Rethink Plans to Loosen U.S. Arms Controls on Arms Exports

Barry Kellman, DePaul University

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In an effort to promote exports, Obama administration officials have proposed that the Department of Commerce assume responsibility for reviewing licenses to export certain military equipment and services now regulated by the Department of State. The goal of the initiative, as described by the State Department, is to take advantage of the flexibility inherent in the Commerce Department’s system to ease the export of less-sensitive equipment.

This may be advisable for certain low-risk equipment, such as spare parts for nonlethal equipment. The administration, however, also is considering whether to relax controls for lethal equipment, such as small arms and related ammunition, that may not directly threaten a U.S. military advantage but may contribute to atrocities. This approach ill serves the United States because it weakens oversight of small arms that, in the hands of tyrants or terrorists, can threaten U.S. interests.

Last year, the United States authorized the export of small arms worth hundreds of millions of dollars, including to countries with extremely poor human right records and militants linked to al Qaeda, such as Nigeria. Exported weapons often change hands undetected; one in seven arms exports is destined for or end up with “unfavorable” users. A 2003 study found that 49 percent of the 76 unfavorable determinations involved firearms and ammunition.

In light of the human rights implications of weapons transfers, the administration should reconsider the proposal to shift licensing authority to the more lenient Commerce Department system for any items that could be used to commit atrocities or violate human rights. The State Department’s more-rigorous oversight is more likely to prevent the illicit transfer of small arms and other equipment and services to individuals and governments that would misuse them. Indeed, the administration should ensure that the State Department does not approve the export of such equipment and services to countries with a consistent track record of committing atrocities.

**Proposed Reforms**

The Obama administration has proposed wide-ranging reforms of the export control regime, the centerpiece of which is the movement of a large number of items from the list of equipment controlled by the State Department, the U.S. Munitions List, to the list controlled by the Commerce Department, the Commerce Control List. Although the administration must notify Congress of such proposed shifts in licensing authority, it does not need congressional permission to implement the proposed reforms.

Over the last few years, the administration has reviewed several categories of equipment and proposed regulations that would transfer control of export approval for certain equipment to the Commerce Department. It plans to finalize the review process this year.

A full review of these proposals is outside the scope of this article. Instead, the discussion below will focus on the statutory distinctions between the departments’ oversight regimes that cannot be changed by regulations, including those that make the State Department’s oversight regime inherently stronger.
Export control policy has a simply stated objective: protecting the United States from the security risks associated with technology transfer. Exports are to be encouraged, but some technologies could contribute to an adversary’s capability to threaten U.S. national security now or in the future. Much of U.S. export control policy focuses, therefore, on technologies for nuclear, chemical, and biological weapons; delivery systems for such weapons; and other specialized technologies, such as lasers, satellites, and cybersystems.

Exports of less-sophisticated military equipment, including semiautomatic and automatic weapons, are controlled for altogether different reasons. These small arms are plentiful and cannot seriously be considered sensitive technology. Illicit traffic in firearms and small weapons does not threaten a technological edge of the United States.

Such exports are controlled because a significant amount of violence that actually occurs, including against U.S. military and law enforcement personnel, is inflicted by small arms. By one estimate, 1,000 people are killed every day around the world by terrorists, insurgents, and criminal gangs using such weapons. Thus, controlling small arms exports is uniquely concerned with diminishing the role of firearms and related small weapons in inflaming global conflict, tyranny, terrorism, and crime.

Various items and services that may not threaten a U.S. military advantage may be used to engage in atrocities, repression, or other forms of mass violence. For example, surveillance technology or training in security operations, both of which historically have been subject to State Department licensing requirements, have been used by oppressive governments to undermine calls for democratic reforms. Export by the United States of such sensitive equipment to oppressive regimes can inflame anti-U.S. sentiment. As the Department of Defense stated in the 2010 “Quadrennial Defense Review Report,” well-trained and -equipped defense forces that are not accountable to the rule of law can be “counterproductive” to U.S. interests. Yet, administration officials have already relaxed restrictions on certain military training and considered easing restrictions on exports of some small arms, including semiautomatic firearms and related munitions.

