)(3)).
68. *Id.* (citing 8 U.S.C. § 1324b(a)(2)(C)).
69. 8 U.S.C. § 1324b(a)(1).
70. *Penalties*, U.S. CITIZENSHIP & IMMIGRATION SERV.'S, http://www.uscis.gov/i-9-central/penalties (last updated Nov. 23, 2011).
71. *Id.*
72. *Id.*
73. *Id.*

The IRCA, despite its flaws,[74] has been touted as "the most ambitious amnesty program in U.S. history."[75] It may appear that the IRCA antidiscrimination provisions are unnecessary in light of the safeguards provided under Title VII, but the U.S. Supreme Court clarified the need for these provisions in the 1973 case *Espinoza v. Farah Manufacturing Co.*,[76] noting the distinction between national origin and alienage discrimination, "and that Title VII did not cover the latter."[77] Coupled with the protections of Title VII, then, it would appear that Congress put sufficient guards in place to protect the American workforce from the dangers of employment discrimination.

B. Protecting American Technology: A Regulatory Labyrinth[78]

Export-control regulations and licenses are issued by several different agencies given authority by separate pieces of legislation.[79] Most export-control requirements have not been enacted, amended, or codified as a basic statute, so it can be difficult for employers to find the applicable pieces of these regulations.[80] As such, it is useful to outline the applicable regulations themselves as well as the guidance issued by their respective administering agencies.

1. Defending Defense: International Traffic in Arms Regulations

The Directorate of Defense Trade Controls ("DDTC") of the Department of State promulgates the International Traffic in Arms Regulations ("ITAR") in an effort to provide further guidance regarding the actions prohibited and required under the Arms Export Control Act.[81] Under the ITAR, an "export" includes "disclosing or transferring in the

74. *See* Katherine L. Vaughns, *Restoring The Rule Of Law: Reflections On Fixing The Immigration System And Exploring Failed Policy Choices*, 5 U. MD. L. J. RACE RELIGION GENDER & CLASS 151, 164–65 (2005).

75. *Id.* at 163 (citing STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 607 (4th ed., 2004)).

76. 414 U.S. 86 (1973).

77. *Id.*; Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1080–81 (1988).

78. Cecil Hunt, *Overview of U.S. Export Controls and Sanctions*, *prepared for* Practicing Law Institute Program: Coping with U.S. Export Controls (Dec. 2009), http://www.hwglaw.com/siteFiles/News/0471C3EAEA4C63C69B1A7BD7BA43CE59.pdf ("Export controls . . . are a frightful labyrinth.") [hereinafter Hunt, *Overview*]. Cecil Hunt is the former Deputy Chief Counsel for Export Administration. Cecil Hunt, *U.S. Export Controls and Economic Sanctions–An Overview*, ALI-ABA BUS. LAW COURSE MATERIALS J. (Feb. 2009), at 1, http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/Cl037-ch11_thumb.pdf [hereinafter Hunt, *U.S. Export Controls*].

79. *See infra* Part B.1–B.2.

80. Hunt, *Overview*, *supra* note 78.

81. Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Jan. 18, 1977); *see also* 22 C.F.R. § 120.1(a) (discussing authority for regulations). Under the Arms Export Control Act (AECA), the President may "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." 22 U.S.C. § 2778(a)(1) (2012); *see also* 22 C.F.R. § 120.1(a) (2014) (listing the authority for the ITAR under the AECA).

United States any defense article to an embassy, any agency or subdivision of a foreign government; or . . . disclosing or transferring technical data to a foreign person, whether in the United States or abroad."[82] These regulations specifically govern "defense articles" and "defense services."[83]

The headings "defense articles" and "defense services" can and do cover a vast array of technology. The ITAR policy is to designate an article or service as a "defense article" or "defense service" if it "[m]eets the criteria of a defense article or defense service on the U.S. Munitions List; or provides the equivalent performance capabilities of a defense article on the United States Munitions List."[84] The U.S. Munitions List[85] ("USML") contains "items specifically designed or modified for military use, but designations and determinations have extended ITAR jurisdiction to some items with non-military use as well (e.g., commercial communications satellites)."[86] The USML includes items categorized into twenty groups, spanning from (I) firearms and (III) ammunition to (XIV) chemical agents and (XVI) nuclear weapons.[87]

An article not initially designated as controlled by ITAR shall be designated as such in the future "if it provides a critical military or intelligence advantage such that it warrants control under this subchapter,"[88] effectively making an ITAR-governed item list an ever-moving target. To that end, some USML categories are intentionally vague, including (XVII) "Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated."[89]

A "defense service" under ITAR is defined in a similar manner. It includes furnishing assistance or training "to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles."[90] This definition also includes furnishing technical data[91] or training foreign military forces "by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice."[92]

It is, of course, understandable that the United States would seek to protect against disclosure of defense technology; we invest more money

82. 22 C.F.R. § 120.17(a)(3)–(4) (2014).
83. 22 C.F.R. § 120.1(a)(1) (2014).
84. 22 C.F.R. § 120.3(a) (2014).
85. 22 C.F.R. §§ 120–30 (2014).
86. Hunt, *U.S. Export Controls*, *supra* note 78, at 4.
87. *See* 22 C.F.R. § 121.1(j) for the full list of categories.
88. *Id.* § 120.3(b).
89. *Id.* § 121.1. This category includes "Any article not enumerated . . . until such time as the appropriate U.S. Munitions List category is amended." The Director, Office of Defense Trade Controls Policy decides whether or not an article will be included in this category.
90. *Id.* § 120.9(a)(1).
91. *Id.* § 120.9(a)(2).
92. *Id.* § 120.9(a)(3).

into our armed forces than the next eight countries *combined*,[93] and we certainly would not want that investment lost. It is crucial to note, however, the countries for which this information is controlled. It is U.S. policy "to deny licenses and other approvals for exports and imports" from the following countries: Afghanistan, Angola, Belarus, Burma, People's Republic of China ("PRC"), Cyprus, Cuba, Haiti, Iran, Iraq, Liberia, Libya, Nigeria, North Korea, Rwanda, Somalia, Sudan, Syria, Vietnam, Yemen, and Zimbabwe.[94] Concerning any license requests for those countries, "generally, a presidential waiver is required to overcome the policy of denial, but such waivers are granted infrequently and only for large-scale projects in which the United States has an overwhelming interest in promoting."[95] That list of countries is not entirely surprising, though, considering it seems to mirror U.S. Arms Embargos and United Nations Security Council embargoes.[96] Of course that list represents only the countries for which export licenses are automatically denied.[97] Every oral and visual disclosure[98] of ITAR-controlled technology to a "foreign person," including those authorized to work in the United States, requires a license.[99]

To obtain a license under ITAR, a person or company must first be registered with the U.S. Department of State Directorate of Defense and Trade Controls.[100] The Directorate-reported average review time for this registration is forty-five days.[101] If registration is successful, the person or company must then apply for a "Temporary Export License"—classified as a "DSP-73"[102] or a "Permanent Export License"—classified as a "DSP-5."[103] This application "must clearly identify the need for the temporary export and describe the role of each party to the transaction . . . [t]echnical data and/or product brochures must be provided on

93. Mark Koba, *U.S. Military Spending Dwarfs Rest of World*, NBCNEWS.COM (Feb. 24, 2014, 2:29 PM), http://www.nbcnews.com/storyline/military-spending-cuts/u-s-military-spending-dwarfs-rest-world-n37461.

94. 22 C.F.R. § 126.1 (2014). *See also Country Policies and Embargos*, U.S. DEP'T OF STATE DIRECTORATE OF DEF. & TRADE CONTROLS, http://pmddtc.state.gov/embargoed_countries/index.html (last updated July 7, 2015).

