Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act

By
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I. INTRODUCTION

Armed militias operating with the complicity of extremists in Rwanda's ruling regime murdered more than 500,000 Tutsi civilians and politically moderate Hutus in 1994.1 The international community failed in its efforts to prevent this tragedy.2 Instead, governments, private exporters, commercial manufacturers, brokers, transporters, and shipping agents helped to foster conflict by providing arms to the extremists.3 Perhaps no single set of actions undermined the potential to resolve the civil war and de-escalate the genocide as significantly as the sale of more than $26.9 million in small arms and light weapons to the Rwandan government between 1990 and 1994.4

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4. ELISE KEPPLER & JEFFREY MOAG, NATIONAL SECURITY NEWS SERVICE, CENTRAL AFRICA: THE INFLUX OF ARMS AND THE CONTINUATION OF CRISIS, A BACKGROUND REPORT FOR JOURNALISTS, 50-52 (1998). The figures listed above represent only the fraction of transfers in which the transaction and monetary value of the sale are comprehensively documented. Additional information suggests that these numbers significantly underestimate the actual amount and value of arms transactions that occurred. For a comprehensive review of published details on arms transfers to the Hutu regime between 1990 and May 1994, see id.
Arms sales to the perpetrators of genocide in Rwanda were far from unique. In the past decade, arms transfers to government and rebel forces engaged in intra-state conflicts or to regimes that violate human rights have been widely documented.5 Despite domestic arms export controls and numerous arms embargoes that prohibit transfers to such destinations, few, if any, of the actors involved in these deals are ever held accountable for their activities.

Such deals often have escaped public scrutiny and criminal responsibility because of the role played by private arms brokers. These brokers facilitate arms deals, often undertaking activities such as negotiating the terms of sale, locating weapons suppliers, or arranging the logistics. Currently, arms brokers remain uniquely unregulated under domestic export laws and regulations.6 Brokers also tend to operate outside their countries of citizenship and the countries supplying or receiving the weapons.7 As a result, brokers cast a shroud of secrecy over arms transfers, make deliveries difficult to track, and evade even the limited brokering regulations actually in effect.8

In recent years, the international community has begun to recognize the significance of arms brokers in arms flows to conflict zones and regimes that abuse human rights. Governments, regional institutions, and international organizations are developing domestic export laws, international norms, and a host of information exchange initiatives to regulate the arms brokers. Thus far, one of the most significant efforts toward regulation of arms transfers has been the enactment of a comprehensive brokering law in the U.S. on July 21, 1996.9 This law creates virtually unprecedented regulation of brokering throughout the world by requiring brokers to obtain licenses for each transaction. The law applies to U.S. citizen brokers, regardless of their place of residence, and foreign nationals residing or conducting a substantial amount of their business opera-

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6. For reviews of existing controls, see Part IV of this Comment; see also JAMES COFLIN, INT’L SEC. RESEARCH & OUTREACH PROGRAMME, INT’L SEC. BUREAU, DEP’T OF FOREIGN AFFAIRS AND INT’L TRADE, SMALL ARMS BROKERING: IMPACT, OPTIONS FOR CONTROLS AND REGULATION 20-22 (2000); WOOD & PELEMAN, supra note 5, at 105-14.

7. See HUMAN RIGHTS WATCH, STOKING THE FIRES: MILITARY ASSISTANCE AND ARMS TRAFFICKING IN BURUNDI 34, 44 (1997); WOOD & PELEMAN, supra note 5, at 63-65; Letter Concerning Angola, supra note 5, at para. 29.

8. WOOD & PELEMAN, supra note 5, at 16.

tions in the U.S. The law also applies to foreign nationals who broker U.S.-
made weapons, regardless of the broker’s place of residence. Since the enactment of the Brokering Amendment, however, not one indi-

vidual or company has been prosecuted or even indicted for a violation. This may be due, in part, to the law’s novelty, but the statute suffers from at least three major impediments to holding violators accountable: (1) inadequate and ineffective procedures for administering the law; (2) practical challenges of enforcement; and (3) a specific intent requirement. As the law is currently being offered as a model on which other governments and international institutions could base their own brokering regulations, an analysis of the U.S. law’s weaknesses is timely.

Part I of this comment outlines the relationship between human rights abuses, conflict, and arms flows. This discussion centers on the dynamics of weapons transfers and the intensification of conflict, the humanitarian implications of such arms transfers, the structure of the international arms market, and the role of brokers in that market. Part II describes the U.S. legislation regulating arms brokering, focusing on the law’s legislative history and requirements. Part III analyzes the obstacles to effective implementation of the law, including administration and enforcement procedures, overseas investigations, extradition, and the requirement that violations be “willful.” Finally, Part IV evaluates regulatory efforts outside the U.S. and analyzes regional and U.N. initiatives to establish brokering norms.

II.
SMALL ARMS, CONFLICT, AND HUMAN RIGHTS ABUSES

A. Small Arms Flows to Conflict Zones and Regimes that Abuse Human Rights

“Small arms” are generally defined as arms operated for personal use and “light weapons” are any arms that can be operated by a small group of people.

10. Id.
11. Interview with U.S. Customs Official, in Washington, D.C. (Oct. 24, 2000) (on file with author). Between October 1999 and December 2000, the author conducted a series of interviews with U.S. and foreign government officials, academics, non-governmental organization and United Nations staff, and practitioners on behalf of the Arms & Conflict Program at The Fund for Peace, a non-governmental organization based in Washington, D.C. Such interviews often were granted on the basis that the individual being interviewed would not be cited by name.

Broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew. The category of small arms includes revolvers and self-loading pistols, rifles and carbines, submachine guns, assault rifles and light machine-guns. Light weapons include heavy machine-guns, hand-held underbarrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of calibres of less than 100 mm.

Id.
Together, small arms and light weapons pose a grave threat to peace, prosperity, and human security.\textsuperscript{13}

The relationship among small arms flows, conflict, and human rights violations is complex. While proof that small arms cause conflict and human rights abuses has not been documented widely and would be difficult to obtain, it is commonly recognized that small arms are not simply instruments of violence.\textsuperscript{14} Rather, small arms play a critical role in the initiation, escalation, duration, and resurgence of conflict and human rights violations in areas of tension.\textsuperscript{15} One expert in small arms and conflict analysis has suggested:

\begin{quote}
[In regions of conflict there is typically a dynamic political and social process, in which the proliferation and use of weapons are closely intertwined with other causes and effects of conflict. The availability and use of arms can add to the causes of conflict and generate a vicious circle in which greater insecurity further increases the demand for, and use of, weapons.\textsuperscript{16}

Thus, while it is rarely possible to link a particular arms deal to a specific act of violence, documented arms flows to some of the most vicious conflicts of the 1990s suggest a relationship among the influx of arms, increased armed violence, and grave consequences for combatants and civilians. For example, arms transfers to combatants have been significant in conflicts in Angola, Burundi, Bosnia, Croatia, the Democratic Republic of Congo, Eritrea, Ethiopia, Liberia, Republic of Congo (Brazzaville), Rwanda, Sierra Leone and Sudan, among others.\textsuperscript{17}

Until the 1990s, the problem of small arms flows was largely ignored. The perceived threat of the use of weapons of mass destruction\textsuperscript{18} dominated Cold War politics and discourse, and the Cold War arms race was directed toward proliferation of conventional weaponry\textsuperscript{19} rather than small arms.\textsuperscript{20} In contrast,

\begin{itemize}
\item\textsuperscript{13} Id. Hereinafter, this comment will utilize the term "small arms" to refer generally to those weapons that fall under the categories of small arms and light weapons.
\item\textsuperscript{14} U.N. GAOR Small Arms 1999, supra note 12, at para. 17.
\item\textsuperscript{15} EDWARD J. LAURANCE, CARNEGIE COMM'N, LIGHT WEAPONS AND INTRASTATE CONFLICT, EARLY WARNING FACTORS AND PREVENTIVE ACTION 8 (1997); U.N. GAOR Small Arms 1999, supra note 12, at para. 17.
\item\textsuperscript{16} OWEN GREENE, ET AL., INTERNATIONAL ALERT, LIGHT WEAPONS AND PEACEBUILDING IN CENTRAL AND EAST AFRICA 11 (1998).
\item\textsuperscript{18} Michael T. Klare, An Overview of the Global Trade in Small Arms and Light Weapons, in JAYANTHA DHANAPALA, ET AL., SMALL ARMS CONTROL 3 (1999).
\item\textsuperscript{19} No uniform definition of conventional weapons exists, but the United Nations' definition of conventional weapons includes battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, and missiles and missile launchers. U.N. Dep't for Disarmament Affairs, United Nations Register of Conventional Arms, in 2001 DEP'T FOR DISARMAMENT AFFAIRS, UNITED NATIONS REGISTER OF CONVENTIONAL ARMS, 2001 INFORMATION
contemporary conflicts depend almost exclusively on small arms. Analysts suggest that this trend marks a shift away from Cold War era conflicts, which tended to be waged by two opposing governments that were allies of or were supported militarily by either the U.S. or the Soviet Union in furtherance of superpower politics. Current conflicts tend to be civil wars fought within one state resulting from tensions between various ethnic, political, religious, and cultural groups in that country. These conflicts are fought increasingly by non-state forces such as armed militias, insurgents, and criminal gangs. Analysts suggest that these combatants favor small arms over conventional weapons because small arms are more affordable, easier to operate, less visible, and more portable than conventional weaponry. According to a study of conflicts fought between 1989 and 1996, small arms and light weapons were belligerents' preferred weapons and often the only weapons used in those hostilities.