**Protecting Human Rights**

Congress has crafted an elaborate statutory regime to prevent the export of U.S. weapons that would threaten U.S. interests. That regime includes restrictions on the export of defense items and services to individuals engaged in human rights abuses. Items having “substantial military utility” are subject to special controls by law, including registration requirements, rigorous licensing requirements, re-export restrictions, end-use monitoring, reporting requirements to Congress, and criminal penalties and disbarment from federal contracts for violators.

Administration officials have asserted authority to transfer jurisdiction over exports of military equipment, including items such as semiautomatic firearms that clearly have substantial military utility, to the Commerce Department. Such a transfer of jurisdiction would mean that the export of such items would no longer be subject to the special controls established for significant military equipment, thus creating a greater risk of illicit transfers.

Several questions warrant closer review: Will items that are placed under the authority of the Commerce Department still be subject to the national security and human rights provisions of the Foreign Assistance Act, and if so, how will officials know which items are covered? Will the loss of special controls for the export of military equipment placed under the control of the Commerce Department undermine efforts to prevent arms trafficking? How can the U.S. government best ensure effective review of items once they have been exported? Does the Commerce Department have the requisite expertise and statutory authority to ensure effective detection and prosecution of violators?

At a minimum, the impacts of the proposed transfer of export control authority on the United States’ ability to suppress global traffic in atrocity-enabling arms must be thoroughly assessed, including the potential financial implications of hiring more Commerce Department oversight officials to deal with the increased workload. Yet, evidence of such careful assessment is scant. According to U.S.
government auditors, “U.S. agencies have not fully assessed the potential impact that export control reform of control lists might pose for the resource needs of the range of compliance activities agencies undertake, as suggested by federal internal control standards and executive branch requirements.”[6] This question is especially important because some State Department enforcement officials are funded through registration fees collected from those engaged in exporting items regulated by that department. The shift of items to Commerce Department control could therefore lead to a reduction in fees used to fund existing enforcement activity.

In other words, the question that should be central to how the United States controls arms exports has not yet been officially answered. Transferring export control oversight over such articles and services from the State Department to the Commerce Department could jeopardize this system’s capacity to stanch the illicit trade in arms. Because the State Department is best positioned to lead U.S. policy against the global traffic in small arms, central authority to judge export applications for significant military equipment should remain with the State Department.

**Human Rights and Arms Exports**

The statutory regime governing the export of arms is closely linked with federal laws that regulate the provision of security assistance, including the export of defense articles, to foreign governments. The Foreign Assistance Act contains specific restrictions on the export of defense articles[7] to governments that support terrorism, violate internationally recognized human rights norms, or interfere with humanitarian operations.[8]

It is unclear whether these restrictions will apply to the export of items placed under Commerce Department control. The State Department maintains a list of defense articles as part of its export control process. In order to transfer licensing authority for these items to the Commerce Department, the Obama administration must remove these items from the State Department list. Once the transfer is complete, officials will face the difficult task of determining whether, for example, a semiautomatic rifle is a defense article for the purpose of the Foreign Assistance Act, given that it is no longer considered such for the purpose of the export regime. A large number of items may ultimately be placed under Commerce Department control, thus complicating the process for determining which statutory regime applies to which item.

Therefore, the administration’s expansive reading of its authority to transfer export control authority over certain items to the Commerce Department may undermine key human rights and national security provisions of the Foreign Assistance Act. At the least, the shift of export authority to the Commerce Department will create ambiguity concerning which items continue to be covered by that law. At worst, the shift would allow the export of significant military equipment without regard to the legal protections created to prevent such transfers to human rights violators.

Past experience suggests that Washington’s ability to predict which governments will remain in power and can be trusted to use U.S. weaponry solely for legitimate defense purposes is mixed at best. Countries that consistently receive poor marks for human rights practices from the State Department continue to receive significant arms exports. Friendly governments are subject to sudden changes. In light of such risks, it may be advisable to ensure that small arms that fuel regional instability, insurgencies, and human rights violations remain subject to the special controls of the State Department’s oversight regime.

The State Department is better situated to ensure that arms exports do not undermine respect for human rights. The bureau charged with enforcing relevant provisions of the Foreign Assistance Act is in the State Department. Other bureaus in the department have the requisite expertise to evaluate the potential impact of arms exports on the development or lack thereof of the rule of law in recipient countries. Absent a clear advantage to transferring control of exports of such inherently risky equipment to a department primarily charged with promoting business opportunities, such oversight responsibilities should remain at the State Department.