95. Linda M. Weinberg & Lynn Van Buren, *The Impact of U.S. Export Controls and Sanctions on Employment*, 35 PUB. CONT. L.J. 537, 543–44 (2006).

96. 22 C.F.R. §§ 126.1(a)–(c).

97. *Id.* § 126.1.

98. *Id.* § 120.17.

99. *Id.* § 127.1.

100. *Licensing*, U.S. DEP'T OF STATE DIRECTORATE OF DEF. & TRADE CONTROLS, http://pmddtc.state.gov/licensing/ (last updated Jun. 18, 2015).

101. *Registration*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, http://pmddtc.state.gov/registration/index.html (last updated Oct. 24, 2013).

102. *See* 22 C.F.R. § 123.5.

103. *Guidelines for Completion of a Form DSP-5 Application/License for Permanent Export of Unclassified Defense Articles And Related Unclassified Technical Data*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, http://www.pmddtc.state.gov/DTRADE/documents/dtrade_dsp_5_instructions.pdf (last visited Oct. 1, 2015). The application procedures are nearly identical for DSP-73 and DSP-5 licenses, but DSP-73 licenses are issued only for "defense articles that will be exported for a period of less than 4 years and will be returned to the United States and transfer of title will not occur during the period of temporary export." 22 C.F.R. § 123.5(a).

the requested defense articles."[104] The average application processing time reported by the Directorate of Defense and Trade Controls for September 2015 was twenty-eight days.[105] The government websites provided no information on approval rates for these applications.[106]

This information on application procedures and processing is important to note with regard to employers handling export-controlled technology because the employers, not employees, are responsible for submitting the applications.[107] In the context of a company seeking to assign a "foreign person" to a project involving ITAR-controlled technology, Professor Sperino notes that "an employee or a potential employee may not seek a deemed export license on his or her own behalf; rather, the license may only be sought through the employer."[108] Due to the specificity requirements of the licensing process, however, if an employee is successfully granted a license to work on an ITAR-controlled project, any deviation from the originally applied license for technology warrants an additional license application.[109]

Violations of the ITAR are punished severely. Any person who willfully violates the Arms Export Control Act ("AECA") or ITAR "shall upon conviction be subject to a fine or imprisonment, or both, as prescribed by [military export controls]."[110] Violation may range from actual disclosure or export to making "any untrue statement of a material fact or omit[ting] to state a material fact required to be stated therein or necessary to make the statements therein not misleading" in a registration or license application or required report.[111] Violators "shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both."[112] Companies who are convicted of violating the ITAR also stand to lose the right to compete for or perform any government contracts.[113]

As export-control regulations go, ITAR requirements appear logical considering the national security concerns with the majority of items falling under the USML. Despite the intentionally vague section XVII ("Classified Articles, Technical Data and Defense Services Not Other-

104. *DSP-73 and DSP-61 License Applications–Supporting Documentation Requirements–UPDATED*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, https://www.pmddtc.state.gov/licensing/documents/gl_supportingdoc.pdf (last visited Oct. 1, 2015).

105. *License Processing Times*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, http://pmddtc.state.gov/metrics/index.html (last updated Aug. 3, 2015).

106. *See supra* notes 102–04.

107. Sperino, *supra* note 6, at 385.

108. *Id.*

109. *DSP-73 and DSP-61 License Applications–Supporting Documentation Requirements–UPDATED*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, https://www.pmddtc.state.gov/licensing/documents/gl_supportingdoc.pdf (last visited Oct. 1, 2015).

110. 22 C.F.R. § 127.3 (2014).

111. 22 U.S.C. § 2778(c) (2012).

112. *Id.*

113. 22 C.F.R. § 127.7(b).

wise Enumerated,")[114] the majority of classified technology and information falls into one ITAR category or another. While some employers may have projects, data, goods, or services that fall under ITAR despite valid objections to the classification, the items contained in the USML are generally narrowly tailored.[115] The EAR, conversely, has a much broader scope and, in a post-globalization world, is an umbrella that covers seemingly infinite categories of goods and services.[116]

2. Export Administration Regulations and the "Dual-Use" Catchall

The Export Administration Regulations ("EAR") also prohibit export of certain items to foreign nationals.[117] The United States Department of Commerce, Bureau of Industry and Security ("BIS") promulgates the EAR,[118] and its authority derives from two main sources: the Export Administration Act of 1979 ("EAA")[119] and, "from time to time," the International Emergency Economic Powers Act ("IEEPA") with respect to the EAR.[120] The EAA is not permanent legislation, and when it has lapsed, Presidential executive orders under IEEPA have directed and authorized the continuation in force of the EAR."[121]

The EAR employs the "deemed export" rule in defining its scope: an "export of technology . . . is 'deemed' to take place when it is released to a foreign national within the United States."[122] Technology is "released" under the rule when "it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology."[123] Unlike the ITAR, EAR controls items that may be but are not exclusively for defense purposes, often called "dual-use."[124] The EAR-controlled items list, then, includes "*purely civilian items*, items with both civil and military, terrorism or potential [Weapons of Mass Destruction] - related applications, and items that are

114. *Id.* § 121.1(j). This category includes "Any article not enumerated . . . until such time as the appropriate U.S. Munitions List category is amended." The Director, Office of Defense Trade Controls Policy decides whether or not an article will be included in this category.

115. 22 C.F.R. § 121.1 (2014).

116. 15 C.F.R. § 730 (2014).

117. 15 C.F.R. § 734.2(b)(2)(ii) (2014).

118. *Id.* § 730.1.

119. *Id.* § 730.2; 50 U.S.C. Appx. 2414(b) (2012) ("The President and the Secretary may issue such regulations as are necessary to carry out the provisions of this Act.").

120. 15 C.F.R. § 730.2.

121. 15 C.F.R. § 730.2; 50 U.S.C. § 1701 ("Any authority granted to the President . . . may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.").

122. 15 C.F.R. § 734.2(b)(2)(ii).

123. *Deemed Export Frequently Asked Questions*, U.S. DEP'T OF COMMERCE BUREAU OF INDUS. AND SEC., http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs (last visited Oct. 1, 2015).

124. 15 C.F.R. § 730.3.

exclusively used for military applications but that do not warrant control under [the ITAR]."[125] Crucially, the "Items Subject to EAR" casts a wide net, applying to:

> All items in the United States . . . [a]ll U.S. origin items wherever located . . . [f]oreign-made commodities that incorporate controlled U.S.- origin commodities . . . [c]ertain foreign-made direct products of U.S. origin technology or software . . . [and c]ertain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software. . . .[126]

Generally, then, any item of U.S. origin or located in the United States is subject to EAR. There are then exceptions to this broad brush stroke, providing a list of items not EAR-controlled, namely "items that are exclusively controlled for export or re-export" by the Department of State, Treasury Department, U.S. Nuclear Regulatory Commission, Department of Energy, Patent and Trademark Office, Department of Defense, and Department of State Foreign Military Sales Program.[127] Publicly available technology, software, and other media are also not subject to EAR.[128] Generally, despite a vast expanse of items subject to the EAR, the majority of those items do not require an export license.[129]

Although not every item subject to the EAR is included on the list, the Commerce Control List ("CCL") enumerates most items that will require a license.[130] The CCL has ten categories, numbered as 0 - Nuclear Materials, Facilities and Equipment and Miscellaneous; 1 - Materials, Chemicals, "Microorganisms," and Toxins; 2 - Materials Processing; 3 - Electronics; etc.[131] Within each of these ten categories, items are further divided into five groups, identified such as A - Equipment, Assemblies and Components; B - Test, Inspection and Production Equipment; C - Materials; etc.[132] Finally, within each group, an Export Control Classification Number ("ECCN") identifies individual items.[133] Included in the ECCN is not only the type of control but also the reason for control, numbered as 0 - National Security reasons; 1 - Missile Technology reasons; 2 - Nuclear Nonproliferation reasons; etc.[134]

