BIS MEETS *LOPER BRIGHT*: RETHINKING "NATIONAL SECURITY"

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In Loper Bright Enterprises v. Raimondo, *the Supreme Court overruled traditional* Chevron *deference, shifting the power to interpret ambiguous statutes from agencies to courts. As a result, federal agencies face increased litigation, with courts now redefining the scope of congressionally delegated authority. This rollback of agency power is particularly concerning for agencies that rely on broad statutory terms to address evolving national security threats.*

The Bureau of Industry and Security (BIS) within the U.S. Department of Commerce heavily relies on broad statutory terms, such as "national security," to justify adding foreign parties to the Entity List. Although the Export Control Reform Act of 2018 (ECRA) outlines specific national security threats, its scope continues to expand without clear justification. BIS experts play a crucial role in identifying foreign adversaries engaged in high-risk activities that could divert U.S. dual-use exports. However, while these listings protect national security, they often lack transparency, involve prolonged delays, and are subject to limited judicial review.

This Comment argues that to safeguard BIS's authority to protect national security amid emerging threats, the End-User Review Committee (ERC), the interagency body responsible for Entity List decisions, should increase transparency by providing fact-based national security justifications to listed parties, cite to specific provisions in ECRA that are the basis for national security concerns, secure additional funding and staffing, and revise its regulations to reflect a more accurate procedural timeframe for entity removals.

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INTRODUCTION

"*Chevron* is overruled."[1] As of June 28, 2024, *Loper Bright Enterprises v. Raimondo*[2] has overruled the traditional *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[3] deference afforded to agencies to interpret their ambiguous statutory terms.[4] Since the landmark *Chevron* ruling in 1984, federal courts have cited it more than 18,000 times, shaping judicial decisionmaking.[5] In contrast, *Loper Bright* has been cited up to 810 times by the Federal Circuit within its first year on the books, signaling a potential

1. Loper Bright v. Raimondo, 603 U.S. 369, 412 (2024).
2. 603 U.S. 369 (2024).
3. 467 U.S. 837 (1984).
4. *Loper Bright*, 603 U.S. at 412.
5. Amy Howe, *Supreme Court to Hear Major Case on Power of Federal Agencies*, SCOTUSBLOG (Jan. 16, 2024, 3:30 PM), https://www.scotusblog.com/2024/01/supreme-court-to-hear-major-case-on-power-of-federal-agencies [https://perma.cc/9XFS-WRT8] (reporting that as of 2014, *Chevron* had been cited in over 18,000 federal court cases).

seismic shift in the legal landscape.[6] With *Loper Bright*, the U.S. Supreme Court has reshaped agency deference, empowering courts—not agencies—to interpret ambiguous statutory terms.[7]

What does *Loper Bright* mean for agencies that rely heavily on broad statutory terms like "national security?"[8] This Comment will consider the U.S. Department of Commerce (DOC), Bureau of Industry and Security's (BIS) reliance on this concept to justify adding foreign parties to its Entity List. The Entity List publicly identifies foreign parties involved in high-risk activities that could lead to the diversion of U.S. exports in ways that threaten national security or undermine foreign policy interests.[9] Further, the discussion below also aims to clarify congressional intent and define the term "national security" insofar as it shapes the additions to and removals from the Entity List.

The Entity List is a critical tool for restricting access to U.S. technology and goods used to enhance adversarial military capabilities and supply chains.[10] However, Entity List designations to combat national security concerns have expanded in "scale and scope" since the 2010s to implement "novel" export control tactics.[11] Authority under the Export Control Reform

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6. Loper Bright — Citing References, WESTLAW, https://1.next.westlaw.com/RelatedInformation/Ib96867e3354011efb5b5e02d7c311e0c/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData[https://perma.cc/8QXC-XWMU] (last visited May 30, 2025); Kristen Eichensehr, *Foreign Affairs Deference After* Chevron, JUST SEC. (June 28, 2024), https://www.justsecurity.org/97317/supreme-court [https://perma.cc/VZU2-5W3L] (providing that agencies risk receiving less deference to interpret their statutes).

7. Eichensehr, *supra* note 6 (noting the Court has not applied the *Chevron* doctrine since 2016).

8. *See generally* Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/Y6TJ-DJ25] (outlining the controversial separation of powers between the Executive and Legislative Branches relating to foreign affairs); U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations").