Regardless of the causes, the prevalence of small arms in contemporary conflicts has had devastating consequences for civilians. Recent civil strife has led to increased civilian casualties, displacement, refugee outflows, and human rights abuses, thus undermining relief and reconstruction efforts at an unparalleled rate. The culture of violence created by small arms flows in post-conflict societies also has made civilians the targets of increased crime and lawless-

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23. Id.
24. Id.; INT'L COMM. OF THE RED CROSS, ARMS AVAILABILITY AND THE SITUATION OF CIVILIANS IN ARMED CONFLICT (1999); U.N. GAOR Small Arms 1997, supra note 21; see also U.N. GAOR Small Arms 1999, supra note 12, at para. 19 (noting that small arms are being used more than ever before as the primary or sole tool of violence in conflicts).
25. Klare, supra note 18, at 4-5.
27. According to a study of conflicts in which the United Nations has become involved: The vast majority of the casualties have been civilians, mostly women and children. It was estimated that, by 1996, over 35 million people in 23 countries throughout the world were at risk of facing civil strife either owing to ongoing humanitarian crises or as a result of a slow recovery from past ones.

ness. Less direct effects, including poverty and failed development and reconstruction programs, also have been present in these contemporary wars.

B. Arms Brokers' Role in Arms Transfers to Conflict Zones

Arms transfers to conflict zones and regimes that abuse human rights often evade public and legal scrutiny because the transfers occur outside the legal market. The majority of these arms transfers are facilitated by arms brokers.

Arms transfers are said to occur through three primary markets: legal, gray, and black. Arms sales in the legal market are either government-to-government arms sales or commercial sales, e.g., between a government and a private company. These transactions comply with national export laws and international and regional arms embargoes. Gray market deals generally are understood to fall in between legal and illicit transfers. Gray deals include state-sponsored or supported transfers that are covert or politically contentious, although technically "legal" since they are not subject to commercial export controls. Privately engineered deals that elude such controls by exploiting loopholes and countries with weak control regimes are also regarded as gray transfers, as are diversions of weapons by the intended end-user or contractual recipient to an unauthorized third party. Such transfers may be made for a variety of reasons, including implementing national security interests, currying political favor, supporting a political ally, or making a financial profit. These

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29. A case study by the International Committee of the Red Cross of the post-conflict situation in the Kandahar Region of Afghanistan revealed that weapon-related casualties dropped only 20 to 40 percent in the first eighteen months after the ending of hostilities. Int'l Comm. of the Red Cross, supra note 24, at 39-40.


34. See Klare, supra note 22, at 21.

35. One example of gray market transactions was the sale of weapons to the war effort of Ethiopia and Eritrea by Bulgaria, the Czech Republic, Russia and Slovakia in 1999 and at the beginning of 2000. Although such deals were reportedly completed before the U.N. imposed a mandatory arms embargo on both belligerents in May 2000, these five countries ignored previous non-binding calls by the U.N. and the Wassenaar Arrangement for Export Controls over Conventional Arms and Dual-Use Goods to prevent and stop arming Ethiopia and Eritrea. Interview by Loretta Bondi with a U.S. official present during these discussions, in Washington, D.C. (June 6, 2000) (on file with author).

36. One such example is the sale of arms to the military regime in Sudan; Hermes a.s., based in the Slovak Republic, acted as the commercial arms exporter and the deal was brokered by one British and one Belgian national. The European Union (E.U.) has imposed an arms embargo on Sudan, but the arms were not subject to regulation because they never touched E.U. soil. Brian Johnson-Thomas, Anatomy of a Shady Deal, in Running Guns, The Global Market in Small Arms 21 (Lora Lumpe, ed., 1999).

deals often comport technically with arms export laws, but violate other prohibitions such as customs regulations, regulatory policies, regional sanctions, arms embargoes, and international laws.\textsuperscript{38} Black market sales are transactions conducted by non-government entities, individuals, and private companies in explicit violation of domestic export laws or binding international arms embargoes.\textsuperscript{39}

Arms brokers are integral to the success of arms deals in both the gray and black markets. Since 1990, the role of such operators has been documented in diverse contexts, among them Angola, Burundi, Bosnia, Colombia, Croatia, the Democratic Republic of Congo, Eritrea, Ethiopia, Liberia, Nigeria, Papua New Guinea, Republic of Congo (Brazzaville), Rwanda, Sierra Leone, Yemen, Sudan, Uganda and Yemen.\textsuperscript{40}

There is no universally accepted definition of brokering. Nonetheless, a broker can be defined broadly as a private individual or company that acts as an intermediary between a supplier and a recipient of weapons to facilitate an arms transaction in return for a fee.\textsuperscript{41} Brokering can include a wide range of activities that may be as “simple as ‘making the right introductions’ or as complex as managing all aspects of a transfer including price negotiations, financing, transportation and official ‘paper work.’”\textsuperscript{42} Governments and analysts, however, often differ as to which of the specific activities in this broad conceptualization of brokering should be considered “brokering” for the purposes of a universal definition, norms, and laws.

Precise data on arms brokers are not available, as the brokers tend to operate in secrecy. Information supplied by governments, the United Nations, and NGOs, however, suggests that a large number of brokers operate from Europe.\textsuperscript{43} Brokers involved in gray and black market sales also tend to fit a general profile. The brokers tend to be businessmen with military or security industry backgrounds who are driven by financial instead of political interests. Often, brokers are engaged in other legal business, but may have associations with organized

\textsuperscript{38} Id.

\textsuperscript{39} Kartha, supra note 31, at 51.

\textsuperscript{40} Human Rights Watch, Angola Unravels, supra note 17 (Angola); Human Rights Watch, Stoking the Fires, supra note 7, at 30-32 (1997) (Burundi); Wood & Peleman, supra note 5, at 45, 50, 54, 68-69, 75, 85-86 (1999) (Bosnia, Congo-Brazzaville, Croatia, Papa New Guinea, Sudan, Sri Lanka, Yemen); Johnson-Thomas, supra note 36 (Uganda); Rwanda/Zaire: Rearming with Impunity, supra note 17 (Rwanda); Leppard, et al., supra note 17 (Sierra Leone); Fleishman, supra note 5 (Eritrea, Ethiopia); Pallister, supra note 17 (Democratic Republic of Congo); Jude Webber, Peru Authorities Bust Colombia Arms-Smuggling Ring, Reuters, Aug. 22, 2000 (Colombia).

\textsuperscript{41} Wood & Peleman, supra note 5, at 105.

\textsuperscript{42} Canada Dep’t of Foreign Affairs and Int’l Affairs, State Authorization and Inter-State Information Sharing Concerning Small Arms Manufacturers, Dealers and Brokers (1999).

\textsuperscript{43} Oxfam, Out of Control: The Loopholes in UK Controls on the Arms Trade 3 (1998).
crime and corrupt officials. Some use fraudulent shipping documents or illegal transport.  

Brokers are uniquely unregulated under national export control regimes. Few countries have regulations that might be interpreted to apply to brokering. Even fewer countries have explicit laws on brokering, and fewer still impose any kind of comprehensive licensing requirements on brokers. Moreover, brokers evade regulation by basing their operations outside of their countries of citizenship, residence, or domicile, and in places with lax export controls. No countries other than Sweden, South Africa and the U.S. apply their brokering regulations extraterritorially. Thus, most countries fail to capture brokers.

Illegal traffickers further insulate themselves from accountability for the transfers they broker by covering their tracks and inserting distance between arms suppliers and recipients through a chain of associates and various bases of operation. Oxfam, a non-governmental organization that investigated arms brokering activities from existing case studies, described brokers’ activities as follows:

In some cases the arms will be delivered by a shipping firm based in one country, with its aeroplane registered in a second, which flies out from a third, will pick up arms in a fourth country, re-fuel in a fifth, be scheduled to land in a sixth, but actually will deliver its lethal consignment in a seventh country.

The result of operating in such a complex web of activity is that deals that utilize brokers are less subject to public or legal scrutiny. Often, all that appears to be happening is that weapons are moving from a supplier country to another country that is not under embargo under the national export law. The fact that these weapons eventually will be transferred to other countries who are under embargoes will escape most cursory monitoring by law enforcement and advocacy organizations.


45. See Part IV for a review of existing controls. See also CoFLIN, supra note 6, at 20-22; WOOD & PELEMAN, supra note 5, at 105-14.