These classifications are important, because, compared to the relative specificity of ITAR-controlled items, the CCL covers virtually every

125. *Id.* (emphasis added).
126. *Id.* § 734.3(a).
127. *Id.* § 734.3(b).
128. *Id.*
129. Linda M. Weinberg & Lynn Van Buren, *The Impact of U.S. Export Controls and Sanctions on Employment*, 35 PUB. CONT. L.J. 537, 547 (2006).
130. 15 C.F.R. § 734.3(c).
131. *Id.* § 738.2(a).
132. *Id*. § 738.2(b).
133. *Id.* § 738.2(d) ("Each [EECN] consists of a set of digits and a letter. The first digit identifies the general category within which the entry falls. The letter immediately following this first digit identifies under which of the five groups the item is listed. The second digit differentiates individual entries by identifying the type of controls associated with the items contained in the entry.").
134. *Id.*

item manufactured in the United States or by U.S. corporations.[135] The BIS maintains the "Commerce Country Chart" to aid companies and persons in determining license requirements for most CCL items, particularly important when dealing with technology under the "dual-use" catchall.[136] The chart does not definitively answer licensing questions for persons or companies attempting to comply with EAR, but in most cases the chart will at the very least reference another section of the EAR to aid in the application process.[137] Each country is listed on the Commerce Country Chart with notations for the type of items controlled and the reason for their control.[138]

The list of countries for which ITAR-license requests would be automatically denied[139] is not identical, but the majority of those countries have specific notations in the Commerce Country Chart as well.[140] For example, instead of piecemeal controlling exports for Cuba in each ECCN category, the Commerce Country Chart directs the applicant to 15 C.F.R. § 746, which reads in pertinent part: "you will need a license to export or re-export all items subject to the EAR to Cuba."[141] Although export license applications are not automatically denied under the EAR, licenses are required for all EAR-controlled exports to embargoed countries.[142]

If a company or person intends to disclose EAR-controlled information to a company or person in an EAR-controlled country, a license must be obtained if "they intend to transfer controlled technologies to foreign nationals in the United States; and transfer of the same technology to the foreign national's home country would require an export license."[143] The application process for an export license under EAR is similar to that of ITAR.[144] Once again, an employer must apply on behalf of its employee and a current or potential employee can not act on his or her own behalf.[145] The application process must begin with an online registration with BIS's Simplified Network Application Process - Redesign ("SNAP-R") system.[146] Once successfully registered, applicants can expect a resolution on their application "no later than 90 calendar days

135. *Id.* § 738.4.

136. *Id.* § 738.3 ("Such license requirements are based on the Reasons for Control listed in the Export Control Classification Number (ECCN) that applies to the item.").

137. *Id.* § 738.4 ("[N]ot all license requirements set forth under the 'License Requirements' section of an ECCN refer you to the Commerce Country Chart, but in some cases this section will contain references to a specific section in the EAR for license requirements.").

138. 15 C.F.R. pt. 738 Supp. 1 (2014).

139. 22 C.F.R. § 126.1 (2014).

140. 15 C.F.R. pt. 738 Supp. 1.

141. *Id.* § 746.2.

142. *Id.* § 746.1.

143. *Deemed Export Frequently Asked Questions*, *supra* note 123.

144. *See supra* Part II.B.1.

145. 15 C.F.R. § 748.4(a)(1) ("Only a person in the United States may apply for a license to export items from the United States. The applicant must be the exporter, who is the U.S. principal party in interest with the authority to determine and control the sending of items out of the United States . . . .").

146. *Deemed Export Frequently Asked Questions*, *supra* note 123.

from the date of BIS's registration of the license application," subject to "actions not included in processing time calculations."[147] As was the case with ITAR-license applications, no information was provided on approval rates. Violations of the EAR (or EAA) are punished with varying degrees of administrative sanctions as well as "any other liability, sanction, or penalty available under law."[148] These sanctions include civil monetary penalties, probation or denial of export privileges, seizure, and even criminal charges.[149] Like penalties under the ITAR, violations may result in loss of government contracts as well.[150]

Export controls in some form predate the founding of the United States,[151] but they took the first steps towards their current form through ITAR and EAR in 1940.[152] Although these complicated regulations have changed in attempts to evolve along with modern technology and adapt to new threats, the most recent changes came in the wake of the terrorist attacks of September 11, 2001.

3. Export Control Post-9/11

Export-control regulations are undoubtedly a priority for national security,[153] but also must be measured against the need for qualified workers in a postglobalization market[154] and, of course, the need to guard against discrimination in hiring.[155] This already delicate balance took center stage after the terrorist attacks of September 11, 2001, when the need to protect American technology meant the need to protect American lives.[156] The vast majority of civil liberties debates over the past decade have focused on the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act,

147. 15 C.F.R. §§ 750.4(a)–(b). "Actions not included in processing time calculations" include consultations with other governments, Congressional notification, review and recommendations for other agencies, and pre-license checks. *Id.* §§ 750.4(b)–(c).

148. *Id.* § 764.3(a).

149. *Id.* §§ 764.3(a)(1)–(c)(2).

150. *Id.* § 764.3(c)(2)(ii)(B).

151. Jackson Slipek, *U.S. Export Controls: Is There a New Sheriff in Town?*, SUPPLY & DEMAND CHAIN EXECUTIVE (June 4, 2009), http://www.sdcexec.com/news/10326902/us-export-controls-is-there-a-new-sheriff-in-town.

152. *See id.*

153. *See* Tara L. Dunn, *Surviving United States Export Controls Post 9/11: A Model Compliance Program*, 33 DENV. J. INT'L L. & POL'Y 435, 436 (2005).

154. *See* Burke, *supra* note 22, at 602 ("Restrictions on the sharing of research results and collaboration among scientists worldwide actually may undermine critical security goals. Further, some commentators argue that, in order to be competitive, U.S. firms must recruit talented, knowledgeable employees from a global marketplace, and nonimmigrant foreign nationals help to fill that void."); *Defense Panel Recommends Cut in Export Control List*, *DOD Role*, WASH. TARIFF & TRADE LETTER, Feb. 14, 2000, at 1 ("Protection of capabilities and technologies readily available on the world market is, at best, unhelpful to the maintenance of military dominance and, at worst, counterproductive, undermining the industry upon which U.S. military-technological supremacy depends . . . .").

155. For examples of individuals whose employment is affected by export control regulations see Burke, *supra* note 22.

156. *See infra* Part III.A.

more commonly known as the "USA PATRIOT Act"[157] and its implications.[158] A more nuanced look at government oversight in a post-9/11 environment will show that export-control regulations are mandating privacy violations of a different but still relevant nature.

Former Deputy Chief Counsel for Export Administration Cecil Hunt noted that, prior to 9/11, a company could reasonably believe that "it could readily judge from the nature of its operations whether it had to be concerned with compliance with U.S. export controls and economic sanctions."[159] That is no longer the case.[160] The terrorist attacks opened America's collective eyes on all manner of foreign policy issues, not the least of which was export control, as the reports published in the months following noted, the terrorists relied upon "access to U.S.-origin technologies and financial networks to achieve their scheme."[161]

Many research facilities and universities have strengthened their export-control oversight and training in the years following 9/11, noting the increased governmental scrutiny and even more complicated regulations.[162] BIS, enforcing the EAR, specifically notes, "[i]n the post-9/11 world, the export control challenge is to enable legitimate global trade in U.S. goods and technology, while keeping these items out of the hands of weapons proliferators and terrorists."[163] Although the export-control sys-

157. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 107 Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act].