9. *Entity List*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list [https://perma.cc/M8AZ-B6A5] (last visited Apr. 3, 2025). This Comment will not analyze the interpretation of the term "foreign policy," another basis upon which the Bureau of Industry and Security (BIS) adds or removes parties from the Entity List.

10. The Entity List restricts the export, re-export, or in-country transfer of items subject to the Export Administration Regulations (EAR) to listed parties based on foreign policy and national security concerns. 15 C.F.R. § 744 (Supp. No. 4 2025).

11. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R47684, EXPORT CONTROLS – INTERNATIONAL COORDINATION: ISSUES FOR CONGRESS 21 n.157 (2023), https://www.

Act of 2018 (ECRA) has developed alongside justifications for its necessity but without clear boundaries, resulting in restricted and delayed opportunities for review.[12] What are the limits to BIS's Entity List national security determinations in the context of ECRA after *Loper Bright*?

These determinations carry significant consequences. Among other notable examples, the Entity List prohibits U.S. as well as non-U.S. persons from exporting, reexporting, or transferring (in-country) any item "subject to the [Export Administration Regulations (EAR)]," effectively cutting off access to certain sectors of some of the world's largest markets.[13] In response, Chinese entities have turned to U.S. law firms for help, challenging their inclusion on the Entity List by alleging due process violations.[14] However, greater transparency in justifying Entity List determinations could strengthen BIS's delegated authority and reduce the bases for challenge.

This Comment argues that, although the *Loper Bright* decision poses a potential threat to BIS's national security determinations, a reviewing court will likely uphold the agency's ability to make expansive determinations. However, to strengthen its position, the End-User Review Committee (ERC) within BIS should focus on increasing transparency, securing additional funding and staffing, and revising its regulations to reflect a more accurate procedural timeframe for entity removals. Part I of this Comment discusses

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congress.gov/crs-product/R47684 ("[T]he Trump Administration took a series of individual classical and novel unilateral export control actions under its [Export Control Reform Act of 2018 (ECRA)] authorities." (quoting Kevin J. Wolf, Testimony before the Senate Committee on Banking, Housing, and Urban Affairs 5 (Feb. 28, 2023))); *see also* Gregory C. Allen, Emily Benson & William Alan Reinsch, *Improved Export Controls Enforcement Technology Needed for U.S. National Security*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 30, 2022), https://www.csis.org/analysis/improved-export-controls-enforcement-technology-needed-us-national-security [https://perma.cc/9CFK-T3WV] (stating that U.S. export controls have experienced "a sea change in the U.S. approach to China, particularly since the controls are both geographic in nature and unilateral").

12. *See* 50 U.S.C. § 4801; *see also* United States v. Huawei Techs. Co., 2024 WL 4665264, at *8 (E.D.N.Y. Nov. 4, 2024) (finding that "the government's varied and lengthy response times underscore the need for a set deadline to keep defendants informed on the process," and that if the government cannot meet the deadline, it "must confer with the defendants and come to an agreement on an appropriate extension of time").

13. Sujai Shivakumar, Charles Wessner & Thomas Howell, *Balancing the Ledger: Export Controls on U.S. Chip Technology to China*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 21, 2024), https://www.csis.org/analysis/balancing-ledger-export-controls-us-chip-technology-china [https://perma.cc/6NBV-RVPJ]; 15 C.F.R. § 734.3 (2024).

14. *See* Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 719, 721 (D.C. Cir. 2022) (listing James E. Tysse of Akin Gump Strauss Hauer & Feld LLP representing Changji Esquel Textile after its listing on the Entity List).

the background of BIS, *Chevron* deference, and *Loper Bright*. Part II analyzes *Loper Bright*'s impact on Entity List determinations. Part III provides administrative safeguards to support BIS's Entity List additions. Part IV discusses the due process concerns posed by the ERC's Entity List removal process. Finally, Part V outlines several recommendations for BIS to continue adding and removing entities from the Entity List. This Comment concludes that these critical national security issues belong within BIS's jurisdiction, and if this authority is removed or limited, it will result in (i) reduced efficiency of export controls aimed at targeting malign foreign actors and (ii) diminished consistency in U.S. export controls enforcement.

