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DUAL-USE AND MUNITIONS LIST EXPORT CONTROL PROCESSES AND IMPLEMENTATION AT THE DEPARTMENT OF ENERGY

HEARING

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

JUNE 10, 1999

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DUAL-USE AND MUNITIONS LIST EXPORT CONTROL PROCESSES AND IMPLEMENTATION AT THE DEPARTMENT OF ENERGY

THURSDAY, JUNE 10, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Voinovich, Domenici, Lieberman, and Akaka.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. Let us come to order, please.

In June of last year, the Committee heard testimony regarding a general breakdown of our licensing and control of dual-use items. As a result, I requested an agency review last August by the inspectors general of six different agencies. I asked them to review the licensing processes for dual-use and munitions commodities in an effort to determine what weaknesses still exist and what efforts we make to assess other countries' handling of these items after export. Dual-use items are those that have both civilian and military applications and munitions are those that have to do with strictly military applications.

This was an update of a similar report that was issued by four of the agencies back in 1993, so this, in a real sense, is an update of these conclusions. But, obviously, since that request, a great deal of additional information about the problems of our weapons labs with regard to controlling information has surfaced.

The six agencies from whom I requested this report are the Departments of Defense, Energy, Treasury, State, Commerce, and the Central Intelligence Agency. Each of these agencies plays a key role in controlling dual-use and munitions commodities.[1]

The first agency to complete their work is the Department of Energy, and because they have highlighted some particular problems within our nuclear weapons labs, they are here today to discuss their findings. We look forward to, of course, having the other agencies in the not-too-distant future. We are going to have individual reports from the inspectors general of these various agencies

[1] Chairman Thompson's letter, sent to six agencies, dated Aug. 26, 1998, appears in the Appendix on page 25.

and a comprehensive report that tries to tie all of it together so we can look at it from a comprehensive standpoint.

Senator Lieberman.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thanks, Mr. Chairman, for holding this hearing today which addresses a topic of genuine urgency and importance. The export control process is of vital interest to our national security and economic strength and the complex and serious nature of the issues demand the kind of careful and reasoned examination of the process that you requested the Inspectors General of Defense, Commerce, Treasury, State, CIA, and Energy to undertake. So I appreciate the lead that you have taken on this issue.

Let me also thank the witnesses from the DOE Inspector General's office for their very good work in this report on their agency's export control procedures. The report, I think, will help place in context the important issues surrounding a wide range of national security concerns related to American trade and security policies, a matter that has obviously taken on renewed importance in light of the recent release of the Cox report, with its allegations that some American companies had business dealings with the PRC that circumvented or violated the current export control process.

What makes this such a difficult area to deal with, I think, are the complex issues associated with export control. In some cases, controlling high-tech equipment that has both commercial and military application, so-called dual-use commodities, may not be easy. High-performance computers provide an excellent example of this, because technology that is considered sensitive today, or maybe in that case has been considered sensitive yesterday, may be in widespread commercial use today. In other words, it is sometimes going to be difficult to define precisely what technology should or should not, or realistically can or cannot be adequately controlled.

A second difficulty in the crafting of our export control policies is that the United States may not be the only country that produces a specific controlled technology. As the authors of the Cox report have reminded us, other nations around the world may be quite willing to sell to countries that we would consider a possible security threat. So if we undertake unilateral action to place advanced technologies, such as satellites or supercomputers, on our restricted lists, we may in the end not prevent a potential adversary from obtaining it elsewhere, and, of course, we may also be doing some damage to American companies' international market positions. So the best course, though clearly not an easy course, is to arrive at a system of controls on a multilateral basis.

There is also a larger question, I think, that we will need to consider as these hearings go on. The export control system focuses on products, but there are overall industrial capabilities in critical defense areas where we need to ensure that our companies continue to dominate or retain significant market share. So I think we have really got to think big about export controls and look at this larger question of whether the United States will retain industrial capability in the key defense needed technologies.

The answer to the question will have an effect on whether we have a fully robust American defense or whether parts of that ca-

pacity emigrate abroad. In other words, we have a problem here not just of individual products, but of overall technologies.

That, of course, does not mean we should relax our export controls. As the Cox report well reminded us, there is still a great deal of technology in commercial use that can have military applications and there are still many individuals and nations who we obviously cannot count on to use that technology in a manner that coincides with our national security interests. We must take care not to unwittingly provide technologies to nations which may use it to our detriment.

So I think our challenge here is to create an export control regime that protects our national security interests around the world while recognizing that we will harm our national interest if we unduly curtail the legitimate export of American technology for commercial use. By telling us how the current process works, the information discussed in this report that we will hear testimony on today and the additional material we expect from the other inspectors general will assist in framing these issues, and I think in this, Mr. Chairman, this Committee has a unique opportunity under your leadership to really provide some information and, hopefully, reasoned judgment on these complicated issues.

Before closing, let me just make a few brief comments on the specifics of the report that we are going to hear about today.

Most importantly, I guess, I was heartened to read in it that, on a whole, from the perspective of this review of the DOE, the current control process is working. But, I must say, I am also disappointed with some of the report's findings, most significantly the apparent failure by DOE officials to follow proper procedures regarding obtaining licenses for visiting foreign scientists at our national labs. I understand that there are now efforts to remedy this problem, but it is very troubling to learn in this report, or to see here another example of insufficient focus at the labs on the protection of sensitive information. I will be interested in hearing from our witnesses this morning how serious they believe this problem to be and whether they have any reason to believe that sensitive information was, in fact, improperly transferred to parties who should not have seen it.

Mr. Chairman, once again, I thank you for holding this hearing. I look forward this morning to a good, constructive discussion with the witnesses and I thank them for doing a first-rate job in their report.

Chairman THOMPSON. Thank you very much.

Senator Voinovich, did you have any opening comments?

Senator VOINOVICH. No. I am looking forward to hearing the testimony.

Chairman THOMPSON. Thank you very much.

With us today is the Inspector General for the Department of Energy, Gregory Friedman. Accompanying him are Sandra Schneider and Alfred Walter, also from the Inspector General's office.

Your report covers a number of areas and recommendations. I was particularly interested in your findings regarding the deemed export licensing process. I look forward to your explaining to us today what your findings and recommendations are, and particu-

larly as they apply to scientists visiting our labs from other countries, so we appreciate your being with us today.

Mr. Friedman, would you like to make an opening statement? I think we all read your report, but any summary statement you might want to make, we would appreciate it.

TESTIMONY OF HON. GREGORY H. FRIEDMAN,[1] INSPECTOR GENERAL, DEPARTMENT OF ENERGY, ACCOMPANIED BY SANDRA L. SCHNEIDER, ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS, DEPARTMENT OF ENERGY, AND ALFRED K. WALTER, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF ENERGY

Mr. FRIEDMAN. Thank you, Mr. Chairman. Mr. Chairman and Members of the Committee, I am pleased to be here today to testify on the Office of Inspector General's review of the Department of Energy's export licensing process for dual-use and munitions commodities. This review was part of an interagency effort by the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency. It was requested by the Chairman of this Committee as a follow-up to a similar IG review in 1993.

I am joined today at the witness table by Sandra Schneider, the Assistant Inspector General for Inspections, and Alfred Walter, the Director of the Office of Management Operations of the Office of Inspections. They will also be available to respond to the Committee's questions concerning our review.

In short, we determined that the Department of Energy's process for reviewing nuclear dual-use and munitions license applications generally appeared adequate, subject to certain concerns which I will discuss. Our review also identified indicators of possible problems with the licensing of deemed exports.

Certain commodities and technologies are designated as dual-use. That is, they have both a civilian and military application. Some are also designated as nuclear dual-use, items controlled for nuclear nonproliferation purposes. For example, carbon fibers are used in the manufacture of tennis rackets, golf clubs, and fishing poles, yet they are also used in the manufacture of centrifuges for uranium enrichment activities. Another group of controlled commodities is designated as munitions, which are goods and technologies that have solely military uses, such as high explosives.

The Nuclear Transfer and Supplier Policy Division of the Office of Nonproliferation and National Security is responsible for reviewing export license applications and recommending to the Departments of Commerce or State either approval or disapproval of an application. Procedures for processing dual-use license applications submitted to the Department of Commerce are clearly articulated in relevant regulations. However, there is no equivalent process for reviewing munitions cases referred by the State Department.

As part of the interagency review, the Department of Commerce provided a statistically-based sample of 60 export license applications that it had provided to the Department of Energy in the first 6 months of 1998. We determined that all of the 60 cases in the

[1] The prepared statement of Mr. Friedman appears in the Appendix on page 29.

sample were appropriately referred by the Department of Commerce. Our analysis of the 60 cases disclosed that the Proliferation Information Network System, commonly referred to as PINS, contained the required records concerning the recommendations and decisions on the 60 cases. The data in PINS was appropriately secured. PINS provided an adequate audit trail. The Department of Energy analysts were provided an adequate level of training. The escalation process for resolving agency disagreements regarding approval or disapproval of specific license applications appeared satisfactory, and there was no evidence that the Department of Energy analysts were being pressured improperly regarding their recommendations.

We also reviewed whether the Department of Commerce was appropriately referring cases to the Department of Energy through an analysis of an additional random sample of 60 cases provided by the Department of Commerce not previously referred to the Department of Energy. Of the 60 cases not previously referred, a Nuclear Transfer and Supplier Policy Division analyst concluded that one case should have been referred, based on the involvement of a nuclear end user for the commodity. However, the Department of Commerce maintains that the license application was not required, therefore, neither was a referral.

The Department of Energy has delegated to the Department of Commerce the authority to process export licenses for certain commodities without referring them to the Department of Energy. Based on the Department of Energy's review of a sample of the delegated cases, the Department of Energy officials determined that approximately 1 percent should have been referred but were not. The Department of Energy officials plan to rescind the delegations of authority to the Department of Commerce and determine whether they should be continued.

The international traffic in arms regulations implemented by the State Department include the U.S. munitions list, which identifies munitions commodities that are subject to export controls. These items include those used in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. The regulations do not require the State Department to refer license applications for munitions commodities to other agencies for review, and there is no formalized system for escalating and resolving differences among agencies.

As a result, the Department of Energy's role in reviewing munitions license applications is not clear. Historically, the State Department has received few requests for export of nuclear-related commodities but routinely refers any such applications to the Department of Energy for review. The Department of Energy handles munitions license applications in the same manner as dual-use applications referred from the Department of Commerce.

In our 1993 report on the Department of Energy's export license process, it contained 11 recommendations for corrective actions and some still need additional review and action. For example, an assessment of the adequacy of the staffing level for the Nuclear Transfer and Supplier Policy Division is required.

Two other recommendations require the Department of Energy to coordinate with the Department of Commerce to obtain information

regarding the shipment of commodities. The remaining recommendation requires the Department of Energy to coordinate with the State Department to obtain information regarding whether a license application was approved by the State Department for a munitions commodity and whether the commodity was actually shipped. This type of information for both Departments of Commerce and State would assist the Department of Energy analysts in their review of license applications for possible proliferation implications.

I would now like to address our concerns with regard to deemed exports. During our review, there were indicators that the Department of Energy laboratories were not seeking export licenses for foreign nationals having access to certain unclassified information. According to the Export Administration Regulations, any release to a foreign national of technology or software that is subject to those regulations is, "deemed to be an export" to the home country of the foreign national.

Our review included a relatively small judgmental sample of foreign national assignees from China, India, Iran, Iraq, and Russia who were involved for more than 30 days in unclassified activities at four the Department of Energy laboratories. We then identified several cases where an export license may have been required because of the information being accessed or the individual's employer. We found that laboratory guidance was not clear. We believe this stems from the fact that the Export Administration Regulations and internal the Department of Energy guidelines do not clearly explain when a deemed export license may be required.

We also found the laboratories we surveyed generally rely on the hosts of the foreign national assignee to determine whether there are export concerns. We found several hosts who were not aware of or did not understand the requirements for deemed export licenses and several hosts who did not appear to exercise appropriately their host responsibilities. Our review also disclosed that there is no organization within the Department of Energy that has management responsibility for the deemed export license process.

In response to our report and our recommendations, the Department has told us that it is clarifying its policies and has initiated a number of other corrective actions, including the establishment by the Under Secretary of an export control task force to review export control issues relating to the Department of Energy facilities, including deemed exports.

Mr. Chairman, this concludes my testimony. My colleagues and I would be pleased to answer any questions you might have.

Chairman THOMPSON. Thank you very much, Mr. Friedman, for a good presentation and a good report. We thank you and your entire staff for that.

As I said earlier, this is going to be the first of several hearings on these subjects, and it is a subject that is going to be with us for a while. It has become very high profile. It is of obvious importance.

The dual-use commodities matter, of course, is regulated primarily by the Export Administration Act. We are going to hear a lot about that. The Export Administration Act of 1979 expired in 1994, and its policies have been continued pursuant to executive

order since that time, but Congress is going to take up the matter of the Export Administration Act now for the first time in a long time. There have been some amendments to it, but, basically, the 1979 framework is pretty much what we have been operating under. We are going to readdress that.

One of the things we are dealing with here today is the body of rules and regulations that have been promulgated by the Commerce Department pursuant to the Export Administration Act, the Export Administration Regulations. So that is what we are dealing with.

Here today, the Department of Energy primarily has to do with nuclear-related dual-use items. These items are referred to the Department of Energy by the Department of Commerce. I think, as everyone knows now, the Department of Commerce pretty much runs this show in terms of dual-use items and when matters come in, they make a determination as to what should be handed out to these other agencies. That is a gross oversimplification, but that is kind of the way it works. We are looking here at what is normally handed to the Department of Energy, and that is nuclear-related dual-use items.

You mentioned some problems on the munitions side, and those are points well taken, I think. But as far as I am concerned, today, I want to talk primarily about the dual-use part regulated by the Department of Commerce as opposed to the munitions part that is handled primarily by the State Department.

In your report, there is some good news, as Senator Lieberman pointed out. The responses, the timely responses, the training appears to be adequate. The escalation process as it goes through the potential appeal process, that seems to be working pretty well from the Department of Energy's standpoint. We will get into perhaps a little bit later what still is left over from the 1993 inquiry. As you know, in 1993, the Inspectors General conducted a similar review, and you did make some recommendations. One of the things we want to talk about is the extent to which those recommendations have been implemented. But it looks like, pretty much, most of them have. There are still some lingering problems in some other areas.

One of the things you pointed out, of course, is the problem with deemed exports, and this is one of those things, of course, that makes your work so wonderful. Although lots of times we think that we are trying to ask you to come up with something that will, in effect, verify what we already believe, quite often, you come up with something that has not occurred to anybody. I do not know about anybody else, but I was not aware of the deemed export problem at all.

You point out a problem here where foreign nationals are visiting our laboratories. As you know, we have had a policy now for some years, certainly in the 1990s, of pushing visitation programs between our labs, labs in China, and labs in Russia, and in connection with cooperative efforts in the nonproliferation area, which, I guess, in the wrong hands can turn to proliferation instead of nonproliferation.

But all that has been going on and you highlight a problem where foreign nationals come and visit our labs and have access to

dual-use or munitions information. As you point out, under the regulations, or under the law, we have all assumed that the law says that when these people have this kind of access, it is deemed to be an export. It is just like an export. I mean, you are giving them the information, in effect, and if you have got a problem with that, you have got just as big a problem with it by showing it to someone, giving them access for a month, maybe, or 2 months, as if you shipped it to them.

So that is the basis of the situation. As I understand it, it is based on the nature of the information that they might be exposed to and it is also based on their citizenship. Obviously, some countries are more sensitive than others. It is also based on, perhaps, their employer—that is, who the foreign national might be working for.

My understanding is that your methodology was that you looked at assignments, and the definition of assignments is when the foreign national is, let us say, at a lab for more than 30 days, is that correct?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. Did you look at all assignments over a period of time?

Mr. FRIEDMAN. No. We looked at a selected, small judgmental sample.

Chairman THOMPSON. Do you know how many assignments there have been over the last year or 2 years or any particular period of time?

Mr. FRIEDMAN. Mr. Chairman, at the four labs that we looked at, Sandia, Lawrence Livermore, Los Alamos, and Oak Ridge, according to the information that was provided to us by the Department, there were 3,100 assignments in 1998. But I want to caution you and the other members of the Committee that we think that number may not be accurate and we are working with the Department to try to figure out what the right number is. It is a significant number, and I also want to caution you that a large percentage of those were people from non-sensitive countries.

Chairman THOMPSON. Could you elaborate on that a little further, as to why you think the information might be off and in what direction and to what extent?

Mr. FRIEDMAN. Well, in the information that was provided to us, there were anomalies in terms of two of the labs in that the numbers are so low that it does not look reasonable. We will be trying to clarify that with the Department. So, therefore, we think the number may be understated.

Chairman THOMPSON. I see. There are also those that are denominated as visitors, which, as I understand it, are those who come for 30 days or less. You only looked at the assignments and did not look at the visitors, is that correct?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. Do you have any feel for how many visitors there have been over this same period of time to these four labs?

Mr. FRIEDMAN. I would ask that Ms. Schneider respond to your question.

Ms. SCHNEIDER. The numbers that Mr. Friedman referenced——

Senator LIEBERMAN. Ms. Schneider, would you take the microphone and speak into it, please?

Ms. SCHNEIDER. I am sorry. The number that Mr. Friedman references, the 3,200 number, is the best number that we have been able to identify from the Department at this point in time. However, they advise us that the laboratories may have substantially higher numbers of visitors and assignees which they have not been able to provide.

Chairman THOMPSON. I had 3,100. Is it 3,100 or 3,200?

Ms. SCHNEIDER. Actually, the number we got was closer to 3,200.

Mr. FRIEDMAN. Thirty-two-hundred.

Chairman THOMPSON. All right. Does that indicate both assignments and visitors, or just assignments?

Mr. FRIEDMAN. No. Let me clarify. The visits, and I can total them very quickly, it is 953 at Oak Ridge, 525 at Lawrence Livermore, 88——

Chairman THOMPSON. A little bit slower. It is 953 at Oak Ridge——

Mr. FRIEDMAN. Five-hundred-twenty-five at Lawrence Livermore, 88 at Los Alamos, and 53 at Sandia.

Senator LIEBERMAN. And what is the period of time there?

Mr. FRIEDMAN. In calendar year 1998.

Senator LIEBERMAN. Ninety-eight?

Chairman THOMPSON. Are these assignments or visitors?

Mr. FRIEDMAN. Those are visits.

Chairman THOMPSON. Those are visits?

Mr. FRIEDMAN. Yes.

Chairman THOMPSON. What does that total to, do you know?

Mr. FRIEDMAN. About 1,600.

Chairman THOMPSON. About 1,700? You have 3,200 assignments, with the caveats that you indicated, and about 1,700 visitors?

Mr. FRIEDMAN. Right.

Chairman THOMPSON. For the four labs.

Mr. FRIEDMAN. And I would attach the same caveat to the visitors, as well.

Chairman THOMPSON. That same caveat, for 1998?

Mr. FRIEDMAN. Correct.

Chairman THOMPSON. All right. Is there any reason to believe that the numbers have substantially increased or decreased over the last few years, or would you think that would be a static number?

Mr. FRIEDMAN. I really could not answer that.

Chairman THOMPSON. You do not know that? All right. That gives us some sense of the level, and we might contrast that with the number of—let us see. The deemed export problem is a potential problem with visitors as well as assignments, perhaps not as big a problem, but potentially, I suppose, it is still a problem?

Mr. FRIEDMAN. That is one of the points we have made, is that there is a lack of clarity in the procedures and the processes that govern that, Mr. Chairman. One of the issues that came up was there are people at the Department of Commerce who apparently have informed people at the Department of Energy that visitors, that is, people who are here 30 days or less, are not subject to

those same requirements, and we are not positive that is the case. That is one of the issues that needs to be clarified.

Chairman THOMPSON. Apparently in some people's mind, there is some question as to whether people on assignment come under the regulations.

Mr. FRIEDMAN. Given the lack of clarity of the policy, yes, that is right.

Chairman THOMPSON. So it is all a little hazy?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. But in terms of a potential problem, a person there 30 days could be as much of a problem as a person there 35 days?

Mr. FRIEDMAN. Absolutely.

Chairman THOMPSON. All right. So we are dealing with 4,900 or almost 5,000 assignments and visitors in 1998. How many applications were there for deemed exports in 1998?

Mr. FRIEDMAN. The information we were provided is that there were two applications.

Chairman THOMPSON. Two? I think that pretty much speaks for itself.

Mr. FRIEDMAN. Mr. Chairman, let me be very clear about that. The number of these individuals were from non-sensitive——

Chairman THOMPSON. I understand. Certainly, not all of them are a problem, or I am assuming that most of them are going to be people from countries that present less of an export-control problem. These are rough numbers, we understand. But we do know that there was in the neighborhood of 4,900 foreign nationals visiting our labs under some kind of program in 1998 and there were, apparently, two applications for deemed export licenses.

Now, the nature of the problem, of course, has to do with—well, there are several elements to it, but one of them certainly has to do with who is responsible. As you understand it, from your inquiry, the host to the foreign national has primarily been given the responsibility for complying with deemed export rules. Is that also a matter that is in some dispute, as to whether or not the host is the correct person to make the initial determination as to whether a license is needed, or is that pretty clear?

Mr. FRIEDMAN. It is clear at the laboratory level. However, when you talk to the host, as our report points out, it is not clear to too many of the hosts.

Chairman THOMPSON. So from a policy standpoint, as far as the Department of Energy is concerned, it is clear.

Mr. FRIEDMAN. No. I do not believe it is codified in the Department of Energy's policies, but at the labs we visited, the hosts were the focal point and had responsibility in the lab policies for submitting export license applications.

Chairman THOMPSON. All right. Taking it down to the laboratory level, then, as far as the administration of the lab is concerned, the people in charge would tell you that the hosts make that determination?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. All right. But what you are saying is that when you get down and actually talk to the hosts it's a bit different. Describe the hosts. Who is the host?

Mr. FRIEDMAN. The host is a laboratory employee who invites, perhaps, a foreign national to visit him or her at the laboratory to collaborate on some work that they may be doing.

Chairman THOMPSON. What level of employee do you have to be in order to do this? I assume not any employee could invite a foreign national.

Mr. FRIEDMAN. I really do not know the answer to that, Mr. Chairman.

Chairman THOMPSON. All right. So what did you find when you went into these labs and actually talked to these hosts in terms of their carrying out this responsibility?

Mr. FRIEDMAN. A number of them, and the report gives the specifics and Ms. Schneider can elaborate on this, but a number of them at all the labs simply did not understand, did not recognize, or did not realize that it was their responsibility to make that kind of a determination.

Chairman THOMPSON. So they did not realize they were supposed to be making that determination?

Mr. FRIEDMAN. That is correct. They were not educated, they were not trained, and they did not seek guidance in these cases.

Chairman THOMPSON. Were they familiar with the deemed export concept?

Mr. FRIEDMAN. Many were not.

Chairman THOMPSON. They were not familiar with the concept of a deemed export?

Mr. FRIEDMAN. I think that is correct.

Chairman THOMPSON. They did not know they were supposed to be doing that sort of thing.

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. Then you pointed out that there was a problem with the Export Administration regulation, actually, that set this up. In looking at your report, as you say, "A reader could conclude from the way it is worded that an export license is not required for research conducted by the Department of Energy laboratories and federally funded research and development centers. Virtually all of the Department of Energy laboratories have been designated as these centers. However, we conclude that a blanket exemption for work at these centers was probably not intended." I think that is probably an understatement. So, in other words, you could read this regulation and potentially conclude that all labs were exempted from this deemed export policy, even though I would assume, our nuclear weapons laboratories would be the primary place that you would want it to be applied.

Mr. FRIEDMAN. Precisely.

Chairman THOMPSON. That is a problem as far as the regulation is concerned. Then you pointed out a problem as far as the DOE order is concerned, and then the guidelines pursuant to the order. Could you characterize the ambiguity there in terms of guidance?

Mr. FRIEDMAN. They are largely silent on the question of deemed exports.

Chairman THOMPSON. I notice there is one reference here under the guidelines that says the private sector would need an export license. The language in the guidelines could give the impression that while the private sector would need an export license, that the

Department of Energy would not. So if you talk about private-sector requirements, the implication might be that it pertains only to private-sector and not to government requirements.

