

2021

Free from the Scourge of War: Defense Contractors Exporting on Behalf of the U.S. Government

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Recommended Citation

Samantha Cook, *Free from the Scourge of War: Defense Contractors Exporting on Behalf of the U.S. Government*, 59 Duq. L. Rev. 387 (2021).

Available at: <https://dsc.duq.edu/dlr/vol59/iss2/10>

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Free from the Scourge of War: Defense Contractors Exporting on Behalf of the U.S. Government

*Samantha Cook**

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I. INTRODUCTION

In 1986, Arif Durrani purchased \$347,000.00 in Hawk missile parts from an American company.¹ He certified to the American company that he would be responsible for complying with all export obligations, signed a written statement acknowledging that the parts required an export authorization, and knowingly shipped them abroad without appropriate licensing.² Durrani was charged with violating the Arms Export Control Act (AECA), which requires Department of State (State Department) licensing for all exports of defense articles.³ Durrani's defense: the United States government directed him to do it.⁴

Shortly preceding Durrani's indictment, the now notorious Iran-Contra Affair was well underway,⁵ and Durrani claimed that he had met with Col. Oliver North, who "assured him 'not to worry about the paperwork' because President Reagan would shortly authorize arms shipments to Iran."⁶ The court examined as an affirmative defense a statutory exemption to the licensing requirement, which would permit defense exports without a license if for official use by the United States government (U.S. government), or as part of a foreign assistance program.⁷ In its analysis, the court described the AECA's legislative history as "sparse"⁸ and turned to the AECA's implementing regulations, the International Traffic in Arms Regulations (ITAR), to guide its interpretation of the government exemption (Section 126.4).⁹

Section 126.4 of the ITAR implements a statutory exemption to the AECA's hard and fast licensing rule.¹⁰ The statute sets forth what appears to be a straightforward rule: unless otherwise noted, a license is not required for the export of defense articles "for official use by a department or agency of the United States Government, or . . . for carrying out any foreign assistance or sales program

1. *United States v. Durrani*, 835 F.2d 410, 413 (2d Cir. 1987).

2. *Id.* at 414.

3. *Id.* at 415.

4. *Id.* at 416.

5. *Id.*

6. *Id.* at 417. For more information on the Iran-Contra Affair, see Executive Summary, S. REP. NO. 100-216, at 7 (1987) (Executive Summary).

7. *Durrani*, 835 F.2d at 417.

8. *Id.* at 420.

9. *Id.* at 418-19.

10. *Id.* at 419.

authorized by law and subject to the control of the President by other means.”¹¹ Despite the plain language of the statute and the assistance of its implementing regulation Section 126.4, evolving circumstances and the increasing role of contractors in military operations has driven certain exporters and contractors to understand the limits of the exemption.¹²

Despite the shoddiness of Durrani’s claim and doubtfulness of his credibility, his case presents a fascinating—and extremely rare¹³—glimpse into a court’s interpretation of a regulatory loophole that allows exporters to ship the most highly-controlled military technology around the world with fairly limited governmental oversight. The rule attempts to answer the question, “when can a private entity ship military equipment at the direction of the government without prior approval by the State Department?”—but it often creates more questions than it answers. In 2019, the State Department amended the language in an attempt to clarify contractors’ responsibilities under the ITAR.¹⁴ This article will explore this amendment in light of the increasing need for contractor support.

Contractors play an ever-increasing role in supporting the United States military.¹⁵ An American contractor was killed in December 2019 in a rocket attack in Kirkuk, Iraq, one of many recent military actions involved in the escalation of tensions with Iran.¹⁶ Little information about this contractor has been made public,¹⁷ but unfortunately, their plight is not uncommon. During President Barack Obama’s presidency, more civilian contractors were killed in Iraq and Afghanistan than American troops.¹⁸ These overseas contingency operations create numerous legal complexities: what are

11. *Id.* at 418 (citing 22 U.S.C. § 2778(b)(2)).

12. *See infra* Section III(A)(1)–(2).

13. Only two cases have interpreted Section 126.4. *See generally Durrani*, 835 F.2d 410. *See also* *United States v. Modarressi*, 690 F. Supp. 87, 91 (D. Mass. 1988) (“These exceptions are applicable, however, only in specific, narrow circumstances. They require, among other things, that a transaction be effected solely by a United States government agency (22 C.F.R. § 126.4) or that an article be transferred by the Department of Defense to a representative of a foreign government in the United States (22 C.F.R. § 126.6).”).

14. International Traffic in Arms Regulations: Transfers Made by or for a Department or Agency of the U.S. Government, 84 Fed. Reg. 16,398, 16,399 (Apr. 19, 2019) (to be codified at 22 C.F.R. § 126.4 (2019)) [hereinafter Final Rule].

15. *See infra* Section III(A).

16. Barbara Starr, *US Civilian Contractor Killed in Rocket Attack in Iraq*, CNN (Dec. 27, 2019, 9:47 PM), <https://www.cnn.com/2019/12/27/politics/iraq-rocket-attack-contractor-killed/index.html>.

17. *Id.*

18. Micah Zenko, *Mercenaries Are the Silent Majority of Obama’s Military*, FOREIGN POLY (May 18, 2016, 4:58 PM), <https://foreignpolicy.com/2016/05/18/private-contractors-are-the-silent-majority-of-obamas-military-mercenaries-iraq-afghanistan/>.

contractors' rights under the Geneva Convention?¹⁹ What are their authority and obligations under military law?²⁰ How are civilians overseas held accountable for their actions?²¹ One overlooked problem of the growing policy of maintaining a heavily civilian-based military force is seemingly inconsequential, but can in fact be a significant threat to national security: how are the United States' export laws—and their implementing agencies' procedures—adapting to give contractors greater flexibility while holding them accountable?

This article will begin by discussing the background of the AECA and the ITAR, describing their purpose, authority, licensing requirements, and license exemption framework. It will then analyze the recently amended “government exemption,” Section 126.4, whose vague language has historically plagued contractors and administrative agencies alike. Section III(A) will discuss the increasing role of private contractors in conducting military operations and illustrate how these contractor-exporters will ultimately benefit from this amended exemption, while Section III(B) will argue that this rule reflects a trend of allowing such contractors increased control over activities that are inherently or closely associated with inherently governmental functions.

The exemption regime of the ITAR acknowledges the need for private individuals to export defense articles overseas in support of U.S. government operations, and the 2019 amendment to Section 126.4 illustrates the State Department's recognition of the military's need for increased contractor mobility. With this increased deference to contractors, however, comes a heightened need for oversight.

II. THE ARMS EXPORT CONTROL ACT, ITAR AUTHORIZATIONS, AND THE SECTION 126.4 EXEMPTION

A. *Arms Export Control Act*

The federal government controls the proliferation of military equipment and technology primarily via the AECA.²² The stated goals of the AECA are “a world which is free from the scourge of war and the dangers and burdens of armaments” and “to facilitate

19. See, e.g., Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them*, Presentation to the Joint Services Conference on Professional Ethics (Jan. 27–28, 2000).