I. BACKGROUND

A. Authority and Organization of BIS and the ERC

BIS, part of the U.S. Department of Commerce, advances national security and foreign policy interests by regulating exports, enforcing compliance with export control laws, and safeguarding critical technologies from adversarial threats.[15]

Persistent national security concerns posed by hostile foreign actors highlight the need for BIS to impose export, re-export, and in-country transfer restrictions on specified entities through their addition to the Entity List.[16] Traditionally, Congress regulates international commerce and has increasingly delegated broad authority to the President to declare national emergencies and regulate various economic transactions.[17] Congress has also delegated authority to BIS in ECRA, through which BIS's mission is to

15. *Mission Statement*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., https://www.bis.doc.gov/index.php/about-bis/mission-statement [https://perma.cc/5PHT-WT8P] (last visited Apr. 3, 2025).

16. Entity List, 15 C.F.R. § 744 (Supp. No. 4 2024).

17. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations"); *see also* International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701(a), 1702(a)(1)(A) (providing the President authority to "investigate, regulate, or prohibit" certain financial transactions following a declaration of an "unusual and extraordinary threat" originating outside the United States); *Fact Sheet: President Donald J. Trump Declares National Emergency to Increase our Competitive Edge, Protect our Sovereignty, and Strengthen our National and Economic Security*, EXEC. OFF. OF THE PRESIDENT (Apr. 2, 2025), https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/ [https://perma.cc/3EPN-FHRN] (noting that President Trump has recently used IEEPA to impose a ten percent tariff on all countries and individualized tariffs on other countries with higher trade deficits).

"advance U.S. national security, foreign policy, and economic objectives" by imposing export controls.[18] ECRA enables BIS to regulate exports of dual-use and other goods subject to U.S. jurisdiction around the world, as well as certain activities by U.S. persons.[19] ECRA also grants BIS authority to "establish and maintain a list of foreign persons and end-uses that are determined to be a threat to the national security and foreign policy of the United States."[20] This list is more commonly known as the "Entity List."[21]

The Entity List's statutory history begins with Congress's enactment of the Export Administration Act (EAA) of 1979, authorizing BIS to regulate the export of goods and technologies for national security and foreign policy purposes.[22] Under the EAA, BIS began administering the EAR in 1979 to govern export controls.[23] The EAA lapsed on August 20, 2001, which led the President to implement Executive Order 13,222 on August 17, 2001.[24] This Executive Order continued the EAR under the International Economic Powers Act (IEEPA).[25] IEEPA[26] provides the President with the authority to address an external threat to national security, foreign policy, or the economy of the United States by declaring a national emergency.[27]

In 2018, Congress passed ECRA to provide a permanent statutory basis for export controls, focusing on "emerging and foundational technologies."[28]

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18. *Mission Statement*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., https://www.bis.doc.gov/index.php/about-bis/mission-statement [https://perma.cc/5PHT-WT8P] (last visited Apr. 3, 2025); 50 U.S.C. § 4811(1)–(2).

19. 15 C.F.R. § 730.3 (2025) (defining "dual use" goods as items, software, or technologies with civilian and military applications that could threaten U.S. national security); 50 U.S.C. § 4812(a)(1).

20. 50 U.S.C. § 4813(a)(2).

21. Entity List, 15 C.F.R. § 744 (Supp. No. 4 2024).

22. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, 504.

23. *Id.*

24. Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

25. *Id.* Several other Executive Orders continued the authority to administer export controls under the Export Administration Act (EAA) of 1979 and the EAR, including Exec. Order No. 12,924, Exec. Order No. 12,058, Exec. Order No. 12,851, Exec. Order No. 12,938, and Exec. Order No. 13,026.

26. *See* 50 U.S.C. §§ 1701–1707.

27. *Id.* § 1701(a)–(b).

28. PAUL K. KERR & CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R46814, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM ACT OF 2018 18–19 (2021) (citing policy justifications for ECRA, including the increasing need to restrict the export of U.S. critical technologies to end-uses and end-users to foreign adversaries and establish a permanent authority for the EAR). *See generally* Kevin J. Wolf, Thomas J. McCarthy & Andrew R. Schlossberg, *The Export Control Reform Act and Possible New Controls on Emerging and Foundational*

ECRA aims to enhance the efficiency of export controls by preventing foreign adversaries from acquiring critical technologies that could be used to develop advanced weapons or military systems, thereby safeguarding U.S. national security and maintaining technological superiority.[29] Relevant language to promulgate the Entity List from ECRA provides that:

> the President, the Secretary [of Commerce], in consultation with the Secretary of State, the Secretary of Defense, the Secretary of Energy, . . . shall . . . establish and maintain a list of foreign persons and end-uses that are determined to be a threat to the national security and foreign policy of the United States pursuant to the policy set forth in [50 U.S.C.] § 4811(2)(A).[30]

Section 4811(2)(A) provides . . .