46. For example, in 1997 Human Rights Watch reported that French and Pakistani nationals operating from Belgium, a South African national operating from Uganda, Kenya, and Tanzania, and a French national operating from Belgium all brokered weapons to Burundi. See HUMAN RIGHTS WATCH, STOKING THE FIRES, supra note 7, at 34, 44. Similarly, arms transfers to rebels in Sierra Leone and Angola were brokered by Victor Bout, a Russian operator, from Belgium, the United Arab Emirates, and South Africa among other countries. Letter Concerning Angola, supra note 5, para. 29; WOOD & PELEMAN, supra note 5, at 63-65.

47. WOOD & PELEMAN, supra note 5, at 105-14; COFLIN, supra note 6, at 20-22.

48. WOOD & PELEMAN, supra note 5, at 105-14; COFLIN, supra note 6, at 20-22.

49. OXFAM, supra note 43, § 2.

50. WOOD & PELEMAN, supra note 5.
III.
THE U.S. BROKERING AMENDMENT TO THE ARMS EXPORT CONTROL ACT

The U.S. Congress passed the Brokering Amendment to the Arms Export Control Act ("AECA") on July 21, 1996.\(^{51}\) The Brokering Amendment represents a bold new approach in Congress' more than thirty-year effort to exert control over commercial weapons transfers in that it extends control from transfers of U.S. weapons to all transfers that involve any person who is subject to U.S. jurisdiction.\(^{52}\) This shift reflects the U.S. government's growing dedication to reigning in unregulated arms transfers to regimes that abuse human rights and conflict zones by targeting key actors in these arms transfers.

A. Early Efforts at Arms Regulation

Export controls have been implemented throughout U.S. history to advance economic, national security, and foreign policy interests.\(^{53}\) It was not until after World War II, however, that such controls were imposed on an ongoing basis, instead of just for limited periods during wartime.\(^{54}\) The regularization of such controls prompted Congress to establish a separate statutory scheme of controls on the import, export, and transfer of U.S. weapons and military services with the Foreign Military Sales Act of 1968 ("FMSA").\(^{55}\)

The passage of the FMSA also demonstrated Congress' interest in exerting increased influence on U.S. arms export policy over which the President previously had retained almost exclusive control.\(^{56}\) Under this act, Congress mandated that all commercial transfers must comport with U.S. foreign policy to promote peace and security and that Congress must be notified of all commercial transfers of U.S. weapons.\(^{57}\) In 1976, Congress amended the FMSA with the International Security Assistance and Arms Export Control Act.\(^{58}\) This legislation further increased Congress' control over arms transfers by requiring all commercial transfers of U.S. arms to be conditioned on congressional approval and not simply post-transfer notification.\(^{59}\) The law reflected Congress' intent to require that commercial arms sales support U.S. foreign policy to reduce international arms trading and regional conflict, in furtherance of an "ultimate goal


\(^{52}\) 22 C.F.R. § 129 (2000).


\(^{56}\) Sheehan, supra note 54, at 191-192.

\(^{57}\) §1, 82 Stat. at 1320; § 3682 Stat. at 1326.


\(^{59}\) AECA, 90 Stat. at 729.
of the United States,” a world free from war and armaments. In conjunction with this amendment, the FMSA became known as the AECA.

Under the AECA, the President is authorized to control the commercial import and export of U.S. arms by requiring all exporters, importers, and manufacturers of U.S. weapons to register with the U.S. government and apply for a license for arms transfers. Any person who willfully violates the registration and licensing requirement, makes any untrue statement, or omits any material fact in a registration or license application is subject to criminal penalties of up to 10 years imprisonment and civil penalties of up to $1,000,000 for each violation. Approval of licenses is based on several key factors concerning arms control and security. For example, if the transaction is deemed to affect non-proliferation efforts by contributing to an arms race, aiding in the development of weapons of mass destruction, or prejudicing the developing of arms control agreements, the transfer will not be approved. Similarly, the transfer will be denied if it could potentially support international terrorism or increase the possibility of outbreak or escalation of conflict. In implementing these requirements, the government currently denies arms export license applications to various countries, including Burma, China, Cuba, Federal Republic of Yugoslavia, Haiti, Iran, Iraq, Libya, Liberia, North Korea, Rwanda, Somalia, Sudan, Syria, and the Democratic Republic of Congo.

The AECA is implemented through the International Traffic in Arms Regulations (“ITAR”), a set of regulations promulgated by the Secretary of State, who has statutory authority over the AECA through a grant from the President. The ITAR sets up the Office of Defense Trade Controls (“DTC”) under the State Department’s Bureau of Political-Military Affairs and gives the DTC the responsibility of issuing and approving licenses and registrations under the AECA. The DTC, the U.S. Customs Service, and the Defense Intelligence Agency are authorized to monitor and enforce against violations of the AECA. Under the regulations, violations of the AECA or any specific provision of the ITAR may also result in statutory or administrative debarment, whereby the vio-

61. AECA, 90 Stat. at 729.
63. Id. § 2778(c).
64. Id. § 2778(a)(2).
65. Id.
66. Id.
68. Id. §§ 120-130.
70. 22 C.F.R. § 120 (2000).
71. Id. § 127.
B. The Brokering Amendment to the Arms Export Control Act

The U.S. law requiring arms brokers to register and obtain licenses for transactions passed as part of a broader bill amending the Foreign Assistance Act of 1961 and the AECA. The bill was intended "to make improvements to certain defense and security assistance provisions under those Acts, to authorize the transfer of naval vessels to certain foreign countries, and for other purposes." 73 The Act was intended generally to consolidate and modify the scope and practice of several defense and security assistance programs. 74

The only explicit reference to brokering in the legislative history is in a provision-by-provision description in the House Report that describes the brokering amendment as an effort to close a loophole in the AECA that permitted arms transactions that do not comply with U.S. foreign policy objectives, national security interests, and world peace. Specifically, the House Report states that the brokering provision:

[Provides new authorities to ensure that arms export support the furtherance of U.S. foreign policy objectives, national security interests and world peace. More specifically, in some instances U.S. persons are involved in arms deals that are inconsistent with U.S. policy. Certain of these transactions could fuel regional instability, lend support to terrorism or run counter to a U.S. policy decision to sell arms to a specific country or area. The extension of U.S. legal authority under this provision to regulate brokering activities would help to curtail such transactions.]

Interviews with State Department officials have provided additional information on the introduction of the brokering provision. According to one U.S. government official, as early as 1980, officials in the U.S. Department of State recognized that, in the increasingly globalized arms bazaar, a significant number of arms deals escaped U.S. control because they were brokered by U.S. citizens operating around the world and foreigners operating or conducting a substantial amount of business in the United States. 75 Nevertheless, at the time, the legal affairs bureau of the State Department determined that the AECA did not grant authority to regulate brokering activities unless American weapons were in

73. Brokering Amendment, Pub. L. No. 104-164 § 151, 110 Stat. 1421. Arguably, the amendment did not gain actual force until December 24, 1997, when the corresponding regulations to the amendment were integrated into the International Traffic in Arms Regulations. The United States Department of State, however, advised brokers to seek guidance from the Office of Defense Trade Controls, the agency responsible for administering the law, if they had questions regarding compliance during the period after the law was passed, but before the implementing regulations were created. OFFICE OF DEFENSE TRADE CONTROLS, BUREAU OF POLITICAL-MILITARY AFFAIRS, UNITED STATES DEP’T OF STATE, BROKERING ACTIVITIES UNDER THE AECA (1997).
75. Id.; see also H.R. 3121, 104th Cong. (1996).
volved. Consequently, such brokers were not subject to the licensing and registration requirements. Moreover, according to State Department officials, there was no political will to create new legislation to apply to brokers. In 1996, however, a Senate staff member perceived an opportunity to close this loophole by adding brokering to a proposed amendment to the Foreign Assistance Act of 1961 and the AECA. The amendment originally added defense and security assistance to the existing regulatory scheme, but Senate staff members worked jointly with DTC officials to modify the proposed law to cover brokering. Even then, the backers of this initiative deliberately kept a low profile to avoid generating opposition in the defense community. By the end of Congress' sessions, the initiative had become a comprehensive licensing and registration scheme for brokering activities.

Notably, the non-governmental community was not involved. Non-governmental organizations (NGOs) in the United States had not commenced legislative advocacy on obtaining increased regulation of brokers at that time, suggesting that advocacy related to the problems posed by unregulated brokering had not yet emerged.

C. The Requirements Under the Brokering Amendment

The Brokering Amendment requires that every U.S. national (living anywhere in the world) and any foreign national residing in the U.S. obtain a license to broker weapons. Brokering licenses are conditioned upon the same human rights, foreign policy, and national security considerations as licenses for exporters, manufacturers, and importers. All brokers must register with the U.S. government and apply for a license for each brokering transaction.