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. Clearly, that is something that you brought to the attention of the appropriate authorities at the Department of Energy, and what has been their response to that?

Mr. FRIEDMAN. We brought this to the attention of the Under Secretary in March. He was the Acting Deputy Secretary at the time.

Senator LIEBERMAN. Who was that?

Mr. FRIEDMAN. Dr. Moniz. He immediately created a task force, which included the Offices of Intelligence, Counterintelligence, General Counsel, and Defense Programs, and they are attacking the problem as we speak.

Chairman THOMPSON. All right. There are several more specifics I want to get into a little later, but I am going to relent right now. Senator Lieberman?

Senator LIEBERMAN. Thanks, Mr. Chairman. Let me just pursue the question of deemed exports for a few moments more. With all the concern lately about security at the DOE facilities, can you determine if any sensitive information might have been compromised by the apparent shortcomings in the deemed export license process?

Mr. FRIEDMAN. We could not make that determination, Senator, and frankly, it was not part of our task. I am not sure we have the competence, to be honest with you. It requires a very keen sense of end use, end users, home countries, employers, and expertise that is really beyond us.

Senator LIEBERMAN. I appreciate that. The numbers are so startling that you have come up with. It looks like it is about a total of 5,000 in 1998, the 3,200 assignees and about 1,700 visitors, and out of that total, only two licenses applied for. It makes me concerned, obviously, about what might have been compromised.

Am I correct in saying that, again, that these visiting foreign scientists presumably were not gaining access to information that was classified? Is that correct?

Mr. FRIEDMAN. The context in which we are presenting this is that these were people who were here for unclassified visits and had access to only unclassified functions, matters, software, and technology. So we have no indication that they had access to classified material.

Senator LIEBERMAN. But, nonetheless, it has previously been determined that even the unclassified information might be sufficient to deem it an export and, therefore, require a license?

Mr. FRIEDMAN. That is correct.

Senator LIEBERMAN. Your report does not, and understandably so, address the issue of whether American scientists traveling abroad might require an export license under certain circumstances, although, and as you follow the story unfolding around DOE and the labs, it is easy to see why similar concerns might be present for information that might be shared by DOE scientists as they travel abroad. I wonder what policies, if any, cover deemed ex-

ports by lab employees traveling overseas in meeting with foreign nationals.

Mr. FRIEDMAN. Well, to be candid with you, Senator Lieberman, we did not pursue that matter. Again, it went beyond our charter in this particular review. But the general question of deemed exports does apply to U.S. citizens traveling to a number of foreign countries.

Senator LIEBERMAN. So as you read the current state of law and regulation, the deemed export license requirement covers not just contacts here in the U.S. but for our scientists traveling abroad?

Mr. FRIEDMAN. That is correct.

Senator LIEBERMAN. That is something we may want to ask DOE to look at more closely. Let me just ask you to flesh out a little bit more, what is DOE now doing as far as you understand to establish more control over this deemed export license process?

Mr. FRIEDMAN. We understand that the Department and the task force has been working with the Department of Commerce and the Department of State to try to clarify the requirements. It has been rewriting its own internal order to try to make it more clear to everyone, both Feds and to the contractor laboratory and personnel, what a deemed export is, when it is required, and when an export license is required to be sought. Those are the efforts that are now being undertaken.

Senator LIEBERMAN. Would you judge them at this point to be adequate or inadequate, or is it too early to say?

Mr. FRIEDMAN. Well, it is too early to say, but I must say, Senator, that we are gratified by the reaction that has taken place. It was very prompt. We met within a week after we had first sent our memo to the Under Secretary with the task force, so that we think is a prompt response.

Senator LIEBERMAN. Do you think they are dealing also with this question of the hosts and informing the hosts of their responsibility under the——

Mr. FRIEDMAN. Yes.

Senator LIEBERMAN. You do? OK. Let me turn to the delegation of authority, which you have covered in the report, certain categories of applications that the Department of Energy has been allowing the Department of Commerce to handle without referring to the Department of Energy. Apparently, this procedure, which covers some 1,000 or 1,500 cases a year, is now being reevaluated by the Department of Energy. I gather that DOE analysts determined that 1 of the 60 randomly selected non-referred cases examined by your office should have been referred. Is that correct?

Mr. FRIEDMAN. That is correct.

Senator LIEBERMAN. That was a situation involving the provision of software, hardware, and a Fortran compiler to a Russian nuclear power facility, which should have been referred, according to DOE, because it involved a nuclear end user, right?

Mr. FRIEDMAN. That is correct.

Senator LIEBERMAN. How was this case resolved, to the best of your knowledge?

Mr. FRIEDMAN. It has not been resolved.

Senator LIEBERMAN. It has not?

Mr. FRIEDMAN. There is a difference between the Department of Energy and the Department of Commerce. At least to the best of my knowledge, at this point, it has not been resolved, and it is one of the issues we are going to be talking to the task force about.

Senator LIEBERMAN. Good. Does this suggest larger concerns that you have with the delegation of authority process?

Mr. FRIEDMAN. As we indicated, the Department itself undertook a review of the cases that were subject to the delegation and came up with roughly a 1 percent error rate.

Senator LIEBERMAN. What prompted that reevaluation, as far as you know?

Mr. FRIEDMAN. I am not sure I have that information right now. I suspect they were concerned about the way the delegations were being handled, as well.

Senator LIEBERMAN. Go ahead.

Mr. FRIEDMAN. They came up with a 1 percent error rate, so they are taking a closer look at the delegation to see if that process is working properly or not.

Senator LIEBERMAN. So it is as yet unresolved, but they are continuing to work with the Department of Commerce on that?

Mr. FRIEDMAN. That is right.

Senator LIEBERMAN. Let me ask you one or two questions about the munitions exports and State Department procedures. I gather that the State Department receives few requests for the export of nuclear weapons or explosive devices as components but refers certain of these cases to DOE and consults on others. While the procedures for the Department of Commerce's processing dual-use applications are clearly articulated in regulations, no comparable procedures exist for reviewing these munitions cases by the State Department.

Your report determined that, in fact, there was no process in place, in contrast to the more formalized procedures on dual-use applications, for the resolution of the interagency disputes on munitions cases, and I wanted to ask you whether you think that that has proved to be a problem, and if so, what steps might be undertaken to improve the situation.

Mr. FRIEDMAN. At this point, Senator, we cannot point to a problem. In all candor, this whole process is part of an intricate system, of course, for ensuring national security, and our concern is if there is a vulnerability in terms of the ability to reconcile differences of recommendations or judgment with regard to the Department of Energy or another department, that there be a formal escalation process to resolve those differences, as there is for dual-use commodities.

Senator LIEBERMAN. I thank you for that. Let me ask you just one or two final policy questions. Your examination of the export control processes employed by DOE, based on that examination and other relevant agencies, I wonder what recommendations regarding some of the larger policies that guide these decisions that you might have.

For instance, does the system we have in place, to the best of your knowledge, appear to adequately assure that all national security and commercial interests are taken into account? Can you reach a judgment on that?

Mr. FRIEDMAN. Our overall judgment, in terms of the evaluation process itself, is that it was adequate in virtually all respects, so that we are comfortable with that, based on the sampling that we have done.

Senator LIEBERMAN. Do you have any knowledge from your own experience—I know that COCOM expired and there are other attempts at multilateral cooperation, but they are not, to my knowledge or in my opinion, very successful—do you have any judgment about the multilateral regimes with voluntary restraints set by individual governments that are in effect now, and do you have any thoughts about this dilemma that we have that we can decide not to sell and we can protect our own secrets, as it were, but other industrialized nations can go ahead and effectively do business and proliferate?

Mr. FRIEDMAN. We really have not thought that through.

Senator LIEBERMAN. OK. Thanks very much. It is a good report, and thanks for your responses.

Chairman THOMPSON. Thank you. Senator Voinovich.

Senator VOINOVICH. We have various Committees in Congress that are involved in this and there are two aspects of it. One is that some things got out that should not have and people are concerned about it. The other aspect is, what are we going to do to tighten this up? I am interested in knowing, from your observations, has everyone got the message? Are you satisfied that the effort being made by the administration in terms of dealing with this problem of tightening it up is adequate, and if you do not think it is adequate, what other things do you think they should be doing so they can come back to Congress in a month or 2 months.

The point I am making is that there are a lot of people in Congress that want to write an administrative policy that is going to take care of the situation, and as a former mayor and governor, I do not think that is the way to get the job done. You have a problem, you go to the administration and you say it is a problem. We know it is a problem. You know it is a problem. What are you doing to solve it? Come back to us with your recommendations.

From your perspective, do they get it and are they moving forward with it and are we going to come up with something that is really going to tighten this thing up so that we do not have what we have had in the past?

Mr. FRIEDMAN. Senator, at this point, we are gratified with the action that the Department has taken. It is our intent to go back at some point in the future to take another look at this issue, to make sure that the fix that has been implemented is, in fact, addressing the issues. That is the only assurance that I can give you at this point in time.

Senator VOINOVICH. The task force that is in place, is that task force just in the Department of Energy, or is it involving the other agencies?

Mr. FRIEDMAN. It is a Department of Energy task force, but they are interacting and coordinating with State and Commerce Departments and I am comfortable that they are doing the right things at this point.

Senator VOINOVICH. Is there a facilitator or a process in place to get everybody's input into this?

Mr. FRIEDMAN. The task force has the imprimatur of the Under Secretary and certainly one of the leaders is a deputy chief of staff, so I think it has the right people to get the right people involved.

Senator VOINOVICH. In your testimony, on page 9, you note that the Nuclear Transfer and Supplier Policy Division of the Office of Nonproliferation and National Security may be understaffed. How big a shortfall are you talking about?

Mr. FRIEDMAN. We did not do a formal staffing study, so I cannot answer that question specifically. I think that is the Department's responsibility because they have taken on a number of additional responsibilities within that division and I think they need to be adequately staffed to evaluate the numerous export license applications that come in.

Senator VOINOVICH. Mr. Chairman, I would suggest that we ask the question about what they are doing, if they have a staff problem, what are they doing to remedy the problem there. I would be interested in getting a report back on that.

You also note that the Department's intelligence capabilities are not being fully utilized in the processing of export cases. What is the Department doing to address that situation?

Mr. FRIEDMAN. Actually, the situation, we understand, has been largely remedied, with the advent of PDD–61, the Presidential Decision Directive, as a result of which, the Department has established the Offices of Intelligence and Counterintelligence as separate stand-alone offices within the Department. We think, in large measure, that issue has been addressed.

Senator VOINOVICH. From your observations, we have, what, 5,000 visitors of one sort or another, and you say most of them are from countries where we have not any problem, but is there anyplace where, before somebody can become a host, that it has to be approved by someone? Do you know?

Mr. FRIEDMAN. I am not here formally representing the Department, but the Secretary, under his sweeping reorganization, has established an Office of Foreign Visits and Assignments Policy Office, and that is the first time that such an office will have been established, as I understand it, certainly in recent history, and they will be, as I understand it, addressing the issues that you are referring to. So there will be a centralized accountability office within the Department to address those issues.

Senator VOINOVICH. Mr. Chairman, again, I think that it would be interesting to get a report back from them on just exactly who is going to do it, what the procedures are, and the standards that they are going to set. Also, I think that they should be recommending a whole new education policy where they decide that somebody can be a host and what the responsibilities are of that host.

Chairman THOMPSON. We will be expecting to hear from the Department of Energy on that. Anything further?

Senator VOINOVICH. Nothing more.

Chairman THOMPSON. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I have a statement and I ask that it be placed in the record.

Chairman THOMPSON. It will be made a part of the record.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Mr. Chairman, I am pleased to join you in welcoming the witnesses today from the Department of Energy's Office of the Inspector General to discuss their report on "Inspection of the Department of Energy's Export Licensing Process or Dual-Use and Munitions Commodities."

I thank you, Mr. Chairman, for requesting the Inspectors General of the Departments of Energy, Defense, State, Commerce, Treasury and the Central Intelligence Agency to conduct an expanded review of their agency's export licensing processes.

This review ill flush out the distressing problems with our export control licensing process raised by Dr. Peter Leitner, senior strategic trade advisor with the Department of Defense's Agency of Defense Threat Reduction, in his June 1998 testimony before this Committee.

It is important to note that the Inspector General's review of the Department of Energy's export licensing process was relatively positive. His recommendations for improving the transparency and efficiency in the process were accepted by the Energy Department's Nuclear Transfer and Supplier Policy Division.

The report criticizes the lack of procedures, or understanding of the procedures, for licensing foreign nationals working at the national weapons laboratories who may be exposed to controlled dual-use and munitions technical data. This is referred to as a "deemed export" because the United States views the transfer of controlled technology to a foreign national as an export to his or her home country. It is very evident that the Department of Energy and the national weapons laboratories do not understand how to determine what constitutes controlled technical data for which an export license is necessary.

We cannot tell from the IG's report whether or not additional losses of dual use and critical military technology occurred from the failure to screen foreign visitors.

Rather than dwelling on the failures of the past, we need to focus on improving the screening process. This hearing is an excellent first step in that direction.

I am pleased, however, that the report concluded that licensing analysts have *not* been forced to change their recommendations on license applications as Dr. Leitner reported happened at the Defense Department. I am also pleased to learn that DOE's computer system for processing license applications was found to contain complete, accurate and consistent information with Commerce's database with the minor exception of a few cases, apparently caused by a glitch in the Commerce Department's computer system.

There is larger issue at stake here: How do we maintain the free flow of ideas needed to maintain our technical edge without sacrificing our national security. In the area of exports, I hope this Committee will examine even more closely how to maintain a choke-hold on critical dual use exports in an environment of rapid technological revolution.

I welcome our witnesses once again and I thank them for taking the time to testify before us this morning.

Senator AKAKA. Mr. Chairman, I also want to add my welcome to the panel this morning and to point out that I felt that the Inspector General's review of the Department of Energy's export licensing process was relatively positive. But there are problems, and I want to mention that some of the problems with DOE was because of the export licensing process. One problem was a lack of clarity in what constitutes a deemed export and confusion about who is responsible for determining when a deemed export license is required. So one of my questions is, who is responsible for determining when a deemed export license is required? Is this DOE or the Department of Commerce, or DOE in cooperation in the Department of Commerce?

Mr. FRIEDMAN. It is within the Department of Energy family, Senator.

Senator AKAKA. So within the Department of Energy?

Mr. FRIEDMAN. Yes.

Senator AKAKA. So it is not done in cooperation with the Department of Commerce?

Mr. FRIEDMAN. In terms of the determination that an application needs to be submitted, it is the Department of Energy responsibility.

Senator AKAKA. How many deemed export licenses have been granted for the lab-to-lab programs?

Mr. FRIEDMAN. I do not have that information, Senator.

Senator AKAKA. Have any deemed export licenses been requested for the U.S.-China lab-to-lab program, do you know?

Mr. FRIEDMAN. I do not have information to that specificity.

Senator AKAKA. Do you know whether any foreign students who are attending U.S. universities working on lab-sponsored programs have been included in this?

Mr. FRIEDMAN. I am afraid I am striking out, Senator. I do not know the answer to that question, either. I apologize.

Senator AKAKA. Very well. Mr. Chairman, thank you. I am very interested in export licensing and I hope maybe we can discuss this later. Thank you.

Chairman THOMPSON. Thank you. Thank you very much.

I was looking at some of the details of your report here. At Los Alamos, they told you that they were allowing their hosts to make the threshold deemed export determination, but you say, however, 9 of the 14 hosts who were interviewed contended that they were not responsible for making this determination, right?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. At Lawrence Livermore, they indicated that hosts had received memoranda regarding their responsibilities, but two of the eight hosts you interviewed said they had never received any guidance on possible export control issues relating to foreign nationals they were hosting, correct?

Mr. FRIEDMAN. Correct.

Chairman THOMPSON. At Los Alamos, a security specialist said the hosts were made aware of their responsibilities, but only 7 of the 14 hosts that were interviewed said that they had received guidance. At Oak Ridge, one Oak Ridge contractor said that he was listed as the host of a Chinese national assignee but that in reality, another Chinese national was the actual host.

Mr. FRIEDMAN. Correct.

Chairman THOMPSON. So you had a Chinese national acting as the host of another Chinese national?

Mr. FRIEDMAN. That is correct.

Chairman THOMPSON. Getting to these numbers, I think I can see where you think you may have some under-reporting here. It seems to me like that Lawrence Livermore, Los Alamos, and Sandia should all be in the same ballpark. Is that kind of the assumption that you would operate under?

Mr. FRIEDMAN. Yes, sir.

Chairman THOMPSON. And yet, Lawrence Livermore reports over 500 and Los Alamos and Sandia only reports 88 and 53.

Mr. FRIEDMAN. In fairness to the office that gave us this information, they indicate that they are trying to improve the quality of their data, if you will. They also indicate that there may have been some direction from the Office of Counterintelligence related to re-

stricting the publication of some of the information of the foreign nationals. So there may be some reasons for these anomalies, Senator——

Chairman THOMPSON. That would be pretty ironic, would it not? The information is so sensitive, you cannot give the number of foreign nationals, but we have absolutely no clue as to any deemed export policy and what the foreign nationals are doing while they are there. How are we going to follow up on those numbers? Are you going to follow up on that?

Mr. FRIEDMAN. We are going to follow up on the numbers, yes.

Chairman THOMPSON. Let us know what you come up with. Oak Ridge, for example, is a science lab. I can see why their number of scientific visitors would be pretty high. Lawrence Livermore might have a little less than that, substantially less, really. But the reported figures from these other two, I mean, clearly are low, and those are weapons facilities. We need to know what the numbers are there. If they do not have accurate numbers or cannot get their arms around their numbers, as to just the gross numbers of foreign nationals coming there, that is a hell of a problem in and of itself. So we will not throw any more rocks until we know that it is justified, but this is something on which we need some follow-up.

Another area, too. You talked about some areas where the Department of Energy delegates its authority back to the Department of Commerce, basically, when the commodity is not intended for a nuclear end user. My concern there is all the information that we have come across now shows that some of these countries are extremely deceptive as to their end user controls. They refuse to let us have any control over end users, and some of our own manufacturers, or sellers, I think, in this country have tacitly participated in such deceptions in order to make the sales. We send it to these countries and we do not know what happens to it.

Now, we are learning bit by bit that, in many cases, we have been deceived. Some of these dual-use items are supposed to go to one facility and they go to another facility, a nuclear-related facility or a military facility. Who makes this end user analysis? Who makes this kind of determination as to the potential problem there?

If they send it to the Department of Energy, you have your PINS database there where they collect all this information. It is a sophisticated computer program. They have a great deal of the information, as I understand it, with regard to all export license applications, and presumably, if someone would use it properly, you would be able not only to tell something about the cumulative effect of these exports to these various countries, but also to help with regard to potential proliferation issues and the end-user problem. But if you are going to delegate such research to the Department of Commerce, which is trying to sell the stuff, it looks to me like you have a potential problem there. What do you think?

Mr. FRIEDMAN. I will give you my judgment, as best I can, but before I do that, they have thought through this question of the delegations of authority and there is a basis for them, and if I can, let me refer to Mr. Walter to describe that process, and then I will give you my best judgment on that.

Chairman THOMPSON. Mr. Walter.

Mr. WALTER. Under Executive Order 12981, agencies, including the Department, are authorized to review any license application. The Executive Order also provides the agency the authority to notify the Department of Commerce of the types of applications that they do not need to see. DOE has provided the Department of Commerce delegations of authority for certain things, for example, items going to the Nuclear Suppliers' Group. Also commodities not intended for nuclear end use and end users. So, basically, DOE has said, we want to see all items that involve nuclear end use or end users, but there are these other items that, for whatever reason, we do not need to see.

One of the things you mentioned was that DOE, through its PIN system, has information, historical information, on export license applications. This is limited to only applications that the Department of Energy has received or that have been referred to the Department of Energy by the Department of Commerce, not the entire universe of export license applications. So in the Department of Energy's process of——

Chairman THOMPSON. But even there, I understand that PINS does not know what the disposition of any of these license applications are, either. That is another potential problem.

Mr. WALTER. That is correct, and if the Department of Energy would have that information, that would help in its proliferation review.

Chairman THOMPSON. All right. Mr. Friedman, do you want to follow up on that?

Mr. FRIEDMAN. I was hoping to buy more time. [Laughter.]

Mr. FRIEDMAN. I think, given the current environment, clearly, this could be a problem. I mean, I am not going to——

Chairman THOMPSON. Is this something that has been discussed or analyzed? Have you talked to the Department of Energy, or to the Department of Commerce, in particular, about that particular problem? What I am concerned about, of course, is an export to a sensitive country but for some ostensible or alleged commercial use. Well, we know that we have sent some goods to China for commercial airline purposes that have been diverted for military-related purposes. That is what I am trying to get at. If you have not had that discussion with the Department of Energy or the Department of Commerce——

Mr. FRIEDMAN. Well, we have had the discussion with the Department of Energy, and what the Department of Energy has told us is that they are going to withdraw the delegations of authority to review the process.

Chairman THOMPSON. So they do not know what they do not know. So we are talking about a process here, not just what the Department of Energy knows. I think it is a matter for consideration by the Department of Energy and the Department of Commerce.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. I was struck in the report—and I suppose this is because we are coming after a day of closed meetings with people from Justice and the FBI and others about the ongoing investigation that has resulted from the Cox report and its preliminaries, but I was struck to note that in this pol-

icy, that is, the existing DOE policy, that U.S. citizens must serve as hosts of visiting U.S. foreign nationals, is not very well known.

You cite one case not followed as it should be where there was a visiting Chinese scientist for whom an American citizen was listed as the host, but, in fact, the visiting Chinese scientist was going to work with and did work with a fellow Chinese national. And this was a Chinese national who was a temporary resident of the United States, I presume.

Mr. FRIEDMAN. I do not have his precise category.

Senator LIEBERMAN. But he was a——

Mr. FRIEDMAN. The laboratory policy was, though, that a U.S. citizen be the host. So, in effect, there was a surrogate host, because the Chinese national could not serve in that capacity.

Senator LIEBERMAN. But everyone knew that the visiting Chinese scientist was working with the Chinese national.

Mr. FRIEDMAN. I do not know if everyone knew, Senator, but, I mean, the people involved certainly knew.

Senator LIEBERMAN. Right. Then I gather another host stated that his name is officially assigned as the host for many visitors, but he does not actually know them all.

Mr. FRIEDMAN. Correct.

Senator LIEBERMAN. Do I assume that as part of the DOE review, that they are going to focus in on, to the best of your knowledge, on this question, along with others?

Mr. FRIEDMAN. Yes. I am informed that they are going to be looking at the question of educating the hosts as to their responsibilities and ensuring that they can carry out those responsibilities. Yesterday, the Secretary's advisory board issued a number of recommendations concerning the foreign assignee and visitors' program. One of the recommendations concerned forcing or directing the laboratory directors to get more directly involved in this program, and that may be a quality check in this whole process. It may be a useful quality check.

Senator LIEBERMAN. Yes. Perhaps I should ask you, this is a very sensitive area, because while I know in some cases of security concern there is a particular concern about what might be called ethnic espionage, on the other hand, obviously, in the best traditions of our country, we do not want to begin to be automatically suspicious of people who are not U.S. citizens. So I suppose the more important lapse here is the failure to carry out the program of deemed export licenses than the question of the citizenship of the host. Did you make a recommendation on that? Do you think that is an important part of this security policy, which is to say that a U.S. citizen would have to be the host for a foreign visitor?

Mr. FRIEDMAN. We did not make a direct recommendation on that point.

Senator LIEBERMAN. Do you have an opinion on that?

Mr. FRIEDMAN. I think that would be a wise policy judgment.

Senator LIEBERMAN. In other words, you think the current policy should continue, but be enforced?

Mr. FRIEDMAN. I think the policy should be that a U.S. citizen should be the host. That assumes, Senator, that the hosts continue to play a pivotal role in determining whether deemed export licenses ought to be sought.

Senator LIEBERMAN. Right.

Mr. FRIEDMAN. If that continues, if they are the focal point, I think you need that kind of assurance, or something similar to that. There may be exceptions, and I have not necessarily thought that through entirely, either.