158. *See, e.g.*, Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013); Symposium, *Cyberspace & The Law: Privacy, Property, And Crime In The Virtual Frontier: Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561 (2010); Jennifer C. Evans, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 963 (2002).

159. Hunt, *U.S. Export Controls*, *supra* note 78, at 51.

160. *Id.* at 52 ("Today, U.S. export controls and economic sanctions affect a much wider range of international transactions. Moreover, these measures reach many activities that are either completely domestic or unlikely to be viewed as having an international aspect.").

161. Dunn, *supra* note 153, at 436 ("It was also clear that throughout the world there were (and are) many other terrorists waiting for the funds and technology required to harm the United States."); *see also* NAT'L COMM'N ON TERRORIST ATTACKS AGAINST THE UNITED STATES ("9/11 COMMISSION"), *The 9/11 Comm'n Report: Final Report of the Nat'l Comm'n on Terrorist Attacks Upon the United States, Exec. Summary* at 14 (2004) ("Hijackers studied publicly available materials on the aviation security system and used items that had less metal content than a handgun and were most likely permissible."), *available at* http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT-24.pdf (last visited Oct. 1, 2015).

162. *See, e.g.*, *Summary of Export Control Laws*, UNIV. S. CAL. OFF. OF COMPLIANCE, http://ooc.usc.edu/summary-export-control-laws ("Since 9/11, the U.S. government has increased its scrutiny of universities and industry to make sure they are complying with these often-complicated regulations.") (last visited Oct. 1, 2015); *Export Controls*, UNIV. CAL. RESEARCH, http://vcresearch.berkeley.edu/export-controls ("Although federal laws restricting exports of goods and technology have been in existence since the 1940s, attention to export controls has increased due to post 9/11 heightened concerns about homeland security, proliferation of weapons of mass destruction, terrorism, and leaks of technology to U.S. economic competitors.") (last visited Oct. 1, 2015).

163. *Enforcement*, U.S. DEP'T OF COMMERCE BUREAU OF INDUSTRY AND SEC., http://www.bis.doc.gov/index.php/enforcement (last visited Oct. 1, 2015).

tem "has not undergone fundamental changes"[164] in the past 13 years, trends in the enforcement of and guidance for these regulations has drastically changed the export-control landscape.[165]

In 2002, the White House initiated "a comprehensive assessment of the effectiveness of U.S. defense trade policies, to identify changes necessary to ensure that those policies continue to support U.S. national security and foreign policy goals."[166] One way in which export control has changed since 9/11 is the processing time for applications. Reform efforts were sidetracked and the clearance process slowed as "the U.S. government understandably shifted resources to focus on anti-terrorism."[167] The focus of export controls turned to security and scrutiny instead of streamlining the license process, as terrorism took the main stage instead of trade.[168] As a result, as at least one commentator noted, recent sanctions expanding the export-controlled country lists are being used "as a policy tool . . . for political rather than national security purposes, motives not shared by other countries supplying similar technology."[169]

Aside from longer processing times associated with heightened application scrutiny, an additional change to export-control administration in the past decade is tied to the passage of the Sarbanes-Oxley Act in 2002.[170] The Act was not passed in response to 9/11 but instead in the wake of financial and accounting failures like that of the much-publicized Enron scandal.[171] Sarbanes-Oxley is an important tool for export control administrators because it requires companies engaged in international trade to certify quarterly and annual reports, holding management accountable for assessing their companies' internal financial controls.[172] This reporting requires detailed knowledge of potential export violations for accurate regulatory compliance reporting on "whether the company's internal controls are sufficient to identify export liabilities that should be disclosed in its periodic reports."[173] Export controls, then, have become a priority not only for, say, engineers working on technology subject to ITAR or EAR, but also for a company's chief officers and key employees.

Finally, the penalties doled out have increased exponentially following 9/11. In fact, from 2000 to 2004, the total administrative penalty

164. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-234, DEFENSE TRADE: ARMS EXPORT CONTROL SYSTEM IN THE POST-9/11 ENVIRONMENT (2005) *available at* http://www.gao.gov/new.items/d05234.pdf.

165. *Id.* ("[Departments of] State and Defense, which reviews export licenses, have continued to implement through regulations and guidance several initiatives primarily designed to streamline the processing of arms export licenses.").

166. *Id.* at 11 (internal quotation marks omitted).

167. Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 HOUS. J. INT'L L. 441, 458–59 (2003).

168. *Id.* at 459.

169. *Id.* at 446.

170. Sarbanes-Oxley Act of 2002, PL 107–204, 15 U.S.C. § 7201 (2012).

171. H.R. REP. NO. 107-418, at 37 (2002).

172. *See* 15 U.S.C. § 7201; *see also* Dunn, *supra* note 153, at 444.

173. Dunn, *supra* note 153, at 444.

amount more than doubled.[174] On the criminal side, despite the fact that the number of investigations increased during that timeframe by just five percent, the number of arrests rose by more than thirty percent.[175] Both the number and total value of arms seizures has also increased during this time period.[176] Furthermore, violations of export control regulations are no longer administrative in nature, but instead a violation of homeland security.[177] The new classification justifies the sobering penalties mentioned in Part II.B;[178] companies face "fines ranging up to $1 million per violation, a loss of export privileges, and debarment from government contracts."[179]

This information, particularly compliance requirements and noncompliance costs, reflects the reality many businesses dealing in export-controlled technology. Yet it is often difficult to conceptualize these hurdles, perhaps because companies like Boeing or Lockheed-Martin come to mind when discussing export controls.[180] With profits of $2.9 billion each in 2012,[181] perhaps the cost of compliance seems justified. But as noted above, export controls cover far more than missiles and aircraft. Now more than ever, smaller companies are subject to export control regulations, particularly those using or manufacturing EAR dual-use technology, as is the case with Company Blue.

C. Company Blue[182]

Company Blue has found success in manufacturing and servicing parts for cooling systems used in internal combustion engines, and it is incorporated in Delaware, United States. The company maintains manufacturing plants in the United States, China, and Germany; a manufacturing licensee in Mexico; and sales offices in the United States, Germany, Mexico, and China. The products it manufactures for cooling systems include parts for pumps, valves, cores, and fans associated with liquid cooling systems. Originally, Company Blue manufactured parts for use only in cars, motorcycles, and snowmobiles but, after a small acquisition three

174. DEFENSE TRADE, *supra* note 164, at 62.

175. *Id.* at 56. It should be noted that in the year 2002, the number of investigations opened soared in response to the attacks of 9/11, so it appears as a statistical anomaly and is not factored into any calculations listed in this Note. *Id.* It's also important to note that the number of convictions did not increase despite the increase in investigations, likely because "it is hard to obtain evidence of a 'willful' violation, the legal standard in the AECA for a criminal conviction, particularly since there is a limited 'paper trail' of documents to prove a violation." *Id.* at 32.

176. *Id.* at 43.

177. Dunn, *supra* note 153, at 437 (citing *Justice Ready to Step Up Criminal Prosecution of Export Violations*, THE EXPORT PRACT. Nov. 2003, at 7).

178. *Supra* Parts II.B.1–II.B.2.

179. Dunn, *supra* note 153, at 441 (citations omitted); *accord supra* Parts II.B.1–II.B.2.

180. Eloise Lee & Robert Johnson, *Top 25 U.S. Defense Companies*, BUS. INSIDER (Mar. 13, 2012, 2:39 PM), http://www.businessinsider.com/top-25-us-defense-companies-2012-2?op=1.

181. *Id.*

182. Company Blue is a purely hypothetical company. Any similarities between Company Blue and an existing company are unintentional and coincidental.

years ago, now produces fans sometimes used in aircraft and diesel generators.

Company Blue currently has 550 employees throughout its headquarters, sales offices, and manufacturing plants. When necessary for this analysis, two hypothetical employees will be used: Employee A, a sales representative in Tucson who was recently transferred from the Mexico City office, and Employee B, a manufacturing plant manager in Beijing, China.