The law defines brokering broadly to encompass nearly any activity that might be associated with brokering. The law applies to anyone engaged in "financing, transportation, freight forwarding, or taking any other action that facilitates the manufacture, export, or import of a defense article or defense service." Brokers operating on behalf of the United States Government or implementing any foreign assistance or sales program authorized by law and subject to Presidential control, are exempted from the registration and licensing requirements. Like other license and registration provisions under the AECA, penalties for brokering violations may be imposed only for willful violations of
the law.\textsuperscript{87} Penalties are also comparable; a violator may be subject to up to 10 years imprisonment or a $1,000,000 fine for each violation.\textsuperscript{88}

The implementing regulations for the Brokering Amendment are contained under § 129 of the ITAR.\textsuperscript{89} The State Department did not conduct notice and public procedure on its proposed regulations, indicating that it was “impracticable and contrary to public interest” due to foreign policy reasons.\textsuperscript{90} Instead, the agency invited written comments on the regulations.\textsuperscript{91}

The final regulations provide greater specificity in the definitions of “broker” and “brokering.” A broker is: “Any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.”\textsuperscript{92}

Brokering is defined as activity by anyone acting as a broker and, “includes, but is not limited to, activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States.”\textsuperscript{93}

Under the Brokering Amendment, persons who are engaged solely in financing, transporting, or freight-forwarding activities without also brokering defense articles and services are not subject to the regulation.\textsuperscript{94} This exemption has not yet been clarified by the regulations, case law, or the DTC.\textsuperscript{95} A plain reading of the text suggests that this provision only exempts actors who are ignorant of any role in facilitating an arms deal, such as banks who may be holding money related to an arms deal, but who have no active involvement in the transaction. It remains to be determined, however, if this exemption might be interpreted to make the brokering regulation significantly narrower, exempting all individuals whose primary role is coordinating, financing, transporting, and freight forwarding for the transaction.

The ITAR also specifically exempts employees of the U.S., foreign governments, or international organizations acting in official capacities from the licensing and registration requirements.\textsuperscript{96} The DTC applies such requirements only to the brokering of weapons listed on the U.S. Munitions List.\textsuperscript{97} The regulations

\textsuperscript{87} Id. § 2778(c).
\textsuperscript{88} Id.
\textsuperscript{89} ITAR, 22 C.F.R. § 129 (2000).
\textsuperscript{91} Id.
\textsuperscript{92} 22 C.F.R. § 129.
\textsuperscript{93} Id.
\textsuperscript{94} For example, if an individual operates as a transporter of arms but conducted no actual negotiation of the deal in return for a fee, he is not subject to the provision. Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at § 121. The Munitions list contains aircraft and related articles, amphibious vehicles, cartridge and shell castings, chemical agents, firearms, forging castings and machined bodies, military blocks and blasting caps, military explosives and propellants, military fuel thickeners, vessels of war, and missile technology. With respect to small arms, the following specific items are included: (1) nonautomatic, semi-automatic, and fully automatic firearms to caliber .50; (2) riflescopes; (3)
also exempt from the brokering requirements the brokering of certain military equipment arranged wholly within and destined exclusively for NATO, its member states, Australia, Japan, and New Zealand. This exemption, however, does not include fully automated firearms and parts for which a license is still required. Violators may be subject to statutory and administrative debarment in addition to civil and criminal penalties. The law closes the loophole in the control of arms brokering by U.S. citizens and foreign nationals living in the U.S. and potentially limits arms transfers to conflict zones and regimes that abuse human rights. Significantly, the law targets the modus operandi of brokers that have been able to evade export controls by operating outside their country of citizenship and arranging deals between two other countries. Where such brokers are American citizens or are operating or conducting business in the U.S., the new law subjects them to license and registration requirements.

IV. IMPEDIMENTS TO EFFECTIVE IMPLEMENTATION OF THE U.S. BROKERING AMENDMENT TO THE ARMS EXPORT CONTROL ACT

Despite the major advances encompassed in the law, it is not widely implemented and serious obstacles must be overcome to promote its effective application. As of October 2000, not one person had been indicted or prosecuted under the law. Additionally, agency officials seem unclear on how the law is being implemented by the various agencies.

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insurgency-counterinsurgency type firearms or other weapons having a special military application (i.e. assault weapons) regardless of caliber; (4) guns over caliber .50, howitzers, mortars, and recoilless rifles; (5) military flamethrowers and artillery projectors; (6) ammunition for the above listed arms; (7) rockets, bombs, grenades, torpedoes, depth charges, land and naval mines, and launchers for such defense articles; and (8) military explosives. See id.

98. Id. at § 121. For a full list of military equipment that is exempted from the license requirement in the case of brokering activities for these countries, it is necessary to compare the list of munitions covered by the regulations generally under Section 121 against those defense articles that are never exempted from the licensing requirement under Section 129.7(a)(1)(i).

99. Id. at § 129.

100. Id. at § 127.


102. The author contacted the DTC and the U.S. Customs Service, the agencies charged with overseeing the implementation of the law, and the Department of Justice to assess its success thus far. Officials provided scant and conflicting information as to whether any investigations, indictments, or prosecutions had occurred. Some officials indicated that there had not been a single prosecution or indictment under the brokering law. Telephone interview with DTC Official (Oct. 26, 1999). Other officials alleged that at least one prosecution had occurred, but were unable to provide any details. Telephone interview with U.S. Customs Official (Oct. 28, 1999); interview with U.S. State Dep't Official, Washington, D.C. (Mar. 29, 2000). One of these officials further claimed that at least one investigation had been initiated and, as of November 1999, was still underway. Telephone interview with U.S. Customs Official (Oct. 28, 1999). According to this official, there was definitely a seizure in November 1999, apparently in the U.S., with most of the work being done here, but some abroad. Telephone interview with U.S. Customs Official (Feb. 25, 2000). This official, however, has been unable to provide more concrete details concerning this operation. Still other officials have suggested that, although there have been no prosecutions for brokering violations, a plea agreement took place between the Department of Justice and an individual indicted for a whole host of other arms export violations. Such violations allegedly included a brokering offense.
One impediment to enforcement may be the law's novelty, as it often takes time for law enforcement and justice officials to begin applying a new law. Some U.S. officials also have explained the slow progress in securing prosecutions with the need to proceed prudently into uncharted territory. Others have posited that the law has not yet been implemented because the regulations did not come until a year and a half after the law’s passage, diffusing the law’s momentum. In addition, coordination problems abound. A U.S. official has suggested that none of the people working on this issue deal directly with one another, so that while regulating arms brokering may be the latest legislative fad, without some real commitment to follow through on the implementation it won't go far.

The lack of systematic information on how the law is applied also prevents the U.S. from addressing the implementation problems that arise. U.S. Customs Service information is limited, in part because of the way indictments and prosecutions are logged. Neither the Department of Justice nor the Customs Service maintains databases of prosecutions categorized by violations of specific provisions of the ITAR and the AECA.

In addition to these considerations, administrative procedures, practical enforcement challenges, and the specific intent requirement create further obstacles to effective application of the law.

A. Administrative Procedures

The DTC is responsible for implementing the brokering law and both the DTC and U.S. Customs oversee enforcement of the law. The DTC and U.S. Customs seem to be understaffed, overburdened by their broad mandates, and insufficiently trained to effectively implement the law. Customs' basic structure and standard operating procedures may also impede efforts to enforce the law.

that was added to the indictment during the plea negotiations. Telephone interview with U.S. Customs Official (Nov. 2, 1999); interview with U.S. State Dep’t Official, Washington, D.C. (Mar. 29, 2000). Months of telephone interviews resulted in suggestions to contact the very same officials with whom the inquiries had commenced. Finally, on October 24, 2000, an official categorically stated that, up to that date, not a single prosecution had been initiated. Interview with U.S. Customs Official, Washington, D.C. (Oct. 24, 2000).


107. ITAR, 22 C.F.R. § 127 (2000). In cases involving classified technical data or defense articles, the Defense Intelligence Agency is also charged with enforcing violations.

The DTC administers licenses and works to ensure compliance with the AECA and the ITAR.\textsuperscript{111} Currently, the DTC reviews approximately 50,000 applications for export defense articles, services, and related technology annually, and monitors end-use compliance of such articles and services.\textsuperscript{112} The DTC also advises U.S. government agencies and the defense industry as to export policy and practice and assists other nations in the development of export control regimes.\textsuperscript{113} Additionally, the DTC administers an export compliance watchlist.\textsuperscript{114} This list includes individuals, companies, agencies, and groups whose applications for, or association with, export activities may warrant closer examination.\textsuperscript{115} Finally, the DTC is responsible for a global end-use verification program, the so-called "Blue Lantern" program, which encourages foreign government and private sector compliance with U.S. law and regulations.\textsuperscript{116}

In testimony before the U.S. Congress in March 2000, John D. Holum, Under Secretary of State for Arms Control and International Security, reported that the DTC faces tremendous resource constraints, particularly with respect to staffing.\textsuperscript{117} One year earlier, even before licensing for commercial satellites was transferred from the jurisdiction of the Commerce Department to the DTC, Mr. Holum had reported that the DTC was facing a resource problem.\textsuperscript{118} To remedy this problem, in 2000, the DTC was authorized to hire 23 additional employees, increasing the total full time staff to 68 and the licensing division staff to 28.\textsuperscript{119} With the burden of processing some 50,000 license applications each year, however, staff constraints remain a significant issue at the DTC.