Senator LIEBERMAN. Again, I think you have done a superb job, and I guess in light of all our questions about the areas of our worry, we should come back and say for the record that, basically, you have said that the DOE system is working, and where it is not working, the Department has now organized a review which, hopefully, will make it work better. But I think on the deemed export licenses, particularly, you have produced some information that is very unsettling and part of the general sense that I think a lot of us are receiving that our guard was down here. Even when we had a good policy, which we seem to have had in the DOE policy on deemed export licenses, it was not being implemented at all.

Five-thousand visitors and assignees and only two licenses applied for is a pretty shocking incongruence or discontinuity in the statistics that you provided. I am sure the Chairman and I will be asking the Department to respond to that, and I will be particularly interested in the other subject we talked about, which is whether anything is being done in regard to deemed export licenses for our scientists when they travel abroad. Again, we do not want to stop that, but if we think there is merit to this policy that the transfer of information is effectively an export, or can be, and it requires a license and the kind of equal protection, almost, then it ought to relate to transfers of information that occur here as well as those that occur abroad. I hope that we will continue to pursue it and push DOE on those questions.

Thanks very much, again, to all of you for the quality of your work here.

Chairman THOMPSON. Thank you very much.

Just on that point, is it your opinion that the laws and the regulations now require our foreign travelers there, if they impart the right kind of information, to obtain an export license?

Mr. FRIEDMAN. Yes.

Chairman THOMPSON. So that two number would include our people abroad, also?

Mr. FRIEDMAN. I am not sure of that.

Chairman THOMPSON. All right. Thank you. Senator Domenici.

OPENING STATEMENT OF SENATOR DOMENICI

Senator DOMENICI. I came principally because I wanted to congratulate you on your report and I strongly concur with the deemed export issue. I also think it needs to be carefully considered. I would encourage the Department to develop procedures that do not stifle the international scientific interactions between the laboratory scientists and foreign scientists that remain essential for the laboratories to remain on the cutting edge. I think procedures should be devised at the labs and the Department that will allow rapid identification of any potential export issues, and wherever possible, I would encourage that entire facilities or technologies be evaluated for export consideration and placed on approved lists for action. Sometimes, long delays are good for no one in this respect.

Could I ask a question with reference to scientists overseas versus visitors to this country. As part of your evaluation, would you be able to determine whether the effort to obtain information from American scientists who go to China is more severe or more pronounced than what we know about Chinese coming here and gathering information? I have an impression that American scientists are really pushed when they go to China and other countries for information that they might have and that they have to be very well trained in order to avoid that kind of pressure. Did you have any observations on that?

Mr. FRIEDMAN. We do not, Senator Domenici. That is way beyond the scope of what we looked at.

Senator DOMENICI. Let me just say to the Senators, I have very reliable information that there is far more pressure on American scientists who go to China and speak the language because they are of the same culture and educated at the same schools and because there is such a fraternity of scientists on nuclear matters, including the whole hierarchy of the Chinese scientists who build their nuclear weapons and do what they do to push it forward. Their American-educated leader, has a Ph.D. from UCLA or University of California, and taught here in America.

Chairman THOMPSON. I think we have discovered, too, or at least our law enforcement officers have made it more clear, I believe, that some countries as a part of their information gathering techniques, I am talking about improper information gathering things, that we would consider improper—that is a fundamental part of there approach to use the attempted debriefing of our scientists abroad.

Senator DOMENICI. Frankly, we can talk about technologies and making sure we do not get the wrong ones exported. But, we have got to be awfully careful that our scientific minds are not transferring the information too. Frequently, such transfers of ideas are much more desirable buying something from the commercial market that might be further changed, and other applied. That is not the subject of this hearing, but it is the subject of your very serious investigation about what we could do to help with this matter. I just want to thank you for the excellent job you have done. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you.

I just, finally, want to ask you to give us an assessment of any problems lingering from the 1993 era. You did an analysis in 1993. You highlighted some problems. They have set about addressing most of them, I think. But what is there left on the table? Where are we not making as much progress as we should be?

Mr. FRIEDMAN. Senator, let me ask Mr. Walter to address that question.

Chairman THOMPSON. All right.

Mr. WALTER. Basically, there are two areas, I think, that we need some additional work on, and they involve interagency actions. They involve Department of Commerce and Department of State. What we had requested in our 1993 report was that the Department of Energy get with the Departments of Commerce and State to obtain what is referred to as "final disposition" of export cases. Final disposition includes not only whether the license appli-

cation was approved or denied, but also whether the item was purchased and/or shipped.

We talked about this briefly earlier, where, from the Department of Commerce, we are currently getting information on approval/denial of license applications, but we are still not getting information regarding whether the item was actually purchased or shipped. This information would be helpful to our analysts for their proliferation reviews.

Chairman THOMPSON. How does that work? If it is denied, how can it be shipped?

Mr. WALTER. If a license application was not approved, the item should not be shipped.

Chairman THOMPSON. So if it is approved, the assumption is that it is shipped, but that might not necessarily be valid? Is that the point?

Mr. WALTER. Yes. We understand now that there is a process in place at the Department of Commerce to try to get this information from Customs and to be able to send it out electronically to DOE. But the system that they would send it to DOE under has not been completed yet.

Now, from the standpoint of the State Department, we are not getting either piece of information. We do not know whether, in fact, the munitions application, for example, was approved or disapproved and we also do not know, if it was approved, whether, in fact, it was purchased and/or shipped, and again, that would be helpful for DOE from a proliferation standpoint.

Senator LIEBERMAN. Mr. Chairman, if I may, am I right that the information that we are not getting adequately now would be critical to our own effort to track possible proliferation of security items?

Mr. WALTER. I would say it would be very helpful. I could not characterize it as critical, but it would be very helpful.

Chairman THOMPSON. Thank you very much. We will be certainly hearing from the Department of Energy on these things as we proceed along. The Department of Commerce, too, for that matter. But thank you very much. This is a valuable contribution.

I think none of us certainly want to see the destruction of our visitors' program. We understand that there is very much to be gained all around by scientists talking to each other. You cannot build a fortress around your country or even all your technology. But when we let our guard down so substantially, when we go to sleep, when we see that our most sensitive technologies are being taken and that we are participating in allowing them to be taken under various guises, whether it be espionage or exports or what not, we are actually harming the visitation program. That is the kind of thing that will destroy it, unless we plug some of these holes that we have clearly got now. By identifying them, I think that is the first step and we appreciate your work. Thank you very much.

Mr. FRIEDMAN. Thank you very much.

Chairman THOMPSON. We are adjourned.

[Whereupon, at 11:20 a.m., the Committee was adjourned.]

APPENDIX

FRED THOMPSON, TENNESSEE, CHAIRMAN

WILLIAM V. ROTH, JR., DELAWARE
TED STEVENS, ALASKA
SUSAN M. COLLINS, MAINE
SAM BROWNBACK, KANSAS
PETE V. DOMENICI, NEW MEXICO
THAD COCHRAN, MISSISSIPPI
NICKLES, OKLAHOMA
ARLEN SPECTER, PENNSYLVANIA

JOHN GLENN, OHIO
CARL LEVIN, MICHIGAN
JOSEPH I. LIEBERMAN, CONNECTICUT
DANIEL K. AKAKA, HAWAII
RICHARD J. DURBIN, ILLINOIS
ROBERT G. TORRICELLI, NEW JERSEY
MAX CLELAND, GEORGIA

HANNAH S. SISTARE, STAFF DIRECTOR AND COUNSEL
LEONARD WEISS, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

August 26, 1998

The Honorable Eleanor Hill
Inspector General
Department of Defense
400 Army Navy Drive
Arlington, VA 22202

The Honorable Jacquelyn Williams-Bridgers
Inspector General
Department of State
2201 C Street, N.W., Room 6817
Washington, D.C. 20520

Mr. Gregory H. Friedman
Acting Inspector General
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Mr. Johnnie E. Frazier
Acting Inspector General
Department of Commerce
2201 C Street, N.W., Room 6817
Washington, D.C. 20230

Mr. Richard B. Calahan
Acting Inspector General
Department of Treasury
Room 2412, Main Treasury Building
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Ms. Dawn Ellison
Acting Inspector General
Central Intelligence Agency
Room 2X30 New Headquarters
Washington, D.C. 20505

Dear Inspectors General:

In 1993, the Inspectors General of the Departments of Defense, State, Energy, and Commerce collaborated to conduct an interagency review of the export licensing processes for dual-use and munitions commodities. I am writing to request that you update and expand your work in this important area, particularly in light of testimony the Committee received at a June 25, 1998 hearing. I have included the Inspectors General of Treasury and the CIA in this request because the 1993 interagency report concluded that those agencies played major roles in the licensing process.

On June 25th, the Committee heard from Dr. Peter Leitner, a senior strategic trade advisor in the Defense Technology Security Administration. Dr. Leitner provided an unsettling description of the dual-use review process. I urge you to read the hearing transcript, an unofficial copy of which is enclosed.[1] His testimony raised many specific areas of concern, but he also recounted, drawing on his twelve years of experience in this area, what he views as a general breakdown in our licensing controls:

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[1] We request that you use the enclosed unofficial transcript for internal purposes only. We will forward you an official transcript once it is available.

> [O]ver the past six years the formal process to control exports of dual-use items has failed its stated mission -- to safeguard the national security of the United States. . . . Through a tireless campaign, the opponents of export controls have managed to destroy the 16 nation Coordinating Committee on Export Controls, decontrol vast arrays of critical military technology, rewire the U.S. domestic export controls process so that it is structurally unsound and unable to safeguard our security, and erect a series of ineffectual domestic regulations and international working groups designed to project a false impression of security, deliberation and cooperation.

(Hearing transcript at pp. 7-8.) Although he took issue with some of Dr. Leitner's specific criticisms, a second hearing witness, Principal Deputy Assistant Secretary of Defense Franklin Miller, told the Committee there was room for improvement in the Department's handling of dual-use applications.

Your 1993 interagency report detailed a number of problems. For example, you described that in nearly a quarter of sampled cases referred for review to Energy by Commerce, the agencies maintained inconsistent information in their respective databases about a given case, a shortcoming which "tends to diminish the credibility of the licensing process." (Report at p. 20.) In addition, you noted that for dual-use licenses that required exporters to document compliance with certain conditions, the government received the required documentation in only four percent of cases sampled. The Commerce Department, moreover, had taken no steps to bring the 96 percent of nonfiling exporters into compliance. (Report at p. 3.)

While I leave it to your judgment to determine how best to examine the dual-use and munitions licensing processes, I ask that in performing the work you address the questions that are listed below. Please do not treat the following list as an exhaustive one; rather, it is suggestive, setting forth some issues arising from the Committee's June 25th hearing:

1. Please examine whether the current, relevant legislative authority contains inconsistencies or ambiguities regarding the licensing of dual-use and munitions commodities, and the effect of any such inconsistencies and ambiguities.

2. Please examine whether Executive Order 12981 (1995) as implemented is consistent with the objectives of the Export Administration Act and other relevant legislative authority.

3. Please determine if there is a continued lack of interagency accord, as stated in your 1993 interagency report (at page 13), regarding whether the Commerce Department is properly referring export license applications (including supporting documentation) out for review by the other agencies.

4. Please determine if the interagency dispute resolution (or "escalation") process for appealing disputed license applications allows officials from dissenting agencies a meaningful opportunity to seek review of such applications, and assess why this process is so seldom used.

5. Please review whether the current dual-use licensing process adequately takes account of the cumulative affect of technology transfers resulting from the export of munitions and dual-use items, and the decontrol of munitions commodities.

6. Please review whether the current munitions licensing process adequately takes account of the cumulative affect of technology transfers resulting from the export of munitions and dual-use items, and the decontrol of munitions commodities.

7. Please determine whether license applications are being properly referred for comment (with sufficient time for responsible review) to the military services, the intelligence community, and other relevant groups (the "recipient groups") by the Defense Department and other agencies. Please consider in particular numerical trends in the frequency of such referrals, trends in the types of applications referred, trends in the nature of the taskings made in connection with the referrals, and the perceptions of officials at the recipient groups.

8. Please determine whether license review officials at each of the agencies are provided sufficient training and guidance relevant for reviewing license applications, and whether more formal training and guidance is warranted. Dr. Leitner noted a paucity of such training and guidance in his Committee testimony. (Hearing transcript at pp. 43-44.)

9. Please review the adequacy of the databases used in the licensing process, such as the Defense Department's FORDTIS, paying particular attention to whether such databases contain complete, accurate, consistent, and secure information about dual-use and munitions export applications.

10. In his testimony, Dr. Leitner described instances where licensing recommendations he entered on FORDTIS were later changed without his consent or knowledge. (Hearing transcript at pp. 46-47.) Please examine those charges, and assess whether such problems exist at your agencies.

11. Please determine whether license review officials are being pressured improperly by their superiors to issue or change specific recommendations on license applications. Dr. Leitner testified about one such incident that happened to him at DTSA. (Hearing transcript at pp. 47-50.)

12. Please determine whether our government still uses foreign nationals to conduct either pre-license or post-shipment licensing activities and whether such a practice is advisable.

13. Please determine whether the agency licensing process leaves a reliable audit trail for assessing licensing performance.

14. Please describe the procedures used by agencies to ensure compliance with conditions placed on export licenses (e.g., no retransfers without U.S. consent, no replications, and peaceful use assurances), and assess the adequacy and effectiveness of such procedures.

I appreciate your prompt attention to this important project. If you need assistance or have questions about the request, please contact Jack Cobb or Maggie Hickey of the Majority staff at (202) 224-4751.

Sincerely,

Fred Thompson
Chairman

FT/jhc

Enclosure

STATEMENT OF GREGORY H. FRIEDMAN

INSPECTOR GENERAL

DEPARTMENT OF ENERGY

Mr. Chairman and members of the Committee, I am pleased to be here today to respond to your request to testify on the review conducted by the Office of Inspector General of the Department of Energy's (Energy's) export licensing process for dual-use and munitions commodities. Our review was part of an interagency effort involving the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency. The interagency review was initiated following receipt of an August 26, 1998, letter from the Chairman, requesting that the Inspectors General update and expand on a 1993 interagency report concerning the export licensing process for dual-use and munitions commodities.

I will address our findings relating to Energy's export license review process, the corrective actions taken by the Department based on our 1993 report, and our concerns with the "deemed export" licensing process.

AUTHORITIES GOVERNING EXPORT LICENSE PROCESS

Several laws, Executive Orders, and regulations control the export of certain commodities and technologies. The authorities include the Export Administration Act of 1979. The requirements of the Act, which expired in 1994, were continued by Executive Order 12924 under the authority of the International Emergency Economic Powers Act. Other implementing authorities include the Export Administration Regulations; and Executive Order 12981, which authorizes Energy to review any export license applications submitted to the Department of Commerce (Commerce). Executive Order 12981 also provides Energy the authority to enter into Delegations of Authority

with Commerce regarding certain applications that Energy does not need to review. In addition, Executive Order 12981 establishes the interagency dispute resolution process. The Arms Export Control Act authorizes the President to control the export and import of munitions on the U.S. Munitions List. Department of State (State) administers export controls on all munitions through the International Traffic in Arms Regulations, and consults with Energy on export license applications for certain munitions.

Certain commodities and technologies are designated as "dual-use," that is, commodities and technologies that have both civilian and military application. Some dual-use commodities are designated as "nuclear dual-use" -- items controlled for nuclear nonproliferation purposes. An example of a nuclear dual-use item is fiber and filamentary material, such as carbon fibers. Carbon fibers are used in the manufacture of tennis rackets, golf clubs and fishing poles. Carbon fibers are also used in the manufacture of centrifuges for uranium enrichment activities. In 1998, Energy received about 2,200 export license applications from Commerce, mostly involving dual-use commodities.

Another group of controlled commodities is designated as munitions, which are goods and technologies that have solely military uses. High explosives are an example of a munitions commodity. In 1997 and 1998, Energy received a total of 10 munitions cases from State.[1]

[1] Subsequent to the release of our report, we learned that an additional munitions application had been referred to Energy during 1998.

Based on our analysis of Energy's process for reviewing nuclear dual-use and munitions license applications, we determined that, for the most part, Energy's process appears adequate. However, we identified several concerns. These include:

- Lack of regulatory guidance for processing munitions cases referred to Energy by State.
- Inability of Energy to obtain complete information on the final disposition of export cases.
- Non-referral of some applications by Commerce under Energy's Delegations of Authority.

Further, our review identified indicators of possible problems with the export licensing process for deemed exports.

ENERGY EXPORT LICENSE REVIEW PROCESS

The Nuclear Transfer and Supplier Policy Division in the Office of Nonproliferation and National Security is responsible for the review of export license applications. Based on this review, Energy recommends to Commerce or State either approval or disapproval of the license application, or approval with certain conditions. Procedures for processing dual-use license applications submitted to Commerce are clearly articulated in relevant regulations. There is no equivalent process for reviewing munitions cases referred by State.

Sample of 60 Cases Referred By Commerce

As part of the interagency review, Commerce provided a statistically-based sample of 60 export license applications that it had referred to Energy in the first six months of 1998. We determined that all of the 60 cases in the sample were appropriately referred by Commerce. Executive Order 12981 requires that, within 30 days of receipt of a referral, Energy will provide Commerce with a recommendation either to approve or deny a license application. Of the 60 cases referred to Energy, only two did not meet the 30-day timeframe, but were processed within 33 days of the referral.

We did not attempt to determine the appropriateness of Energy's license application recommendations for the 60 cases referred by Commerce. Rather, our analysis of the 60 cases was designed to determine the completeness, accuracy, consistency, and security of the Energy database that supports Energy's export license review process. This analysis did not identify problems with the Energy database. Energy's database, which is the Proliferation Information Network System, or PINS, contains the required records concerning the factual and analytical bases for Energy's advice, recommendations and decisions on the 60 referred cases. Also, Energy has established detailed procedures to limit access to the Energy database and to protect the information contained in the database. In addition, the Energy database retains considerable information on each export case and, therefore, provides a reliable audit trail regarding Energy's processing of the case.

We found minor discrepancies between information in the Energy and Commerce databases. One data field in the Energy database did not contain all of the Commerce comments because the comments were "truncated" when electronically sent to Energy. We understand this problem has been corrected.

Consistent with the Chairman's request, we examined the adequacy of the training provided to Energy analysts, the adequacy of the interagency "escalation" process for appealing disputed recommendations, and whether the analysts were improperly pressured by their supervisors regarding their recommendations on license applications. We determined that the analysts are provided an adequate level of training. Also, the escalation process for resolving agency disagreements regarding approval or disapproval of specific license applications appears to be satisfactory. Finally, we found no evidence that Energy analysts are being pressured improperly by their superiors to issue or change specific recommendations on license applications.

Energy's process includes a review for proliferation concerns. Energy analysts have access to classified intelligence information on end-users and suppliers, and export case information on cases that were reviewed by Energy as far back as 1978. Energy analysts use this information to assess the proliferation potential of the destination country of the export.

60 Cases Not Referred By Commerce

In order to determine whether Commerce was appropriately referring cases to Energy, an analysis was conducted of an additional random sample of 60 cases provided by Commerce. These cases had not been previously referred to Energy.

Of the 60 cases that had not been referred to Energy, a Nuclear Transfer and Supplier Policy Division analyst concluded that one case should have been referred. He reached this conclusion based on the involvement of a nuclear end-user for the commodity. However, Commerce maintains that a license application was not required for the commodity and, therefore, it did not need to refer the case to Energy.

Delegations of Authority

Certain commodities controlled for nuclear proliferation purposes comprise the Nuclear Referral List. Some commodities on the Nuclear Referral List are not intended for nuclear end-use or a nuclear end-user. For these commodities, Energy has provided Commerce with Delegations of Authority, which allow Commerce to process these commodities without referring the cases to Energy.

Energy officials in the Nuclear Transfer and Supplier Division independently reviewed a sample of cases covered by the Delegations of Authority to Commerce. Approximately 1,000 to 1,500

cases per year are covered by these Delegations. Based on Energy's review of a sample of these cases, Energy officials determined that approximately one percent should have been referred, but were not. Energy officials plan to rescind the Delegations of Authority to Commerce and determine whether they should be continued.

Munitions Cases From State

The International Traffic in Arms Regulations, implemented by State, include the U. S. Munitions List which identifies munitions commodities that are subject to export controls. Examples of such munitions commodities of interest to Energy include items that could be used in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. These regulations do not require State to refer license applications for munitions commodities to other agencies for review and there is no formalized system for escalating and resolving differences among agencies. As a result, Energy's role in reviewing munitions license applications is not clear.

Historically, State has received few requests for the export of nuclear-related commodities. However, when received, State will, as a matter of practice, refer munitions license applications for such commodities to Energy for review. Energy processes munitions license applications in the same manner as dual-use applications referred from Commerce. In addition to the cases referred to Energy during 1997 and 1998, State and Energy periodically consult to determine whether Energy should review other munitions license applications.

Corrective Actions Required By Other Agencies

Our review disclosed several issues that would best be addressed by other agencies or an interagency task force. For example, there is no process for interagency meetings on munitions cases or for escalation of disagreements over munitions cases. Also, Commerce officials were concerned that several agencies, including Energy, did not always send an Assistant Secretary-level representative to meetings of the Advisory Committee on Export Policy, which is responsible for resolving interagency concerns and differences over export license applications. The Advisory Committee is chaired by the Assistant Secretary of Commerce for Export Administration and has as its members Assistant Secretary-level or equivalent representatives of State, Defense, Energy, and the former Arms Control and Disarmament Agency. At Energy, an Assistant Secretary for Nonproliferation and National Security was recently appointed. We have been advised by the Department that the Assistant Secretary will attend Committee meetings involving extremely sensitive export cases.

In addition, the Commerce database was unable to electronically transmit large diagrams and other oversized documents that support export license applications. Thus, Energy must often either request from Commerce the required documents or contact the applicant directly. The current process used by Commerce to provide supporting documents to Energy might, therefore, adversely impact the timeliness of Energy's review process and should be improved.

1993 Report Recommendations

Our 1993 report on Energy's export licensing process contained 11 recommendations for corrective actions. Although we found that Energy had, for the most part, implemented the corrective actions within its control, several recommendations require additional review and action.

Five recommendations involved matters concerning records retention and the need to document the factual and analytical bases for Energy's recommendations to Commerce on export cases. These recommendations were resolved as a result of the implementation of PINS. A sixth recommendation was addressed by the development of new procedural manuals for use by Energy's export control analysts when processing export cases.

Of the five remaining recommendations, two still require corrective action by Energy. An assessment is required by Energy of the adequacy of the staffing level for the Nuclear Transfer and Supplier Policy Division. This Division has assumed additional responsibilities and may not be adequately staffed. Also, actions are required by Energy to ensure that the Department's intelligence capabilities are being fully utilized in the processing of export cases. Although Energy analysts were generally satisfied with the level of support provided by Energy's Office of Intelligence, one analyst was concerned that intelligence analysts were only providing abstracts of intelligence data and not the actual "raw data."

The remaining three recommendations in our 1993 report will require interagency coordination to assure appropriate implementation of corrective actions. Two recommendations require Energy to coordinate with Commerce to obtain information regarding the shipment of commodities. Although Commerce provides Energy information regarding whether a license application was approved or disapproved, Commerce does not inform Energy whether the commodity was actually shipped. The remaining recommendation requires Energy to coordinate with State to obtain information regarding whether a license application was approved by State for a munitions commodity and whether the commodity was actually shipped. This type of information from both Commerce and State would assist Energy analysts in their review of license applications for possible proliferation concerns.

"Deemed Export" License Process

During our review, there were indicators that Energy laboratories were not seeking export licenses for foreign nationals having access to unclassified information. According to the Export Administration Regulations, any release to a foreign national of technology or software that is subject to those regulations is "deemed to be an export" to the home country of the foreign national. We reviewed the export license process to determine whether hosts should have acquired deemed export licenses for foreign nationals having access to unclassified information or technology.

Our sample included foreign national assignees from China, India, Iran, Iraq, and Russia, who were involved for more than 30 days in unclassified activities at four Energy laboratories: Lawrence Livermore National Laboratory, Los Alamos National Laboratory, Oak Ridge National Laboratory, and Sandia National Laboratories.

We also looked at a sample of projects at the Energy laboratories in which these assignees had participated. The purpose of this sample was to determine whether there were any export concerns regarding the assignments.

During our visits to the four Energy laboratories, we found that guidance was not clear regarding when a deemed export license would be required for an assignment involving a foreign national. This apparently was largely due to the fact that the Export Administration Regulations, the relevant Energy order, and internal Energy guidelines did not clearly explain when a deemed export license may be required.