**Detecting Dangerous Exports**

The State Department’s oversight system entails a series of mechanisms designed to ensure
oversight of the vast array of entities engaged in arms exports. U.S. arms manufacturers and exporters, as well as brokers who negotiate weapons transfers to or from U.S. entities, must be registered with the State Department and must provide substantial information on their activities. During export license review, attention is paid to “unfamiliar foreign parties, unusual routing, overseas destinations with a history of illicit activity or weak export/customs controls, commodities not known to be in the inventory of the host country’s armed forces, and other indicators of concern.”[9]

According to law enforcement officials, this registration and licensing process helps early identification of suspicious transactions and creates an evidentiary trail that has been critical to the denial of potentially dangerous arms exports and successful prosecutions of arms traffickers. For example, investigators uncovered efforts by a United Technologies subsidiary to help China build a new attack helicopter when the company made voluntary disclosures about the transactions, likely in an effort to prevent its disbarment from federal contracts for failure to report an improper transfer.[10]

This is not to say that State Department authority over arms exports operates flawlessly. For example, an exemption from State Department licensing reportedly contributed to the illicit transfer of armored vehicles to Iran.[11] Yet, the State Department’s oversight regime provides a much stronger base on which to make improvements than that offered by the Commerce Department’s inherently weaker system.

Preventing Illicit Retransfers

Preventing legally exported arms from finding their way to the illicit market and to use in grave crimes is a serious policy challenge. The Obama administration has strengthened tactics to detect and deter unauthorized retransfers and diversion of legally exported arms. This policy reflects support for the developing international norm that all countries should adopt policies to curtail arms trafficking. Unfortunately, the administration’s proposed changes in oversight could directly undermine this effort.

The foundation of a policy against arms trafficking is a tracking system that begins with export licensing and extends to verification of foreign recipients of the items exported to it. From this tracking system, the State Department prepares reports to Congress about U.S. participation in the international arms market. Such reports would no longer be statutorily required for arms over which the Commerce Department has export control authority.

Moreover, the Commerce Department does not necessarily have the same close relationship as the State Department with foreign law enforcers with whom U.S. officials cooperate in conducting postexport investigations. U.S. officials often cooperate with well-trained and well-equipped foreign law enforcers. These efforts all operate under agreements that enable civil and criminal investigations within their jurisdiction. Yet, the lack of proper laws and law enforcement training in foreign countries is a perpetual problem. To address it, the State Department offers technical and financial assistance in the areas of law enforcement, export control assistance, and stockpile management.[12]

To combat illicit arms trafficking, it makes sense that the department that has licensing authority over arms exports can knowledgeably and rapidly make inquiries about prospective applicants’ criminal activities. The critical functions of analyzing data and detecting criminal linkages with regard to arms exports must be as robust and focused as possible. Whether the existing export control system, with authority vested in the State Department, can be shifted to the Commerce Department without reducing its effectiveness for prosecuting weapons traffickers is a policy question that Congress must carefully assess.

Although the Commerce Department could draw on State Department expertise in these matters, the Commerce Department’s avowed focus is “to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand” for certain goods and to “further significantly the foreign policy of the United States and to fulfill its international responsibilities.”[13] Protecting against diversion of sensitive arms technologies that
could threaten vital U.S. interests—which is part of the Commerce Department's current mission—calls for a different set of skills than preventing diversion of arms that stoke regional instability and human rights calamities. Small arms trafficking can generate a distinctive evidence trail, pointing not to premier U.S. laboratories from which sensitive information might have been stolen but to criminals that are involved in the illicit trafficking of drugs, money, art, and human beings.

Preventing such international trafficking crimes is a core State Department responsibility. Therefore, transferring arms export control authority over high-risk equipment away from the department with expertise in monitoring broader trafficking networks could allow arms to flow undetected into the international market and more easily reach governments and individuals with ties to terrorism or human rights abuses.