In March of 2000, the Undersecretary for the U.S. Bureau of Alcohol, Tobacco and Firearms reported to Congress on the results of an interagency review conducted by the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency. The Interagency Review of Export Licensing Procedures revealed that U.S. Customs has insufficient trained personnel to inspect and review outbound exports and conduct end-use checks of

\textsuperscript{111} Office of Defense Trade Controls, U.S. Dep't of State, at http://www.pmdtc.org/about.html (last visited Dec. 27, 2000).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Inspectors General Report, supra note 110.
\textsuperscript{115} While at its core the list contains the names of persons debarred from exporting defense articles, and other parties whose activities raise proliferation and law enforcement concerns, it also includes many other parties who are not necessarily engaged in objectionable activities, but are listed to encourage extra scrutiny in evaluating license applications in which their names appear. Telephone interview with a DTC official (Oct. 26, 1999); see also Inspectors General Report, supra note 110.
\textsuperscript{116} Munitions List Export Licensing Issues: Hearing Before the Senate Comm. on Gov'tal Affairs, 106th Cong. (2000) (statement of John D. Holum, Senior Advisor to the President and the Secretary of State for Arms Control, Nonproliferation and Disarmament)[hereinafter Munitions List].
\textsuperscript{117} Id.
\textsuperscript{118} Nomination of John David Holum to be Undersecretary of State for Arms Control and Int'l Security Before the Senate Comm. on Foreign Relations, 106th Cong. (1999) (statement of John D. Holum, Senior Advisor to the President and the Secretary of State for Arms Control, Nonproliferation and Disarmament).
\textsuperscript{119} Munitions List, supra note 116.
arms shipments. In cases involving brokering violations, a U.S. official has pointed out that there will be a need, both in the U.S. and overseas, to re-educate staff members who have been accustomed to looking solely at traditional exports.

The Brokering Amendment also broadened the scope of regulation and made more companies and individuals subject to the AECA. One official also suggested that the regulations' definition of "broker" subjects even more companies and individuals to the registration and licensing requirements than originally anticipated by the DTC and U.S. Customs. This is due, in part, to the wording of the regulations' brokering definition, which includes those who traditionally have been considered "consultants" in the defense industry. The addition of new actors to the purview of the DTC and U.S. Customs without altering these agencies' structure and increasing their response capacity may contribute to minimal enforcement of the law.

The standard operating procedure utilized by U.S. Customs to enforce the brokering law may also be inadequate. The U.S. Department of Customs has the authority to investigate all violations of the brokering amendment under the Arms Export Control Act. U.S. Customs has this authority because most cases against violators of the Arms Export Control Act stem from weapons seizures by customs agents at U.S. borders. Brokers, however, often operate abroad and their transactions may not involve the actual possession of weapons, much less possession of weapons at a U.S. point of entry. As one U.S. official noted: "Traditionally, cases are initiated from the U.S. and then agents follow up with our attaché offices overseas. With brokering, where the weapons do not touch U.S. soil, it's the reverse case. This means that investigations may have to be developed directly from abroad." The U.S. Customs Service, however, maintains only twenty-five offices abroad. This is far less than other multinational crime agencies and the cities where overseas offices are located are not necessarily the optimal broker target-locations.

123. Traditional consulting activities would occur when a foreign consultant is retained by a U.S. defense export firm to advise it on, for example, the needs of the ministry of defense in a foreign country. Under the new brokering provision, such consulting activity clearly "facilitates the exports of the U.S. exporter's defense articles." Philip S. Rhoads, The International Traffic In Arms Regulations: Compliance and Enforcement at the Office of Defense Trade Controls, U.S. Department of State, at 723 (PLI Com. Practice Course, Handbook Series No. 798, 1999); 22 C.F.R. § 129 (2000).
127. U.S. Customs Attaché locations are Bangkok, Thailand; Caracas, Venezuela; Interpol-Lyon, France; Montevideo, Uruguay; Paris, France; Singapore; Vienna, Austria; Beijing, China; Hermosillo, Mexico; London, United Kingdom; Moscow, Russia; Pretoria, South Africa; Tijuana, Mexico; Bogotá, Colombia; Frankfurt, Germany; Mexico City, Mexico; Ottawa, Canada; Rome, Italy; Berlin, Germany; Brussels, Belgium; Hong Kong; Monterey, Mexico; Panama City, Panama;
ing locations. For example, despite numerous intrastate and borderless conflicts currently being fought in Central and West Africa, U.S. Customs maintains only one office on the entire continent in Pretoria, South Africa. With a lack of standard operating procedures for initiating investigations overseas, a minimal number of offices located abroad, and the challenges implicit in collaborating with foreign governments to conduct such investigations, U.S. Customs faces serious challenges in enforcing the brokering law.

Existing prohibitions on information sharing between government agencies may also impede the investigations necessary to ensure effective application of the law. The agencies with the best information on brokering, such as the Bureau of Intelligence and Research in the Department of State, cannot inform U.S. Customs agents about much of their knowledge because many of the officials working in the Bureau of Intelligence and Research have a higher security clearance and are privileged to more classified information than many U.S. Customs agents.

B. Practical Enforcement

Even if government agencies were set up to implement the brokering law, these agencies would not solve the problem of extraterritorial enforcement. The Brokering Amendment likely provides for extraterritorial enforcement and complies with the constitutional requirements. Nonetheless, the need for overseas investigations and extradition makes extraterritorial enforcement practically impossible.

There are two requirements for obtaining extraterritorial jurisdiction over offenders of the U.S. law. First, the legislation must manifest a clear congressional intent that the law be applied extraterritorially. The Brokering Amendment’s text and legislative history indicate that Congress likely intended to exert such jurisdiction. The law explicitly refers to international goals such as


131. In the U.S. government, officials obtain various clearances (i.e. clearance to access unclassified, classified, sensitive, highly classified) to information depending on their duties.

132. A U.S. Customs official explained how the process of sharing information is hindered by bureaucratic asymmetry. If a seizure happens, Customs contacts the DTC to verify whether the dealer was registered and licensed. They also contact informants and intelligence agencies. But the latter share information only on a need to know basis. Telephone interview with U.S. Customs Official (Oct. 28, 1999).

133. RESTATEMENT OF THE LAW, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(i); United States v. Evans, 667 F.Supp 974, 980-981.

134. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402(i); 21 AMERICAN JURISPRUDENCE, CRIMINAL LAW, § 488 (2d ed. 2000).
"furtherance of world peace and the security and foreign policy of the United States." The law also applies not simply to U.S. nationals but to "every person (other than an officer or employee of the United States Government acting in official capacity) who engages in the business of brokering activities. . ." According to the House Report, the brokering amendment was intended to correct the problem that the U.S. government lacked the authority to regulate the activities of U.S. citizens brokering overseas (unless they were brokering U.S.-made weapons).

Case law also supports extraterritorial application. In *United States v. Evans*, the U.S. District Court for the Southern District of New York specifically addressed extraterritorial application of the Arms Export Control Act. In upholding extraterritorial application, the *Evans* court found that "by its terms, this law is inherently international in scope." The court also held that "it was a reasonable exercise of jurisdiction for Congress to have anticipated that this act would be applied to persons and events outside of its borders." The court cited to the *Restatement of Foreign Relations Law*, noting that it is "more plausible to interpret a statute of the United States as having reach beyond the nation's territory when it is international in focus . . . ."

The second requirement for extraterritorial application is that the law apply to the offender's conduct under one of the five jurisdictional principles accepted under U.S. and international law. These principles are (territoriality, nationality, protective jurisdiction, passive personality, and universal-

138. Id.
139. United States v. Evans, 667 F. Supp. 974, 981 (S.D.N.Y. 1987), aff'd on other grounds, 844 F.2d 36 (2d. Cir. 1988). In Evans, eighteen defendants were charged with participating in five separate illegal conspiracies to sell and transfer American-made defense articles to a putative Iranian buyer who was actually an agent for the U.S. Government. The weapons were located in Israel and owned by the Israeli government at the time the conspiracies occurred, and defendants had only minimal connection to U.S. territory during the time they allegedly conspired to make the transfers. The court found that extraterritorial application of the AECA was appropriate, despite the foreign location and ownership of the weapons, because the law is international in scope. Id.
140. Id.
141. Id.
142. Id.
144. Under the principle of territoriality, any individual regardless of his or her nationality operating anywhere may be subject to the requirements of U.S. law when a substantial amount of the offense is committed on U.S. territory. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402 (1)(a).
146. Under the principle of protective jurisdiction, individuals who conduct activity "against the interests of the state" or against government functions may be subject to U.S. law regardless of nationality. United States v. Vasquez-Velasco, 15 F.3d 833, 840 (9th Cir. 1994).
Under the nationality principle, the brokering law would be applicable to the activities of U.S. citizens regardless of where they reside or operate. The law could apply to foreign defendants under the territoriality principle if the foreigner resides in the United States or has brokered arms from or to the United States. The law could apply under the protective principle if the foreigner has brokered U.S. weapons or has brokered weapons to a country that threatens the foreign policy and national security interests of the United States. In *U.S. v. Evans*, the court affirmed the constitutionality of extraterritorial application of the AECA, stating that the law applies "irrespective of whether the party making the false representation, or conspiring to do the same, is located within United States borders, and regardless of whether the conspiracy is averted before effects are actually felt in the United States."^{149}