In addition, we found that the processes at the laboratories for reviewing assignments of foreign nationals generally rely on the hosts of the foreign national assignees to determine whether there are export concerns associated with the assignment. Hosts are required to be Energy or Energy contractor employees. We found several hosts who were not aware of, or did not understand, the requirements for deemed export licenses, and several hosts who did not appear to exercise appropriately their host responsibilities.

The following examples illustrate our concerns with the deemed export process.

- A security specialist at Los Alamos National Laboratory said that they rely on the host to determine if a deemed export license is required for a foreign national assignee. However, nine of the 14 hosts we interviewed contended they were not responsible for making this determination.

- At Oak Ridge National Laboratory, the form used for approval of assignments involving foreign nationals requires the host to indicate whether the assignment will result in the disclosure of technical data that may be subject to export controls. However, 13 of 17 hosts said that they were not responsible for this determination. Also, five of the hosts acknowledged that the foreign nationals they were hosting were affiliated with a nuclear facility or nuclear end-user in their home countries. The Energy analysts we consulted as part of our review, informed us that at least two export licenses might have been required for the assignees because of their nuclear affiliation. In addition, one scientist, who was the host of record, said that although he was listed as the host for a Chinese foreign national assignee, another Chinese foreign national assignee was the actual host.

Our review also disclosed that there is no organization within Energy that has management responsibility for the deemed export license process. Although the Nuclear Transfer and Supplier Policy Division has some responsibilities for reviewing deemed export license applications, that office was not providing oversight of the deemed export process. Energy officials, in response to

our report, stated that the Department is establishing a new policy that will clarify where responsibility lies between Headquarters and DOE facilities.

We selected a relatively small, judgmental sample of the documentation processed for proposed assignments to the laboratories of foreign nationals from the five countries included in our review. From this sample, we identified several cases where an export license may have been required because of the information being accessed or the individual's employer. For example, at Oak Ridge National Laboratory, a license application might have been required for three of 20 foreign national assignees because of possible access to technology subject to export controls. A license application may also have been required for two other assignees because of their affiliation with nuclear end-users in their native countries. Also, at Lawrence Livermore National Laboratory, one foreign national assignee was involved in discussions about lasers, which might have exposed the individual to export controlled technology.

On March 16, 1999, we advised the Acting Deputy Secretary of our concerns regarding deemed exports. We subsequently met with Energy officials regarding our preliminary findings. Following those meetings, Energy officials initiated a number of corrective actions that address the recommendations in our report. Among the more significant actions are:

- establishment by the Under Secretary of an export control task force to review export control issues relating to Energy facilities, including deemed exports;

- initiation of dialogue with Commerce on the issue of deemed exports;

- redrafting of policy with respect to unclassified foreign visits;

- redrafting of export control guidelines that would clarify requirements for deemed exports;

- initiation of efforts to educate Energy personnel on the issue of export control.

Summary of Review

In summary, we found that, with the exceptions that I have previously discussed, Energy's export licensing process for dual-use and munitions commodities was adequate. We also found that additional actions are needed by Energy to complete the recommendations in our 1993 report. Some of these actions will require coordination with Commerce and State. Finally, we found that clarification and improvements are needed in Energy's process for determining whether an export license is required in conjunction with assignments of foreign nationals to Energy laboratories. Management agreed with the recommendations in our report and identified specific actions to implement each of the recommendations. We intend to closely monitor Energy's actions.

Mr. Chairman, this concludes my testimony. I would be pleased to answer any questions.

DOE/IG-0445

INSPECTION REPORT

THE DEPARTMENT OF ENERGY'S EXPORT LICENSING PROCESS FOR DUAL-USE AND MUNITIONS COMMODITIES

MAY 1999

U.S. DEPARTMENT OF ENERGY
OFFICE OF INSPECTOR GENERAL
OFFICE OF INSPECTIONS

THE DEPARTMENT OF ENERGY'S EXPORT LICENSING PROCESS FOR DUAL-USE AND MUNITIONS COMMODITIES

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Overview

INTRODUCTION AND OBJECTIVE

Export of commodities, encouraged by both the private sector and the Federal Government, helps to improve our position in the global economy and is in the national interest of the United States. However, exports of commodities or technologies, without regard to whether they may significantly contribute to the military potential of individual countries or combination of countries or enhance the proliferation of weapons of mass destruction, may adversely affect the national security of the United States. The Federal Government, therefore, implements several laws, Executive Orders, and regulations to control the export of certain commodities and technologies. These commodities and technologies require a license for export. Some of the controlled items are designated as "dual-use," that is, commodities and technologies that have both civilian and military application. Some dual-use commodities are designated as "nuclear dual-use" -- items controlled for nuclear nonproliferation purposes. Another group of controlled commodities is designated as munitions, which are goods and technologies that have solely military uses. The Department of Energy (Energy) conducts reviews of export license applications for nuclear dual-use items and certain munitions.

On August 26, 1998, the Chairman of the Senate Committee on Governmental Affairs requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, and Treasury, and the Central Intelligence Agency (CIA), update and expand on a 1993 interagency review conducted by the Inspectors General of the Departments of Commerce, Defense, Energy, and State of the export licensing processes for dual-use and munitions commodities. The Chairman provided a list of 14 questions relating to export licensing that he requested be addressed during the review. [See Appendix B.]

After consideration of the Chairman's request, a determination was made that an interagency review of the export licensing process would be appropriate. Accordingly, the Inspectors General of Commerce, Defense, Energy, State, Treasury and the CIA initiated an interagency review to evaluate the export licensing process for dual-use commodities and munitions to determine whether current practices and procedures are consistent with established national security and foreign policy objectives. In a joint letter dated September 2, 1998, the Chairman and the Ranking Minority member of the House Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China requested the interagency review of the export licensing process be expedited.

The purpose of our inspection was to review Energy's export licensing process for dual-use items and munitions subject to nuclear nonproliferation controls. Our objectives were to: (1) determine the adequacy of Energy's process for reviewing export license applications referred to Energy for review; (2) address, where applicable to Energy, questions from the Senate Committee on Governmental Affairs; and (3) determine the adequacy of corrective actions that were implemented in response to the recommendations in our previous report on Energy's export licensing process, "Inspection of the Department's Export Licensing Process for Dual-use and Munitions Commodities," DOE/IG-0331, dated August 10, 1993.

OBSERVATIONS AND CONCLUSIONS

Energy's Export License Review Process

Based on our review of Energy's process for reviewing nuclear dual-use and munitions commodities, we determined that, for the most part, the process appears to be adequate. However, we identified several problem areas that require corrective action.

Our determination was based on our analysis of a random sample of 60 export license applications that were referred by the Department of Commerce (Commerce) and processed by Energy during the period January through June 1998 (hereafter, "60 referred cases"). Our determination was also based on a review by an analyst in Energy's Nuclear Transfer and Supplier Policy (NTSP) Division, which is in the Office of Nonproliferation and National Security, of an additional random sample of 60 cases provided by Commerce that had not been referred to Energy during the same period.

We determined that all of the 60 referred cases were appropriately referred by Commerce for Energy's review. We also determined that only two of the 60 referred cases, which were subject to the 30-day Executive Order requirement to review and recommend approval or denial to Commerce, were not processed by Energy within the required timeframe. In addition, we determined that, of the 60 cases that had not been referred to Energy because of Energy's delegation of authority to Commerce to review certain export cases, one of the cases should have been referred for Energy's review because of the nuclear end-user. As part of its implementation of the Government Performance and Results Act of 1993 (Results Act), Energy must, among other things, establish program goals and measure

performance against those goals. The timeliness of Energy's processing of export license applications is a performance-based measure that can be used to evaluate Energy's performance under the Results Act.

Our review of the completeness, accuracy, consistency, and security of the Energy database that supports Energy's export license review process was limited to an analysis of the 60 referred cases. We did not review the cases to determine the appropriateness of Energy's recommendations for the 60 referred cases. Based on our analysis, we did not identify problems with the Energy database. For example, we believe that the Energy database contains the required records concerning the factual and analytical bases for Energy's advice, recommendations and decisions on the 60 referred cases. We also determined that Energy has established detailed procedures to limit access to the Energy database and to protect the information contained in the database. Additionally, we determined that the Energy database retains considerable information on each export case and, therefore, provides a reliable audit trail regarding Energy's processing of the case. The minor discrepancies we found between information in the Energy and Commerce databases were caused by Energy not receiving all the comments of Commerce Licensing Officers on specific cases for input to the "DOC Comments" field. We concluded that, to ensure consistency of the information in the Energy and Commerce databases, the "DOC Comments" field in PINS should capture all of Commerce's comments.

We interviewed NTSP Division analysts to determine the adequacy of their training, their view of the adequacy of the interagency "escalation" process for appealing disputed recommendations, and whether they felt improperly pressured by their supervisors regarding their recommendations on license applications. Based on our interviews, we determined that, although a formal training program for NTSP Division analysts has not been established, the existence of an on-the-job training program, supported by detailed reference material, provides an adequate level of training. Also, we were told by the NTSP Division Director that she believes the escalation process works. Finally, we found no evidence that NTSP Division analysts are being pressured improperly by their superiors to issue or change specific recommendations on license applications.

Our review also disclosed several issues that would best be addressed by other agencies or an interagency task force. For example, we determined that there is no process for interagency meetings on munitions cases or for escalation of disagreements over munitions cases. We concluded that the issue of whether a process is needed regarding the escalation of munitions cases should be addressed.

Also, Commerce identified a concern regarding the level of agency representation at meetings of the Advisory Committee on Export Policy (ACEP). Commerce was concerned that several agencies, including Energy, did not always send an Assistant Secretary-level representative to the meetings. Although the language in the relevant Executive Order regarding the level of representation at meetings could be clearer, we do not believe the Executive Order limits participation at the meetings to only Assistant Secretary-level officials. Therefore, we believe that the agencies involved should jointly determine the appropriate level of representation at ACEP meetings.

In addition, we found that the Commerce database was unable to process image-type information, which prevents electronic transmittal of large diagrams and other oversized documents that support export license applications. This requires Energy to either request from Commerce the required documents or to contact the applicant directly. We concluded that the current process used by Commerce to provide supporting documents to Energy may adversely impact the timeliness of Energy's review process and should be improved.

Deemed Export License Process

During our review of Energy's export license review process, a Commerce official expressed concern about the apparent lack of export license applications submitted to Commerce by Energy for foreign visitors. According to the Export Administration Regulations (EAR), any release to a foreign national of technology or software that is subject to the EAR is "deemed to be an export" to the home country of the foreign national.[1] We found that improvements are needed in the process for determining whether an export license is required in conjunction with assignments of foreign nationals to Energy laboratories.

The focus of our review of the "deemed" export license process was to determine whether the hosts of the foreign assignees should have acquired deemed export licenses. We did not consider whether the foreign nationals should have been at the Energy laboratories. We limited our review to assignments (i.e., visits for more than 30 calendar days) of certain foreign visitors to four Energy

[1] For purposes of this review, we did not address the issue of whether U.S. scientists traveling abroad might require an export license under certain circumstances.

laboratories. As a part of this review, we looked at a small sample of projects at the Energy laboratories in which foreign assignees had participated to determine whether there were any export concerns.

During our visits to Energy laboratories, we were advised that each of the laboratories was taking initiatives regarding visits or assignments of foreign nationals. We had concerns, however, with several aspects of the deemed export license process. For example, we found that guidance was not clear regarding when a deemed export license would be required for an assignment involving a foreign national. We also found that additional guidance from Commerce may be required for an assignment involving a foreign national.

In addition, we found that the processes at the laboratories for reviewing assignments of foreign nationals generally rely on the host of the foreign national assignee to determine whether there are export concerns associated with the assignment. We believe that the reliance on the host to determine whether an export license is required for a foreign national assignment is problematic because we found several hosts who were not aware of, or did not understand, the requirements for deemed export licenses and several hosts who did not appear to appropriately exercise their host responsibilities.

As a result of our review, we are concerned that there does not appear to be an organization that has management responsibility for the deemed export license process within Energy.

We reviewed a small, judgmental sample of the documentation processed for proposed assignments to the laboratories of foreign nationals from certain countries. We found that, under the process existing at the time of our review, there were several cases in which export license applications were not submitted by hosts for certain foreign national assignments. However, an export license may have been required because of the information being accessed, the individual's citizenship, or the individual's employer.

Because we cannot determine the extent of the daily activities in which the foreign nationals have been involved, or the specific information and technologies to which they might have had access, we cannot definitively state that Energy should have obtained deemed export licenses for any of these foreign assignees. Additionally, we do not have any evidence that

any technology or information has been inappropriately exported, without an export license, to any country.

Based on the above, however, we concluded that there are sufficient indicators of possible problems with Energy's deemed export licensing process to warrant a review by Energy officials.

By memorandum dated March 16, 1999, the Inspector General advised the Under Secretary, who was the Acting Deputy Secretary, of our concerns regarding deemed exports. Based on direction from the Under Secretary, Energy officials requested a meeting on this subject, which was convened on April 2, 1999. The Energy officials indicated that actions would be initiated to address the concerns that we had identified.

Energy's Actions on Prior Recommendations

We reviewed the actions taken by Energy in response to recommendations in our 1993 report on Energy's export licensing process to determine the adequacy of the corrective actions. Energy officials had previously reported that corrective actions had been completed. Although we found that Energy has implemented the corrective actions within its control regarding most recommendations, certain recommendations may require additional review and action by Energy, or interagency coordination.

The following matters may best be addressed by an interagency task force. For example, we found that information available to Commerce regarding whether a commodity was purchased and/or shipped is not currently available to Energy. Also, we determined that the Department of State (State) does not notify Energy of the final disposition of munitions cases. Finally, we learned that Commerce was developing the Automated Export System (AES), which was intended to show the final disposition of exported commodities that were licensed by Commerce. We concluded that, to assist them in their review of export license applications, Energy officials should seek access to this information.

BACKGROUND

Legislative History

The principal authority governing the export control of nuclear dual-use commodities derives from the Export Administration Act of 1979, as amended (50 U.S.C. 2401 et seq.) (EAA) and the Nuclear Non-Proliferation Act of 1978, as amended (22 U.S.C. 3201 et seq.). The EAA expired in 1994 and has not been reauthorized. However, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the President has continued and amended the provisions of the EAA through a number of Executive Orders (E.O.s). Most recently, on August 13, 1998, the President issued a notice "Continuation of Emergency Regarding Export Control Regulations" continuing E.O. 12924, dated June 30, 1994. (63 Fed. Reg. 44,119 (1998))

Commerce uses the Export Administration Regulations (15 C.F.R. Part 730 et seq.) to implement policies regarding the export of nuclear dual-use commodities. Items designated for nuclear nonproliferation controls constitute the Nuclear Referral List, a subset of the Commerce Control List. Although E.O. 12981, Administration of Export Controls, dated December 6, 1995, provides authority to Energy and several other Departments to review any export license applications submitted to Commerce, Energy generally reviews only those export license applications received by Commerce dealing with the export of certain nuclear-related dual-use commodities.

Section 38 of the Arms Export Control Act (22 U.S.C. 2778) authorizes the President to control the export and import of defense articles (munitions) and defense services. Commodities designated for such controls constitute the U.S. Munitions List. State administers export controls on all munitions pursuant to the International Traffic in Arms Regulations (22 C.F.R. Part 120 et seq.) and consults with Energy on export license applications for certain munitions commodities.

Energy's Export License Review Process

Energy's export licensing review activities for nuclear dual-use and munitions commodities are based on the provisions of the laws, Executive Orders, and regulations discussed above, which Energy has not supplemented with internal orders. The NTSP Division, within Energy's Office of Nonproliferation and National Security, plays a major role in the formulation of U.S. nuclear nonproliferation and export control policies and makes unique contributions to the implementation of these policies, nationally and internationally.

Energy's process for reviewing export license applications received from Commerce regarding dual-use commodities, which represent the majority of export license applications reviewed by Energy, is shown at Figure 1. Energy also processes export license applications for munitions commodities. These are provided by State in a manner similar to applications received from Commerce, except that they are not transmitted electronically.

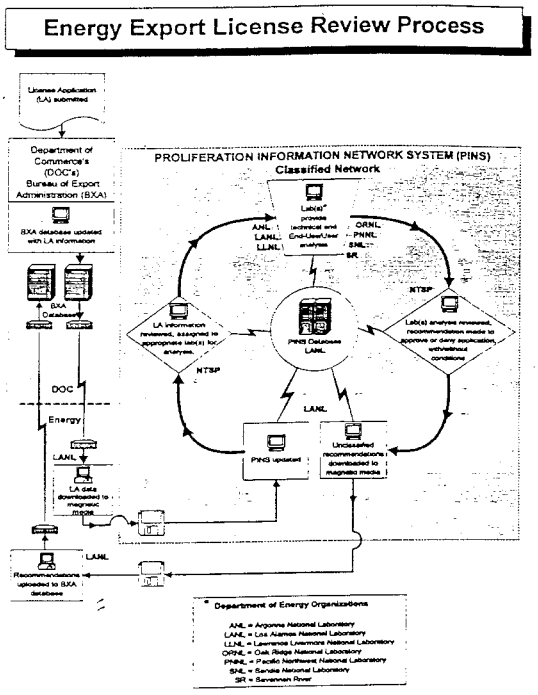

Figure 1 – Energy's Export License Application Review Process

Interface with Commerce

Commerce currently refers nuclear dual-use export license applications (cases) to Energy for review. These cases involve commodities on the Nuclear Referral List (NRL) or commodities that are intended for a nuclear end-use or a nuclear end-user. Commerce, however, does not refer all NRL cases to Energy. For some commodities on the NRL that are not intended for nuclear end-use or nuclear end-users, Energy has delegated to Commerce, through "Delegations of Authority" (DOAs), the authority to process these commodities without referring the cases to Energy. Energy has also given Commerce a DOA for commodities to Nuclear Suppliers Group members, because no license is required for items on the NRL to these countries.

Data concerning export license cases is contained in Commerce's Export Control Automated Support System (ECASS), which is an unclassified system. For cases referred to Energy, the data is electronically sent to Energy's Los Alamos National Laboratory (LANL), where it is downloaded and entered into Energy's Proliferation Information Network System (PINS), which is a classified system. Energy has 30 days from receipt of a referral and all required information to provide Commerce a recommendation regarding the license application.

Energy's NTSP Division is organized into regional and functional analysts who evaluate dual-use licenses with the knowledge and understanding of a particular country's potential nuclear weapons program, civilian nuclear programs, compliance with international nonproliferation or arms control treaties, as well as a familiarity with nuclear-related technologies. The Energy NTSP Division analyst assigned responsibility for the case will usually designate one of seven Energy laboratories and activities with access to PINS to conduct the primary analysis of the case. However, if they have an interest, any of the activities may provide input on the case to the NTSP Division analyst. The majority of cases are also referred to Energy's Lawrence Livermore National Laboratory (LLNL) for end-user analysis.

Energy's NTSP Division analysts factor many criteria into their review of dual-use license applications, including those embodied in EAR, 15 C.F.R. Part 744; namely, end-user of the commodity, technical significance of the commodity and stated end-use, potential risk of diversion, and nonproliferation credentials of the importing country. They also rely on intelligence information from Energy's Office of Intelligence and other segments of the U.S. Intelligence Community in their technical evaluation of nuclear dual-use and munitions license applications. After reviewing the laboratories' analyses, the NTSP Division analyst will make a

recommendation to his or her supervisor to deny, approve, or approve with conditions. When the supervisor approves the recommendation, Energy's unclassified recommendation and the conditions, if any, are downloaded from PINS and uploaded to ECASS. Comments from the Energy activities and NTSP Division analysts are not provided to Commerce.

Interface with State

Munitions commodities under the jurisdiction of State include items that could be used in the design, development, or fabrication of nuclear weapons or explosive devices. Historically, State has received few requests for the export of these types of commodities. However, when received, State usually refers munitions export cases involving commodities in Category V (Explosives, Propellants, Incendiary Agents), Category VI (Vessels of War Special Naval Equipment), and Category XVI (Nuclear Weapons Design and Test Equipment) of the U.S. Munitions List to Energy for review. State also refers export applications to Energy when a munitions commodity is to be used directly or indirectly in "nuclear explosive activities," or "unsafeguarded nuclear activities," and "safeguarded and unsafeguarded nuclear activities." Although State only referred a total of 10 cases to Energy for review during calendar years 1997 and 1998, State and Energy consult several times a month on cases other than those in Categories V, VI and XVI of the U.S. Munitions list. Export cases are transmitted between State and Energy via mail or fax because the agencies lack an electronic interface. However, the State munitions cases are entered into PINS and processed in the same manner as dual-use cases referred from Commerce.

Interagency Dispute Resolution Process

E.O. 12981 provides general guidance for resolving interagency concerns and differences over export license applications. E.O. 12981 further provides a mechanism to escalate cases to a higher level of authority when the reviewing departments or agencies are not in agreement. The escalation process includes, in ascending order, the Operating Committee (OC) of the Advisory Committee on Export Policy (ACEP), the ACEP, the Export Administration Review Board, and the President.

The OC, which has as its members representatives from Commerce, State, the Department of Defense (Defense), Energy, and the Arms Control and Disarmament Agency (ACDA), reviews all license applications on which the reviewing departments and agencies disagree. Representatives of the Joint Chiefs of Staff (JCS) and the Nonproliferation Center (NPC) of the Central Intelligence Agency (CIA) are nonvoting members. The Executive Order does not stipulate the level of representation for the OC. The Chair

of the OC, who is appointed by the Commerce Secretary, will consider the recommendations of the reviewing departments and agencies and issue a decision regarding the license application. If a department or agency disagrees with the decision of the OC Chair, it has five days to appeal the decision to the ACEP.

The ACEP is chaired by the Assistant Secretary of Commerce for Export Administration and has as its members Assistant Secretary-level representatives of State, Defense, Energy and ACDA. Representatives of the JCS and NPC are nonvoting members. However, the Executive Order also provides for an agency representative, regardless of rank, to speak and vote at the ACEP on behalf of the appropriate Assistant Secretary or equivalent. When a license application is appealed to the ACEP, the ACEP reviews all departments' and agencies' information and recommendations, and, by majority vote of the members, decides the appeal. Any dissenting department or agency has five days to appeal the decision to the Commerce Secretary in his or her role as the Chair of the Export Administration Review Board, which has as its members the Secretaries of Defense, Energy, and State, and the Director, ACDA. The JCS Chairman and the Director of Central Intelligence are nonvoting members. A decision by the Export Administration Review Board, which is based on a majority vote of the members, may be appealed within five days to the President.

Energy Export License Database

The Proliferation Information Network System (PINS) is a management information system that supports Energy's export license review activities for nuclear dual-use and munitions commodities and certain nonproliferation activities. The system, which contains data classified up to the SECRET/RESTRICTED DATA level, can be accessed by NTSP Division analysts, as well as analysts at the Energy activities involved in the export license review process. PINS provides analysts with a multitude of reference material to assist in the review of export license applications, including technical information in the Nuclear Technology Reference Book and Military Critical Technology List; policy guidance, such as National Security Directives and Executive Orders; laws, treaties, and regulations; and classified intelligence information on end-users and suppliers. PINS also contains information on export cases currently under review by Energy, as well as export cases that Energy reviewed since 1978.

Adequacy of Energy's Export License Process

We obtained information regarding the Energy export license application review process, as well as information responsive to certain questions from the Senate Governmental Affairs Committee.

To assist the interagency review of the process for referring export cases between agencies, the Commerce Office of Inspector General (OIG) provided a random sample of 60 export license applications referred by Commerce and processed by Energy during the period January through June 1998 (hereafter, "60 referred cases"). Our analysis of these sample cases included a comparison of case information in the automated data bases maintained by Commerce (ECASS) and Energy (PINS). We also examined the timeliness and appropriateness of the referral to Energy of these 60 cases.

At our request, the Commerce OIG also provided an additional random sample of 60 cases that were not referred by Commerce to Energy during the period January through June 1998. We provided these additional 60 cases to an NTSP Division analyst and requested a determination whether, in his view, any of the cases should have been referred to Energy.

Based upon these reviews, we identified several issues concerning Energy's export license review process.