20. *Id.*

21. *Id.*

22. Arms Export Control Act, 22 U.S.C. §§ 2751–2799.

the common defense by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of cooperative exchange of data, research, development, production, procurement, and logistics support to achieve specific national defense requirements and objectives.”²³ The government attempts to strike a balance between its interest in keeping military equipment out of enemies’ hands and being competitive in the international defense market. One former Assistant Secretary for Political-Military Affairs, John Hillen, stated the purpose of export controls very concisely, when describing a very expensive effort to destroy 24,000 MANPADS (man-portable air defense systems): “[h]ow much more effective—in terms not only of dollars, pounds sterling or euros, but also in terms of human lives—would it have been to have exercised responsible export controls in the first place and kept these weapons out of the hands of our enemies?”²⁴

Generally, the AECA provides that, in furtherance of Congress’s stated goals, the State Department, under the direction of the President, is responsible for supervising and monitoring sales and exports of defense articles and defense services in coordination with economic and political factors.²⁵ Exports of defense articles must be in accordance with United States foreign policy, and strict end-user requirements are set forth to ensure that defense articles and technology are truly for the use of the named recipient and for the stated purpose.²⁶ Such purposes include the foreign country’s self-defense, cooperative projects,²⁷ public works, nuclear non-proliferation, or to allow the country to participate in arrangements consistent with the United Nations Charter, among others.²⁸ Its implementing regulations, however, contain specific rules and procedures for carrying out the policies in the AECA.²⁹

23. *Id.* § 2751.

24. John Hillen, Assistant Secretary for Political-Military Affairs, Dep’t of State, Address to the 18th Annual Global Trade Controls Conference (Nov. 3, 2005) (transcript available at the U.S. Department of State Website at <https://2001-2009.state.gov/t/pm/rls/rm/56557.htm>).

25. 22 U.S.C. § 2752(b).

26. *Id.* § 2753(a)(1)–(2).

27. Cooperative projects under the AECA include written agreements “undertaken in order to further the objectives of standardization, rationalization, and interoperability of the armed forces of [NATO],” *id.* § 2767(b)(1), or “a jointly managed arrangement, described in a written agreement among the parties, which is undertaken in order to enhance the ongoing multinational effort of the participants to improve the conventional defense capabilities of the participants” *Id.* § 2767(b)(2).

28. *Id.* § 2754.

29. *The International Traffic in Arms Regulations (ITAR)*, U.S. DEPT OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987 (last visited Feb. 11, 2020).

B. *International Traffic in Arms Regulations*

The President delegated the implementing regulations of the AECA to the State Department.³⁰ The implementing regulations, the International Traffic in Arms Regulations (ITAR), set forth a complex regulatory regime for the authorization of defense exports.³¹ The ITAR controls defense articles, defense services, and technical data.³² Defense articles are tangible items and technical data subject to the United States Munitions List (USML).³³ However, technical data and defense services somewhat warp the conventional wisdom of what an export is.³⁴ Technical data is defined as any information, including software, “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.”³⁵ Similarly, a defense service is the provisioning to a foreign person of technical data, assistance in the use of a defense article, or military training.³⁶ Exports, then, are not as straightforward as shipping an item overseas; merely discussing controlled technical data with a non-citizen in the United States could constitute an export.³⁷ All defense exports must be authorized by the State Department through its regime of licensing, agreements, and exemptions.³⁸ Failure to comply with the ITAR subjects exporters to civil and criminal penalties, up to \$1,000,000.00 per violation or debarment.³⁹

1. *Licensing and Agreements*

The Directorate of Defense Trade Controls (DDTC) reviews and approves export license applications, and different types of exports

30. Exec. Order No. 13,637, 78 Fed. Reg. 16,129 (Mar. 13, 2013).

31. See International Traffic in Arms Regulations, 22 C.F.R. §§ 120–130 (2019).

32. *Id.* § 120.2.

33. *Id.*

34. See, e.g., Final Rule, *supra* note 14, at 16,400 (addressing public comments expressing concern with the proposed rule’s removal of the term “technical data” from the language of the exemption: “Several commenters noted the removal of the reference to technical data and assumed that this indicated that the exemption would no longer authorize exports of technical data. As noted above, the Department removed the reference to technical data because it was redundant and confusing. Technical data is a form of defense article and is authorized by the language authorizing the export (now export, reexport, retransfer, and temporary import) of defense articles.”).

35. 22 C.F.R. § 120.10(a)(1) (2014).

36. *Id.* § 120.9.

37. *Id.*

38. *E.g., id.* §§ 123.1, 123.5.

39. *Id.* §§ 127.1, 127.3, 127.10.

require different types of licenses.⁴⁰ Long-term arrangements for the provision of defense services or technical data require a Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA),⁴¹ while regular shipments of hardware or software may require only a DSP-5 license for the permanent export of hardware or technical data.⁴² Regardless of the method, all exports of defense articles or technical data require review by DDTC unless it falls into one of few exceptions in the ITAR.⁴³ License and agreement applications require the exporter to disclose details of the sale or contract under which they are exporting to the DDTC, including the end user, the quantity, the USML classification, and the dollar value of the items.⁴⁴ The DDTC then reviews the application, in conjunction with other bureaus within the State Department, the Department of Defense (DoD), and other interested agencies, to ensure that it aligns with foreign policy.⁴⁵

While the population of exporters needing authorization to ship controlled military equipment may seem small, the DDTC received roughly 37,000 license applications in 2018.⁴⁶ The DDTC takes on average thirty-four days to process an application.⁴⁷ This long turnaround time drives exporters, many of whom are private defense contractors, to seek exemptions to the strict licensing requirements of the ITAR.⁴⁸

40. *Id.* § 123.1(a)(1)–(4).

41. *Id.* § 124.1(a).

42. *Id.* § 123.1(a)(1).

43. *Defense Trade Controls Licensing (DTCL)*, U.S. DEP'T OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=02bbbbc4dbc7bf0044f9ff621f9619ac (last visited Oct. 4, 2019).

44. *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 DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=cfd37af0db199f00d0a370131f96199d (last visited Oct. 26, 2019).

45. Jonathan Dennis, *Complying with ITAR Controls: License Review Process*, U.S. DEP'T OF STATE 6–12 (Sept. 19, 2016), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=29acd359db9ddf00d0a370131f961942.

46. *Defense Trade Controls Licensing (DTCL)*, *supra* note 43.

47. *Id.*

48. See Clinton Long, *An Imperfect Balance: ITAR Exemptions, National Security, and U.S. Competitiveness*, 2 NAT'L SEC. L.J. 43, 62 (2013) (“Loosening the restrictions of ITAR has been welcomed by U.S. industries because it provides them with additional opportunities to sell their defense products with less bureaucracy.”).