> [t]he national security and foreign policy of the United States require that the export, re-export, and in-country transfer of items, and specific activities of United States persons, wherever located, be controlled for the following purposes: [] To control the release of items for use in—(i) the proliferation of weapons of mass destruction or conventional weapons; (ii) the acquisition of destabilizing numbers or types of conventional weapons; (iii) acts of terrorism; (iv) military programs that could pose a threat to the security of the United States or its allies; or (v) activities undertaken specifically to cause significant interference with or disruption of critical infrastructure.[31]

However, § 4811(2)(B)–(G), (3)–(10) extend the scope of export controls beyond traditional justifications,[32] providing a comprehensive framework to address national security and foreign policy concerns. These provisions emphasize preserving U.S. military superiority, strengthening the U.S. defense industry, protecting human rights, promoting democracy, and fulfilling international obligations under multilateral export control regimes.[33] Export controls under ECRA also aim to enhance military interoperability with the North Atlantic Treaty Organization and other allies, focus on technologies that pose serious national security threats, and maintain U.S. leadership in science, technology, engineering, and

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Technologies, AKIN GUMP STRAUSS HAUER & FELD, LLP (Sept. 12, 2018), https://www.akingump.com/en/insights/alerts/the-export-control-reform-act-of-2018-and-possible-new-controls [https://perma.cc/DTA3-93NG] (highlighting the lack of clear definitions provided by Congress for terms like "emerging" or "foundational" technologies deemed "essential to national security," underscores the critical role for industry in shaping this process).

29. Wolf et al., *supra* note 28.

30. 50 U.S.C. § 4813(a)(2).

31. *Id.* § 4811(2)(A) (providing more justification for the scope of national security concerns versus the EAA).

32. *Id.* § 4811(2)(B)–(G), (3)–(10).

33. *Id.* § 4811(2)(B)–(E).

manufacturing sectors critical to innovation and competitiveness.[34] This framework of export control objectives also highlights the importance of multilateral cooperation to ensure effective enforcement, tailoring controls to core technologies, and minimizing the limitations of unilateral measures.[35] It also underscores the need for a "transparent, predictable, . . . timely," and adaptable export control system supported by robust monitoring, intelligence, and enforcement capabilities.[36] Further, export controls are integrated into broader national security policies, including foreign direct investment regulations, to prevent the transfer of critical technologies to foreign adversaries.[37] Lastly, the statute emphasizes the importance of a coordinated effort leveraging the "expertise" of federal agencies, industry, and academia.[38] This collaboration, "in addition to traditional efforts to modernize and update the lists of controlled items," is designed to effectively utilize export controls in addressing U.S. national security concerns.[39]

Under ECRA, BIS continues to implement and amend the EAR to enforce effective export controls and maintain U.S. leadership in strategic technologies.[40] As part of this mission, General Prohibition Five (§ 736.2(b)(5) of the EAR) prohibits the knowing export or re-export of any item subject to the EAR to an end-user or end-use that is prohibited by § 744 of the EAR without a license.[41] To advance its mission, DOC amended § 744.1 of the EAR to include Supplement No. 4, formally integrating the Entity List into BIS's regulatory framework.[42]

The Entity List is a critical tool to inform the public of entities engaged in activities that pose a risk of diverting exported, re-exported, or transferred (in-country) items in ways that threaten national security.[43] Moreover, the

34. *Id.* § 4811(2)(F)–(G), (3).

35. *Id.* § 4811(4)–(6); *Unilateralism Versus Multilateralism*, COUNCIL ON FOREIGN RELS. (May 5, 2023), https://education.cfr.org/learn/reading/unilateralism-versus-multilateralism [https://perma.cc/G7AN-6T49] (defining multilateral cooperation as the collaborative work with other countries to tackle transnational challenges, whereas unilateralism is defined as countries "acting independently").

36. 50 U.S.C. § 4811 (7)–(9).

37. *Id.* § 4811 (10).

38. *Id.*

39. *Id.*

40. *Id.*

41. 15 C.F.R. § 736.2(b)(5) (2012).

42. Entity List, 62 Fed. Reg. 4,910 (Feb. 3, 1997) (to be codified at 15 C.F.R. § 744 (Supp. No. 4 1997)) (providing regulatory authority for BIS to amend § 744.1, thereby creating the Entity List, "which informs exporters that a license is required for shipments").