III. ANALYSIS

This Part will address the arguments of Professors Sperino and Burke before offering a recommendation for judicial remedy expounded in Part IV. This Part will also analyze the application of the laws introduced in Part II in the business setting, namely the hiring, assignment, and promotion practices for companies that deal with export-controlled technology.

A. The Dangers of Overreaching National Security

As Professor Sperino notes, these steep penalties encourage business to "over-comply" with export-control regulations, often carrying the cost of violating appropriate hiring and assignment procedures.[183] After all, violating homeland security—and being criminally prosecuted in federal court—is an aggressive deterrent.[184] Just as the scales have tipped away from defending against terrorist threats with regard to the USA PATRIOT Act,[185] so may justice require we loosen the reigns on the need to protect American technology. The intrusive nature of not only inquiring about but also requesting documentation of national origin is troublesome, considering both discrimination and privacy concerns.[186]

Professor Sperino recommends that employers handling export-controlled technology adopt a "blanket policy" of making inquiries to determine whether each employee qualifies as a foreign person under these regulations so as to avoid Title VII and IRCA liability.[187] This recommendation presents two problems. First, regardless of "blanket" application, the Supreme Court has consistently held that an employer cannot use an employment practice that has a disparate impact on people of a

183. Sperino, *supra* note 6, at 426.

184. *See supra* notes 170–75 and accompanying text.

185. *See* Adam Liptak, *The 9/11 Decade – Civil Liberties, Before and After*, N.Y. TIMES, Sept. 7, 2011, http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all&_r=0 ("The law, more than 300 pages long, sailed through Congress seven weeks after the attacks with scant dissent. It quickly became a sort of shorthand for government abuse and overreaching.").

186. The U.S. Supreme Court has consistently held that specific guarantees in the Bill of Rights create "zones of privacy." *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

187. Sperino, *supra* note 6, at 423 ("The same inquiry should be made for every position to avoid claims that inquiries were made because an individual looked or sounded foreign. Ideally, applicants would be told that the reason for the inquiry is to comply with the deemed export rules.").

certain national origin—or of only a select few national origins.[188] Even if inquiries are made to all individuals, only those with certain national origins will be affected, as those individuals would not be allowed to work on projects involving export-controlled technology.[189] Furthermore, the EEOC mandates that employers refrain from assigning applicants or employees to certain positions based on national origin in the absence of a *particular* export issue, which discourages requiring verification for all employees regardless of export exposure.[190]

Second, considering the licensing requirements,[191] such a policy would likely prove impractical. The requirement of additional license applications when an employee is added to a project supports this statutory interpretation;[192] broad licensing for all employees would not only be costly and time consuming, but it is unlikely that a "blanket policy" inquiry would even be effective. Further, as export-control regulations struggle to keep up with technological advances, transfers can occur in any number of ways not necessarily contemplated by legislature, such as an American worker's "use of technical expertise abroad if that expertise was acquired in the United States"[193] or internal share-drives accessible throughout multinational corporations.[194]

Consider Company Blue's Employee B, the manufacturing plant manager in Beijing, China. As Company Blue grew modestly in size and clientele, it became increasingly more cost efficient to manufacture its products overseas.[195] While the executives at the plant are American or, if foreign born, they are licensed for their projects, Employee B is a Chinese citizen who is not licensed for export-controlled material. He is in a managerial position whose tasks include, among other responsibilities, setting processing variables, providing manufacturing information, analyzing efficiency data, and facilitating corrections to malfunctions.[196] In practice, Employee B works only with small components, mainly individual valves. Employee B has never seen a cooling fan together in its final form and has certainly never viewed it in use. He merely has technical information on that valve, namely the specifications for its

188. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009); Griggs v. Duke Power Co., 401 U.S. 424, 429–31 (1971); *Shaping Employment Discrimination Law*, U.S. EQUAL EMP'T OPPORTUNITY COMM., http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html (last visited Oct. 1, 2015).

189. *See* ITAR and EAR country listings, *supra* Part II.B.

190. *See* EEOC COMPLIANCE MANUAL, VOLUME II § 618: Segregating, Limiting and Classifying Employees, (BNA), *available at* http://www.eeoc.gov/policy/docs/national-origin.html (last modified Dec. 12, 2002).

191. *See supra* Parts II.B.1–2.

192. *See supra* note 109.

193. Corr, *supra* note 167, at 475.

194. *Id.* at 475–76.

195. Matt Schiavenza, *China's Dominance in Manufacturing—in One Chart*, THE ATLANTIC (Aug. 5, 2013), http://www.theatlantic.com/china/archive/2013/08/chinas-dominance-in-manufacturing-in-one-chart/278366/.

196. *Production Supervisor Job Description Sample*, MONSTER.COM, http://hiring.monster.com/hr/hr-best-practices/recruiting-hiring-advice/job-descriptions/production-supervisor-job-description-sample.aspx (last visited Oct. 1, 2015).

production, so he can conduct qualify control checks and maintain efficiency standards. However, since Company Blue was recently solicited to supply cooling fans to another company that services diesel generators for the U.S. Coast Guard, that valve, and individuals with data relating to that valve's production, are now subject to the EAR. Company Blue, then, must either remove Employee B from his position while an application is filed and processed or hire and send a U.S. citizen to take over his managerial responsibilities. Both options require at least a temporary position vacancy.

No matter what type of export transfer involved, one thing is clear: the overwhelming nature of licensing procedures may deter employers from using the time[197] and resources[198] to license foreign-born employees when the alternative—assigning only American-born workers to the project—is both faster and free if the company is domestic. In that scenario, however, foreign-born individuals lawfully working in the United States are being denied opportunities in violation of Title VII so that employers may comply with ITAR and EAR procedures.[199] And in the case of Company Blue's plant in Beijing, even that discriminatory measure may not be a workable business option.

Although an economic analysis is outside the scope of this Note, it is worth briefly mentioning the internal impact on American employers like Company Blue. Businesses must conduct abstract cost-benefit analysis attempting to quantify (1) the cost of litigating discrimination lawsuits, (2) the loss of potential talent in narrowing the candidate field, (3) the positions held strictly for oversight on export control compliance, (4) loss of government contracts, (5) monetary penalties, (6) production location costs, etc.[200]

197. *See Licensing*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, http://pmddtc.state.gov/licensing/ (last updated June 18, 2015); *Registration*, U.S. DEP'T OF STATE DIRECTORATE OF DEF. AND TRADE CONTROLS, http://pmddtc.state.gov/registration/index.html (last updated Oct. 24, 2013); *Guidelines for Completion of a Form DSP-73 Application/License for Permanent Export of Unclassified Defense Articles*, U.S. DEP'T OF STATE DIRECTORATE OF DEFENSE AND TRADE CONTROLS, http://www.pmddtc.state.gov/DTRADE/documents/dtrade_dsp_5_instructions.pdf (last visited Oct. 1, 2015).

198. *See* 15 C.F.R. § 748.4 (2014).

199. 8 U.S.C. § 1324b(a)(1) (2012); IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

200. For an economic analysis on how export control regulations affect the U.S. national economy, see Gregory W. Bowman, *A Prescription for Curing U.S Export Controls*, 97 MARQ. L. REV. 599 (2014); Nadine Tushe, *U.S. Export Controls: Do They Undermine the Competiveness of U.S. Companies in the Transatlatic Defense Market?*, 41 PUB. CONT. L.J. 57 (2011); Michael D. Klaus, *Dual-Use Free Trade Agreements: The Contemporary Alternative to High-Tech Export Controls*, 32 DENV. J. INT'L L. & POL'Y 105 (2003). *See also* Jason Harrison, *For Small Exporters, Security-Related Regulations Can Be a Thicket*, WASH. POST (Jan. 4, 2013), http://www.washingtonpost.com/business/for-small-exporters-security-related-regulations-can-be-a-thicket/2013/01/04/f9eedf34-5448-11e2-a613-ec8d394535c6_story.html.