2. Exemptions

Interspersed throughout the regulatory labyrinth of the ITAR are various exemptions to the “ask first, export later”⁴⁹ principle.⁵⁰ Under very specific circumstances, exporters may be able to export or temporarily import hardware or software, share technical data, or perform defense services without the need for separate licensing.⁵¹ Though an exporter still needs to be registered with the DDTC in order to be eligible to use an exemption,⁵² as well as maintain records of all exemptions,⁵³ it is typically a much more expeditious process than to apply for a license or agreement.⁵⁴

Exemptions are available for a variety of purposes, but each of them represents a carefully calculated foreign policy consideration.⁵⁵ Some exemptions are based on the close relationship with the end-user country; for example, exemptions exist for shipping hardware and data to certain friendly countries, like Canada.⁵⁶ Similarly, pursuant to Defense Trade Cooperation Treaties, the ITAR sets forth exemptions for Australia⁵⁷ and the United Kingdom.⁵⁸ The North Atlantic Treaty Organization (NATO) partners also receive special treatment under the ITAR through exemptions that permit American exporters to maintain equipment for NATO, Japan, and Sweden without a TAA⁵⁹ and to share technical data for NATO countries’ bid proposals.⁶⁰ There are dozens of other exemptions throughout the ITAR, organized in no intuitive manner.⁶¹ Frequenters of license exemptions include defense contractors, university laboratories, and federally funded research and

49. MARK K. NEVILLE, JR., INTERNATIONAL TRADE LAWS OF THE UNITED STATES: STATUTES AND STRATEGIES ¶ 16.03 (2019).

50. JOHN R. LIEBMAN ET AL., CONG. RSCH. SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE § 4.05[1] (2014).

51. *Id.*

52. *Id.*

53. 22 C.F.R. § 123.26 (2012).

54. See Tom Reynolds, *Stop, Read and Apply ITAR Exemptions*, EXP. SOLS., <https://www.exportsolutionsinc.com/resources/blog/stop-read-and-apply-itar-exemptions/> (Jan. 14, 2019).

55. Long, *supra* note 48, at 63 (“Either national security is compromised or economic interests suffer, and whichever is the priority for lawmakers at any given time when ITAR is modified will win at the end of the day.”).

56. 22 C.F.R. § 126.5 (2012).

57. *Id.* § 126.16.

58. *Id.* § 126.17.

59. *Id.* § 124.2(c).

60. *Id.* § 125.4(c).

61. LIEBMAN ET AL., *supra* note 50 (“There are approximately seventy-five frequently amended exemptions scattered throughout the ITAR, but because the official version of the ITAR contains no index, ITAR readers may be unaware that an exemption is available.”).

development centers.⁶² Strikingly, between the period of 2004 and 2006, four defense contractors alone comprised twenty-five percent of the exemption certification letters issued by the DoD.⁶³ One long-questioned ITAR exemption, and the subject of this article, is the license exemption for transfers to or on behalf of the United States government.⁶⁴

C. *The United States Government Exemption*

1. *Prior Language of the Exemption*

The revision of Section 126.4 was “long-awaited” by defense contractors⁶⁵ as the previous language of the exemption proved to be “complex and difficult to use.”⁶⁶ Prior to the 2019 amendment, the Section 126.4 exemption authorized the “temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service, *by or for* any agency of the U.S. Government for official use by such an agency, or for carrying out any foreign assistance, cooperative project, or sales program”⁶⁷

On its face, this exemption seemed to allow the government, in its official capacity, to temporarily import, or temporarily export, defense articles, technical data, or defense services.⁶⁸ However, the phrase “by or for” insinuated that the exemption was also open to other non-government entities. The rule went on to specify that the exemption:

applies only when all aspects of a transaction (export, carriage, and delivery abroad) are affected by a United States Government agency or when the export is covered by a United States Government Bill of Lading. This exemption, however, does not apply when a U.S. Government agency acts as a transmittal

62. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1103, CLARIFICATION AND MORE COMPREHENSIVE OVERSIGHT OF EXPORT EXEMPTIONS CERTIFIED BY DOD ARE NEEDED (2007).

63. *Id.*

64. 22 C.F.R. § 126.4 (2019 Amended Rule).

65. See, e.g., Williams Mullen & Thomas McVey, *ITAR Amendment Expands License Exemption for Transfers by or for the U.S. Government*, JD SUPRA (Sept. 10, 2019), <https://www.jdsupra.com/legalnews/itar-amendment-expands-license-71842>; John R. Shane & Lori E. Scheetz, *DDTC Makes Long-Awaited Clarification to the ITAR 126.4 Exemption*, WILEY (Apr. 19, 2019), <https://www.wiley.law/alert-DDTC-Makes-Long-Awaited-Clarification-to-the-ITAR-1264-Exemption>.

66. Mullen & McVey, *supra* note 65.

67. 22 C.F.R. § 126.4(a) (2019 Pre-Amended Rule) (emphasis added).

68. *Id.*

agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements.⁶⁹

This provision provides some insight as to how this rule is used by contractors and government agencies alike. It suggests that private individuals and firms could, in fact, ship defense articles abroad without prior DDTC authorization, but only when the entire transaction is carried out by the government.⁷⁰ It also hints at how some exporters have tried to abuse it in the past. By specifying that the rule does not apply when the government agency acts merely as a transmittal agent, the State Department prohibits agencies from circumventing the export control process by simply loading contractors' materiel into a government jet and expediting its shipment abroad. The government is also not authorized to make any export that is otherwise prohibited by law.⁷¹

The final portion of the former version of the rule provided some guidance on shipments, not *by* the government, but *for end-use* by the government, suggesting that this carve-out is intended for private entities. The rule provided:

(c) A license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a defense service, for end-use by a U.S. Government Agency in a foreign country under the following circumstances:

- (1) The export or temporary import is pursuant to a contract with, or written direction by, an agency of the U.S. Government; and
- (2) The end-user in the foreign country is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and
- (3) The urgency of the U.S. Government requirement is such that the appropriate export license or U.S.

69. 22 C.F.R. § 126.4(a) (2019 Pre-Amended Rule).

70. The exemption also applied when the shipment was authorized by a United States Government Bill of Lading. A Government Bill of Lading is an official contract of carriage document setting forth terms with the transporter. 41 C.F.R. § 102-117.85 (2019).

71. 22 C.F.R. § 126.4(b) (2019 Pre-Amended Rule).

Government Bill of Lading could not have been obtained in a timely manner.⁷²

This provision opened significant opportunity and risk for contractors, particularly those under contract with the U.S. government to provide defense articles and services abroad. It drew a seemingly narrow boundary around when Section 126.4 may be used. Applying all three of its elements, it only authorized those private entities that are under contract or written direction from the U.S. government to ship defense articles abroad on very short notice.

The exemption in its prior state was vague, causing confusion among exporters (and their lawyers) as to how and when the provision could be invoked.⁷³ The rule also drove a wedge between the State Department and the DoD as to the authorization authority and recordkeeping requirements for such exports.⁷⁴ In May 2015, the State Department proposed a rule change to clarify the contentious language,⁷⁵ and in April 2019, the final rule went into effect.⁷⁶

2. *Significant Changes in the Amended Rule*

The most significant change in the 2019 amendment is the separation of Sections 126.4(a) and (b), which divides the authorization cleanly between exports by the government and exports for or on behalf of the government.⁷⁷ The prior rule chaotically lumped in Section 126.4(a) a cluster of circumstances where an exporter, whether it be the government or a private entity, could temporarily export, import, or perform a defense service.⁷⁸ The prior paragraph of Section 126.4(c), on the other hand, seemed to be, but was not expressly directed at parties other than the United States government, and gave loose guidance about how that exemption could be used.⁷⁹ The new language of the exemption carves out Section 126.4(a) specifically for use by the government agency with very limited applicability to private entities.⁸⁰

72. *Id.* § 126.4(c) (2019 Pre-Amended Rule).

73. Shane & Scheetz, *supra* note 65.

74. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 62.