Inconsistency In Statutory and Regulatory Authorities

We reviewed whether current statutory and regulatory authorities contain inconsistencies or ambiguities regarding the licensing of dual-use and munitions commodities. NTSP Division officials identified what they believe is an inconsistency in current statutory and regulatory authorities. While procedures for processing dual-use license applications are clearly articulated in relevant regulations, there is no equivalent process for reviewing munitions cases. As a result, Energy's role in reviewing munitions cases is not clear. In addition, there is no process for inter-agency meetings on munitions cases or for escalation of disagreements over munitions cases. We concluded that the issue of whether a process is needed regarding the escalation of munitions cases is an interagency matter that should be addressed.

Executive Order Is Consistent With the EAA

We reviewed whether E.O. 12981, as implemented, is consistent with the objectives of the Export Administration Act and other relevant statutory and regulatory authorities. NTSP Division officials believe that the Executive Order is consistent with the objectives of the Export Administration Act and other relevant statutory and regulatory authorities.

Majority of Cases Properly Referred by Commerce

We reviewed whether there is a continued lack of interagency accord, as stated in the 1993 interagency report, concerning whether Commerce is properly referring export license applications (including supporting documentation) for review by other agencies. NTSP Division officials identified a small number of cases that should have been referred to Energy. Energy has identified certain commodities that it does not need to review and has delegated authority to Commerce for those cases under the DOAs. Approximately 1,000-1,500 cases per year are covered by the DOAs. Based on their review of these cases, NTSP Division officials found approximately one percent of the cases had been erroneously processed. The NTSP Division Director advised us that she plans to rescind the DOAs to Commerce for a period of time to determine whether they should be continued.

We asked NTSP Division officials to review the 60 randomly-selected export cases that had not been referred by Commerce to Energy to determine whether any of these cases should have been referred to Energy. According to an NTSP Division official, one of the 60 cases should have been referred to Energy because of the nuclear end-user. We learned that Commerce ultimately returned the application to the applicant without action.

Although Commerce and Energy share export license information via electronic transfers, not all export licensing information can be electronically transmitted between the agencies. For example, the inability of ECASS to process image-type information prevents transmittal of large diagrams and other oversized documents, such as technical specifications. When NTSP Division analysts require information in the supporting documents, the analysts either contact the applicant directly or request Commerce to provide the documents, usually by mail. We concluded that the current process used by Commerce to provide supporting documents to Energy may adversely impact the timeliness of Energy's review, and should be improved.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

1. Coordinate with Commerce to establish a more effective process to provide supporting documents or information to Energy.

"Escalation" Process Is Adequate

We reviewed whether the interagency "escalation" process for appealing disputed recommendations relating to license applications allows officials from dissenting agencies a meaningful opportunity to seek review of such applications. The NTSP Division Director said that Energy objects to very few cases and she believes the escalation process works. For example, when Energy recommends denial of an application and another reviewing agency has recommended approval, the case is escalated. When Energy recommends denial, Energy's recommendation is almost always accepted. She said that almost all disputed cases are resolved at the ACEP.

We became aware of a potential issue identified by Commerce concerning the level of agency representation at the ACEP. The concern was that several agencies, including Energy, did not always send an Assistant Secretary-level representative to the meetings. Our review of E.O. 12981 determined that although the Executive Order states that the ACEP shall have as its members Assistant Secretary-level representatives from Defense, Energy, State, and the Arms Control and Disarmament Agency, the Executive Order also provides for representatives to be of a lesser rank, such as a Deputy Assistant Secretary or equivalent. The Executive Order further states that "regardless of the department or agency representative's rank, such representative shall speak and vote at the ACEP on behalf of the appropriate Assistant Secretary or equivalent . . . ." Although the language in the Executive Order could be clearer regarding ACEP membership, we believe that the Executive Order does not require that participation at ACEP meetings be limited only to Assistant Secretary-level officials. We believe that the agencies involved should jointly determine the level of representation at ACEP meetings.

Energy Reviews For Proliferation Concerns

We reviewed whether the current dual-use licensing process adequately takes account of the cumulative affect of technology transfers resulting from the export of munitions and dual-use items. We determined that Energy's process includes a review for proliferation concerns. As discussed previously, PINS provides Energy analysts classified intelligence information on end-users and suppliers. Energy analysts can use data stored in PINS to provide a summary of license applications sorted by destination countries; by exporter; by equipment and commodities, by type or description; and by export commodity classification numbers. PINS also contains export case information on cases that were reviewed by Energy as far back as 1978. However, Energy does not have the information available to Commerce as to whether a specific commodity was shipped, and does not have information available to State on the final disposition of munitions cases. We believe that if Energy analysts had access to this information, their analyses would be more complete.

Training for NTSP Division Analysts Is Adequate

We reviewed whether license review officials at Energy are provided sufficient training and guidance relevant for reviewing license applications. We determined that, although a formal training program has not been established, the existence of an on-the-job training program, supported by detailed reference material, provides an adequate level of training. According to NTSP Division officials, Energy seldom hires new NTSP Division analysts, therefore there is no formal training program. When a new analyst is hired, however, the individual is assigned to work with a more experienced licensing officer. The new analyst, who would be given increasing responsibilities, would initially be tasked to review countries or technologies for which there are no significant proliferation concerns and would attend interagency meetings as an observer to learn about other agencies, national policies, and the nonproliferation environment. Continuing training is in the form of participation at Energy-sponsored nonproliferation workshops, attendance at trade shows, and attendance at seminars with Commerce, exporters or international delegations. NTSP Division officials said that new procedural manuals have been written that analysts can use for reference, including "A Guide to Nuclear Export Controls" and the "Inspection Guidebook for the Nuclear Suppliers Group Dual-Use Annex." We concluded that the training currently being provided to NTSP Division analysts appears to be adequate.

No Problems Identified With Energy's Database

We reviewed the adequacy of databases used in the export licensing process, and the completeness, accuracy, consistency and security of the databases. Our review of the Energy database, PINS, which was based on the 60 referred cases, did not identify any significant issues.

Minor data discrepancies identified

Our review of the data contained in PINS and the Commerce database (ECASS) for the 60 referred cases disclosed only minor discrepancies, which were related to the data field in PINS for "DOC Comments." This data field is used to record the Commerce Licensing Officer's comments to Energy. We learned that, for some cases, Energy did not receive the entire comments from Commerce for this data field because the comments were "truncated" when received by Energy. We concluded that, to ensure consistency of the information in PINS and ECASS, the "DOC Comments" field in PINS should capture all of the Commerce comments.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

2. Coordinate with Commerce to ensure that Energy receives all Commerce comments concerning an export license application.

PINS contains required records

Based on our review of records maintained in PINS for the 60 referred cases, we believe that PINS contains the required records. Export control requirements provide for departments or agencies consulted in connection with a license application to keep records of their advice, recommendations or decisions, including the factual and analytical bases of the advice, recommendations or decisions. In our view, PINS contained the required records concerning the factual and analytical bases for Energy's advice, recommendations, and decisions for the 60 referred cases.

PINS access limited and data protected

We determined that Energy has established detailed procedures to limit access to the PINS classified databases and to protect the information contained in the databases. All communication lines between servers are protected with National Security Agency-approved Type I encryption units (STU-III and NES encryption units). Terminals are located in secure areas at Energy Headquarters and at the sites that participate in the review of export cases. Access to PINS requires presentation of a password and user identification. Audit trails are maintained of certain events, such as attempts to use an incorrect password more than five consecutive times, the receipt of a message from an unknown NES unit, or the inability to decrypt a message. These audit trails are restricted from access by any PINS user except the LANL System Manager. The NES audit logs from all laboratories accessing PINS are reviewed biweekly by LANL. Also, the server security log is monitored daily at LANL.

We reviewed data security, and whether comments or recommendations can be changed once entered into PINS. We determined that although PINS users are permitted to view, extract, and print information from the PINS server, users do not have the ability to change or delete data or recommendations. For example, NTSP Division analysts and Energy activity analysts enter their comments into PINS on each application they review. NTSP Division analysts said that, although they may disagree with an activity analyst's comments, they do not have the ability to overwrite the comments. They said they will, however, document in the

"Comment Section" of the particular case, their reasons for disagreement with the activity analyst. According to the NTSP Division analysts, there were two types of comments entered into PINS for each case; an "Active Comments" field, which can be accessed by the author and allows the author to edit his or her comments, and a "Frozen Comments" field, which can be reviewed by all PINS users, including the author, but which cannot be edited or changed. As of December 1998, PINS was determined to be "Y2K" compliant.

Analysts Not Pressured to Change Recommendations

We found no evidence that NTSP Division analysts are being pressured improperly by their superiors to issue or change specific recommendations on license applications. All NTSP Division analysts that we interviewed stated that they had never been pressured to change their recommendations regarding license applications.

PINS Provides Adequate Audit Trail

We reviewed whether Energy's licensing process leaves a reliable audit trail for addressing licensing performance. We determined that considerable information regarding each export case is retained in PINS. According to an NTSP Division analyst, PINS tracks virtually everything that is done to a license application, and therefore, the case history in PINS for each export case will show everything that has been done for a particular application. Our review of case histories in PINS for the 60 referred cases showed that the case histories contained the information regarding Energy's processing of the case. For example, among other things, each case history contained the dates that Energy received the case for review and subsequently provided its recommendation to Commerce; comments by Energy activity analysts who reviewed the case; comments by the NTSP Division analyst; and Energy's recommendation, including a description of any conditions on the license.

Referral of Sample Export Cases

As discussed previously, we reviewed two sets of sample export license application cases provided to us by the Commerce OIG. The results of our analyses follow.

Energy Review Timely

E.O. 12981 requires that, within 30 days of receipt of a referral, a department or agency provide Commerce with a recommendation either to approve or deny the license application. The results of our analysis of the timeliness of Energy's review of 51 of the 60 referred cases is shown in Figure 2 (see note). Energy provided comments to Commerce for 49 of the 51 cases within the 30-day requirement specified by E.O. 12981 and, on average, cases processed by Energy were completed well within the time requirements.

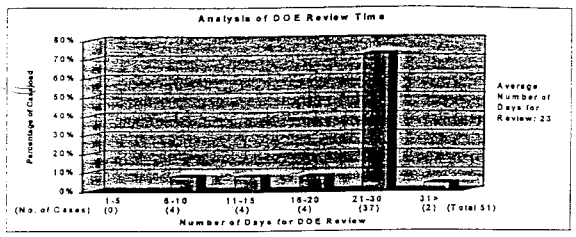

Figure 2 – Analysis of DOE Review Time[2]

Data generated from PINS showed that the average number of days for Energy to process the cases received from Commerce in calendar year 1998 was nine days. This excludes cases referred to Energy for review prior to OC meetings.

[2] Of the 60 referred cases, we only included 51 in our timeliness analysis. In one case, Energy was the applicant so Energy did not provide a response; four cases were cases sent to Energy for review for OC meetings; and four cases were National Defense Authorization Act cases, which have a ten-day response time and are not subject to the 30-day review requirement.

Majority of Cases Appropriately Referred

An analysis of the 60 referred cases indicated that all the cases were appropriately referred by Commerce.

Also, the analysis by an NTSP Division analyst of the 60 sample cases that had not been referred to Energy by Commerce showed that one of the 60 cases should have been referred to Energy for review because of the nuclear end-user. We learned that Commerce ultimately returned this case to the applicant without action.

PINS Contains Required Records

As discussed previously, based on our review of records maintained in PINS for the 60 referred cases, we believe that PINS contains the required records. We could not, however, make a determination regarding the appropriateness of Energy's recommendations on the 60 referred cases.

Adequacy of Database Information

Also, as discussed previously, our review of the data contained in ECASS and PINS for the 60 referred cases disclosed only minor discrepancies, which concerned the comments in the "DOC Comments" data field for some cases.

Improvements Needed In "Deemed" Export License Process

We found that Energy needs to clarify its policies with regard to deemed export licenses. When the policies are clarified, improvements should be made to the process for determining whether an export license is needed in conjunction with assignments of foreign nationals to Energy laboratories.

During our review of Energy's export license review process, a Commerce official expressed concern that Energy entities were not applying for export licenses for foreign nationals who might have access to export-controlled technology and/or software while visiting Energy laboratories. He based his concern on the large number of foreign visitors to Energy laboratories and the apparent lack of export license applications submitted to Commerce by Energy entities for foreign visitors. According to the EAR, any release to a foreign national of technology or software that is subject to the EAR is "deemed to be an export" to the home country of the foreign national. [3] These exports are commonly referred to as "deemed exports." In such instances, the U.S. host(s) would generally be required to obtain an export license before providing the foreign national access to technology or software that may be subject to export controls. According to a Commerce official, a deemed export license might also be required for a foreign visitor who is affiliated with an entity involved in proliferation activities, regardless of the technology or software that this visitor might access.

We reviewed the requirements for deemed exports contained in the EAR, as well as relevant Energy guidance. We limited our review to four Energy laboratories: LANL, LLNL, Oak Ridge National Laboratory (ORNL) and Sandia National Laboratory (SNL)-Albuquerque. For each laboratory, we reviewed the process used for determining whether there are export issues related to assignments of foreign nationals to unclassified activities in the laboratory. Energy has defined "assignments" as visits by foreign nationals for more than 30 calendar days. Our review did not include visits by foreign nationals to the laboratories, which are 30 calendar days or less. We also reviewed a small sample of projects at each of the four Energy laboratories in which foreign assignees had participated. The review of these projects was to determine whether there were any export concerns. The focus of our review of "deemed" exports was to determine whether the

[3] Release includes, among other things, visual inspection by foreign nationals of U.S.-origin equipment and facilities, and oral exchanges of information.

hosts of the foreign assignees should have acquired deemed export licenses.[4] We did not consider whether the foreign nationals should have been at the Energy laboratories.

During our visits to the Energy laboratories, we were advised that each of the laboratories was taking initiatives regarding export controls for visits or assignments of foreign nationals. For example, SNL-Albuquerque, LANL and ORNL are making guidance available to employees via internal websites that addresses the need to consider export controls during visits or assignments by foreign nationals. LLNL anticipated making such guidance available electronically in May 1999.

We had concerns, however, with several aspects of the deemed export license process. For example, we found that neither Commerce guidance (as promulgated in the EAR) nor Energy guidance was clear regarding when a deemed export license would be required for an assignment involving a foreign national. We also found that: (1) the processes at the laboratories for reviewing foreign national assignees generally rely on the host of the foreign national assignee to determine whether there are export concerns associated with the assignment; (2) several hosts were not aware of, or did not understand, the requirements for deemed export licenses; and (3) several hosts did not appear to appropriately exercise their host responsibilities. In addition, as a result of our review, we are concerned that there does not appear to be an organization that has management responsibility for the deemed export license process within Energy.

By memorandum dated March 16, 1999, the Inspector General advised the Under Secretary, who was the Acting Deputy Secretary, of our concerns regarding deemed exports. Based on direction from the Under Secretary, Energy officials requested a meeting on this subject, which was convened on April 2, 1999. The Energy officials indicated that actions would be initiated to address the concerns that we had identified.

Our findings are consistent with the General Accounting Office (GAO), which in September 1997 concluded that Energy lacked clear criteria for identifying visits by foreign nationals that involve sensitive subjects. GAO did not specifically consider whether Energy should be obtaining export licenses for these visits. However, GAO recommended that Energy require

[4] For purposes of this review, we did not address the issue of whether U.S. scientists traveling abroad might require an export license under certain circumstances.

experts with appropriate technical backgrounds, such as laboratory individuals involved in export control issues, to independently review the subjects of visits by foreign nationals. Similarly, a July 1998 study conducted by Energy's Office of Counterintelligence (CN) reviewed the process used by Energy facilities to vet their foreign national visitors and assignees and reviewed the degree of counterintelligence involvement in this process. The CN study found that the lack of understanding regarding deemed exports had both legal and counterintelligence implications. According to the study, given the high number of foreign visitors to the laboratories, and the visitor's relatively free access to areas where high performance computers are located, one might expect that there would be a number of applications for deemed export licenses.

Guidance On Deemed Exports Not Clear

We found that the EAR, the relevant Energy order, and the guidance issued by the NTSP Division do not clearly explain when a deemed export license is required for a foreign national assignment. Also, based on our discussions with Energy officials and Energy laboratory personnel, it appeared to us that there is a lack of understanding regarding if and when deemed export licenses are required.

EAR Difficult to Interpret

The Energy officials who we interviewed contended that the deemed export provisions in the EAR are difficult to interpret. Our review and analysis of the EAR confirmed that, in our judgement, the EAR provisions lacked clarity. In our view, due to the ambiguity of the EAR language, a reader could conclude, for example, that an export license is not required for research conducted by Energy laboratories and Federally Funded Research and Development Centers (FFRDCs). Virtually all of the Energy laboratories have been designated as FFRDCs. However, we concluded that a blanket exemption for work at FFRDCs was probably not intended. In general, the restrictions in the EAR regarding deemed exports do not apply to publicly available technology and software that arise during, or result from, "fundamental research." Section 734.8 of the EAR defines fundamental research as basic or applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community. The EAR further states that research conducted by scientists or engineers working for a Federal agency or FFRDC may be designated as

"fundamental research" within any appropriate system devised by the agency or the FFRDC to control the release of information by such scientists and engineers.

Energy has not further defined fundamental research. Also, Energy scientists are expected to determine when to assert restrictions for proprietary or national security reasons, which is categorized as "a matter of judgment." The following examples illustrate the difficulties experienced by individuals in interpreting the deemed export requirements in the EAR.

- A contractor attorney at LLNL said that laboratory representatives might not be applying for many deemed export licenses because the EAR guidance is vague, especially where it interplays with notions of fundamental research and publicly available information. He said that their classification office and the laboratory employees routinely struggle to try to determine if and when a deemed export license might be required.

- An export compliance manager at ORNL said that he sends a letter to all hosts of foreign nationals. The letter contains the statement that "No license is required for a Federal agency or a Federally Funded Research and Development Center (FFRDC)," which reflects language in the EAR. When asked whether this statement meant that none of the scientists that worked at ORNL needed to apply for a deemed export license for foreign national assignments involving research activities, he said that he was not sure what the statement meant.

We believe that additional guidance from Commerce is required regarding the circumstances under which a foreign national's visit or assignment would require an export license.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

3. Coordinate with Commerce to obtain guidance regarding when a visit or assignment by a foreign national would require an export license.

Energy Order Not Clear

We found that the Energy order regarding assignments of foreign nationals also is not clear on when an export license may be necessary in conjunction with a foreign national assignment. DOE Order 1240.2B, "UNCLASSIFIED VISITS AND ASSIGNMENTS BY FOREIGN NATIONALS," dated September 3, 1992, contains provisions for visits and assignments by foreign nationals to Energy facilities. The Order defines "Export Controlled Information (ECI)" and states that some sensitive subjects are controlled as ECI under U.S. laws and regulations. However, the Order does not explicitly state that the Energy host might be required to apply for a deemed export license in conjunction with a foreign national's assignment, nor does the Order prescribe circumstances that would exclude research activities from the requirements of the EAR.

Energy Guidelines Not Clear

We found that guidance issued by the NTSP Division does not clearly state the requirement for an export license for Energy-sponsored activities and, in our view, could give the impression that while a private sector entity would require an export license for certain activities, Energy may not.

In February 1997, the NTSP Division published a document titled "GUIDELINES ON EXPORT CONTROL AND NONPROLIFERATION." These guidelines establish policy and procedures for transfers by Energy of unclassified equipment, materials, and information that could adversely affect U.S. nuclear nonproliferation objectives or national security. According to an NTSP Division official, these guidelines have been widely distributed throughout Energy. However, the requirement for a deemed export license for Energy-sponsored activities is not clearly stated. Also, the language in the guidelines could give the impression that, while the private sector would need an export license, Energy would not. For example, the guidelines state that "DOE-sponsored activities often entail the transfer abroad of technical information, and sometimes equipment and materials. Private sector export of such items would be subject to U.S. Government export control review and approval; lack of an export control review and approval process for DOE-sponsored actions could defeat the intent of the NPT [Non-proliferation Treaty], U.S. laws and regulations, and U.S. international commitments."

Possible Management Control Weaknesses Identified

We found that the processes at the laboratories for reviewing assignments of foreign nationals generally rely on the host of the foreign national assignee to determine whether there are export concerns associated with the assignment. We believe that the reliance on the host to determine whether an export license is required for a foreign national assignment is problematic because we found several hosts who were not aware of, or did not understand the requirements for deemed export licenses and several hosts who did not appear to appropriately exercise their host responsibilities.

For example, the form used at ORNL for approval of foreign visits and assignments (DOE Form IA-473, "Request for Foreign National Unclassified Visit or Assignment") requires the applicant (host) to indicate whether the assignment will result in the disclosure of technical data other than that allowed by the general export license. We found, however, that 13 of the 17 hosts we interviewed said that they were not responsible for making this determination. In addition, when asked who certifies that no license is required, four of the 17 hosts said that they did not know or were not sure.

Also, five of the 17 hosts that we interviewed at ORNL said that the six foreign nationals they were hosting were affiliated with a nuclear facility or nuclear end-user in their home countries. However, none of these hosts had considered applying for deemed export licenses. A limited review of information on the DOE Form IA-473 by Energy contractor technical analysts, who review export license applications for Energy, indicated that export licenses might have been required for two of these foreign nationals because they were affiliated with nuclear end-users in their native countries.

Additionally, a security specialist at LANL said because no one is an expert in every technical area, LANL relies on the hosts to determine if a deemed export license is required for every foreign national visitor or assignee who comes to the laboratory. However, nine of the 14 hosts who we interviewed contended that they were not responsible for making this determination. We were not able to reconcile this inconsistency.

Hosts Did Not Understand Requirements

We found a lack of understanding by some hosts of the requirements for deemed export licenses. We also found that other hosts did not appear to appropriately exercise their host responsibilities.

For example, hosts at LLNL had received memoranda regarding their security responsibilities pertaining to foreign national assignments. The memoranda reminded the hosts that access to Export Controlled Information must be strictly controlled. However, two of the eight hosts we interviewed said that they never received guidance on possible export control issues relating to the foreign nationals they were hosting.

Also, a LANL security specialist said that hosts are made aware of their responsibilities to review possible export issues for every visitor or assignee. However, only seven of the 14 hosts that we interviewed said they had received guidance related to export controls in conjunction with hosting foreign nationals. An additional host said he had received export guidance twenty years ago.

In addition, one host at SNL-Albuquerque said that the request for the foreign national he hosted stated that the individual might have access to software that was export controlled. The host explained that counterintelligence representatives reviewed the request, but a determination was never made regarding whether the software was, in fact, controlled.

We reviewed whether hosts appropriately adhered to Energy's policies for hosting unclassified assignments by foreign nationals. One ORNL contractor said that he was listed as the host of a Chinese national assignee, but that another Chinese national was the actual host. The contractor said he was the host of record because of the requirement that the host should be a U.S. citizen.

Also, another ORNL contractor host said that his name is officially assigned as the host for many visitors. He said, however, that he does not actually know them all.

In addition, one LLNL contractor who hosted an Indian national assignee said that a revision to the laboratory's policy required the laboratory director to approve all requests to host Indian nationals. He said, therefore, that he asked the Indian national to leave. The Indian national returned to the U.S. university where he was employed. However, the host said that he planned to send a laboratory employee to the university to collaborate with the Indian national because this would be easier than trying to get approval for the Indian national to work at the laboratory.

Program Management Responsibility Not Clear

We could not determine which Energy organization, if any, has management responsibility for the deemed export licensing process.

DOE Order 1240.2B assigns several responsibilities in the area of export controls to the NTSP Division. For example, the NTSP Division has review and concurrence responsibility for visits by foreign nationals. However, the NTSP Division does not review and concur on visits and assignments to non-security areas that do not involve sensitive subjects. The NTSP Division also develops export control policy and guidance that is widely disseminated throughout Energy. In addition, the NTSP Division provides awareness seminars for Energy employees. In July 1996, the then Director, Office of Nonproliferation and National Security, issued guidance on access to export controlled information by foreign nationals that stated that personnel familiar with export control regulations should be consulted routinely when determining what access to technology can be afforded foreign visitors. However, the NTSP Division Director said that the NTSP Division does not have an oversight role to ensure that Energy sites and contractors are adhering to export control requirements.