B. The Pipedream of Legislative Reform

Professor Burke acknowledges the need for balancing the valid interest of export-control regulations with "their propensity to affect adversely the conditions of employment of some foreign nationals working in the United States."[201] Her recommendation to preserve equal opportunity in employment is legislative in nature. She primarily argues that licenses should be obtained through the initial visa process rather than through employer-drafted, project-specific applications[202] or through various legislative reform proposals loosening the reigns on the licensing process.[203] This recommendation seems to adequately balance individual employee rights with defense-related technology protection. Its practical value and pragmatic application, however, are lacking.

Practically, as noted above, export-control licenses must be specific to the individuals involved and the technology at issue.[204] While her recommendation would include changing that process, it would eliminate a large number of jobs for those entering the United States legally. Professor Burke's visa process system could validly restrict a foreign-born individual from working on, say, nuclear projects, but it would be invalid to automatically reject them from work on manufacturing for an employer like Company Blue. The level of classification necessary to correctly clear individuals for appropriate positions would likely require, in the end, the same project-specific application criteria that is currently in place.

Pragmatically, the bipartisan support necessary to confront this nuanced conflict of laws, alongside the sheer amount of time necessary to undertake such action, make this recommendation unworkable. Though it may seem defeatist, it is also irresponsible not to factor the current political landscape into recommendations that affect both national security and individual civil rights. Recently, Sarah Binder of the Brookings Institution conducted an empirical study[205] of Congressional productivity to investigate whether current sentiments of political gridlock[206] were as overwhelming as they seem in American mainstream media. It turns out, they were. Binder measured the number of "failed, salient issues" proposed throughout each Congressional session since 1947 and issued a sobering conclusion: "[L]evels of legislative deadlock have steadily risen over the past half-century. Stalemate at times now reaches across three-

201. Burke, *supra* note 22, at 566.

202. *Id.* at 607.

203. *Id.* at 609–10.

204. *See supra* note 108 and accompanying text.

205. Sarah Binder, *Polarized We Govern?*, BROOKINGS INST. (May 2014), http://www.brookings.edu/~/media/research/files/papers/2014/05/27%20polarized%20we%20govern%20binder/brookingscepm_polarized_figreplacedtextrevtablerev.pdf.

206. *See, e.g.*, Robert Barnes, *Political Gridlock Puts Supreme Court at Center of Controversial Social Issues*, WASH. POST (Oct. 6, 2013), http://www.washingtonpost.com/politics/political-gridlock-puts-supreme-court-at-center-of-controversial-social-issues/2013/10/06/675348a0-2d2c-11e3-b139-029811dbb57f_story.html.

quarters of the salient issues on Washington's agenda."[207] A recent article interpreting Binder's data noted that the numbers are growing even grimmer as of late.[208]

That is not to say legislative reform is without hope, but on these particular issues based on Professor Burke's recommendation, export control regulations[209] and the immigration reform,[210] the legislature is particularly polarized. As one export-control expert noted, "[n]otwithstanding talk of review and reform, the odds are not good for accomplishing a basic overhaul of the complex U.S. export control structure and achieving a truly level international playing field."[211] For these reasons, recommendations focusing on legislative action are, in the current political landscape, inefficient at best and ineffective at worst. Fortunately, the role of the judicial branch offers another option for reconciling export-control regulations and antidiscrimination laws and seems poised to offer further guidance to employers currently wading through liability quagmires.

C. Footnote Four's "Discrete and Insular" Minorities

In the absence of direct guidance on conflicting federal laws, legal scholars may look to U.S. Supreme Court jurisprudence concerning the Equal Protection Clause of the Fourteenth Amendment[212] as applied to the Federal government through the Fifth Amendment Due Process Clause.[213] Since lawfully-admitted resident aliens are considered persons under these amendments,[214] this analysis applies to any law-making classifications based on national origin. The U.S. Supreme Court has consistently held that national-origin classifications are subject to strict scrutiny.[215] In order to pass the Court's strict scrutiny standard a law must be justified by a compelling governmental interest, narrowly tailored to achieve that interest, and use least restrictive means to achieve that in-

207. Binder, *supra* note 205, at 17.

208. *Political Gridlock: Unprecedentedly Dysfunctional,* ECONOMIST, (Sept. 22, 2014, 4:52 PM), http://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock ("Between 1947 and 2000, for instance, conference agreements averaged about 100 per congress [sic]. Between 2001 and 2012, however, the number was just over 20. This number plummeted even further during the 112th Congress, from 2011 to 2013, when only seven final agreements were reached via conference committee.").

209. Corr, *supra* note 167 (analyzing past failures of export control reform initiatives).

210. *See, e.g.*, Ryan Lizza, *Getting to Maybe*, THE NEW YORKER (June 24, 2013), http://www.newyorker.com/magazine/2013/06/24/getting-to-maybe (discussing the Gang of Eight's failed immigration initiatives).

211. Hunt, *Overview*, *supra* note 78.

212. U.S. CONST. amend. XIV § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

213. *See* U.S. CONST. amend. V § 5; Bolling v. Sharpe, 347 U.S. 497 (1954).

214. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

215. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 482 (1954) (holding that excluding individuals from jury service due to their national origin "bespeaks discrimination" and violates the Equal Protection Clause).

terest.[216] As the name suggests, this is the highest standard applied by the Court, and, as a result, courts applying strict scrutiny find laws unconstitutional more often than not.[217]

Professor Burke uses this framework to conduct a constitutional analysis of export-control regulations.[218] She notes that alienage, quite different from national origin, is also subject to "heightened judicial scrutiny" but explains that strict scrutiny need not always apply.[219] She mentions *Carolene Products* footnote 4 in describing immigrants as a potential "discrete and insular" minority,[220] but ignores the purpose of this footnote in context. Professor Burke's assessment is that export control is more akin to appointing State police officers subject only to rational review.[221] Company Blue and its employees are all subject to export-control regulations, however, which illustrates the problem with that analogy.

None of these employees have responsibilities akin to State police officers that led the Supreme Court to conduct a rational basis review only, as they are not even tangentially related, let alone "intimately related to the process of democratic self-government."[222] Since the Court has found police officers,[223] public school teachers,[224] notaries,[225] and probation officers[226] fitting into this narrow "political function" exception, Professor Burke places employees working with export-controlled technology into this category.[227] Although that exception undoubtedly applies to some export-controlled positions, it does not fit them all.