75. Exports and Temporary Imports Made to or on Behalf of a Department or Agency of the U.S. Government, 80 Fed. Reg. 29,565, 29,565 (proposed May 22, 2015).

76. Final Rule, *supra* note 14, at 16,398.

77. *Id.*

78. 22 C.F.R. § 126.4(a)–(c) (2019 Pre-Amended Rule).

79. *Id.* § 126.4(c) (2019 Pre-Amended Rule).

80. 22 C.F.R. § 126.4 (2019 Amended Rule).

The public comments to the proposed rule “specifically asked the Department to state that any use by a U.S. Government contractor in the course of contract is within the scope of official use by the U.S. Government.”⁸¹ The department accepted this recommendation in the new rule and provided clearer criteria for when use by a contractor qualifies as “official use.”⁸² Section 126.4(b) now belongs to contractors: it omits the need for a license when shipping to a department of the U.S. government or an entity other than the U.S. government at its written direction.⁸³

Another significant change is found at Section 126.4(b)(1), which now provides that an entity may export without a license to the U.S. government “at its request.”⁸⁴ Previously, private contractors shipping to the U.S. government abroad were burdened with additional elements, including being in a contract with or at written direction of the government, verifying that the end-user is the U.S. government, and extreme urgency.⁸⁵ The “at its request” standard suggests that there is a lower bar for exporters to ship directly to the U.S. government; notably, the rule implies that the request need not even be in writing, at least for purposes of ITAR compliance.⁸⁶ Further, the exemption no longer requires that the government effect the entire transaction.⁸⁷ With this change, private entities shipping to the government, or to a foreign person at the written direction of the government, no longer need to question whether they are exporting “by” or “for” the government for one of the approved purposes.

The amended rule also adds a provision to expressly prohibit exports that would otherwise violate the law, such as United Nations Security Council Resolutions and U.S. arms embargoes.⁸⁸ This is a seemingly obvious and intuitive catch-all rule to contour the U.S. government exemption. However, like the other changes in the rule, its addition suggests that the broadening of the exemption raised concerns with the DDTC that exporters—and potentially even government agencies themselves—would attempt to export

81. Final Rule, *supra* note 14, at 16,400.

82. *Id.*

83. 22 C.F.R. § 126.4(b) (2019 Amended Rule).

84. *Id.* § 126.4(b)(1) (2019 Amended Rule).

85. 22 C.F.R. § 126.4(c)(1)–(3) (2019 Pre-Amended Rule).

86. 22 C.F.R. § 126.4(c)(1)–(3) (2019 Amended Rule). Section 126.4(c) previously required a contract or written direction for use of the “by or for” exception. 22 C.F.R. § 126.4(c) (2019 Pre-Amended Rule).

87. 22 C.F.R. § 126.4(a) (2019 Amended Rule). This requirement was removed from Section 126.4(a) (2019 Pre-Amended Rule).

88. 22 C.F.R. § 126.4(d) (2019 Amended Rule).

controlled technology to countries with a heightened risk of diversion to enemy nations or terrorist organizations.⁸⁹

Section 126.4(d) now cites another section of the ITAR, Section 126.1, titled, “Prohibited exports, imports, and sales to or from certain countries.”⁹⁰ This section provides for a near-absolute bar to exports of defense articles and defense services to certain countries⁹¹ and a qualified bar on exports to others, meaning that there is generally a policy of denial to these countries with certain enumerated exceptions.⁹² The addition of this section is significant because it involves countries that are likely to be involved in operations warranting the use of the Section 126.4 exemption. Recall that the exemption authorizes exports at the request or written direction of the government, whether for end-use by U.S. persons or not.⁹³ The United States military carries out foreign assistance in Section 126.1(b) countries, such as Afghanistan and Iraq.⁹⁴ Much of this foreign assistance supports peace and security, which is comprised of initiatives such as counter-narcotics, counter-terrorism, transnational crime, combating weapons of mass destruction, and stabilization.⁹⁵ Though these programs are funded and monitored by the government,

[m]ost development and humanitarian assistance activities are not directly implemented by United States government personnel but by private sector entities, such as individual personal service contractors, consulting firms, universities, private

89. The ITAR’s purpose is balancing national security with the economic interests of the U.S. defense industry. Exemptions attempt to add nuance to this balance, but they create additional risk to national security. See, e.g., Long, *supra* note 48, at 60 (“There are significant concerns that terrorists or rogue states could acquire these defense articles from other countries—even those friendly to the United States—that import these goods but do not have the same strict export controls as the United States. It is therefore unclear how the State Department will use its exemption authority in the future.”).

90. 22 C.F.R. § 126.1 (2019).

91. See *id.* § 126.1(d)(1) (setting forth a policy of license denial to Belarus, Burma, China, Cuba, Iran, North Korea, Syria, and Venezuela).

92. *Id.* § 126.1(d)(2).

93. 22 C.F.R. § 126.4(b) (2019 Amended Rule).

94. In 2018, the United States government spent \$999,741,283.00 on assistance to Afghanistan and \$452,070,635.00 to Iraq. *Map of Foreign Assistance Worldwide*, U.S. DEP’T OF STATE, <https://www.foreignassistance.gov/explore> (Nov. 6, 2020) (Select Iraq or Afghanistan, and filter to “2018” and “Spent.”).

95. Of the 2018 foreign assistance funding to Afghanistan and Iraq, peace and security projects made up \$80,248,924.00 and \$53,764,002.00 respectively. *Id.* (Select Iraq or Afghanistan; then filter to “2018,” and “Spent,” and “Peace and Security.”).

voluntary organizations (PVOs), or public international organizations (PIOs).⁹⁶

This arrangement leaves non-governmental parties responsible for carrying out these billion-dollar programs and accountable to ensure that they are done safely and efficiently. The addition of the Section 126.1 provision in the new exemption language is a nod to those contractors whom the prior exemption left wondering if otherwise-prohibited countries was in the scope of Section 126.4. Here, the DDTC affirmatively states that they are not and puts that question to rest.⁹⁷

III. INCREASED CONTRACTOR FLEXIBILITY, DECREASED GOVERNMENT OVERSIGHT: COMPETING ARGUMENTS ON THE SECTION 126 EXEMPTION

A. *The Role of Contractors in Defense Administration Has Increased the Need for Less Restrictive Export Controls to Maintain Compliance*

The expansion of the government exemption reflects the law's adaptation to the need for contractors to support military operations. Though the military has always employed contractors to conduct wartime operations, "[t]heir support is no longer an adjunct, ad hoc add-on to supplement a capability."⁹⁸ In 2007, there were an estimated 100,000 civilian contract workers in Iraq alone.⁹⁹ Today, the number of security contractors in Afghanistan is estimated at 5,800, raising concern about concealment of what is really happening "on the ground."¹⁰⁰ Critics against the use of private contractors claim that contractors are employed to give the appearance of de-

96. MARIAN L. LAWSON & EMILY M. MORGENSTERN, CONG. RSCH. SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 18 (2019).

97. 22 C.F.R. § 126.4(d) (2019 Amended Rule) ("This section does not authorize any department or agency of the U.S. Government to make or authorize any export that is otherwise prohibited by any other administrative provisions or by any statute that is inconsistent with U.S. arms embargoes or United Nations Security Council Resolutions (see § 126.1).").