**Prosecuting Arms Traffickers**

One of the biggest untold stories in global peace and security in the past few years has been the successful prosecution of international arms traffickers. Viktor Bout and Monzer al Kassar are only two of the more high-profile lords of war to find their bloody careers ending in federal prison. Significantly, many of these recent prosecutions of arms traffickers have included charges for violations of the State Department’s statutory regime, the Arms Export Control Act (AECA), which criminalizes the unlicensed import or export of defense articles.[14]

Bringing a criminal prosecution against a weapons trafficker under the AECA offers some important advantages. The prosecutor must demonstrate only “that the defendant voluntarily and intentionally violated a known legal duty not to export the proscribed articles.”[15] An act is illegal if it is committed with the knowledge that it was prohibited by law and with the purpose of disobeying or disregarding the law.[16]

The government is not required to prove that the defendant had specific knowledge of the licensing requirements under the AECA, nor must prosecutors establish a specific intent to affect world peace and the security and foreign policy of the United States because “the illegal exportation of arms could well have consequences far beyond what the defendant contemplated or understood.”[17]

If export control authority over arms is transferred to the Commerce Department, then criminal prosecutions of traffickers will have to proceed under the regulations that authorize that department to oversee exports. It remains unclear whether the Commerce Department’s regulatory regime reaches the middlemen that broker these illegal transactions.

The AECA, which currently authorizes the State Department to regulate arms exports, was amended to specifically address the problem of weapons brokers,[18] who play a substantial role in facilitating and stoking the global market. Reaching their activities has been an important policy priority and has led to successful prosecutions.[19]

There is no comparable extension of authority over brokers under Commerce Department regulations. There is broader language that extends criminal liability to anyone who “aids or abets in the commission of a violation.”[20] The recent expansion of the Commerce Department’s regulatory authority to specifically impose responsibility on corporations or other legal entities that enable or assist in export control violations may help reduce this problem.[21]

More broadly, it is imperative that prosecution of illicit arms traffickers not be weakened by the proposed transfer of export control authority. Although President Barack Obama’s objective of simplifying the licensing process is laudable, it is far more important to ensure that the United States can effectively prosecute the agents and colleagues of arms traffickers who violate the country’s export control laws.

**The Solution**

In light of these concerns about the Commerce Department’s authority and expertise to oversee the export of arms, no equipment or service with substantial military utility should be made subject to
that department’s control. The administration could still transfer to the Commerce Department control of the export of a great deal of equipment that does not contribute to human rights atrocities.

The administration should review its criteria for assessing the risk associated with arms exports that may have deleterious effects on international stability and human rights. Any reforms needed to expedite the licensing process should be accomplished through amendments to State Department regulations. The administration should conduct a high-level review of criteria used to determine whether a country has engaged in a consistent pattern of human rights abuses and therefore is ineligible to receive defense articles under existing law.

Before placing the export of any items under Commerce Department control, the administration should assess how transferring control of arms exports will affect the efficacy of law enforcement. The Commerce Department should not have export authority over any significant military equipment unless the department’s statutory authority is reauthorized and expanded to include brokers and to ensure that relevant provisions of the Foreign Assistance Act continue to apply to exports of military equipment that is under the department’s control.

Conclusion

Illicit traffic in arms undermines regional stability, accelerates rampant human rights violations, and inflames global violence. The United States is dedicated to combating illegal arms trafficking and to prosecuting offenders to the fullest reach of its jurisdiction. It is imperative to determine whether the Obama administration’s plan to transfer authority over exports of low-sensitivity but potentially high-risk military equipment from the State Department to the Commerce Department will help or hinder U.S. efforts to combat illicit arms trafficking.

In the end, arms export licensing decisions should be assigned to officials with the greatest expertise and strongest authority for detecting and analyzing information on suspicious arms exports, for investigating and deterring unauthorized retransfers, and for enabling effective prosecution of apprehended traffickers. No proposal for export control reform should replace a statutory regime specifically designed for this purpose with a regulatory regime that does not contain the same oversight provisions. Congress should carefully review the proposed transfer to the Commerce Department of authority over exports of significant military equipment and services.

Brittany Benowitz is chief counsel of the American Bar Association Center for Human Rights. She previously served as defense adviser to Senator Russell Feingold (D-Wis.). Barry Kellman is a professor of international law and director of the International Weapons Control Center at the DePaul University College of Law. The views expressed in this article are those of the authors.

ENDNOTES


7. See, for example, *U.S. Code* 22 (1961), § 2304.


14. *U.S. Code* 22 (1976) § 2778. The Arms Export Control Act provides that “no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter.”

15. *United States v. Murphy*, 852 F.2d 1, 6 (1st Cir. 1988).

16. Ibid.


18. Brokering activities are defined as “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.” *Arms Export Control Act*, § 2778(b)(1)(A)(ii)(II).


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