Company Blue's Employee A, the Mexican born sales representative in Tucson, has included on her list of responsibilities the following, conducting and adjusting sales presentations, submitting orders, recommending changes in products, and providing historical records of area and customer sales.[228] She does not have a security clearance, so she does not sell directly to the U.S. Government or the U.S. Military, but she does sell fan components to one of Company Blue's new clients, a subsidiary of a defense contractor. Because Company Blue has expanded to include this client,[229] and because the cooling fans Employee A is selling

216. Johnson v. California, 543 U.S. 499 (2005).
217. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICES 690–94 (4th ed. 2011).
218. Burke, *supra* note 22, at 598–601.
219. *Id*. at 598–99.
220. *Id.* at 599.
221. *Id.*
222. *See* Bernal v. Fainter, 467 U.S. 216 (1984).
223. Foley v. Connelie, 435 U.S. 291, 299–300 (1978).
224. Ambach v. Norwick, 441 U.S. 68, 79–80 (1979).
225. *Fainter*, 467 U.S. at 220.
226. Cabell v. Chavez-Salido, 454 U.S. 432, 445–46 (1982).
227. Burke, *supra* note 22, at 601.
228. *Sales Representative Job Description Sample*, MONSTER.COM, http://hiring.monster.com/hr/hr-best-practices/recruiting-hiring-advice/job-descriptions/sales-representative-job-description-sample.aspx (last visited Oct. 1, 2015).
229. Hunt, *Overview*, *supra* note 78.

are now classified as dual-use,[230] Company Blue needs a license for Employee A to continue working in her current capacity. Her duties in no way relate to the "process of democratic self-government," which illustrates the problem with Professor Burke's sweeping categorization that export-control laws are akin to State Police officers, thus combatting the assertion that export-control regulations warrant only rational review.[231]

Some positions that work with export-controlled technology *may* serve a political function, in particular those dealing with classified information. But those positions already require a security clearance,[232] and the background investigation for these clearances handles all national-origin related inquiries.[233] As a result, export-control regulations for non-classified positions that mandate national origin inquiries should be subject to strict scrutiny. Professor Burke relies on strict scrutiny cases before both the U.S. Supreme Court and other federal Circuit Courts to show that legally admitted, nonimmigrant aliens are not a suspect class.[234] This reliance misses a crucial distinction.

In her analysis of *LeClerc*, a Fifth Circuit case applying rational-basis review to a challenge of Louisiana law rendering "nonimmigrant aliens" ineligible to sit for the state bar,[235] she theorizes that the court's rejection of strict scrutiny reveals precedent that exclusionary employment practices are subject to rational review only.[236] As the seven Circuit Judges dissenting in the Fifth Circuit's rejection of rehearing the case *en banc* wrote, however, "the trumping constitutional power of the federal government in controlling the nation's borders, including matters of immigration and naturalization, [is] an allocation that the Supreme Court has pointed to as itself demanding strict scrutiny of [] regulations of persons whose presence in the country is lawful under federal law."[237] A closer look into *Carolene Products* footnote four[238] supports that dissent and illustrates the problems in Professor Burke's argument, namely that individuals sitting for the state bar fall under the narrow "political function" exception,[239] whereas many private employees involved in projects using export-controlled technology have no such responsibility.

Judge (later Chief Justice)[240] Harlan F. Stone wrote the majority opinion in *Carolene Products*, a case over filled milk that, without foot-

230. 15 C.F.R. § 730.3 (2015).
231. Burke, *supra* note 22, at 599–601.
232. *All About Security Clearances*, U.S. DEPT. OF STATE http://www.state.gov/m/ds/clearances/c10978.htm (last visited Oct. 1, 2015).
233. *Id.*
234. Burke, *supra* note 22, at 600 (analyzing LeClerc v. Webb, 419 F.3d 405, 419 (5th Cir. 2005)).
235. *LeClerc*, 419 F.3d at 410–11.
236. Burke, *supra* note 22, at 600.
237. LeClerc v. Webb, 444 F.3d 428, 429 (5th Cir. 2006) (dissent on motion for rehearing en banc).
238. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
239. *See* Bernal v. Fainter, 467 U.S. 216 (1984).
240. Lincoln Caplan, *Ruth Bader Ginsburg and Footnote Four*, THE NEW YORKER (Sept. 13, 2013), http://www.newyorker.com/news/news-desk/ruth-bader-ginsburg-and-footnote-four.

note four, would be utterly unremarkable.[241] Appealing to invalidate the Filled Milk Act ("FMA") under the Commerce Clause, the Court followed the post-*Lochner* era precedent[242] and upheld the statute under the "rational basis" test.[243] This deference to the legislature was novel, as the *Lochner* era ran for roughly forty years[244] and was defined by judicial activism declaring a host of social welfare legislation unconstitutional, including minimum wage, maximum hour, business licensing, and union protection.[245] Since the precedent was set for this departure from activism the year prior,[246] this opinion was not necessarily noteworthy but for Judge Stone's reluctance to unequivocally embrace the Court's newfound deference,[247] and thus the importance of footnote four.

In footnote four, Judge Stone believed that the deference accorded to economic regulations, the 'rational basis' test,[248] was inadequate when dealing with fundamental rights, particularly in the case of "discrete and insular minorities."[249] This was, as one commentator noted, "the Court's first—and maybe only—attempt to say, systematically, when the courts should declare laws unconstitutional."[250] This footnote heaved the Court in a new direction, telling lower courts to "step in when 'those political processes which can ordinarily be expected to bring about repeal of undesirable legislation' are curtailed in some way."[251]

Using that framework, export-control regulations should not be reviewed under a rational basis standard. Although there are clearly economic components to these statutes, the legislative histories of both EAR and ITAR[252] reveal the underlying national security concerns that were present when these acts were passed and remain relevant today. Moreover, since these regulations potentially affect employment practices, export controls should not automatically trigger a rational basis test reserved for economic regulations.[253] Instead, using the footnote four analysis above, a court hearing the case should determine if the employment practice involves a fundamental right or a suspect class of persons.[254] Here, the practice involves requiring documentation of national origin for foreign-born employees legally working within the United

241. *Id.*

242. Lochner v. New York, 198 U.S. 45 (1905). *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 946 (1999) (describing the *Lochner* era as "the substitution of judicial judgment for that of the policymaker or legislature").

243. *Carolene Prods. Co.*, 304 U.S. at 152–54.

244. David Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1253.

245. *Id.*

246. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (overturning Adkins v. Children's Hospital, 261 U.S. 525 (1923) (holding a federal minimum wage law for women was unconstitutional)).

247. Caplan, *supra* note 240.

248. *Carolene Prods. Co.*, 304 U.S. at 152.

249. *Id.* at n.4.

250. Strauss, *supra* note 244, at 1254.

251. *Id.* at 1256 (quoting *Carolene Prods. Co.*, 304 U.S. at 152 n.4).

252. 15 C.F.R. § 734 (2014); 22 C.F.R. § 120 (2014).

253. *Carolene Prods. Co.*, 304 U.S. at 152.

254. CHEMERINSKY, *supra* note 217, at 540.

States. If a fundamental right or suspect class is implicated, the courts will only uphold the law if it meets strict scrutiny.[255]

The "strict scrutiny" standard demands that the regulation in question be "necessary to achieve a compelling government purpose" and must be narrowly tailored, using the least restrictive means available.[256] Requiring proof of national origin and naturalization is then, as applied under the discrete and insular test with the individual rights of both privacy and equal opportunity at risk, at the very least subject to strict scrutiny and perhaps even per se prohibited. Drawing on the items covered and the application procedures required under the ITAR and, especially, the EAR, the "dual-use" catchall in itself illustrates why export controls are not narrowly tailored.[257] Additionally, there are clearly less discriminatory means available to accomplish the admittedly compelling government interest in national security, that is to rely on the procedures in place for verifying foreign-born individuals' eligibility to work and the security clearance procedures already in place for employees working with classified technology.[258]

As Professor Burke noted, the Supreme Court has held that Congress has plenary power to regulate inclusion in and exclusion from the United States.[259] In fact, the Court found that it could not even review Congressional action relating to the ability of foreign persons to enter the United States in *The Chinese Exclusion Case*.[260] Export controls, however, do not govern or even play a part in immigration. That these regulations are analyzed alongside the IRCA is not indicative of their purpose or of Constitutional authority to act but rather an attempt to reconcile the requirements of export control regulations with the anti-discrimination provisions of the IRCA when viewed alongside Title VII. ITAR and EAR requirements in no way affect individuals immigrating to the United States, they affect individuals already in the United States seeking employment opportunities. For these reasons, neither Professor Sperino nor Professor Burke can reconcile Title VII and the IRCA with the national origin inquiries of ITAR and EAR without abandoning individual rights.

255. *Id.*

256. *Id.* at 540.