Constitutionality aside, extraterritorial jurisdiction remains difficult to enforce. One reason is that there are no guarantees that other countries will accept jurisdiction. In response to extraterritorial enforcement of U.S. antitrust laws, for instance, many countries enacted statutes blocking U.S. attempts to gather information and evidence abroad.^{150} A U.S. official has suggested that some smaller countries may perceive U.S. extraterritorial enforcement of brokering laws as an unfair imposition of U.S. laws.^{151}

Another reason for the difficulty of enforcement is that indictment for a brokering violation requires evidence of the crime. Where brokering occurs outside U.S. borders, the U.S. Department of Customs may have to conduct investigations abroad to gather enough evidence to support the indictment. Although tools for overseas investigation do exist, their scope is limited and they leave much of the investigative process to informal information exchange. For example, the International Criminal Police Agency (Interpol) maintains several databases on arms trafficking. Member countries use the databases to locate fugitives,^{152} yet Interpol generally does not conduct independent investigations of potential arms export violations or other criminal activities.^{153}

The U.S. Customs Service, U.S. Department of Justice, and their foreign counterparts also have developed bilateral agreements with foreign governments to facilitate overseas investigations of transnational crime. These agreements, known as Customs Mutual Assistance Agreements ("CMAAs"),^{154} serve to for-

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150. *Griffin*, supra note 147, at 505.


154. For example, in the area of bribery, a series of agreements, the "Lockheed Agreements," permitted broad mutual assistance including sharing of information, and utilizing the best efforts to obtain all pertinent information, and to locate witnesses, but the investigative assistance was limited to actions relating to specific investigations of bribes paid to officials by U.S. aircraft manufacturers.
malize cooperation in document, information, and intelligence exchanges between U.S. and foreign customs agencies. As of 1999, however, only 41 of these agreements existed. According to one Customs official, actual cooperation varies significantly, depending on the relationships U.S. Customs has with its overseas counterpart.

Once an indictment has been obtained, evidence is available through Mutual Legal Assistance Treaties ("MLATs") and letters rogatory, formal letters outlining information requests. These channels enable states to request help from a foreign country for a variety of tasks, including locating persons, delivering court documents, producing and authenticating records, conducting searches, and obtaining witness testimony.

MLATs secure evidence more effectively than letters rogatory because MLATs are binding and delineate the range of services available and the states' obligations in complying with requests. MLATs also provide broad assistance, since they do not require that the activities under investigation be criminalized in the country from which assistance is requested. Consequently, investigations under the U.S. brokering statute could benefit from assistance under MLATs, despite the lack of legislation on brokering outside of the U.S. To date, however, the U.S. only has thirty-six MLATs in force.

For countries with which the U.S. does not have an MLAT, the only available option may be a request for assistance through the more archaic and subjective process of letters rogatory. Processing such requests is a "time consuming, cumbersome process," that is often unsuccessful. In many cases, there are no standard operating procedures. The letters often are funneled

Other agreements, such as in the area of narcotics trafficking investigations, permit more limited investigative assistance, relating primarily to witnesses and document production, but the evidence may be used in a wider number of legal matters. Michael Abell & Bruno A. Ristau, International Judicial Assistance, Criminal, Obtaining Evidence Abroad §12-3-2(6), §§12-3-4 to 12-3-11 (1990 ed., Supp. 1997).


157. Abell and Ristau, supra note 154, at § 12-3-3.

158. Note that all of this assistance is subject to constitutional limitations. Extradition and Mutual Legal Assistance Treaties: Hearing Before the Senate Foreign Relations Comm., 105th Cong. (1998) (statement of Jamison S. Borek, Deputy Legal Adviser, U.S. Dep't of State). As for the volume of requests processed, John Harris, Director of the Office of International Affairs at the Dep't of Justice observed: "On any given day, we are in the process of handling about 6000 requests to and from the U.S., for extradition and mutual assistance. About two thirds of these are requests for mutual assistance, and the number of requests grows every year, due in large part to the growth of transnational crime." John E. Harris, Mutual Legal Assistance Treaties: Necessity, Merits, and Problems Arising in the Negotiation Process, at http://www.acpf.org/Activities/public%20lecture2000/lectureHarris(E).html (Feb. 10, 2000).

159. Nadelman, supra note 128, at 318.

160. Telephone interview with John Harris, Director of the Office of International Affairs at the Dep't of Justice (Oct. 25, 2000). The thirty-six countries with which the U.S. has MLATs pale in comparison to the overall number of one hundred and ninety-one states that currently exist. Barry Turner, Ed., The Stateman's Yearbook: The Politics, Cultures, & Economies of the World, vii-xii (2001).

through an untold number of administrative agencies and offices before generating a response.\textsuperscript{162}

Enforcing the brokering regulations extraterritorially also requires extradition of brokers indicted for violations. Extradition can only occur when the following conditions are met: (1) the U.S. has jurisdiction over the subject matter and the person; (2) the U.S. has an extradition treaty with the country to which the request is submitted; (3) the treaty lists the offense with which the individual is charged as extraditable; and (4) double criminality exists, i.e. the offense is a crime in both the requesting country and the country receiving the request.\textsuperscript{163}

The U.S. has extradition treaties with more than one hundred countries and territories, but extradition remains difficult to obtain, legally and practically.\textsuperscript{164} Extradition is an extremely cumbersome and lengthy process, even for long-established offenses. This is evidenced by the number of outstanding extradition requests in the U.S.—between 300 and 500 at any given day.\textsuperscript{165} Ultimately, some countries refuse to extradite their nationals, even where all the requirements for extradition have been met.\textsuperscript{166}

Since the brokering statute is new in the U.S. and few other countries have any brokering regulations, it is unlikely that violations of the U.S. brokering law will constitute extraditable offenses. Extradition treaties generally define extraditable offenses either as all offenses listed in the text of the treaty, or those offenses punishable by more than one year in both countries.\textsuperscript{167} Where extraditable offenses are listed in the text of the treaty, it is unlikely that brokering will be enumerated. Brokering was not a crime in the U.S. until 1996 and most extradition treaties were adopted before that time. Where extraditable offenses are those punishable by more than one year in both countries, brokering offenses are still unlikely to be included because brokering is not a crime in most countries.\textsuperscript{168}

The U.S. District Court for the Southern District of New York recently considered whether a violation of arms export laws fulfills the requirements of double criminality and listed extraditable offenses. In In the Matter of the Extradition of Rafael Eduardo Pineda Lara, the Court held that actions taken to violate an arms export law constituted extraditable offenses under the treaty.\textsuperscript{169}

\begin{footnotes}
\item[164] See generally \textit{id.;} at 396; Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms 84 (1998).
\item[165] Telephone interview with U.S. State Dep't Official (Sep. 22, 2000).
\item[166] Bassouini, supra note 143, at 588.
\item[167] See Bassouini, supra note 143, at 396; and Gilbert, supra note 164, at 84.
\item[168] Wood & Peleman, supra note 5 (describing the brokering provisions that exist in only a handful of states around the world). It should also be noted that it is not necessary that the requested country have a crime called "brokering violation" to satisfy double criminality. It is merely necessary that the facts as demonstrated constituted some crime under the requested country's laws.
\item[169] In the Matter of the Extradition of Rafael Eduardo Pineda Lara, 1998 U.S. Dist. LEXIS 1777, *1, *41-42. In Pineda Lara, the court ruled on an extradition request from the government of
\end{footnotes}
The court held that where the treaty lists broad offenses under which a specific charge may fall, the offense should be deemed extraditable. The court also noted that extradition treaties should be liberally construed to achieve the surrender of fugitives. The decision suggests that brokering activities may be deemed to constitute specific offenses within a more general category of offenses subject to extradition in many treaties.

In light of these constraints, U.S. officials have suggested that the best hope for comprehensive application of the AECA and brokering amendment is the adoption of similar laws by more countries. Where extradition treaties enumerate specific extraditable offenses, brokering should be included. Currently, U.S. officials are making efforts to encourage other countries to enact brokering legislation. It is unlikely, however, that such measures will be implemented comprehensively in the near future due to a variety of constraints. These include many governments' hesitance to increase arms transfer regulation and their failure to recognize the significance of arms brokering in the proliferation and misuse of small arms.

Alternatively, some analysts have suggested that violations could become extraditable offenses if governments signed an international convention criminalizing such activity. Efforts are underway to develop such international norms, but thus far, no treaties are in effect.