43. *Entity List*, *supra* note 9; Jacob Aaron Pagano, Note, *Contrary to National Security: The Rise*

Entity List identifies entities ineligible to receive items subject to the EAR, whether exported from the United States or obtained abroad, without a license.[44] Since the first publication of the Entity List, it has rapidly expanded. Currently, the Entity List contains over 600 foreign entities, "including businesses, research institutions, government and private organizations, individuals, and other . . . legal persons" subject to specific license requirements for the export, re-export, or in-country transfer of designated items.[45]

The ERC is responsible for deciding additions, removals, or other modifications to the Entity List.[46] This review committee comprises representatives from several agencies, including DOC and the U.S. Departments of State, Defense, Energy, and the Treasury.[47] The EAR governs the legal process for adding entities to the Entity List.[48] In the process of adding parties, BIS, in coordination with other agencies, evaluates whether an entity is involved in "or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States."[49] The ERC then assesses the recommendations to add entities and votes on the additions.[50] Upon a majority vote by the ERC to add an entity to the Entity List, BIS notifies the entity by publishing the decision in the *Federal Register*, thereby updating Supplement No. 4 to § 744 of the EAR.[51] The *Federal Register* notice includes the entity's name, location, and a description of the restrictions imposed.[52] Once the updated listing is published in the *Federal Register*, the listed entities are subject to license requirements for all items subject to the EAR with a presumption of denial unless otherwise specified.[53] Listed entities may

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of the Entity List in U.S. Policy Towards China and Its Role in the National Security Administrative State, 61 COLUM. J. TRANSNAT'L L. 453, 454 (2024); Entity List, 62 Fed. Reg. at 4,910.

44. Entity List, 15 C.F.R. § 774 (Supp. No. 4 2024).

45. *See Entity List*, *supra* note 9. *See generally* Additions and Revisions of Entities to the Entity List, 89 Fed. Reg. 87,261 (Nov. 1, 2024) (to be codified at 15 C.F.R. § 744) (providing that Entity List targets are "End-User and End-Use Based").

46. Additions and Revisions of Entities to the Entity List, 89 Fed. Reg. at 87,261.

47. *Id.*

48. *Id.*

49. 15 C.F.R. § 744.11 (2025).

50. *Id.*

51. 15 C.F.R. § 744 (Supp. No. 5 2025).

52. 15 C.F.R. § 744 (Supp. No. 4 2023); *see infra* note 200 and accompanying text. *Federal Register* notices often lack detailed explanations of why the End-User Review Committee (ERC) determined that an entity poses a national security concern.

53. 15 C.F.R. § 744 (Supp. No. 4 2023) (noting that certain ECCNs may be exempt from the presumption of denial if specified in the designation).

request removal from the Entity List by submitting an appeal to BIS under the process outlined in 15 C.F.R. § 744.16(e) whereby the ERC reviews and decides whether to remove the entity by a unanimous vote.[54]

The Entity List relies on multiple authorities, including the EAA, IEEPA, various Executive Orders, and now ECRA.[55] When enacting the EAA, Congress outlined numerous justifications for regulating U.S. exports, underscoring the breadth and importance of these controls as well as providing insight into the policy rationales that might support Entity List designations.[56] Congress emphasized the role of export regulations in advancing U.S. economic prosperity, safeguarding national security, and achieving foreign policy objectives by strategically managing the flow of goods, technology, and resources.[57] Further, export regulations under this congressional directive were implemented to contribute to domestic employment, production, and trade balance while preventing economic harm from excessive restrictions.[58] Congress also prioritized controlling sensitive technologies that could enhance adversaries' military capabilities and emphasized unfair access to global supplies and dependence on critical resources from potential adversaries.[59] Lastly, under this congressional direction, export regulations aim to reduce uncertainty in export control policies, promote agricultural exports, and uphold the United States' reputation as a responsible trading partner while addressing the foreign availability of controlled goods.[60] Additionally, through the Nuclear Non-Proliferation Act of 1978, Congress declared national security concerns related to the proliferation of nuclear explosives and provided U.S. policy to increase the effectiveness of international safeguards.[61] In doing so, Congress identified technologies suitable for nuclear weapons as a key target for export controls.[62]

B. Standards for Entity List Determinations

Entity List determinations are generally based on findings that a foreign entity is either an end-user or involved in an end-use that is the target of export controls to protect U.S. national security.[63] Specifically, the ERC