Some Foreign National Assignments May Have Required an Export License

We found that, at the time of our review, export license applications were not submitted by hosts for certain foreign national assignments, even though an export license may have been required because of the information being accessed, the individual's citizenship, or the individual's employer.

We selected a small, judgmental sample of the documentation processed for proposed assignments of foreign nationals to LANL, LLNL, ORNL, and SNL-Albuquerque during calendar year 1998. We limited our sample to foreign nationals from China, India, Iran, Iraq and Russia. We then provided Energy analysts, who are involved in reviewing export license applications, with the documentation regarding these proposed assignments. The documentation included the citizenship of the foreign national assignee, the assignee's employer, and the purpose or justification for the assignment. The analysts concluded that export licenses might have been required by the Energy hosts for certain of the assignees.

For example, at ORNL, three of the 20 foreign nationals might have had access to technology that is covered under specific export commodity control numbers. Two other foreign nationals at ORNL had affiliations with nuclear end-users in their native country. Also, research activities by four other foreign nationals at ORNL might have involved more than basic research.

At LLNL, one of the foreign nationals was involved in two projects – a high-power laser for Extreme Ultraviolet Lithography, which has potential application to advances in the semiconductor industry, and the development of a high-energy laser for the U.S. Army's missile defense program. In addition, another foreign national at LLNL was involved in discussions about laser optics and development of solid state lasers, which might have exposed the individual to export-controlled technology.

At this time, Energy analysts have not completed their reviews of our samples from SNL-Albuquerque and LANL. However, we noted that export licenses might have been required for six foreign nationals in our sample at LANL because of their affiliations with nuclear end-users in their home country.

Based on the above, we concluded that there are sufficient indicators of possible problems with Energy's implementation of the deemed export licensing process to warrant a review by Energy officials.

We recommend that the Under Secretary:

4. Assure that the Energy task group established to review and resolve possible issues associated with Energy's deemed export process, addresses these issues as expeditiously as possible.

Additional Actions Needed on Prior Recommendations

In 1993, as part of the interagency export license process review by the Offices of Inspector General of Commerce, Defense, Energy and State, we issued a report on Energy's export licensing process for dual-use and munitions commodities subject to nuclear nonproliferation controls. The report, titled "Inspection of the Department's Export Licensing Process for Dual-use and Munitions Commodities," DOE/IG-0331, contained recommendations for corrective actions to improve Energy's process. As part of our current inspection, we reviewed the actions taken by Energy in response to our previous recommendations to determine the adequacy of the corrective actions. Energy officials had previously reported that corrective actions had been completed. We found that Energy has implemented the corrective actions within its control regarding most recommendations. However, certain recommendations may require additional review or action by Energy, or interagency coordination.

Several Prior Recommendations Resolved by PINS

Five recommendations were adequately resolved by the implementation of PINS:

Recommendation 1 (1993 Report): Review and update records maintained by the Export Control Operations Division (now the NTSP Division) to ensure compliance with Energy records management directives and provisions of the Export Administration Act of 1979, as amended.

Recommendation 2 (1993 Report): Ensure that the Records Inventory Disposition Schedule complies with the provisions of the Export Administration Act of 1979, as amended, regarding records retention.

Recommendation 3 (1993 Report): Ensure that records are developed and maintained to document the Export Control Operations Division's factual and analytical bases for providing Commerce advice, recommendations, and decisions on export cases.

Recommendation 6 (1993 Report): Ensure timely completion of the fielding of PINS at the Energy national laboratories to allow them access to export case information in order to assist in Energy's processing of export cases.

Recommendation 11 (1993 Report): Coordinate with Commerce to develop and implement procedures to ensure that export license application information in the ECASS data base maintained by Commerce and the Energy Information System data base (now a part of PINS) maintained by Energy are reconciled on a periodic basis.

One Recommendation Addressed By Other Action

One recommendation was adequately addressed by the development of procedural manuals.

Recommendation 4 (1993 Report): Update the procedures manual titled "Procedures/ Policies United States Nuclear Export Control," and ensure the manual is used by analysts when processing export cases.

This recommendation was addressed by the development of new procedural manuals that NTSP Division analysts can use for references. These include "A Guide to Nuclear Export Controls" and the "Inspection Guidebook for the Nuclear Suppliers Group Dual-Use Annex."

Several Recommendations Require Additional Actions

The remaining five recommendations require additional corrective actions. We recognize that certain of these recommendations will require interagency coordination to assure appropriate implementation of corrective actions. However, in view of the significance of these issues, Energy should initiate actions as soon as practicable for Recommendations 8, 9, and 10.

Recommendation 5 (1993 Report): Assess the adequacy of the staffing level in the Export Control Operations Division (ECOD) for processing nuclear dual-use export cases.

The NTSP Division (formerly the ECOD) has three analysts to process license applications. According to the Division Director, staffing is inadequate because her office has experienced an increase in tasks, and case levels have increased in the last few years, with most cases requiring significant analytical work. She said, for example, her staff has been receiving additional taskings regarding commercialization of technologies, which must be reviewed for any proliferation concerns before Energy releases the technologies. She also said that her staff has been working with property managers across the complex to ensure that export controls have been addressed before the property is processed as surplus property. She said that she will attempt to hire one additional analyst to process license applications. We concluded that a review of the NTSP Division workload should be conducted to determine the appropriate level of staffing.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

5. Conduct a review, in coordination with the Director, Office of Management and Administration, of the NTSP Division workload to determine the appropriate staffing level.

6. Ensure that, if the workload review identifies a requirement for increased staffing, actions are initiated to provide the NTSP Division with the appropriate level of staff.

Recommendation 7 (1993 Report): Coordinate with the Office of Intelligence and the Energy National Laboratories to ensure that Energy's intelligence capability is being fully utilized in the processing of export cases.

Prior to initiating this review, it came to our attention that there was an unresolved issue regarding access to export-related information (referred to as 12(c) information). The NTSP Division Director said that the Office of Intelligence provides excellent support to the NTSP Division; however, the issue of access to 12(c) information remains unresolved. In a memorandum dated March 2, 1998, we requested the Office of General Counsel review the possible conflict between the requirements of E.O. 12333, "United States Intelligence Activities," and the requirements to protect 12(c) information. The Office of General Counsel has not yet issued a written legal opinion.

We recommend that the General Counsel:

7. Complete the review to determine whether a possible conflict exists between E.O. 12333 and the requirements to protect 12(c) information.

8. Issue a written legal opinion concerning whether Intelligence officials should have unrestricted access to 12(c) information maintained by Energy.

Another NTSP Division official was not satisfied with the support provided by the Office of Intelligence. He said that instead of providing the NTSP Division with "raw" intelligence data, the intelligence analysts routinely write an abstract from the raw intelligence data and provide the abstract to the NTSP Division

analysts. He said the access to raw intelligence data could enhance the work of the NTSP Division. For example, at interagency meetings, NTSP Division officials may take a position based on the intelligence abstract, while another agency may have more complete intelligence data supporting the opposing position. Also, the Office of Intelligence insistence on preparing an abstract of the raw intelligence delays the timeliness of the receipt of such data. Finally, he said that State, which chairs the Nuclear Export Violators Working Group, provides an agenda to Energy prior to scheduled meetings that cites relevant raw intelligence reports. According to the NTSP Division analyst, Office of Intelligence officials will not provide NTSP Division analysts with access to the raw intelligence reports, which are classified above the SECRET level. Therefore, an NTSP Division official must travel to State to review relevant intelligence information for the meetings. The then Deputy Director, Office of Intelligence, advised us that he believed that the Office of Intelligence is prohibited from releasing raw intelligence data due to CIA requirements to protect sources and methods.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

9. In coordination with the Director, Office of Intelligence, ensure that the issue of access to intelligence information required to support NTSP Division export license activities is resolved.

Recommendation 8 (1993 Report): Coordinate with Commerce to ensure access by Energy to information within Commerce regarding the final disposition of export cases and to develop guidelines for Energy's access to the information, if possible.

In our 1993 report, we defined "final disposition" as approval or denial of license applications and the purchase and/or shipment of commodities. Energy currently receives information regarding the approval or denial of an export license application referred by Commerce to Energy. However, Energy does not receive information from Commerce regarding whether the commodity was actually purchased and/or shipped. The U.S. Customs Service (Customs) provides this information to Commerce, but Energy does not have access to the information. We concluded that Energy officials should initiate action to obtain this information from Commerce.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

10. Coordinate with Commerce to ensure access by Energy to information within Commerce regarding the final disposition of export cases and develop guidelines for Energy's access to the information.

Recommendation 9 (1993 Report): Coordinate with State to ensure access by Energy to information maintained by State regarding final disposition of munitions export cases and develop guidelines for Energy's access to the information.

State currently only shares this type of information with Defense. Therefore, Energy is not notified of the final disposition of munitions cases and Energy NTSP Division analysts do not know whether the applications they review are approved or disapproved. We concluded that Energy officials should initiate action to obtain this information from State.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

11. Coordinate with State to ensure access by Energy to information maintained by State regarding the final disposition of munitions cases and develop guidelines for Energy's access to the information.

Recommendation 10 (1993 Report): Ensure that Los Alamos National Laboratory completes its plan to obtain licensing decision information from Commerce.

As discussed above, Commerce does not provide the information it receives from Customs to Energy. An NTSP Division official said that Commerce was developing the Automated Export System (AES), which was intended to show the final disposition of exported commodities that were licensed by Commerce. However, the official did not know the status of this initiative. We concluded that Energy officials should seek access to the information in AES when the system becomes operational.

We recommend that the Assistant Secretary for Nonproliferation and National Security:

12. Coordinate with Commerce to obtain access for Energy to information in the AES when the system becomes operational.

MANAGEMENT COMMENTS

Management concurred with all recommendations in our report.

By memorandum dated May 6, 1999, the Assistant Secretary for Nonproliferation and National Security provided management's comments to our draft report. According to the Assistant Secretary, her comments included, as appropriate, comments by the Office of Defense Programs and the Office of Science.

The Assistant Secretary concurred with 11 of the 12 recommendations in our draft report and identified specific actions to implement the recommendations. However, she did not concur with Recommendation 2, which was to ensure that PINS is modified to permit the capture of all Commerce comments concerning an export license application. According to the Assistant Secretary, the problem was the receipt of truncated comments from Commerce. The PINS memory space for the "DOC Comments" field was modified in April 1998, and no comments have exceeded the current memory space. She stated that Energy believes that the problem of truncated comments has been corrected by Commerce.

By memorandum dated May 14, 1999, the Director, NTSP Division, suggested a revision to Recommendation 2 to address this matter. Therefore, we have revised Recommendation 2 in our final report.

The following is a summary of several key actions by the Department that were identified by the Assistant Secretary in her management comments. [See Appendix C for management's complete comments.]

- The Under Secretary formed an export control task force with representatives from the Secretary's office and the Offices of Nonproliferation and National Security, Counterintelligence, General Counsel, Defense Programs, and Science. The task force is reviewing export control issues relating to Energy facilities, including deemed exports.

- The Under Secretary raised the issue of deemed exports at a meeting with Energy laboratory directors.

- The task force has begun a dialogue with Commerce over the issue of deemed exports, received some limited additional guidance, and intends to use this mechanism to deal with issues as they arise.

- The February 1997 Guidelines on Export Control and Nonproliferation are being updated and will, among other things, clarify requirements on deemed exports.

- Energy is redrafting its policy with respect to unclassified foreign visits. The new policy will clarify where export control review responsibility lies between Headquarters and Energy facilities and ensure that consideration of export license requirements is part of the visits and assignments process.

- The Office of the Chief Financial Officer is examining its procedures for processing foreign travel applications. The procedures will provide that export license issues be considered as part of the application process.

- In addition to revising existing policies and procedures, a one page summary guide has been drafted for hosts of foreign nationals and for Energy foreign travelers.

- Energy plans additional efforts to educate Energy personnel on the issue of export control. These include bringing Commerce experts to the annual meeting of the Energy contractors' Export Control Coordinators Organization, participating in video conferences, and recommending that the Secretary and Under Secretary raise the level of awareness of this issue.

Management's comments have been incorporated into our report where appropriate.

INSPECTOR COMMENTS

We believe the actions by management are responsive to our recommendations.

Scope and Methodology

We conducted the field work portion of our review during the period October 1998 to April 1999, at the Department of Energy (Energy) Headquarters and four of the Department's laboratories; Lawrence Livermore National Laboratory (LLNL), Los Alamos National Laboratory (LANL), Oak Ridge National Laboratory (ORNL), and Sandia National Laboratory (SNL). At Energy Headquarters, we interviewed officials in the Nuclear Transfer and Supplier Policy Division, which was the principal office within the Department for export control activities, and officials in the Office of Intelligence. We also attended briefings provided by representatives from the Department's of Commerce, Defense, Energy, State, Treasury and the Central Intelligence Agency regarding their agencies' export license activities and we conducted interviews of officials at those agencies, as appropriate. We interviewed Energy Operations Office personnel and laboratory contractor officials who were involved in the review of export license applications and who were responsible for managing and operating the Energy's Proliferation Information Network System (PINS). We also interviewed hosts of foreign national assignees at Energy laboratories.

We reviewed the applicable laws, Executive orders, regulations and Departmental guidance regarding the export license process. We also reviewed files, both electronic and hardcopy, pertaining to the management and administration of the Department's export license activities.

In addition, we analyzed data from samples of export license cases and samples of applications for assignments of foreign nationals to selected Energy laboratories. These samples involved:

- A sample of 60 randomly selected export license cases that were referred by Commerce to Energy during the period January 1, 1998, to June 30, 1998. The cases were referred to Energy either because the commodity was designated as a nuclear dual-use item, the commodity was intended for a nuclear end-use or nuclear end-user, or the application was escalated to the Operating Committee.

- An additional sample of 60 randomly selected export license cases that were not referred by Commerce to DOE during the period January 1, 1998, to June 30, 1998.

- Samples from LANL, LLNL, ORNL, and SNL of applications for foreign nationals from sensitive countries for assignments to the laboratories.

This inspection was conducted in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

QUESTIONS FROM THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE CHAIRMAN

1. Please examine whether current, relevant statutory and regulatory authority contains inconsistencies or ambiguities regarding the licensing of dual-use and munitions commodities, and the effect of any such inconsistencies and ambiguities. (See page 12)

2. Please examine whether Executive Order 12981 (1995) as implemented is consistent with the objectives of the Export Administration Act and other relevant statutory and regulatory authority. (See page 12)

3. Please determine if there is a continued lack of interagency accord, as stated in your 1993 interagency report (at page 13), regarding whether the Commerce Department is properly referring export license applications (including supporting documentation) out for review by the other agencies. (See page 13)

4. Please determine if the interagency dispute resolution (or "escalation") process for appealing disputed license applications allows officials from dissenting agencies a meaningful opportunity to seek review of such applications, and assess why this process is so seldom used. (See page 14)

5. Please review whether the current dual-use licensing process adequately takes account of the cumulative affect of technology transfers resulting from the export of munitions and dual-use items, and the decontrol of munitions commodities. (See page 14)

6. Please review whether the current munitions licensing process adequately takes account of the cumulative affect of technology transfers resulting from the export of munitions and dual-use items, and the decontrol of munitions commodities. (See page 14)

7. Please determine whether license applications are being properly referred for comment (with sufficient time for responsible review) to the military services, the intelligence community, and other relevant groups (the "recipient groups") by the Defense Department and other agencies. Please consider in particular numerical trends in the frequency of such referrals, trends in the types of applications referred, trends in the nature of the taskings made in connection with the referrals, and the perceptions of officials at the recipient groups. (Not applicable to Energy)

8. Please determine whether license review officials at each of the agencies are provided sufficient training and guidance relevant for reviewing license applications, and whether more formal training and guidance is warranted. (See page 15)

9. Please review the adequacy of the databases used in the licensing process, such as the Defense Department's FORDTIS, paying particular attention to whether such databases contain complete, accurate, consistent, and secure information about dual-use and munitions export applications. (See page 15)

10. In his testimony, [a witness] described instances where licensing recommendations he entered on FORDTIS were later changed without his consent or knowledge. Please examine those charges, and assess whether such problems exist at your agencies. (See page 16)

11. Please determine whether license review officials are being pressured improperly by their superiors to issue or change specific recommendations on license applications. (See page 17)

12. Please determine whether our government still uses foreign nationals to conduct either pre-license or post-shipment licensing activities and whether such a practice is advisable. (Not applicable to Energy)

13. Please determine whether the agency licensing process leaves a reliable audit trail for assessing licensing performance. (See page 17)

14. Please describe the procedures used by agencies to ensure compliance with conditions placed on export licenses (e.g., no retransfers without U.S. consent, no replications, and peaceful use assurances), and assess the adequacy and effectiveness of such procedures. (Not applicable to Energy)

Department of Energy
Washington, DC 20585

May 6, 1999

MEMORANDUM FOR: SANDRA L. SCHNEIDER

FROM: ROSE GOTTEMOELLER
ASSISTANT SECRETARY FOR
NONPROLIFERATION AND NATIONAL SECURITY

SUBJECT: COMMENTS ON INSPECTOR GENERAL'S EXPORT LICENSING PROCESS DRAFT REPORT

The Office of the Assistant Secretary for Nonproliferation and National Security appreciates the opportunity to have reviewed the draft report on the export licensing process for dual-use and munitions commodities. The recommendations of the Inspector General will enhance the Department's export license processing as well as ensure that the Department's position on each license application is sound and defensible. Furthermore, the recommendations will ensure that the Department uses all its resources, including policy, technical, and intelligence efficiently and effectively. During our review of the draft report, we received comments from the Office of Defense Programs and the Office of Science and have addressed their comments as appropriate. Our general comments and the specific comments regarding the recommendations are attached.

Attachment

Comments on
IG Draft Report
Inspection of the Department of Energy's
Export Licensing Process For Dual-Use
and Munitions Commodities

General Comments

We appreciate the careful review the Inspector General (IG) has given to the Department of Energy (DOE) export control activities and are gratified by the findings indicating the strength of this program.

Your specific recommendations will be addressed in detail farther on but we would like to summarize some key actions that have been taken as follows:

- Formation of an Export Control Task Force. The Under Secretary formed an export control task force with representatives from the Secretary's office, and the Offices of Nonproliferation and National Security (NN), Counterintelligence (CN), General Counsel (GC), Defense Programs (DP) and Science (SC). This group is reviewing export control issues relating to DOE facilities, including deemed exports.

- Meeting with Lab Directors. Under Secretary Moniz raised the issue of deemed exports at a meeting with DOE Lab Directors and the Inspector General explained his concerns.

- Consultations with Commerce. The Task Force has begun a dialogue with the Department of Commerce (DOC) over the issue of deemed exports, received some limited additional guidance, and intends to use this mechanism to deal with issues as they arise.

- Attendance at ACEP. Since the end of 1998, a Deputy Assistant Secretary level representative has attended meetings of the Advisory Committee on Export Policy (ACEP). Assistant Secretary Gottemoeller has attended meetings for extremely sensitive export cases. In a April 21, 1999, letter, Under Secretary Moniz confirmed to DOC that this practice would continue. DOC has stated that it satisfied with this arrangement.

- Redrafting of Export Control Guidelines. NN is updating its February 1997 Guidelines on Export Control and Nonproliferation. A draft has been sent to all Secretarial Offices for concurrence and should be circulated to DOE facilities soon. The new guidelines will, among other things, clarify requirements on deemed exports.

- Redrafting of Foreign Visits and Assignments Policy. The Department is redrafting its policy with respect to unclassified foreign visits and assignments. The new policy will clarify where export control review responsibility lies between headquarters and DOE facilities and ensure that consideration of export license requirements is part of the visits and assignments process.

- Updating Foreign Travel Procedures. The Office of the Chief Financial Officer is examining its procedures for processing foreign travel applications. The procedures will provide that export license issues be considered as part of the application process.

- Drafting Additional Guidance. In addition to revisions of existing policies and procedures, NN has drafted one page summary guides for hosts of foreign nationals and for DOE foreign travelers. These will be circulated to DOE facilities at the same time that the revised Guidelines on Export Control and Nonproliferation are released.

- Additional Educational Efforts. The Department plans additional efforts to educate DOE personnel on the issue of export control. These include bringing DOC experts to the annual meeting of the DOE contractors' Export Control Coordinators Organization, participating in video conferences, and recommending Dr. Moniz and Secretary Richardson raise the level of awareness of this issue.

The recommendations of the IG will enhance export license processing at DOE and will ensure that DOE's position on each license application is sound and defensible. Furthermore, the recommendations will ensure that DOE has used all its resources, including policy, technical, and intelligence efficiently and effectively.

Many of the issues discussed in the report have been under review for several years, requiring effort on the part of DOE and incurring substantial costs. Resolving these issues would be beneficial in terms of allocation of overall resources. In many cases, the full support of senior management is necessary to achieve a successful resolution of issues identified in the report.

DOE is pleased that our automated export license processing system, the Proliferation Information Network System (PINS), is considered exemplary. Considerable resources have been allocated to this project, and most of the technical problems have been resolved. DOE continues to improve the system.

DOE is concerned about the issues raised by the IG regarding transfers of export-controlled technology to foreign nationals at DOE sites. As noted in the IG report and above, the Secretary of Energy has established a task force to address export control issues associated with transfer of technology to foreign nationals at DOE laboratories. The Nuclear Transfer and Supplier Policy Division (NTSP) has been an integral part of this group and has provided the group with extensive guidance on export control issues. However, DOE agrees with the IG that clear guidance from the Department of Commerce on the "deemed export" issue is essential.

On page 7 of the draft report, the IG notes, "For some commodities on the Nuclear Referral List [NRL], Energy has delegated to Commerce, through 'Delegations of Authority' (DOAs), the authority to process these commodities without referring the cases to Energy. These delegations generally pertain to commodities that Energy determined they no longer need to review because of recommendations that were made on previous similar export cases. The delegations are also based on guidelines from the international Nuclear Suppliers Group [NSG], which may recommend the easing of export controls on certain commodities." These statements are misleading. DOE has given DOC a DOA for commodities on the NRL not intended for a nuclear end-use or nuclear end-user. DOE also has given DOC a DOA for commodities to NSG members, because no license is required for items on the NRL to these countries. However, we would note that some six months ago, NTSP requested that the national laboratories review DOA cases to determine whether DOC was carrying out the delegations appropriately. We found inconsistencies and have drafted a revised DOA to be sent to DOC in the near future.

There is a minor error on page 13 regarding reviews of audit trails on the electronic license processing system. The IG report should clarify that the reviews occur at LANL. The Network Encryption Server (NES) audit logs from all laboratories are reviewed bi-weekly by Los Alamos National Laboratory (LANL). The NT server security log is monitored daily at LANL.

Finally, a seventh laboratory, Savannah River Site (SRS), has been added to the PINS network to provide technical reviews of license applications. SRS should be added to the diagram on page 6 of the IG draft report.

Comments on Recommendations

"We recommend that the Assistant Secretary for Nonproliferation and National Security..."

IG Recommendation 1.

Coordinate with Commerce to establish a more effective process to provide supporting documents or information to Energy.

Management Position

Concur.

DOE's Nuclear Transfer and Supplier Policy Division (NTSP) has been working with the DOC on the issue of providing supporting documents for several years. The goal of NTSP is to have the supporting documents in our electronic case processing system so that the documents can be linked to the case throughout the case escalation process.

NTSP has held many discussions with DOC management and technical experts on the issue of scanning the supporting documents into an electronic database. Currently, DOC's electronic database of supporting documents is used for archival purposes only, and is maintained at an electronic bandwidth too narrow to allow DOE electronic systems to access the stored information. Therefore, NTSP has relied on DOC to send hardcopy documentation by courier to NTSP.

NTSP will develop an internal system to electronically store scanned images of the hardcopy information received from DOC. The hardcopy information will be accessible to all license reviewers through hyperlinks to the case file, which in turn will be archived in DOE electronic files. NTSP estimates that this system will take two to three months to implement.

DOE will request that DOC provide supporting documents to DOE on the same day that the case is electronically distributed, and to note in the case file that supporting documentation has been sent to DOE. We will strongly object to distribution of the case to the reviewing agencies prior to obtaining complete and full information from the applicant.

IG Recommendation 2.

Ensure that PINS is modified to permit the capture of all Commerce comments concerning an export license application.

Management Position

Non-concur.