98. Campbell, *supra* note 19.

99. CARRIE HUNTER & DANIEL GOURE, LEXINGTON INST., CONTRACTORS ON THE BATTLEFIELD 1 (2007).

100. Paul D. Shinkman, *Afghanistan's Hired Guns*, US NEWS (Apr. 26, 2019, 5:00 AM), <https://www.usnews.com/news/national-news/articles/2019-04-26/us-employs-unprecedented-number-of-security-contractors-in-afghanistan> ("The main problem with contractors of all sorts is there's just not enough attention to what they're doing. That's not been reported out in a clear way to anybody's satisfaction for all these years,' says Catherine Lutz, a professor at Brown University and a director of its Costs of War project, which documents the use of private contractors in U.S. conflicts. 'The Pentagon should be telling us, the American public, who's funding this, what that means, why this is happening.'").

escalation by withdrawing “troops,” as in military personnel, but merely replacing them with “hired guns.”¹⁰¹

The United States Army (Army) characterizes battlefield contractors as either systems contractors, external support contractors, or theater support contractors.¹⁰² These contractors’ roles range from providing support for weapons and other materiel, supporting the combat authority at headquarters, and simply providing goods and services to service members.¹⁰³ The Joint Chiefs of Staff Joint Logistics Doctrine states that the “DOD relies on contractors to perform many tasks . . . such as base operating support[,] intra-theater transportation, logistics services, maintenance, storage, construction, security operations, and common-user commodities.”¹⁰⁴ The law has adapted with the changing composition of the battlefield to grant privileges to contractors that were previously reserved for the military, and the expansion of the government exemption appears to be one such example.

Another such development is the trend of hybrid Foreign Military Sales (FMS) and Direct Commercial Sales, an arrangement where “the main defense article [is] provided through direct commercial sales and classified systems, weapons, and/or upgrades [are] provided through FMS.”¹⁰⁵ This type of contract means that the government carries out one portion of the contract, while the private contractor is responsible for the others; therefore, the export obligations of the government and the contractor are inextricably linked in order to perform the contract, which incentivizes the government to ensure that the contractor can meet its obligations in a timely manner.

Further, the Defense Federal Acquisition Regulations Supplement (DFARS) requires that defense contracts place the burden of export compliance upon the contractor and their subcontractors.¹⁰⁶ This lessens the liability on the contracting agency for mistaken commodity classifications or incorrect interpretations of State

101. *Id.*

102. HUNTER & GOURE, *supra* note 99, at 2.

103. *Id.* at 3.

104. JOINT CHIEFS OF STAFF, DEP’T OF DEF., JOINT LOGISTICS, at xi (2019).

105. Derek Gilman et al., *Foreign Military Sales & Direct Commercial Sales*, DEP’T OF DEF. & DEF. SEC. COOP. AGENCY 14 (Sept. 30, 2014), https://www.dsca.mil/sites/default/files/final-fms-dcs_30_sep.pdf.

106. 48 C.F.R. § 252.225-7048(b) (2019) (requiring federal defense contracts to include the following clause: “The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.”).

Department regulations, such as the appropriate use of the exemption at issue here. Because of this heightened regulatory and operational responsibility on private contractors to execute national security and foreign assistance activities, these entities must receive specific guidance to improve their compliance programs and operate more efficiently with their government partners. The 2019 amendment to Section 126.4 is one such regulatory change.

The use of civilian contractors in battlefield operations raises numerous legal questions related to international and military law,¹⁰⁷ but the focus here is whether the expansion of the ITAR to allow civilians to carry out defense exports at the request of the United States government goes a step too far in authorizing contractors to conduct inherently governmental functions. Below is an examination of potential scenarios where contractors who would previously have been limited in their use of the government exemption may find new opportunity with the amended rule.

1. *Application of the Section 126.4 Exemption*

One scenario where the revisions to Section 126.4 may benefit exporters and the DoD alike is during the performance of an Indefinite-Delivery/Indefinite-Quantity (IDIQ) contract. IDIQ contracts arise when “the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period”¹⁰⁸ IDIQ’s are a more convenient contract arrangement for the government, where the contract is awarded to multiple contractors and the competition lies at the task order level.¹⁰⁹ Between 2011 and 2015, the DoD accounted for sixty-eight percent of all of the federal government’s IDIQ contracts.¹¹⁰ The Government Accountability Office (GAO) investigated the DoD’s use of IDIQ contracts in 2017, reporting:

[i]n addition, [DoD] officials told us that the contracts they used served a broader customer base, for example, multiple commands, other federal agencies, and foreign military sales. By not needing to specify an exact quantity or timing of

107. See *supra* text accompanying notes 19–21.

108. 48 C.F.R. § 16.504(b) (2019).

109. Gregory R. Hallmark, *2019 NDAA Analysis: Enhancing IDIQs and Other Provisions*, HOLLAND & KNIGHT GOV’T CONTS. BLOG (May 15, 2019), <https://www.hkclaw.com/en/insights/publications/2019/05/2019-ndaa-analysis-enhancing-idiqs-and-other-provisions>.

110. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-329, AGENCIES WIDELY USED INDEFINITE CONTRACTS TO PROVIDE FLEXIBILITY TO MEET MISSION NEEDS (2017).

delivery at the time of contract award, program offices can accommodate unforeseen needs on an ongoing basis through issuance of orders. For example, an Army contract for Aerial Target Systems training and testing is intended for use by all military departments as well as foreign military partners. Since the need for testing and training varies depending on the customer, these requirements were less defined at contract award, and will be more clearly specified at the time of order.¹¹¹

The IDIQ arrangement requires the contractor to be agile in its ability to support operations, which presumably creates an increased burden to ship supplies on very short notice.

The GAO's report also discussed two contracts for Unmanned Aircraft Systems (UAS), which provided "support for overseas contingency operations."¹¹² UAS operations often require "[c]ontractors [to be] deployed for weapon systems maintenance operate out of established overseas military installations or highly secured forward operating bases."¹¹³ If the exporter was obligated under the contract to transport the equipment to contractors overseas, then prior to the 2019 amendment, it would not have qualified for the "for official use"¹¹⁴ element of Section 126.4(a) or the "for end-use by" provision of Section 126.4(c),¹¹⁵ even though it was supporting American military operations.

One illustrative DoD contract opportunity calls for Requests for Information from industry for procurement of supplies and services "related to integration of a [counter-UAS Family of Systems]."¹¹⁶ Under this contract, the "systems integration partner" will be responsible for integrating sensors and systems to provide "layered defense for [Special Operations Forces] Operators in a variety of . . . environments [outside of the continental United States (OCONUS)]."¹¹⁷ The contractor will need to "[c]oordinate with the

111. *Id.* at 14.

112. *Id.* at 18–19.

113. Keric D. Clanahan, *Wielding a "Very Long, People-Intensive Spear": Inherently Governmental Functions and the Role of Contractors in U.S. Department of Defense Unmanned Aircraft Systems Missions*, 70 A.F. L. REV. 119, 173 (2013).

114. 22 C.F.R. § 126.4(a) (2019 Pre-Amended Rule).

115. *Id.* § 126.4(c) (2019 Pre-Amended Rule).