**C. Lack of Knowledge Defense**

Even where brokers can be indicted and extradited, brokers may attempt to raise a lack of knowledge defense. Violations of the brokering law require that the offender have acted "willfully." Although the U.S. Supreme Court has not considered the requirements of willfulness under the AECA, the Court has

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170. Id. at *42.


175. See Revised Draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplemen

176. Under Section 2778(c), violations may be imposed only on any person "who willfully violates" the law. 22 USC § 2778(c) (1994).
held that willfulness in a criminal case generally requires proof that the defendant has acted with knowledge that his conduct was unlawful.\textsuperscript{177} Several lower courts addressing willfulness under the AECA have required that the defendant knows his conduct was unlawful, but not that he is aware of a specific law that criminalizes his activity.\textsuperscript{178}

These courts have held that a defendant had the requisite knowledge for willfulness where certain characteristics of the individual or situation suggested that the defendant understood that there was a requirement to register and obtain a license. For example, the some have found "willfulness" where someone specifically told the defendant about the requirement\textsuperscript{179} or where the defendant received written notice as part of the arms invoice.\textsuperscript{180} Additionally, when the defendant is an expert in arms transactions,\textsuperscript{181} or when it is determined that the defendant systematically or purposefully attempted to cover an illicit operation, courts also have found the requisite knowledge.\textsuperscript{182}

The "willfulness" requirement may pose serious obstacles to successful prosecutions, particularly in the short term. Since brokers previously have not been subject to regulation, many may not have learned that it is illegal to broker without registering or obtaining a license. The U.S. Office of Defense Trade Controls has made efforts to notify U.S.-based brokers about the regulations.\textsuperscript{183} In addition to announcing the law in the Federal Register,\textsuperscript{184} the agency has given workshops and distributed information on brokering to members of the

\textsuperscript{177} Bryan v. United States, 524 U.S. 184, 192 (1998). In a firearms licensing case involving the Firearms Owners’s Protection Act ("FOPA"), the Supreme Court held that "willfulness" required that the defendant knew his conduct was unlawful, but not necessarily that the conduct violated a specific licensing provision under law. See also United States v. Lee, 183 F.3d 1029, 1033 (9th Cir., 1999).

\textsuperscript{178} United States v. Muthana, 60 F.3d 1217, 1222 (7th Cir. 1995); see also United States v. Adames, 878 F.2d 1374, 1377 (11th Cir., 1989); United States v. Beck, 615 F.2d 441, 451 (7th Cir. 1980); United States v. Tsai, 954 F.2d 155, 162 (3d Cir., 1992), cert. denied, 121 L. Ed. 2d 54, 113 S. Ct. 93 (1992); United States v. Murphy, 852 F.2d 1, 7 (1st Cir. 1988), cert. denied, 489 U.S. 1022, 103 L. Ed. 2d 205, 109 S. Ct. 1145 (1989).

\textsuperscript{179} In 1985, for example, the Seventh Circuit found in U.S. v. Malsom that the defendants were guilty of violating the Arms Export Control Act for exporting weapons to Libya without a license when they had been informed by a friend in the shipping business and an employee at the Commerce Department that a license was required. U.S. v. Malsom, 779 F.2d 1228 (7th Cir. 1985).

\textsuperscript{180} For example, in United States v. Swarovski, the Second Circuit affirmed the conviction of Mr. Swarovski for attempting to export a military aircraft gunsight camera without a license after he had previously received an export notice identifying that a license was required for this item. 592 F.2d 131 (2d Cir. 1979).

\textsuperscript{181} For example, in United States v. Beck, the court affirmed a decision by a jury that Beck’s status as an operator of an arms exporting business since 1972 and his knowledge of an existing arms embargo to South Africa where he had attempted to export weapons demonstrated the requisite intent. 615 F.2d 441, 451 (7th Cir. 1980); see also United States v. Wieschenberg, 604 F.2d 326 (5th Cir. 1979).

\textsuperscript{182} For example, in United States v. Murphy, the First Circuit affirmed a district court’s finding that the defendant violated the Arms Export Control Act on the grounds that he did not have a license and had engaged in year-long clandestine efforts, covert acts, and subterfuges to purchase weapons for shipment to Ireland for the IRA. 852 F.2d 1, 7 (1st Cir. 1988).

\textsuperscript{183} Telephone interview with U.S. Office of Defense Trade Controls Official (Nov. 2, 1999).

\textsuperscript{184} Defense Security and Assistance Improvements Act, 62 Fed. Reg. 67, 274 ("Section 151 of Public Law 104-164 added a new clause (ii) to Subsection (b)(1)(A) of section 38 of the AECA requiring the registration and licensing of persons who engage in the business of brokering.")
defense community.\textsuperscript{185} Brokers domiciled abroad are less accessible to the U.S. government and it is more difficult to inform them properly.\textsuperscript{186} Thus, despite efforts to inform brokers, many remain uninformed about the new law.

Since brokered weapons generally are not being exported from the U.S.,\textsuperscript{187} it is unlikely that information on the U.S. brokering amendment will be listed on arms invoices. Brokers could conceivably be considered "experts" in arms transactions, but the lack of previous regulation suggests that they still might not be expected to have the appropriate knowledge for the willfulness requirement.

Even where brokers are aware of a general brokering regulation, proving notice still may be difficult because of the breadth and ambiguity of the brokering and broker definitions under the regulation.\textsuperscript{188} As discussed above, the definition of brokering under the AECA and ITAR\textsuperscript{189} includes more activities than may be understood as brokering within the defense industry.\textsuperscript{190} Additionally, since a "broker" is defined as an "agent for others" in the regulation, one analyst has suggested there may be some confusion as to "whether the common law distinction between an agent and an independent contractor applies in this context or whether a broader coverage is intended."\textsuperscript{191} The lack of clarity may result in brokers successfully arguing that they did not know that their particular activities were subject to regulation.\textsuperscript{192} The way the terms are defined and the difficulty in making brokers aware of the new regulations may constrain the government’s ability to obtain convictions for violations of the brokering law.

\section*{V. \hspace{1em} INTERNATIONAL EFFORTS TO REGULATE SMALL ARMS}

\subsection*{A. Domestic Brokering Laws Outside of the U.S.}

Other governments also have taken steps to regulate brokers. For example, South Africa and Sweden have laws that apply extraterritorially and impose licensing requirements.\textsuperscript{193} The South African legislation specifically states that

\begin{itemize}
  \item \textsuperscript{185} Telephone interview with U.S. Office of Defense Trade Controls Official (Nov. 2, 1999).
  \item \textsuperscript{186} Telephone interview with U.S. Customs Official (Feb. 25, 2000).
  \item \textsuperscript{187} If the weapons were being transferred to or from U.S. soil as a result of brokering activities, the broker would be subject to a general export provision aside from brokering. 22 U.S.C. § 2778 (2000).
  \item \textsuperscript{188} ITAR, 22 C.F.R. § 129 (2000).
  \item \textsuperscript{189} See id. ("Broker means any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration ... brokering activities means acting as a broker as defined in § 129.2(a).")
  \item \textsuperscript{190} An example of traditional consulting activities would occur when a foreign consultant to a U.S. firm contracted to advise a U.S. defense export on the Ministry of Defense needs in Thailand. This act clearly "facilitates the exports of the U.S. exporter's defense articles" and thus, would be subject to the registration and licensing requirements but may not be understood as brokering to many in the industry. See Rhoads, supra note 123, at 723.
  \item \textsuperscript{191} Peter D. Trooboff, A Brief Primer on the International Traffic in Arms Regulations ("ITAR"), 798 PLI/COMM 303, 308 (1999).
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Regulation of Foreign Military Assistance, R1232 of 2 October 1999; Wood & Peleman, supra note 5, at 112-13.
\end{itemize}
penalties may be imposed even when operations are conducted abroad. Similarly, the *Swedish Military Equipment Act* requires anyone who pays taxes in Sweden to comply with the law even when activities are carried out overseas. In both South Africa and Sweden, however, brokering is included under a general category relating to arms transfers.

Canada, France, Germany, the Netherlands, Norway, Switzerland, and the United Kingdom also have existing legislation that imposes varying degrees of regulation on brokers. The Dutch, German, and Norwegian laws require brokers operating on their soil to register and apply for a license when brokering weapons from their country or between two other countries. The French and Swiss laws require brokers operating on their soil to register and apply for licenses, but only when the weapons are coming from or moving through their territory. The Canadian law prohibits brokering by anyone located in Canada of any prohibited weapons listed on the Canadian Export Control List (including automatic weapons and other prohibited devices) from Canada or any other place to countries not included in an Automatic Firearms Country Control List. Canada, however, does not appear to require registration or licensing to enforce the restriction. Notably, none of these countries’ laws explicitly subjects citizens or residents operating in other countries (or non-nationals residing in other countries brokering weapons from their soil) to register and obtain licenses for transactions. The United Kingdom and Canada are exceptions, as they have laws that apply to brokers operating outside their territory, but only in the case of mandatory U.N. arms embargoes. More recently, Bulgaria and Poland have initiated legislative efforts. In 1998, the Bulgarian cabinet proposed draft amendments to the Bulgarian export laws that would explicitly cover brokering. Poland also is assessing which of its existing export laws might be applied to regulate brokers.