The truncated DOC comments were incorrectly identified as a problem with the DOE system. Prior to the 1998 upgrade of the PINS system, memory space for the DOC comments was unlimited. In April 1998, PINS was modified to allow 4 Gigabytes of memory space for the "DOC Comments" field. To date, no comment has exceeded this length. Comments truncated before reaching the 4 Gigabyte limit were coming to DOE from DOC in that form, but DOE believes that DOC has corrected the problem. DOE encourages the IG to address any further concerns to DOC.

IG Recommendation 3.

Coordinate with Commerce to obtain guidance regarding when a visit or assignment by a foreign national would require an export license.

Management Position

Concur.

DOE has initiated discussions with DOC to obtain clear guidance on the need for export licenses for visits or assignments of foreign nationals to DOE laboratories. As a part of the previously-mentioned task force, DOE has undertaken discussions with both DOC legal and export licensing to ensure that DOE and all of its national laboratories and facilities are complying with all export laws and regulations, including the deemed export provisions. The Task Force dialogue with DOC has provided some limited additional guidance on the deemed exports issue thus far. The task force intends to use this mechanism to further address the deemed export issue.

As noted, we also have invited DOC to speak on the issue of deemed exports at the annual meeting of the DOE contractors' Export Control Coordinators Organization (ECCO) in June. This will ensure that most DOE site personnel with responsibility for exports will have an opportunity to engage in a fruitful discussion of the matter.

In addition, DOE will recommend to DOC that an interagency group be established to address this issue and to develop clear and comprehensive policy guidance regarding license requirements for use by U.S. industry, including U.S. Government laboratories and contractors. DOE also will recommend that the resulting guidance be reviewed and endorsed by the interagency Advisory Committee on Export Policy (ACEP).

IG Recommendation 4.

Assure that the Energy task group established to review and resolve possible issues associated with Energy's deemed export process, addresses these issues as expeditiously as possible.

Management Position

Concur.

Major steps have already been taken and others are in the immediate offing:

- As noted in the IG report, the Secretary of Energy has established a task force to address export control issues associated with transfer of technology to foreign nationals at DOE laboratories. On the task force are representatives from the Secretary's office, NN, CN, DP, SC, and GC. This group has reviewed, and will continue to review, export control issues relating to DOE facilities, including the issue of deemed exports.

- Under Secretary Moniz raised the issue of deemed exports with DOE Lab Directors at their last regularly scheduled meeting at headquarters. At Under Secretary Moniz' request, the Inspector General explained his concerns about deemed exports at this meeting.

- NN is redrafting its February 1997 Guidelines on Export Control and Nonproliferation. The new edition, among other things, will make clear that DOE is subject to DOC, Department of State (DOS), and Nuclear Regulatory Commission (NRC) export control regulations just as is the private sector; it also will clarify procedures with respect to deemed exports. A new draft has been sent to all Secretarial Offices for concurrence and should be circulated to DOE facilities soon.

- The Department is revising the DOE Order on visits and assignments of foreign nationals at DOE sites. NN has provided to Department officials preparing the revision extensive guidance regarding the protection of export controlled technology and has updated the Sensitive Subject List attached to the Order, and has stressed the need to obtain all required export licenses for foreign nationals at DOE sites. With respect to export controls, the new policy will clarify where responsibility lies between headquarters and DOE facilities, and ensure that the consideration of the need for an export license is part of the visits and assignments process.

- The Office of the Chief Financial Officer is examining its procedures for processing foreign travel applications. With respect to export controls, the process will require consideration of export licensing issues as part of the application procedure.

- In addition to revising the Guidelines on Export Control and Nonproliferation, NN has drafted brief one page summary guidance for hosts and others dealing with foreign nationals and for DOE personnel going abroad. These documents will be circulated to DOE facilities at the same time that the revised Guidelines on Export Control and Nonproliferation are released.

- The Department plans additional efforts to educate DOE personnel on export control issues. These include bringing Department of Commerce experts to the annual meeting in June of the DOE contractors' Export Control Coordinators Organization, participating in video conferences, and recommending Dr. Moniz and Secretary Richardson raise the level of awareness of this issue.

IG Recommendation 5.

Conduct a review, in coordination with the Director, Office of Management and Administration, of the NTSP Division workload to determine the appropriate staffing level.

Management Position

Concur.

Intensified DOE export licensing reviews will require increased resources. The Department is committed to providing the necessary funding and staff to ensure effective implementation of U.S. export control laws and regulations.

IG Recommendation 6.

Ensure that, if the workload review identifies a requirement for increased staffing, actions are initiated to provide the NTSP Division with the appropriate level of staff.

Management Position

Concur.

It is important that if the review identifies the need for additional staff, action is taken immediately to adjust staffing levels. This will reduce DOE's vulnerability across the board, including our ability to carry out essential international cooperative programs, such as those with Russia related to securing nuclear materials and reducing stockpiles of nuclear weapons

IG Recommendation 7 and 8. **[We recommend that the General Counsel...]**

7. Complete the review to determine whether a possible conflict exists between E.O. 12333 and the requirements to protect 12(c) information.

8. Issue a written legal opinion concerning whether Intelligence officials should have unrestricted access to 12(c) information maintained by Energy.

Management Position

Concur.

The Office of General Counsel plans to reexamine the questions raised in the recommendations to determine whether there is a conflict between Executive Order 12333 and the confidentiality provision of the Export Administration Act, and the need for issuance of a legal opinion on access to 12(c) information.

IG Recommendation 9.

In coordination with the Director, Office of Intelligence, ensure that the issue of access to intelligence information required to support NTSP Division export license activities is resolved.

Management Position

Concur.

Since the arrival of the current Director of the Office of Energy Intelligence (IN-1) in October 1998, intelligence support to NTSP has markedly improved. However, NN will continue to work with IN to improve further support to NTSP, including potential provision of an intelligence staff member devoted full-time to support NTSP functions.

IG Recommendation 10.

Coordinate with Commerce to ensure access by Energy to information within Commerce regarding the final disposition of export cases and develop guidelines for Energy's access to the information.

Management Position

Concur.

Information regarding final disposition of all cases from 1992 has been sent to DOE from DOC. When the latest update to the PINS system is on-line, this information will be entered into the archived case files. Thereafter, DOE will receive daily updates on final disposition of cases from DOC electronically. The update to PINS should be completed in May 1999.

IG Recommendation 11.

Coordinate with State to ensure access by Energy to information maintained by State regarding the final disposition of munitions cases and develop guidelines for Energy's access to the information.

Management Position

Concur.

Since all munitions cases are distributed for review by the Department of State (DOS) in hardcopy, and DOE has no access to the DOS electronic system, DOE will work with DOS to obtain the information via hardcopy. NN will address this issue with the appropriate management of DOS.

IG Recommendation 12.

Coordinate with Commerce to obtain access for Energy to provide information into the AES when the system becomes operational.

Management Position

Concur.

The U.S. Customs Service is the lead agency for the development of an automated information sharing system, the Automated Export System (AES), which will address these concerns. DOE is involved as an interagency partner to receive export data from the Customs AES when it is implemented. Progress has been slow due to lack of dedicated resources to the AES at Customs and support from U.S. industry. We are confident that DOE will receive the information when it is made available electronically to Customs from industry, and we will modify the Export Information System (EIS) database in PINS to record the information at that time.

Department of Energy
Washington, D.C. 20585

May 14, 1999

MEMORANDUM FOR SANDY SCHNEIDER
ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS

FROM: TRISHA DEDIK
DIRECTOR
NUCLEAR TRANSFER AND SUPPLIER POLICY DIVISION
OFFICE OF ARMS CONTROL AND NONPROLIFERATION

SUBJECT: MODIFICATION ON RECOMMENDATION 2 OF THE INSPECTOR GENERAL'S EXPORT LICENSING PROCESS DRAFT REPORT

The truncated Department of Commerce (DOC) comments were incorrectly identified in the IG report on export licensing as a problem with the Department of Energy (DOE) computer, the Proliferation Information Network System (PINS). In fact, the problem was due to the file transfer process used by DOC in electronically transmitting export applications to DOE. Although the DOC export control computer system ECASS file contained the complete DOC comment, the entire DOC comment was not transferred to DOE. NN recommends that recommendation 2 be changed to :

IG Recommendation 2.

Assistant Secretary for NN coordinate with Commerce to ensure that DOE receives all Commerce comments concerning an export license application.

Management Position

Concur.

The truncated DOE comments were incorrectly identified as a problem with the DOE computer system. Around the April 1998 timeframe, DOC discovered that not all DOC comments were correctly being sent to DOE for uploading into PINS. Although the ECASS database contained the complete DOC comment, some comments were truncated by DOC during the data transfer process, which caused DOE to receive a truncated version of the comment. When DOC discovered the problem, they fixed it. In May 1998, DOE discovered that there was a new problem with the DOC comments. After discussions among the computer staffs, it was determined that the April DOC fix was causing a problem in PINS. DOE had been

unaware of the initial problem and fix that DOC had discovered and implemented. The two staffs resolved the new problem and no truncations have occurred since that time.

As a technical comment, PINS allows 2 gigabytes of storage for the "DOC Comments" field (equivalent to more than 3 encyclopedias of data). To date, no comment has exceeded this length. Previous to the new version of PINS, which was implemented in April 1998, the "DOC comments" field was virtually unlimited.

If you have any other further questions, please contact Toli Welihozkiy (6-2155) or Ed Fox (6-2144) of my staff.

IG Report No. DOE/IG-0445

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May 28, 1999

MEMORANDUM FOR THE SECRETARY

FROM: Gregory H. Friedman
Inspector General

SUBJECT: INFORMATION: Report on "Inspection of the Department of Energy's Export Licensing Process for Dual-Use and Munitions Commodities"

BACKGROUND

On August 26, 1998, the Chairman of the Senate Committee on Governmental Affairs requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, and Treasury, and the Central Intelligence Agency, update and expand on a 1993 interagency review of the export licensing processes for dual-use and munitions commodities. After consideration of the Chairman's request, the Inspectors General initiated an interagency review to evaluate the export licensing process for dual-use commodities and munitions to determine whether current practices and procedures are consistent with established national security and foreign policy objectives. In a joint letter dated September 2, 1998, the Chairman and the Ranking Minority Member of the House Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China requested the interagency review of the export licensing process be expedited.

The objectives of our inspection were to: (1) determine the adequacy of the Department of Energy's (Energy's) process for reviewing export license applications; (2) address, where applicable to Energy, questions from the Senate Committee on Governmental Affairs; and (3) determine the adequacy of corrective actions that were implemented in response to the recommendations in our 1993 report on this subject.

RESULTS OF INSPECTION

Based on our review of Energy's process for reviewing export license applications for nuclear dual-use and munitions commodities, we determined that, for the most part, the process appeared adequate. However, we identified issues that required corrective actions by Energy, as well as issues that would best be addressed by other agencies or an interagency task force.

For example, a determination was needed by Energy regarding the adequacy of the staffing level for the Nuclear Transfer and Supplier Policy (NTSP) Division, which conducts reviews of export license applications. Also, Energy needed to resolve the issue of access by NTSP Division analysts to certain intelligence information required to support their export license activities.

Issues that would best be addressed by other agencies or an interagency task force included, among others, whether a process is needed for the escalation of munitions cases; the concern by

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Commerce that several agencies, including Energy, did not always send the appropriate-level representative to meetings of the Advisory Committee on Export Policy; and the inability of the Commerce database to process image-type information, which prevents electronic transmittal of certain documents that support Energy's review of export license applications. This may adversely impact the timeliness of Energy's review process.

Also, we found that improvements are needed in the process for determining whether an export license is required in conjunction with assignments of foreign nationals to Energy laboratories. Specifically, guidance was not clear regarding when a "deemed" export license would be required for an assignment involving a foreign national. The term "deemed" export is defined as a release to a foreign national of technology or software that is subject to the Export Administration Regulations and, therefore, is "deemed to be an export" to the home country of the foreign national. The processes at the laboratories for reviewing assignments of foreign nationals generally rely on the host of the foreign national assignee to determine whether there are export concerns associated with the assignment. However, we found several hosts who were not aware of, or did not understand the requirements for, deemed export licenses and several hosts who did not appear to appropriately exercise their host responsibilities. Also, there does not appear to be an organization within Energy that has management responsibility for the deemed export license process.

We also reviewed the actions taken by Energy in response to recommendations in our 1993 report on Energy's export licensing process to determine the adequacy of the corrective actions. Although we found that Energy has implemented the corrective actions within its control regarding most recommendations, certain recommendations may require additional review and action by Energy, or interagency coordination.

Our report contains recommendations for actions to improve Energy's export licensing review process and to strengthen Energy's deemed export licensing process. Our report also contains recommendations for actions to address issues that remain from our 1993 inspection report.

MANAGEMENT REACTION

Management concurred with the findings and recommendations, indicating that it would initiate corrective actions. The Department promptly established an Export Control Task Force, formed by the Under Secretary, to review export control issues, including the Department's treatment of deemed exports. Management's comments are provided in their entirety at Appendix C of our report.

cc: Deputy Secretary
Under Secretary

LETTER TO HON. BILL RICHARDSON, SECRETARY, DEPARTMENT OF ENERGY, FROM CHAIRMAN THOMPSON AND SENATOR LIEBERMAN

COMMITTEE ON GOVERNMENTAL AFFAIRS,
U.S. SENATE,
WASHINGTON, DC.
June 16, 1999

THE HONORABLE BILL RICHARDSON
Secretary, Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

DEAR SECRETARY RICHARDSON: On June 10, 1999, the Senate Committee on Governmental Affairs held a hearing on the Department of Energy Inspector General's report regarding the Department's Export Control process. We were pleased to learn that the Inspector General determined that, for the most part, the Department's process for reviewing nuclear dual-use and munitions commodities appears to be adequate. We were troubled, however, by the IG's finding that the Department appears not to be complying with applicable rules that require certain foreign nationals visiting DOE's nuclear labs to obtain licenses before gaining access to controlled technology or information.

According to the testimony of Inspector General Friedman, there may have been as many as 3,200 foreign national assignees staying more than 30 days at DOE labs in 1998. He also indicated that over 1,600 foreign nationals may have visited the labs for shorter periods during that year. In that same year, only two deemed export license applications were filed regarding visitors to the DOE labs.

Although there may be legitimate reasons why many of these visitors did not require licenses during their stay at the labs, the stark contrast between the number of visitors and the number of license applications, combined with other information the IG provided at the hearing, raises serious questions about DOE's compliance with export control requirements. In order to help us more accurately assess the extent to which this truly is a problem, we would appreciate your providing some additional information. Specifically:

(1) Please provide an exact number of visitors and assignees to each DOE nuclear lab during calendar year 1998.

(2) In each of these categories, how many foreign nationals were from countries to which we restrict the release of sensitive technical information? Which countries were involved? Please provide a breakdown of the number of visitors and assignees from each country named.

(3) How many of these individuals had access to controlled information or technology?

(4) How many export licenses did DOE apply for on behalf of these visitors and assignees?

(5) With respect to the foreign nationals described in response to Question 2, were all of these assignees and visitors working under the supervision of U.S. citizens? If not, who did supervise them? Did the absence of supervision by a U.S. national comply with applicable requirements?

(6) Has the Department attempted to determine whether those individuals may have used any controlled information or technology to which they had access at the DOE labs when they returned to their home country?

(7) How many DOE employees traveled abroad in 1998 to work with nationals of countries to which we restrict the release of sensitive technical information? Did these DOE employees' interactions with the foreign nationals involve the exchange of any information or technology that would require a license under our export control laws? How many of these individuals received export licenses?

(8) Are DOE employees with access to controlled information and technology counseled before trips abroad regarding the need to protect controlled information?

Finally, we understand that after the IG provided a memo to the Under Secretary regarding the deemed export issue in March, the Department formed an Export Control Task Force to address issues related to the Agency's export control process, including the Department's treatment of deemed exports. Please advise what steps that are being taken to (1) define oversight responsibility for deemed exports, (2)

clarify the Department's guidance on visits and assignments of foreign nationals, and (3) ensure that guidance is understood and adhered to by Department personnel. Also please provide an indication of when completion of these initiatives is expected.

We appreciate your prompt attention to these important questions. Please contact Christopher Ford of the Committee's Majority staff at (202) 224–4751 and Laurie Rubenstein of the Minority staff at (202) 224–2627 to discuss a time frame for your response.

Sincerely,

JOSEPH I. LIEBERMAN *Ranking Minority Member*	FRED THOMPSON *Chairman*

ANSWERS TO QUESTIONS FROM THE DEPARTMENT OF ENERGY

Question 1: Please provide an exact number of visitors and assignees to each DOE nuclear lab during calendar year 1998.

Answer: Total: 11,136.

Los Alamos National Laboratory (LANL) 3,325
Lawrence Livermore National Laboratory (LLNL) 2,624
Oak Ridge National Laboratory (ORNL) 2,684
Sandia National Laboratory (SNL) 2,503

Question 2: In each of these categories, how many foreign nationals were from countries to which we restrict the release of sensitive technical information? Which countries were involved? Please provide a breakdown of the number of visitors and assignees from each country named.

Answer: Controls on transfers of technology differ from country to country, based upon the reason for controlling the technology. Some export controls are applicable to all countries, others applicable only to a select few countries. For example, technology associated with machine tools, which is controlled for nuclear proliferation reasons, is restricted to a different group of countries than technology associated with production of kevlar jackets, which are controlled for anti-terrorism reasons. Some technologies, such as munitions items, require a license to any country. We are providing the information below with respect to visitors and assignees from countries on DOE's sensitive country list.

A total of 2,876 national visitors and assignees held citizenship (not necessarily residence) from countries on DOE's sensitive country list, and these visits and assignments involved the following laboratories:

LANL	*1,063*	*ORNL*	*741*
LLNL	*525*	*SNL*	*547*

DOE Order 1240.2b, Unclassified Visits and Assignments by Foreign Nationals, which was in effect during the time of these visits, defines a foreign national as "any person who is not a U.S. National or is a stateless person. An Immigrant Alien is considered a foreign national for the purposes of this Order." Therefore, in 1998, immigrant aliens were considered foreign nationals and are included in these numbers. For example, at Lawrence Livermore National Laboratory, of 155 sensitive country national assignees, 80 were in resident alien status; and of 370 sensitive country national visitors, they estimate about a quarter of them (approximately 90) were in resident alien status in 1998.

Many of the visits were short term in nature and involved one day tours of unclassified areas, arms control conferences, and in some instances, job interviews. For example, the North Korean visit occurred at Sandia National Laboratories' Cooperative Monitoring Center under the aegis of DOE and the State Department to help promote North/South Korea arms control dialogue. The Iraqi visits occurred at Oak Ridge National Laboratory and Sandia. The Oak Ridge visit was by a permanent resident alien, employed by a private firm in Wisconsin, who was seeking employment at the lab. The Sandia visitor (an Iraqi-born Hungarian who is listed as Iraqi because of his place of birth) was part of a University of New Mexico class visiting an unclassified microelectronics facility.

The breakdown of the number of visitors and assignees from each country is as follows:

*India 511, Iran 43, Iraq 2, Israel 127, North Korea 1, Pakistan 8, Peoples' Republic of China 930, and Russian Federation 1,131. Other sensitive countries 123.**

**Other sensitive countries include: Algeria, Armenia, Azerbaijan, Belarus, Cuba, Georgia, Kazakstan, Kyrgyzstan, Libya, Moldova, Sudan, Syria, Taiwan, Tajikistan, Ukraine, and Uzbekistan.*

Question 3 and 4: How many of these individuals had access to controlled information or technology? How many export licenses did DOE apply for on behalf of these visitors and assignees?

Answer: The majority of interactions between DOE laboratory scientists and foreign nationals occur in the realm of public domain information or fundamental research. Such interactions fall outside the scope of U.S. export controls. Additionally, a transfer of controlled technology to a foreign national requires a license only when the technology is export controlled to the home country of the foreign national. It is for this reason DOE has seen very few requests for export licenses, and the number of those compares favorably with private industry and other U.S. Government agency practices.

According to our records, these four laboratories have applied for export licenses for transfers of commodities and technology under DOE programs, but no applications for individual validated export licenses were submitted directly in connection with visits and assignments of foreign nationals to the weapons laboratories in 1998. For example, the DOE Materials Protection, Control, and Accounting (MPC&A) Program, a cooperative program with the Russian Federation to ensure the secure storage of their special nuclear material, operated under a special comprehensive export license granted by the Department of Commerce (DOC) in 1997, valid for a four year period. The license grants authorization for transfers of certain controlled technologies to the participating Russian institutes regardless of whether the transfer occurs here or abroad.

Question 5: With respect to the foreign nationals described in response to Question 2, were all of these assignees and visitors working under the supervision of U.S. citizens? If not, who did supervise them? Did the absence of supervision by a U.S. national comply with applicable requirements?

Answer: The hosts of record for all of the visitors/assignees were U.S. citizens. However, as identified in previous reports to Congress, the Department needs to strengthen its policy and procedures regarding hosts. Under the new policy statement and Notice, to be released later this month, all hosts must be a DOE or DOE contractor employee. A visitor cannot be a host. Additionally, a sensitive country foreign national cannot be a host of another sensitive country foreign national.

Program reviews shall be conducted periodically by the Office of Foreign Visits and Assignments Policy and the Office of Counterintelligence to assess policy effectiveness and identify improvement areas. In addition, independent oversight of the overall performance of the Foreign Visits and Assignments Program shall be the responsibility of the Office of Independent Oversight and Performance Assurance.

Question 6: Has the Department attempted to determine whether those individuals may have used any controlled information or technology to which they had access at the DOE labs when they returned to their home country?

Answer: As we have responded above, only a very small number of foreign national visitors/assignees have had access to controlled information or technology. The Department does not have the ability to determine what foreign nationals do once they return home. However, by careful review and screening prior to a visit or assignment, we believe we can minimize any risks associated with foreign nationals access to the DOE laboratories.

Question 7: How many DOE employees traveled abroad in 1998 to work with nationals of countries to which we restrict the release of sensitive technical information? Did these DOE employees' interactions with the foreign nationals involve the exchange of any information or technology that would require a license under our export control laws? How many of these individuals received export licenses?

Answer: Routinely, DOE employees and DOE contractor employees travel to foreign countries, including sensitive countries, in support of diverse programs and initiatives. In many instances, these interactions pertain to policy and scientific exchanges, including basic research, and international conferences that crosscut the broad spectrum of activities within the Department and do not involve sensitive information requiring special controls. Such travel allows the Department to leverage its resources against those of other countries, helps to reduce duplication of effort in the international arena, and allows the United States to coordinate and influence policies and actions by other countries.

Official foreign travel by DOE employees and DOE contractor employees, including those working at the nuclear laboratories, requires approval by the sponsoring program office. In the event the employee is traveling to a designated "sensitive country" and/or discussing a "sensitive subject," prior to approval by the sponsoring program office, additional reviews and concurrence are required. While no export licenses have been granted, during the review/concurrence process DOE has denied travel requests and required modifications to joint activities and presentations to comply with the export control regulations.

Question 8: Are DOE employees with access to controlled information and technology counseled before trips abroad regarding the need to protect controlled information?

Answer: Yes. DOE employees traveling to sensitive countries are required to have a security briefing prior to departure.

LETTER TO HON. GREGORY H. FRIEDMAN, INSPECTOR GENERAL, DEPARTMENT OF ENERGY, FROM CHAIRMAN THOMPSON

COMMITTEE ON GOVERNMENTAL AFFAIRS,
U.S. SENATE,
WASHINGTON, DC.
June 11, 1999

THE HONORABLE GREGORY H. FRIEDMAN
Inspector General
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

DEAR MR. FRIEDMAN: Enclosed are additional questions from the hearing which was held on June 10, 1999 regarding the Dual-Use and Munitions List Export Control Processes and Implementation at the Department of Energy that have been directed to you and submitted for the record by Senator Akaka. In order to ensure a complete hearing record, I would appreciate it if you would return your written responses to these questions to the Committee on Governmental Affairs by Friday, June 25, 1999.

If you have any questions, please contact Christopher Ford of the Committee staff at (202) 224–4751. thank you for your kind attention to this request.