116. *Contract Opportunity: Counter Unmanned Systems (CUxS), Systems Integration Partner (SIP)*, BETA SYS. FOR AWARD MGMT., https://beta.sam.gov/opp/65fa7d2fd0984bed9cb6f2187afd07e3/view?keywords=unmanned&sort=relevance&index=opp&is_active=true&page=1&inactive_filter_values=false&opp_publish_date_filter_model=%7B%22dateRange%22:%7B%22startDate%22:%222020-05-06%22,%22endDate%22:%222020-05- (last visited Nov. 19, 2020).

117. *Id.*

Government logistics team in the fielding of packaged solutions.”¹¹⁸ The contract will also require contractors to be able to “staff and support 24x7 work week . . . including . . . OCONUS deployments to active armed conflict areas.”¹¹⁹ This solicitation exemplifies the integrated nature of the contractor-military relationship in UAS operations and illustrates the contractor’s need—and government’s expectation—of flexibility to provide overseas support “in the event of an immediate surge or a reduction in requirements.”¹²⁰

In the absence of an advisory opinion from DDTC, a risk-averse company would err on the side of first seeking authorization from DDTC rather than relying on direction from the DoD. The 2019 amendment, however, provides clearer guidance for exporters in this position and expressly answers the looming question of whether the exemption applies to private entities.¹²¹ The exemption now provides for entities in a contractual relationship with the government to export without a license in specific circumstances,¹²² or for any person or entity to ship to the government without a license as long as it is at its written direction.¹²³

B. The Exemption May Continue to Exacerbate Agencies’ Oversight Challenges

1. A Note on Department of Commerce’s GOV Exemption

Though the focus of this article is the ITAR exemption for government use, the Department of Commerce’s Bureau of Industry and Security’s (BIS) role in regulating sensitive exports cannot be understated. While the State Department has jurisdiction over the export of defense articles on the munitions list, the Commerce Department’s jurisdiction covers the export of quite literally everything else. BIS regulates exports through the Export Administration Regulations (EAR) Commerce Control List (CCL), the scope of which covers the export of everything from nuts and bolts to commercial aircraft. As a result, contractors involved in defense exports often juggle both the ITAR and the EAR when shipments include both military equipment and commercial products. The CCL also regulates “dual-use” items, also known as “600-series” items, which are items that moved from the USML to the CCL during the

118. *Id.*

119. *Id.*

120. *Id.*

121. 22 C.F.R. § 126.4(a)(1)(ii)(A)–(D) (2019 Amended Rule).

122. *Id.* (2019 Amended Rule).

123. *Id.* § 126.4(b) (2019 Amended Rule).

Export Control Reform Initiative, an administrative attempt at harmonizing the multiple export control regimes.

The EAR contains a number of exceptions, as the ITAR does exemptions, which allow exporters to ship without a license. Notably, the EAR contains an exception called GOV.¹²⁴ This regulation generally authorizes exporters to ship products (excluding 600-series items) when they are “for personal use by personnel and agencies of the U.S. Government,”¹²⁵ when they are “made by or consigned to a department or agency of the U.S. Government,”¹²⁶ or when they are “made for or on behalf of a department or agency of the U.S. Government.”¹²⁷

This third option somewhat mirrors the contentious language of the §126.4 exemption, but it sheds some additional light. The regulation goes on to authorize exports that are “for use by a department or agency of the U.S. Government, when: [t]he items are destined to a U.S. person; and [t]he item is exported . . . pursuant to a contract between the exporter and . . . the U.S. Government.”¹²⁸ The exception further applies to exports to “support . . . cooperative program[s] . . . or arrangement[s] with a foreign government or international organization,”¹²⁹ much like the ITAR exemption. Finally, the exception explicitly authorizes exports without a license “pursuant to an official written request or directive from the U.S. Department of Defense,”¹³⁰ again raising the question of what constitutes a written request or directive.

This exception may also be used to ship to cooperating governments or NATO members, again excluding 600-series items and a number of other exclusions.¹³¹ The use of this exception does not appear to require a contract, written direction, or even consent of the U.S. Government.

EAR compliance is extremely important for exporters. Not only is the jurisdiction incredibly broad, but the regulations are more complex, and the enforcement actions for violations tend to be even more severe than those imposed upon ITAR violators. Though the goal to completely harmonize the export control regimes into one set of regulations never came to fruition, defense contractors with ITAR-controlled products must also understand their obligations

124. 15 C.F.R. § 740.11 (2020).

125. *Id.* § 740.11(b)(2)(i).

126. *Id.* § 740.11(b)(2)(ii).

127. *Id.* § 740.11(b)(2)(iii).

128. *Id.* § 740.11(b)(2)(iii)(A)(1)–(2).

129. *Id.* § 740.11(b)(2)(iii)(B).

130. *Id.* § 740.11(b)(2)(iv).

131. *Id.* § 740.11(c).

under the Commerce Department's EAR when it comes to carrying out military contracts, as more and more formerly ITAR-controlled products shift under the watchful eye of BIS.

2. *Improved Alignment Between the State Department and the DoD: Two Arms of American Foreign Policy*

Though defense contractors generally see this rule as a triumph,¹³² it illustrates a more widespread concern related to administrative oversight of national security and foreign policy. Section III(A) discussed the increasing role of contractors in overseas military operations, a necessity for the DoD to augment its personnel, but a bane for government accountability.

If export controls pose a question of balance of powers, it does not fall within the traditional debate of legislative versus executive powers. Considering all the governmental actions that plague legal analysts as to the federal balance of powers, the authority over arms controls historically, and mostly uncontestedly, bends toward the executive branch. Dating back to *United States v. Curtiss-Wright Export Corp.*,¹³³ the president has had broad discretion over decisions concerning national security. The Court held that "the President alone has the power to speak or listen as a representative of the nation."¹³⁴ The more pressing struggle over authority to administer the AECA is between the administrative agencies with a stake in foreign policy.¹³⁵

The AECA delegates the authority and the duty to control arms exports to the State Department.¹³⁶ The role that arms exports play in foreign policy, however, extends beyond the State Department into the realm of national defense, necessarily implicating the DoD and other national security agencies. Though these agencies fall under the control of the executive, each agency has a distinct charter with regard to the execution of foreign policy.

The DDTC's mission is, "[e]nsuring commercial exports of defense articles and defense services advance U.S. national security and foreign policy objectives."¹³⁷ Generally, the State Department's role in arms administration can be broken into three prongs: policy,

132. See, e.g., Shane & Scheetz, *supra* note 65.

133. 299 U.S. 304 (1936).

134. *Id.* at 319.

135. See, e.g., IAN F. FERGUSSON & PAUL K. KERR, CONG. RSCH. SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 3–4 (2019).

136. 22 U.S.C. § 2752(b).