B. International Efforts to Regulate Brokering

Intergovernmental organizations at the regional and international levels also have begun to recognize and address arms brokering as it affects arms flows to conflict zones and regimes that abuse human rights. The Organization of

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195. *Coflin, supra* note 6, at 20.
196. *See Coflin, supra* note 6; *Wood and Peleman, supra* note 5, at 105-14.
197. *Id.*
198. *Coflin, supra* note 6, at 17.
202. These efforts reflect a general increase in attention by the international community to combatting the problem of the proliferation and misuse of small arms which has resulted in discussion and development of a wide array of measures including creating procedures for increased transparency in government-to-government arms transfers, establishing norms that condition arms transfers on human rights standards, constructing more secure arms stockpiles warehouses, implementing post-conflict weapons collection and destruction, and imposing small arms moratoria on
American States adopted the first comprehensive treaty on arms trafficking, the 1998 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Material.\textsuperscript{203} The Convention does not specifically address the role of brokers in arms trafficking. Depending on how it is interpreted, however, the Convention may require States Parties to regulate brokering and make brokering an extraditable offense in their respective countries. This requirement arguably is implicit in the Convention’s prohibition of the unlicensed manufacture, import, export, acquisition, delivery, transport and sale of weapons, ammunition and explosives, and other related material without a license.\textsuperscript{204} The Convention also criminalizes “participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling” any of these activities. The Convention also encourages signatories to consider the Convention as the “legal basis for extradition” in cases where bilateral extradition treaties on trafficking do not exist.\textsuperscript{205}

The European Union (E.U.) also has identified the need to regulate brokering activities. At the E.U.-U.S. Summit in December 1999, the E.U. pledged to cooperate with the U.S. to consider measures to prevent illicit arms brokering as part of the \textit{U.S.-E.U. Action Plan on Small Arms.}\textsuperscript{206} Additionally, the Wassenaar Arrangement, an international forum of thirty-three states that are weapons producers and suppliers, has slated brokering as an agenda item for discussion in 2001 and has initiated a survey of member states’ brokering laws.\textsuperscript{207}

Brokering has also drawn the attention of the Organization for Security and Cooperation in Europe (“OSCE”). On November 24, 2000, the 308th Plenary Meeting of the OSCE Forum for Security Cooperation adopted a document that identified the regulation of “activities of international brokers in small arms as a critical element in a comprehensive approach to combating illicit trafficking in all its aspects.”\textsuperscript{208} The document called on states to consider requiring registration and licensing of brokers operating within their territory, disclosing import and export licenses and authorizations, and revealing the names and locations of brokers involved in the transaction.\textsuperscript{209}

\begin{footnotes}
\item[203] Nov. 14, 1997, 37 I.L.M. 143, art. IV.
\item[204] Id.
\item[205] Id.
\item[207] Royal Ministry of Foreign Affairs, Oslo, Wassenaar Arrangement, Information Exchange on the Control on Arms Brokerage (2000 ) (on file with the FFP).
\item[209] Id.
\end{footnotes}
Other regional initiatives include recent efforts by the South African Development Community ("SADC"). The SADC drafted a Firearms Protocol that, if approved as currently written, will create comprehensive provisions to regulate brokering activities and a requirement for States Parties to the Protocol to incorporate such controls into law. This Protocol was scheduled to be approved in March 2001.

At the U.N., several initiatives are underway, including a Protocol to the Convention on Organized Transnational Crime, a conference, and a background study. Since 1998, the U.N. has been considering a protocol to the U.N. Convention on Organized Crime. The "Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition" would include specific language on brokering and extradition. The draft text includes a brokering provision based on text originally submitted by the U.S. The provision requires arms brokers to register with their countries of nationality and residence, as well as countries in which the brokers conduct operations. The text also requires brokers to obtain a license for each transaction they intend to undertake. According to one U.S. official, however, this provision remained controversial throughout the negotiations due to conflicting views by some negotiators regarding what activities should constitute brokering and whether licensing schemes are burdensome on law enforcement agencies. Negotiations dissolved in October 2000 over more

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210. **Wood and Peleman, supra** note 5, at 108. A draft of the SADC Protocol is on file with The Fund for Peace. According to this version, brokering is defined as acting: (i) for a commission, advantage or cause, whether pecuniary or otherwise; (ii) to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of firearms, ammunition or other related materials; and thereby acting as intermediary between any manufacturer, or supplier of, or dealer in firearms, ammunition, and other related materials and any buyer or recipient thereof.

211. As of April 2001, however, the SADC had not published information regarding approval of the Protocol.

212. **Firearms Protocol, supra** note 175.


214. The provision was drafted from text proposed by the United States with additions submitted by Switzerland and Colombia (marked with brackets) and states:

Registration and licensing of brokers, [traders and forwarders]: [With a view to preventing and combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition], States Parties that have not done so shall take steps to require persons who act on behalf of others, in return for a fee or other consideration, [for traders, forwarders] in negotiating or arranging transactions involving the international export or import of firearms, their parts and components or ammunition: (a) To register with the country [of nationality and with the country where the negotiations or arrangements referred to above take place]; [where they are resident or established]; and (b) To ;obtain for [their transactions] [each transaction] a licence or authorization from the country [where the negotiations or arrangements referred to above take place] [where they are resident or established].

fundamental disagreements as to the basic scope and content of the Protocol and it has not been adopted.\textsuperscript{216}

To complement the Protocol and draw increased attention to the proliferation and misuse of small arms, the U.N. plans to convene the \textit{U.N. Conference in 2001 on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects} in July 2001.\textsuperscript{217} In conjunction with the conference, the U.N. has initiated a background study on the feasibility of restricting arms manufacture and trade to state-authorized dealers.\textsuperscript{218} Thus far, preparatory meetings have reflected a growing recognition of the need to address brokering. Participants do, however, have opposing views regarding which activities constitute brokering and whether licensing and registration schemes are too burdensome for law enforcement agencies.\textsuperscript{219}

\section*{VI. Conclusion}

The diffusion of small arms to conflict zones is a problem that must be addressed. The widespread availability of small arms in conflict zones is instrumental in the formation and perpetuation of conflict. The presence of the arms in conflict has subjected civilians to untold horrors. As brokers help make many of these transfers successful, regulating brokers will be a critical component of any potential solution.

The AECA and the Brokering Amendment constitute unparalleled advances in the regulation of brokering to conflict zones and regimes that abuse human rights. The Brokering Amendment explicitly subjects brokers and brokering activities to licensing requirements. Moreover, the law encompasses a broad understanding of what constitutes brokering, and thus, regulates more brokers than might otherwise have been regulated. The extraterritorial application of the law also provides an opportunity to regulate an even greater number of brokers, many of whom might have been able to evade regulation because most other countries have not yet created brokering laws.

Despite the Brokering Amendment's positive attributes, there are major problems suggesting that simply adapting legislation is not sufficient. These problems include inadequate and ineffective procedures for administering and enforcing the law, the necessity for overseas investigations and extradition, and high standards for indictment. Thus, in addition to adopting brokering legisla-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{219} Interview with U.S. Customs Official, Washington, D.C. (Oct. 25, 2000). This official was present at the U.N. expert meeting.
\end{enumerate}
\end{footnotesize}
tion, countries must devise effective local, regional, and international implement-
tation mechanisms.

Perhaps most importantly, agencies charged with administration and en-
forcement of the law must be adequately staffed with trained employees. This
involves establishing offices throughout the world. In conjunction with having
such offices, governments need to foster both informal and formal avenues, in-
cluding Customs Mutual Assistance Agreements and MLATs, to provide for
information exchange and overseas investigations. Similarly, governments that
adopt brokering laws must also develop extradition treaties that make brokering
offenses extraditable crimes. In countries that pass brokering laws requiring that
violators have knowledge of the law, it is also essential that the law be suffi-
ciently publicized to inform potential violators of the regulations.

These problems have constrained and will continue to constrain effective
regulation of brokers and brokering subject to the U.S. law. These problems
also constrain efforts to address brokering internationally, regionally, and in
other countries. The U.S. Brokering Amendment currently presents merely a
starting point, and not a comprehensive model for the development of far-reach-
ing and truly effective control over brokering activities. The brokering law must
be fortified so that effective implementation in the U.S. is possible and so that
the law can be used as a model for international conventions, regional regula-
tions, and domestic export laws in other countries.
APPENDIX:
The Text of the Brokering Amendment to the Arms Export Control Act, 22 U.S.C. §2778

2778(b)(1)(A)(ii)

(I) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President under subsection (a)(1), or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service (as defined in subclause (IV)), shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.

(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this Act, except that no license shall be required for such activities undertaken by or for an agency of the United States Government—

(aa) for use by an agency of the United States Government; or

(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.