Sincerely,

FRED THOMPSON,
Chairman

LETTER FROM HON. GREGORY H. FRIEDMAN, INSPECTOR GENERAL, DEPARTMENT OF ENERGY, TO CHAIRMAN THOMPSON

DEPARTMENT OF ENERGY,
WASHINGTON, DC.
June 25, 1999

THE HON. FRED THOMPSON, *Chairman,*
Committee on Governmental Affairs,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your letter of June 11, 1999, which contained questions from Senator Daniel Akaka concerning the hearing that was

held on June 10, 1999, regarding the dual-use and munitions export control processes at the Department of Energy. Your letter was received by this office on June 23, 1999.

Several of the questions are within the scope of our review. Our responses are enclosed. The remaining questions most appropriately can be answered by the Department's Export Control Task Force. Therefore, we have referred these questions to Ms. Rebecca Gaghen, who heads the Department's Export Control Task Force, and requested she respond directly to you.

Please contact me if I can be of further assistance.

Sincerely,

GREGORY H. FRIEDMAN
Inspector General

Enclosure

QUESTIONS AND ANSWERS FROM HON. GREGORY H. FRIEDMAN, INSPECTOR GENERAL, DEPARTMENT OF ENERGY, SUBMITTED BY SENATOR AKAKA

In your report, you stated the State Department does not have an established interagency fora to discuss routine munitions license applications and that there is no process for escalating disputed applications. You concluded that this issue should be addressed.

Question 1: What steps have DOE taken with the State Department to rectify these issues?

Answer: This question was referred to the Department's Export Control Task Force for response.

You indicated that the NTSP Division (Nuclear Transfer and Supplier Policy Division) believes the dual-use dispute resolution escalation process works adequately.

Question 2: Do you believe the process could be improved and if so, how?

Answer: Our review of the Department's export licensing process did not identify any major concerns with the escalation process. A concern was raised regarding the level of the Department's representation at meetings of the Advisory Committee for Export Policy. However, this concern was subsequently addressed by the Under Secretary in his April 21, 1999, letter to the Department of Commerce on this issue.

I understand the Commerce Department, including concurrence from the Departments of State and Defense, granted DOE a special comprehensive license (SCL) authorizing the export of dual-use nuclear controlled items to certain entities in Russian and the Newly Independent States. A SCL authorizes the export of specific categories of items to pre-approved end-users for pre-approved end-uses without the requirement to obtain individual licenses for each export order or shipment.

The SCL requires, however, the implementation of an Internal Control Program (ICP) to ensure compliance with the license conditions and administrative and screening elements.

Question 3: Did you conduct a review of this license? If not, do you plan to conduct a review of the Internal Control Program (ICP) for this sensitive license to ensure DOE is adequately implementing the ICP requirements?

Answer: We did not review the special comprehensive license, which was not within the scope of our review of the Department's export licensing process. We are continuing to evaluate potential export control issues for possible future reviews. The ICP is one of the issues which we shall consider in this process.

Your review of the 60 dual-use "non-transferred" cases indicated that Commerce should have referred one (1) case to DOE because the end-user was a nuclear end-user. Your report further notes that Commerce ultimately returned the application without action.

Question 4: Do you know why Commerce returned the application without action?

Answer: The nuclear end-user was a Russian nuclear power plant. It was included in an agreement on safeguards between the USSR and the International Atomic Energy Agency (IAEA) in 1985 and was on the 1997 list of Russian/USSR IAEA-safeguarded nuclear facilities. As a safeguarded civil-

ian nuclear power plant, Commerce determined that it is not subject to Section 744.2 of the Export Administration Regulations and the license was returned without action to the applicant. The Department of Energy, we are informed, is not in agreement with the Commerce position. We have recommended that Energy resolve this matter with the responsible Department of Commerce officials.

In your 1993 report, you recommended an assessment of the staffing level in the NTSP Division. In this report you also recommend a review of the staffing levels.

Question 5: What is the status of this review?

Answer: This question was referred to the Department's Export Control Task Force for response.

Question 6: In your opinion, how many employees should the NTSP Division have to properly fulfill its licensing function?

Answer: We are not in a position to determine the appropriate level of staffing necessary to perform export license review activities. As was evident from the information elicited at the June 23 hearing on this matter, there are a substantial number of export license applications to be reviewed by the Department. We concluded that this workload justifies our recommendation that the Department conduct a review of the NTSP Division workload to determine the appropriate staffing level.

Based upon your 1993 report recommendation and subsequent information you received, you requested your Office of General Counsel to opine on a possible conflict between Section 12(c) of the Export Administration Act of 1979 regarding the protection of company proprietary information and the 1981 Executive Order 12333 regarding the "United States Intelligence Activities."

Question 7: What are the specific issues that may be in conflict?

Answer: A concern was raised by the Department's Senior Intelligence Officer (SIO) that he was not able to appropriately exercise his intelligence oversight responsibilities under Executive Order 12333. Reportedly, the SIO was unable to access information regarding intelligence analyses that were conducted in support of the export license review process. This lack of access was purportedly the result of protections afforded to export control information by Section 12(c).

Question 8: What is the status of your General Counsel's review of this issue?

Answer: This question was referred to the Department's Export Control Task Force for response.

I believe it is critical for NTSP Division analysts to have access to raw intelligence data to complete their analysis of license applications.

Question 9: What measures has the Assistant Secretary for Nonproliferation and National Security taken with the Office of Intelligence to rectify this critical problem?

Answer: This question was referred to the Department's Export Control Task Force for response.

Question 10: The IG Report recommends redrafting the policy on foreign visits and drafting new guidance for hosting foreign nationals, including new guidelines for deemed exports.

- Who is responsible for determining when a deemed export license is required?
- Is the U.S.-Russia Lab-to-Lab program subject to these requirements?
- What is the Lab-to-Lab program's record of requesting deemed export licenses?
- How many deemed export licenses have been granted for the Lab-to-Lab program?
- Have any deemed export license [sic] been requested for the U.S.-China Lab-to-Lab program?
- Have any deemed export licenses been granted for Chinese nationals associated with this program?
- What are the criteria for requesting deemed export licenses for sensitive countries?

- Has DOE requested any deemed licenses for exports of sensitive information to India?

Answer: This question was referred to the Department's Export Control Task Force for response.

Question 11: The IG Report does not address foreign students.

- Are foreign students who are attending U.S. universities working on lab-sponsored projects?

Answer: During our review, we determined that there were a number of foreign national students, including post-doctoral students, at our laboratories.

- Are any of those projects sensitive in nature? Are any such projects related to DOE's Stockpile Stewardship program?

Answer: This question was referred to the Department's Export Control Task Force for response.

- Are background checks done on foreign students from U.S. universities who are working on lab-sponsored research?

Answer: This question was referred to the Department's Export Control Task Force for response.

- Have such students been granted security clearances?

Answer: This question was referred to the Department's Export Control Task Force for response.

- Will the IG recommendations be applied to foreign students?

Answer: Foreign students at the laboratories are subject to the same export licensing requirements as foreign nationals. Accordingly, any recommendation regarding foreign nationals will include foreign students at the laboratories.

LETTER FROM ERNIE J. MONIZ, UNDER SECRETARY OF ENERGY, DEPARTMENT OF ENERGY, TO CHAIRMAN THOMPSON

DEPARTMENT OF ENERGY,
WASHINGTON, DC.
July 14, 1999

THE HON. FRED THOMPSON, *Chairman,*
Senate Committee on Governmental Affairs,
U.S. Senate,
Washington, DC 20510

DEAR MR. CHAIRMAN: On June 10, 1999 Gregory Friedman, Inspector General of the Department of Energy, testified regarding the Dual-Use and Munitions List Export Control Processes and Implementation at the Department of Energy.

Enclosed are answers to questions 1, 5, 8, 9, 10 and 11, submitted for the record by Senator Akaka. The remainder of the questions, 2, 3, 4, 6 and 7, has been submitted to you in a separate letter from the Inspector General's Office.

If we can be of further assistance, please have your staff contact John C. Angell, Assistant Secretary for Congressional and Intergovernmental Affairs.

Sincerely,

ERNIE J. MONIZ

Enclosures

SUPPLEMENTAL ANSWERS TO QUESTIONS SUBMITTED BY SENATOR AKAKA, FROM THE EXPORT CONTROL TASK FORCE, DEPARTMENT OF ENERGY

Question 1: In your report, you stated the State Department does not have an established interagency fora to discuss routine munitions license applications and that there is no process for escalating disputed applications. You concluded that this issue should be addressed. What steps have DOE taken with the State Department to rectify these issues?

Answer: The Assistant Secretary for Nonproliferation and National Security (NN) has signed a letter to the Assistant Secretary for Political Military Affairs at the Department of State requesting the convening of an interagency meeting to initiate discussions regarding the need for an interagency dispute resolution process for escalating munitions license applications under dispute between reviewing agencies.

Question 5: In your 1993 report, you recommended an assessment of the staffing level in the NTSP Division. In this report you also recommend a review of staffing levels. What is the status of this review?

Answer: The review is ongoing. The Department of Energy (DOE) is going over staffing levels for the Nuclear Transfer and Supplier Policy (NTSP) Division in conjunction with its overall annual budget preparation and submission process. The issue is also receiving the attention of a special Secretarial task force on export controls. The assignment of Federal personnel to any given function is dependent upon several factors, including available funding and overall allotment of Full Time Equivalent (FTE) slots provided to DOE. Staffing levels for the Nuclear Transfer and Supplier Policy (NTSP) Division are developed through a periodic review of existing, as well as anticipated requirements. Future requirements are identified at the division level and coordinated with the Director, Office of Arms Control and Nonproliferation, and the Assistant Secretary for Nonproliferation and National Security (NN) to ensure that NTSP's staffing needs are considered along with those of other NN offices and DOE at large. Ultimately, NTSP's final allocation is dependent upon the number of Federal slots available to the Department, and the prioritization of staffing needs by the Department.

Question 8: Based upon your 1993 report recommendation and subsequent information you received, you requested your Office of General Counsel to opine on a possible conflict between Section 12(c) of the Export Administration Act of 1979 regarding the protection of company proprietary information and the 1981 Executive Order 12333 regarding the "United States Intelligence Activities."

What is the status of your General Counsel's review of this issue?

Answer: The Office of the General Counsel has concluded that there is no conflict and the basis for that conclusion will be described in a memorandum the Office of the General Counsel expects to complete no later than this month.

Question 9: I believe it is critical for the NTSP Division analysts to have access to raw intelligence data to complete their analysis of license applications. What measures has the Assistant Secretary for Nonproliferation and National Security taken with the Office of Intelligence to rectify this critical problem?

Answer: The NTSP has been discussing with the current Director of the Office of Intelligence arrangements for greater access to Intelligence Community resources for its export control analysts. In the meantime, the Office of Intelligence has established a permanent liaison position with the NTSP to provide relevant intelligence analyses on an as-needed basis, until a more permanent solution can be implemented.

Question 10: The IG Report recommends redrafting the policy of foreign visits and drafting new guidance for hosting foreign nationals, including new guidelines for deemed exports.

Question 10A: Who is responsible for determining when a deemed export license is required?

Answer: Responsibility for export control compliance is shared among DOE headquarters, laboratory and facility managers, and program officials. By the end of the month, the Department will have a new policy with respect to unclassified foreign national visits and assignments and DOE foreign travel. The new policy will ensure that the consideration of the need for an export license is part of the visits and assignments and foreign travel approval processes. The Secretary of Energy has undertaken steps to ensure that "deemed export" controls are made an integral part of the approval process for foreign national visits and assignments throughout the DOE complex.

The Under Secretary of Energy has chartered an export control task force with representatives from the Secretary's office and relevant headquarters program of-

fices. This group has reviewed, and will continue to review, export control issues relating to DOE facilities, including the issue of deemed exports. The task force has updated the DOE Guidelines on Export Control and Nonproliferation, *which provides guidance on when an export license may be required. Specialized training programs are planned for laboratory personnel who participate in collaborative programs with foreign nationals. An active, flexible communications channel between headquarters and export control experts in the field will be established to ensure all DOE facilities receive appropriate guidance on export control policies.*

Question 10B: Is the U.S.-Russia Lab-to-Lab program subject to these requirements?

Answer: The U.S.-Russia Materials Protection, Control, and Accounting (MPC&A) program and all other DOE cooperative programs with Russia and the Newly Independent States are subject to U.S. export control requirements. To ensure compliance with export control regulations, the MPC&A program has hired two staff members and detailed one Department of Commerce (DOC) employee to DOE headquarters to assist in acquiring export control licenses from DOC. Other DOE cooperative programs also have taken steps to ensure that all initiatives are reviewed by export control experts and that all appropriate export licenses are obtained.

Question 10C: What is the Lab-to-Lab program's record of requesting deemed export licenses?

Answer: In large part, the MPC&A Program operates under an international cooperative license granted by the Department of Commerce (DOC) in 1997, valid for a four-year period and can be extended for one additional four-year period with the concurrence of DOC. The license grants authorization for transfers of certain controlled technologies to participating Russian institutes. More than 560 requests to use this license have been approved by DOC. This covers approximately 17,000 items and totals more than $20M in goods.

Question 10D: How many deemed export licenses have been granted for the Lab-to-Lab program?

Answer: Approximately 250 individual validated licenses (IVLs) were granted by the Department of Commerce, authorizing the transfer of both commodities and technologies to specified Russian institutes under the DOE Lab-to-Lab programs. There is no special application for a "deemed export" license; the IVLs obtained by the programs authorize the transfer of technology to the Russian institute regardless of whether the transfer occurs here or abroad.

Question 10E: Have any deemed export licenses been requested for the U.S.-China Lab-to-Lab program?

Question 10F: Have any deemed export licenses been granted for Chinese nationals associated with this program?

Answers: Steps have been taken to ensure that Chinese assignees to the National Laboratories working on arms control and nonproliferation projects of mutual interest, under the U.S.-China Arms Control Exchange program, formerly known as U.S.-China Lab-to-Lab program, such as atmospheric modeling, are given access only to software or other technologies that do not require export licenses. DOE laboratories applied for only a small number of licenses from the Department of Commerce—seven were equipment-related; none would have fallen into the realm of deemed exports.

In keeping with legal and political constraints on the U.S. side, all activities were unclassified and avoided any technical discussion of nuclear weapons matters. They focused instead on exclusively non-sensitive public domain information, which was limited to arms control, nonproliferation (including export controls), and safeguards.

The U.S.-China Arms Control Exchange program was recognized to be sensitive from the outset because of the institutions involved, and special measures were taken to oversee and control the proposed U.S.-China interactions to preclude discussion of any sensitive subject material or inappropriate transfer of information or technology. All of the interactions under the program were closely monitored by the U.S. Government through an Inter-

agency Contact Group, chaired by the Department of State (DOS), which was organized to review plans, specific activities, progress, and in some cases, complete briefing packages. The Group included the Departments of Energy (DOE), State (DOS), and Defense (DOD), the former Arms Control and Disarmament Agency (ACDA), the National Security Council (NSC) and the Intelligence Community (IC).

Question 10G: What are the criteria for requesting deemed export licenses for sensitive countries?

Answer: The majority of interactions between DOE laboratory scientists and foreign nationals occur in the realm of public domain information and fundamental research, and therefore, fall outside the scope of U.S. export controls. When a DOE program has been determined to involve a transfer of technology not in the public domain, the proposed transfer undergoes a thorough review by export control experts at the DOE laboratory or facility to determine if the technology requires an export license to the country involved. A transfer of controlled technology to a foreign national requires a license only when the technology is export-controlled to the home country of the foreign national.

The process used to determine which interactions require an export license application includes the following steps:

- *Careful subject matter review within the U.S. laboratories by the program manager at each laboratory;*
- *Review by classification experts and the Export Control Coordinator at the laboratory/facility; and*
- *Review by DOC upon request of the Export Control Coordinator at the laboratories.*

Additionally, other steps in the review process can include:

- *Subsequent review by DOE personnel overseeing the program;*
- *Review by DOE Headquarters of any sensitive-country foreign travel and foreign visits and assignments; and*
- *Final review by an interagency group (such as that overseeing the China Arms Control Exchange Program).*

Question 10H: Has DOE requested any deemed licenses for exports of sensitive information to India?

Answer: According to our records, DOE has not applied for an export license to transfer any sensitive information to India. DOE currently has no active programs of cooperation with India that involve the transfer of export-controlled technology. After the 1998 nuclear tests and in keeping with U.S. sanctions policy, DOE suspended all programs of cooperation with India and Pakistan.

Question 11A: The IG Report does not address foreign students. Are foreign students who are attending U.S. universities working on lab-sponsored projects?

Question 11B: Are any of those projects sensitive in nature?

Question 11C: Are any such projects related to DOE's Stockpile Stewardship program?

Answers: Much like the Department of Defense, the Department of Energy and its laboratories maintain relationships with universities. These relationships make significant contributions to our scientific research. Foreign students attending U.S. universities may be involved in unclassified research projects related to the Stockpile Stewardship program. Foreign students on-site access to DOE labs are subject to the same restricted security measures as other foreign scientists access.

Question 11D: Are background checks done on foreign students from U.S. universities who are working on lab-sponsored research?

Answer: Background, or "indices" checks, are conducted on: (1) all foreign nationals from sensitive countries, and (2) all foreign nationals from any country who are to visit a secure area or discuss a sensitive technology while at DOE. These checks are completed by both the FBI and CIA, and the results are routed through the Office of Counterintelligence to the requesting facility.

Personnel security background investigations, on the other hand, are only done in instances where an individual is an applicant for a DOE access authorization (personnel security clearance).

Question 11E: Have such students been granted security clearances?

Answer: All requests for access authorization for any foreign national are processed through the Office of Security Affairs. In order for a foreign national to be granted access authorization, there must be a bilateral agreement between the United States and the individual's country of citizenship which covers the specific information that would be released to the individual. Such bilateral agreements exist only with the United Kingdom and France. In addition, the program office having responsibility for the information to be released must attest that the individual is uniquely qualified for the work and that there are no U.S. citizens available having the necessary skills, knowledge, and ability to do the work. There are no more than 12 foreign nationals holding DOE access authorization in the entire DOE complex. These are all high-level professionals, most from the United Kingdom and Canada. None of the foreign nationals holding DOE access authorization are from sensitive countries.

LETTER TO HON. GREGORY H. FRIEDMAN, INSPECTOR GENERAL, DEPARTMENT OF ENERGY, FROM CHAIRMAN THOMPSON

COMMITTEE ON GOVERNMENTAL AFFAIRS,
U.S. SENATE,
WASHINGTON, DC.
July 9, 1999

THE HONORABLE GREGORY H. FRIEDMAN
Inspector General
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

DEAR MR. FRIEDMAN: During the hearing on June 10, 1999 regarding the Dual-Use and Munitions List Export Control Processes and Implementation at the Department of Energy, you were requested to provide the Committee with the following items for the official record:

1. *Chairman Thompson:* Follow up on the precise number of foreign nationals visiting the Oak Ridge, Lawrence Livermore, Los Alamos and Sandia Laboratories;
2. *Senator Voinovich:* Report on the adequacy of staffing at the Nuclear Transfer and Supplier Policy Division of the Office of Nonproliferation and National Security at the Department of Energy and what that office is doing to remedy any problems in this regard; and
3. *Senator Voinovich:* Report on current and planned Energy Department policies regarding who may host a foreign national visitor to a national laboratory and what responsibilities such hosts have.

In order to ensure a complete hearing record, I would appreciate it if you would return your written responses to these requests to the Committee on Governmental Affairs by Friday, August 20, 1999.

If you have any questions, please contact Christopher Ford of the Committee staff at (202) 224–4751. Thank you for your kind attention to this request.

Sincerely,

FRED THOMPSON
Chairman

ANSWERS TO QUESTIONS FROM HON. GREGORY H. FRIEDMAN, INSPECTOR GENERAL, DEPARTMENT OF ENERGY

Question 2: According to the Inspector General's testimony, Energy's intelligence capabilities are not being fully utilized in the processing of export cases. What measures are being taken to ensure that Energy's intelligence capabilities are fully utilized?

Answer: Since the initial IG's report on the Department's Export Control activities, collaboration between the Nuclear Transfer and Supplier Policy (NTSP) Division and the Office of Intelligence has been strengthened. This effort is helping to ensure that export control analysts have ready access to intelligence information required to make informed decisions on export applications. Because of these changes, NTSP now has more flexibility to utilize the Field Intelligence Elements at the National Laboratories, including Lawrence Livermore National Laboratory to provide independent assessments of end-users on export license applications. The NTSP is discussing with the current Director of the Office of Intelligence arrangements to provide NTSP export control analysts greater access to Intelligence Community resources. Until a more permanent solution can be implemented, the Office of Intelligence has established a permanent liaison position with the NTSP to provide relevant intelligence analyses on an as-needed basis.

Question 3: According to the Inspector General's testimony, the Nuclear Transfer and Supplier Policy Division in the Office of Nonproliferation and National Security may not be adequately staffed.

Question 3A: How is the staffing level determine?

Answer: The assignment of Federal personnel to any given function is dependent upon several factors, including available funding and overall allotment of Full Time Equivalent (FTE) slots provided to the Department. DOE determines staffing levels for the Nuclear Transfer and Supplier Policy (NTSP) Division through a periodic review of existing and anticipated requirements. Future requirements are identified at the division level and coordinated with the Director, Office of Arms Control and Nonproliferation, and with the Assistant Secretary for National Security and Nonproliferation (NN) to ensure that NTSP's staffing needs are considered along with those of other NN offices and the Department of Energy at large. Ultimately, NTSP's final allocation is dependent upon the number of Federal slots available to the Department, and the prioritization of staffing needs by the Department.

Question 3B: What is the staff shortfall?

Answer: Given the importance that the Department attaches to export control and the increasing responsibilities of the NTSP Division, the Department is committed to ensuring that the Division has the resources necessary to carry out its mission. The Secretarial task force on export control is currently reviewing options for strengthening DOE's implementation of these requirements and is assessing, among other matters, the need for increased staff in the NTSP Division and at the National Laboratories.

Question 3C: Are there vacant positions, do additional positions need to be authorized, or both?

Answer: The NTSP Division currently has one position that is vacant, for which recruitment is currently under way. The possible need for additional positions is a subject of the on-going review of Departmental export control activities noted above.

Question 3D: What measures are being taken to address this?

Answer: The Department is reviewing NTSP's staffing needs in conjunction with the work of the Secretarial task force to strengthen DOE export control efforts. In addition, possible future staff increases are being considered as part of the development of the FY 2001 budget. In the meantime, one laboratory technical expert has been assigned to Headquarters to provide on-sight technical support to DOE's export license review activities.

Question 3E: How long will it be before the division is adequately staffed?

Answer: The mission of the division is rapidly expanding. Several of the contributing factors include: (1) implementation of a major export control initiative designed to address full compliance with all export control laws in the DOE complex; (2) increased responsibility related to the review of Department of Commerce dual-use licenses; (3) the re-enactment of the Export Administration Act; (4) declassification and decommissioning activities within the DOE complex; and (5) future multilateral activities. Once the ongoing review of staffing needs is completed, any recruiting of new personnel that may be approved could be completed in a matter of months.

Question 4: According to the Inspector General's testimony, there appears to be widespread noncompliance with regulations requiring foreign nationals visiting the labs to obtain deemed export licenses prior to having access to unclassified, but sensitive, information. Apparently, internal Energy guidelines are unclear. As a result, Energy hosts were not aware of, or did not understand, the regulations, and several hosts did not appear to appropriately exercise their host responsibilities. The Inspector General did note that your new security initiative includes establishing the Office of Foreign Visits and Policy Assignments ("Office") within the Office of Security Affairs. Please explain the process through which the Office will approve foreign scientists for visits to or work at the labs, and how the Office will determine the level of access granted to foreign scientists. Please outline how the Office will control the access of foreign scientists, who are either visiting or working at the national labs, to sensitive unclassified or classified information for which a deemed export license would be required? What are the criteria for an Energy employee to be a host to a foreign scientist? Will this Office issue guidance to employees regarding the responsibilities of being a host? Please explain the process. Will this Office conduct oversight to hosts to ensure that regulations are being followed? Please explain the process.

Answer: Revision of DOE's existing Foreign Visits and Assignments policy is currently underway. The Department of Energy is continuing to improve its efforts to establish an effective policy, including the development of a systematic approach to the DOE review and approval process, as well as providing a mechanism for management accountability. This effort also will include the improvement of standard DOE-wide operating procedures and the implementation of education and training programs for management officials and hosts. DOE expects to complete the process shortly at which time we will more fully respond to the questions posed here.

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