137. *The Directorate of Defense Trade Controls (DDTC)*, U.S. DEP'T OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_about_us_landing (last visited Jan. 10, 2020).

licensing, and enforcement.¹³⁸ In its capacity for determining defense trade policy, the DDTC is primarily responsible for maintaining the ITAR, developing technology policy, and analysis of end-users and countries to establish export eligibility.¹³⁹ The licensing arm coordinates review and approval of all export licenses and agreements, as well as provides guidance and advisory opinions to exporters.¹⁴⁰ Finally, the enforcement arm of the DDTC “is tasked with ensuring compliance with the AECA and ITAR through civil enforcement of the regulations and coordination with law enforcement regarding criminal violations.”¹⁴¹

Meanwhile, the DoD’s primary agency concerned with arms controls is the Defense Security Cooperation Agency (DSCA), whose mission is to “advance U.S. national security and foreign policy interests by building the capacity of foreign security forces to respond to shared challenges. DSCA leads the broader U.S. security cooperation enterprise in its efforts to train, educate, advise, and equip foreign partners.”¹⁴² DSCA administers cooperation programs and FMS transactions with the goal of bolstering allies’ military and institutional capabilities in alignment with U.S. interests.¹⁴³

Although the federal agencies are aligned to a unified policy as to the proscribed end-users, locations, and purposes of arms exports, the DoD is in a unique and potentially conflicted position as both a regulator of defense trade as well as a party to the transaction. On one hand, the interest of national security would warrant a full and thorough investigation of each transaction, down to each shipment and email concerning controlled defense articles. On the other hand, the DoD’s realistic need for expeditious overseas support for itself and its allies poses a dichotomous stake in export controls.

The application of many of these ITAR exemptions concerning official use by the U.S. government requires the execution of an exemption letter.¹⁴⁴ In calendar years 2004 to 2006, the DoD and its various components certified 1,900 letters for more than 270

138. *Id.*

139. *Defense Trade Controls Policy (DTCP)*, U.S. DEP’T OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=47ee3b08dbc7bf0044f9ff621f9619d7 (last visited Jan. 10, 2020).

140. *Defense Trade Controls Licensing (DTCL)*, *supra* note 43.

141. *Defense Trade Controls Compliance (DTCC)*, U.S. DEP’T OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=000d7b84dbc7bf0044f9ff621f9619a3 (last visited Jan. 19, 2020).

142. *Mission, Vision, and Values*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/about-us/mission-vision-values> (last visited Jan. 19, 2020).

143. *Id.*

144. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 62.

exporters.¹⁴⁵ The State Department has no prior review of any transactions authorized certified under these exemption letters, which has caused friction amongst the agencies.¹⁴⁶ Generally, the process is as follows:

[s]ome ITAR exemptions apply to exports that directly benefit [DoD] activities, ranging from support of defense cooperative programs, such as the Joint Strike Fighter, to providing equipment and technical services necessary to support U.S. forces in foreign locations. For such exemptions, [DoD] confirms whether the export activity appropriately qualifies for the use of an exemption and typically documents this confirmation in a written letter directly to the exporter or sometimes to the cognizant [DoD] program office that the exemption will benefit.¹⁴⁷

Certification guidelines were drafted but never issued department-wide.¹⁴⁸ DoD Instruction 2040.02 provides that the Director of the Defense Technology Security Administration is responsible for developing policy of how the DoD uses ITAR exemptions, but this directive does not explain exactly what that policy is.¹⁴⁹ The Foreign Military Sales Handbook provides some, but very limited guidance on how the DoD should handle this exemption.¹⁵⁰ Agencies may authorize the use of the exemption “by submitting a written request through the Technology Security Directorate of the Defense Threat Reduction Agency.”¹⁵¹ One 2004 memo from the Under-Secretary of Defense offered some guidance on how the Section 124.6 exemption should be invoked by military departments, but this guidance appears to have expired in 2006.¹⁵² Similarly, the National Security Administration, which is under the oversight of the Department of Homeland Security, appears to have its own, disparate process for authorizing ITAR exemption/exception letters

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. DEP'T OF DEF., INSTRUCTION NO. 2040.02, Enclosure 2, ¶ 3.a, 3.p (Mar. 27, 2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/204002p.pdf?ver=2019-01-28-141235-830>.

150. ANTHONY J. PERFILIO, FOREIGN MILITARY SALES HANDBOOK § 10:65: EXPORTS FOR U.S. GOVERNMENT END USE, n.1, Westlaw (2019).

151. *Id.*

152. Memorandum from Lisa Bronson, Deputy Under Secretary of Defense, Technology Security Policy and Counterproliferation, to Deputy Assistant Secretary of the Army for Defense Exports and Cooperation; Director, Navy International Programs Office; Deputy Under Secretary of the Air Force for International Programs, at 6 (Mar. 8, 2004) (on file with author).

via its Technology Security and Export Control Office.¹⁵³ As such, there is no standard protocol for how government officials should certify the use of ITAR exemptions, and limited confidence in the reliability of the data for the State Department to validate.

One of the most significant concerns raised by the State Department was that the DoD was improperly certifying the use of the former Section 126.4(a) to authorize contractors, asserting that the use of that exemption was reserved for United States government personnel only.¹⁵⁴ Guidelines issued to the military departments set forth the circumstances under which they are authorized to certify the use of Section 126.4.¹⁵⁵ Paragraph (d) provides that Sections 126.4(a) and (c) may be used:

when the services of US persons (e.g., US industry) are required pursuant to the following USG activities: 1. USG sales, loans, leases or grants of defense articles, services and technical data to foreign governments 2. International cooperative armaments research, development and acquisition agreements. 3. Government-to-government military and civilian personnel exchange agreements. 4. Combined military operations and training. 5. Unilateral US military operations abroad.¹⁵⁶

Thus, the memo concedes that U.S. industry is needed to support these types of missions and represents the DoD's policy of when private entities may export their services, though this interpretation was exactly what State had previously disagreed with.¹⁵⁷ Paragraphs (i) and (j) explain the standard for authorizing the export of hardware using Section 126.4.¹⁵⁸ The two paragraphs distinguish between the former Sections 126.4(a) and (c), both of which authorize temporary imports and temporary or permanent exports of defense articles, services, and technical data, but the significant distinctions between the two are that Section 126.4(a) was reserved for transfers "for official use by the Military Department, or pursuant to a USG sale, . . . or international cooperative armaments research, development or acquisition agreement administered by the Military Department"¹⁵⁹ and Section 126.4(j) was for transfers "for end use

153. *Technology Security and Export Control*, NAT'L SEC. AGENCY CENT. SEC. SERV., <https://www.nsa.gov/business/programs/export-control-policy/> (last visited Jan. 20, 2020).

154. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 62.

155. Memorandum from Lisa Bronson, *supra* note 152, at 3 ¶ d(1)–(5).

156. *Id.*

157. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 62.

158. Memorandum from Lisa Bronson, *supra* note 152, at 4 ¶ i, j.

159. *Id.* at 4 ¶ i.

by the Military Department in a foreign country pursuant to a contract with, or pursuant to the written direction of, that Department.”¹⁶⁰ The memo further specifies that the “[u]se of exemptions will not be certified solely for the benefit of the exporter, . . . or for exports to prohibited/embargoed/sanctioned/denied persons, destinations[,] or entities.”¹⁶¹

The 2019 amendment appears to be a sign of progress in resolving this dispute among the State Department and the DoD by carving into the exemption specific circumstances under which a contractor’s export is “for official use by” or “on behalf of” the government. However, in making such progress, this policy change can be interpreted as a concession by the State Department to allow contractors to take on a role in foreign policy that was traditionally deemed to be strictly governmental in nature.