257. *See supra* Part II.B.

258. *See infra* Part IV.B.

259. The Chinese Exclusion Case, 130 U.S. 581, 603–04 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.").

260. *Id.* at 602 ("The validity of this legislative release from the stipulations of the treaties was, of course, not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.").

IV. RECOMMENDATION

Although export-control regulations have, at least outwardly, coexisted with antidiscrimination laws since their inception, Part III highlighted the tensions and irreconcilability of certain provisions while pointing out the inherent liability businesses face. Rather than recommending that businesses rely on the national security exception to Title VII as Professor Sperino does, and rather than advising legislative reform as Professor Burke does, this Note recommends two separate courses of actions, one for courts in reviewing discrimination claims involving export-control positions and another for businesses dealing in export-controlled technology.

A. Implied-Repeal: Equality Over Fear

When constitutional scholars discuss preemption, it is generally in the context of the Commerce Clause,[261] noting that States have general sovereignty in their police power except where federal law preempts that power under the Supremacy Clause.[262] The analysis is relatively simple in those cases. Notwithstanding dormancy issues,[263] if a federal law and state law are mutually exclusive, the state law is preempted.[264] The analysis is trickier when the conflicting laws are both federal, or in this case when each of the four applicable laws is federal. When federal laws conflict, the term "preemption" is not used, but instead an "implied repeal" analysis is undertaken.[265] Whereas Congress preempted State law in many areas,[266] courts have historically been reluctant to apply the "implied repeal" doctrine "because it is limited to reconciling laws that are so 'plainly repugnant' to one another that they are incapable of coexisting."[267] The historical hesitance to invoke the doctrine, however, may be changing in modern courts.[268]

Implied repeal is a doctrine that "arose out of the common law as a way for courts to adjudicate cases where they are called upon to resolve the uncertainty that is created when a legislature has enacted two statutes that potentially conflict."[269] Both the ITAR and EAR are silent on the

261. U.S. CONST. art. I, § 8, cl. 3.

262. U.S. CONST. art. 6, cl. 2; *see, e.g.*, New York v. Miln, 36 U.S. 102 (1837).

263. *See* Cooley v. Board of Wardens, 53 U.S. 299 (1852).

264. *See* Gibbons v. Ogden, 22 U.S. 1 (1824). For an analysis on the evolution of Supreme Court jurisprudence on the area of federal preemption, see also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

265. Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy"*, 45 GONZ. L. REV. 437 (2009).

266. *Preemption*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/preemption (last visited Oct. 1, 2015).

267. Markham, *supra* note 265, at 439.

268. *See id.*

269. Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of* Hoffman Plastic*, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 3 (2008).

inconsistency between the requirements they promulgate and nondiscrimination statutes, so courts must interpret them in light of Title VII and the IRCA. This Note has illustrated where and why these laws are irreconcilable, which is why I recommend the seldom-used doctrine of implied repeal. While implied repeal tenants generally hold that the statute that was passed most recently governs, the doctrine is more nuanced than a simple chronological inquiry.[270]

Another tenant of implied repeal is that "the statutes under consideration should be reconciled if at all possible."[271] That tenant is the most useful to this analysis. Export-control and nondiscrimination statutes may be *generally* reconciled if and only if they are interpreted to enforce only those export-control requirements that do not violate Title VII and the IRCA. While this comes closer to Professor Burke's legislative reform proposal, no amendments need to be passed in order for the ITAR and EAR to be read in that way. Rather, the Court could, and this Note argues that it should, impliedly repeal the portion of the licensing criteria that mandates national-origin discrimination. This would not change the general application procedure, but instead would allow employers to rely on the I-9 verification process and their internal-reporting controls already in place to determine whether an employee has sufficient documentation to support an application on their behalf.

B. Ensuring Security: Third-Party Checks for Balance

Part of the liability problems businesses face is not necessarily in the inquiry itself, but the dissemination or even publication of an employees' personal information with regard to national origin documentation for export control. For example, although publishing this information in some form may help shield a company from inadvertent export-control violations,[272] it may also subject the company to liability on employment-discrimination claims. Employees who feel wronged might easily make out a prima facie case of national-origin discrimination because it will be clear that peers and supervisors knew the employee's national origin.[273] The burden of proof would then shift to the company, as in other discrimination claims, potentially involving costly and time-consuming litigation.[274]

A solution to this problem may lie in a process analogous to the federal security clearance process. Similar to the export-control license process, individual employees may not initiate an application for a secu-

270. *Id.* at 11.

271. *Id.* at 29–30.

272. Corr, *supra* note 167, at 475 ("One area of particular difficulty concerns the increasing use of internal company e-mail servers, or intranets, where proprietary data is shared among employees, and broad company computer networks where a foreign national may gain access to controlled data and files.").

273. *See* Joel William Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979).

274. *Id.*

rity clearance; instead their employer must do so for them.[275] The Office of Personnel Security and Suitability, Bureau of Diplomatic Security runs that process, with oversight from the State Department.[276] Handling these clearances as a third party, an individual employee's supervisor has no visibility on the process, background materials, personal information, or status of the clearance and, instead, only knows that the process is underway and when a determination has been made.[277] This insulates employers from liability because no individual supervisor has access to his or her employees' personal information necessary for clearance paperwork, and thus an employee has no reason to believe he or she is subject to discrimination based on that information.

A third-party licensing system, as opposed to employer-initiated license applications, would thus provide the benefit of shielding an employer from discrimination claims and, through the cost-prohibitive nature of these checks,[278] ensure employers only use them when hiring individuals for positions truly requiring export licenses. Since this system mirrors that of security-clearance procedures for government positions, export-control licenses for individuals cleared through this third-party system should be automatically approved so long as the clearance covers the technology at issue. This would not only encourage nondiscriminatory hiring and placement practices but also more efficient application processing through the ITAR and EAR mechanisms. This type of mechanism would then act as a sort of "safe harbor" for employers; businesses will be able to provide proof of these third-party checks as an affirmative defense to violation allegations as well as appeals of denied applications.

V. CONCLUSION

There is no question that national security concerns require regulation of technology in many instances. When businesses deal in export-controlled technology, they may be forced to violate Title VII and the IRCA in order to comply with licensing requirements for legal employees born outside of the United States. Professor Sperino's recommendation to amend Title VII to allow for full compliance with ITAR and EAR requirements favors national security concerns over the protections afforded by antidiscrimination laws.[279] While the post-9/11 export-control landscape supports this recommendation, that approach contradicts U.S. Supreme Court jurisprudence on the appropriate approach to safeguarding individual rights as articulated in *Carolene Products* and throughout the Courts jurisprudence.[280]

275. 15 C.F.R. § 748.4 (2014); *Security Clearance Frequently Asked Questions*, U.S. DEP'T OF STATE, http://www.state.gov/m/ds/clearances/c10977.htm (last visited Oct. 1, 2015).

276. *Security Clearance Frequently Asked Questions*, *supra* note 275.

277. *See id.*

278. *See id.*

279. Sperino, *supra* note 6.

280. *See supra* Part III.C.

Professor Burke's recommendation considers but ultimately dismisses that jurisprudence surrounding individual rights.[281] Her assumption that individuals exposed to export-controlled technology fall under the narrow "political function" exception[282] is not supported by case law. As illustrated by Company Blue, many employees legally working for a company within the United States can complete all assigned duties without even a tangential relationship with the democratic process.

For those reasons, the most efficient way to reconcile these statutes is to impliedly repeal the portions of export-control regulations that require employers to violate Title VII and the IRCA. While the safest way for employers to comply, in the meantime, is to use third-party clearance procedures for employees working with export-controlled technology.

281. Burke, *supra* note 22, at 608–10.
282. *See* Bernal v. Fainter, 467 U.S. 216 (1984).