3. *DoD and Underreported Inherently Governmental Functions*

National security operations require a long, interconnected chain of expert engineers, operators, and decision-makers to carry out missions.¹⁶² DoD contractors perform a wide array of functions, including “professional and management support, information technology support, and weapon system support.”¹⁶³ Contractors are therefore inextricably embedded with the military in ensuring mission success. Congress has acknowledged the military’s growing reliance on private contractors and has since tightened the DoD’s reporting requirements as to the number of contractors employed and for what types of services.¹⁶⁴ The GAO has found these reports to be insufficient and the volume likely inaccurate.¹⁶⁵

The concern raised is that DoD contractors are performing activities that cross the line into functions that an ordinary citizen would expect to be reserved for government entities.¹⁶⁶ The Federal Acquisition Regulations (FAR) prohibit the use of federal contracts to private firms for the provision of inherently governmental

160. *Id.* at 4 ¶ j.

161. *Id.* at 4 ¶ k.

162. *See supra* Section III(A).

163. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-17, DO D INVENTORY OF CONTRACTED SERVICES: TIMELY DECISIONS AND FURTHER ACTIONS NEEDED TO ADDRESS LONG-STANDING ISSUES 1 (2016).

164. 10 U.S.C. § 2330a(c) (approved 2019).

165. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 163, at 10.

166. Clanahan, *supra* note 113, at 140 (citing Interview with James (Ty) Hughes, former Deputy Gen. Counsel, Acquisitions, Office of the Sec’y of the Air Force (SAF/GCQ) (Feb. 13, 2012)).

functions¹⁶⁷ (IGF) and lays out a non-exhaustive list of examples, including commanding military forces,¹⁶⁸ conducting foreign relations,¹⁶⁹ and directing or controlling intelligence and counter-intelligence operations.¹⁷⁰

The FAR go on to outline functions that are not inherently governmental but “may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance.”¹⁷¹ Such functions may include “[c]ontractors participating in any situation where it might be assumed that they are agency employees or representatives.”¹⁷² These functions are referred to as “closely associated with inherently governmental functions” (CAIG).¹⁷³

One particular function of the DoD that presents a severe risk of IGF and CAIG is in the administration of UAS programs, also known as drones.¹⁷⁴ The DoD currently operates more than 11,000 UAS,¹⁷⁵ up from 7,000 in just 2010.¹⁷⁶ The human resources needed for the engineering, manufacture, operation, maintenance, support, and logistics related to maintaining a single UAS is astronomical due to the rapid expansion of UAS systems for intelligence, surveillance, and reconnaissance (ISR), and general mission support.¹⁷⁷ UAS operations require contractor support because:

the medium to large UAS aircraft make up only a single component of a very complex system. It involves U.S. based grounded flight operators, sensor operators, communications technicians, and imagery analysts, it includes fielded forces and personnel directing takeoff, landing and recovery procedures, and also includes forward deployed maintenance and

167. 48 C.F.R. § 7.503(a) (2020).

168. *Id.* § 7.503(c)(3).

169. *Id.* § 7.503(c)(4).

170. *Id.* § 7.503(c)(8).

171. *Id.* § 7.503(d).

172. *Id.* § 7.503(d)(13).

173. DEP'T OF DEF., HANDBOOK OF CONTRACT FUNCTION CHECKLISTS FOR SERVICES ACQUISITION 7 (May 2018), https://www.dau.edu/cop/ace/DAU%20Sponsored%20Documents/DoD_Handbook_for_Contract_Function_Checklists.pdf.

174. Clanahan, *supra* note 113, at 121.

175. *Unmanned Aircraft Systems (UAS): DoD Purpose and Operational Use*, U.S. DEP'T OF DEF., <https://dod.defense.gov/UAS/> (last visited Jan. 19, 2020).

176. Peter Singer, *Unmanned Systems and Robotic Warfare*, BROOKINGS INST. (Mar. 23, 2010), <https://www.brookings.edu/testimonies/unmanned-systems-and-robotic-warfare/>.

177. Clanahan, *supra* note 113, at 138.

logistics crews who keep the aircraft and payload . . . mission ready.¹⁷⁸

The FAR's superficial description of inherently governmental functions fails to encapsulate the assembly line of activities that contractors perform in the operation of UAS, but given the nature of ISR missions, it could be argued that any control that a private individual has over a UAS conducting an ISR mission could be violative of Section 7.503(d). The first step in this supply chain is the transportation of the equipment, which now, due to Section 126.4(b), can be more leniently applied by the contractor. The GAO warns that "the government can become overly reliant on contractors in some situations, such as when a contractor performs functions that put an agency at risk of losing control over functions that are core to its mission and operations."¹⁷⁹

The carving out of Section 126.4(b) to allow for contractors to execute the export of defense articles without a license at the mere request of the DoD is an extension of the trend toward increased contractor control over certain military functions and, as a result, diminished governmental oversight.

IV. CONCLUSION

If the goal of defense export controls is, as the AECA purports "a world which is free from the scourge of war and the dangers and burdens of armaments,"¹⁸⁰ then regulatory exemptions reflect instances where the need for exporters under contract with the military to act quickly and stealthily outweighs the State Department's need for oversight. Often, the policy behind the ITAR exemption hinges on the parties involved. The State Department's concession of Section 126.4 seems to rely upon its trust in its fellow federal agencies to appropriately certify and monitor the actions of its contractors exporting controlled military technology overseas. There is some cause for concern in the State Department's reliance on the DoD. GAO's findings that the DoD failed to properly report and track the use of ITAR exemptions¹⁸¹ coupled with the DoD's questionable oversight of contractors performing activities closely associated with inherently governmental functions¹⁸² call into question

178. *Id.* at 137–38.

179. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 163, at 1.

180. 22 U.S.C. § 2751.

181. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 62.

182. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 163 ("What GAO Found").

the national security risks associated with giving defense contractors greater deference in ensuring the legitimacy of their export.

It is not uncommon for weapons bought by the United States military to find themselves in the hands of those whom they were purchased to defend against.¹⁸³ An independent organization “committed to working towards understanding the landscape of illicit weapon flows”¹⁸⁴ found that an anti-tank missile was diverted to the Islamic State within fifty-nine days, suggesting that “that there are not many intermediaries in this chain of custody.”¹⁸⁵

As the global War on Terror continues and tensions escalate with Iran, the military’s reliance on contractors to operate and maintain advanced weapons systems is only likely to grow. With the existence of contractor logistics support contracts, the DoD relies upon timely shipment of hardware and spares to support active weapons systems. State Department export controls apparently did not contemplate these time-sensitive and high-stakes contractual arrangements. The amendment of Section 126.4 of the ITAR is evidence of a trend toward reforming export laws to contemplate scenarios where contractors are operating less like international arms brokers and more like an extension of the DoD. The DoD must improve its oversight of private contractors in light of the State Department’s increased leniency in order to minimize national security risks.

183. *E.g.*, Gabe Joselow, *ISIS Weapons Arsenal Included Some Purchased by U.S. Government*, NBC NEWS (Dec. 14, 2017, 10:51 AM), <https://www.nbcnews.com/news/world/isis-weapons-arsenal-included-some-purchased-u-s-government-n829201>.

184. *About Us*, CONFLICT ARMAMENT RSCH., <https://www.conflictarm.com/about-us/> (last visited Jan. 20, 2020).

185. Joselow, *supra* note 183 (citing an interview with Damien Spleeters).