54. 15 C.F.R. § 744 (Supp. No. 5 2023).
55. 50 U.S.C. §§ 4601, 4608; 50 U.S.C. § 1701 (Supp. III 2018).
56. 50 U.S.C. app. § 2401.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Nuclear Non-Proliferation Act of 1978, 22 U.S.C. § 3201.
62. *Id.*
63. 50 U.S.C. § 4813(a)(2).

makes determinations to add foreign entities because "there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities contrary to the national security."[64] Not all criteria for being added to the Entity List require a nexus between the foreign entity and an item subject to the EAR.[65] Federal regulations provide "merely illustrative[,] not exhaustive" examples of types of conduct the ERC has deemed a national security concern, thus providing BIS with broad discretion to determine national security concerns beyond the traditional scope.[66] This catchall provision has since justified the expansion of Entity List determinations, including recent designations of foreign entities involved in enabling human rights abuses.[67]

In response to this final rule, one commenter noted that the rule is "seriously flawed and imprecise, offering a dubious process."[68] BIS defended the rule as sufficiently precise, emphasizing that increasing public disclosure would provide exporters with greater "access to information about these parties of concern."[69] While the Entity List does offer public disclosure on specific listed entities, the extent of this promised transparency remains unclear.[70]

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64. 15 C.F.R. § 744.11(b) (2021).

65. *Entity List FAQs*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., https://www.bis.doc.gov/index.php/component/fsj_faqs/cat/33-entity-list-faqs (last visited Apr. 15, 2025).

66. *See* 15 C.F.R. § 744.11 (2021); *see also* 50 U.S.C. § 4811(2)(A); *supra* text accompanying note 31 (listing five examples deemed to be a national security concern: "(i) the proliferation of weapons of mass destruction; (ii) the acquisition of destabilizing amounts of conventional weapons; (iii) acts of terrorism; (iv) military programs threatening U.S. or allied security; or (v) destruction of critical infrastructure"); Authorization To Impose License Requirements, 73 Fed. Reg. 49,312 (Aug. 21, 2008) (to be codified at 15 C.F.R. pts. 730, 744 & 756).

67. BIS has since promulgated a rule adding human rights abuses to the official bases for designation in addition to case law. Additions to the Entity List; Amendment To Confirm Basis for Adding Certain Entities to the Entity List Includes Foreign Policy Interest of Protection of Human Rights Worldwide, 88 Fed. Reg. 18,983 (Mar. 30, 2023) (to be codified at 15 C.F.R. § 744); *see also* Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 723 (2022) (finding that while ECRA omits human rights, it allows the Secretary of Commerce to take necessary actions for its implementation).

68. Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security, 73 Fed. Reg. 49,313 (Aug. 21, 2008) (referencing general comment number five on the proposed rule).

69. *Id.*

70. *Id.* at 49,311 (questioning the sufficiency of information provided about listed entities involved in activities deemed a national security concern).

C. Loper Bright *and* Chevron

Recently, *Loper Bright* overturned *Chevron*, which had been precedent since 1984.[71] *Chevron* afforded agencies deference to interpret their statutes when the statutory language was ambiguous, so long as the agency's interpretation was reasonable and permissible.[72] Further, *Chevron* deference enabled agencies to use their expertise to fill in statutory gaps if Congress was silent on the precise issue.[73]

Chevron established a two-step framework for determining whether an agency's action is entitled to deference.[74] Before applying the two-step framework outlined in *Chevron*, the court must determine that Congress intended to delegate authority to the agency.[75] First, a reviewing court considers whether the statute is ambiguous.[76] If Congress has directly spoken to the question, there is no ambiguity, and the agency's interpretation is not entitled to deference.[77] Second, if the statute is ambiguous, the court determines whether the agency's interpretation is a permissible construction of the statute; if so, the agency is afforded *Chevron* deference.[78]

The Supreme Court in *Loper Bright* overturned *Chevron* by holding that courts must exercise independent judgment when interpreting whether an agency has acted within its statutory authority and must not defer to an agency's interpretation of the law simply because the statute is ambiguous.[79] Moreover, the Court relied on the Administrative Procedure Act (APA) to overrule *Chevron* by requiring a reviewing court to exercise its independent judgment in deciding whether an agency has acted within its statutory authority.[80] The Court also cited its foundational 1803 precedent in *Marbury*

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71. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

72. *Id.* at 412.

73. *Id.*

74. *Id.*

75. That is, whether the statute is implemented through the Administrative Procedure Act (APA) notice-and-comment process or formal rulemaking. *See id.* at 404–405.

76. *Id.* at 379.

77. *Id.*

78. *Id.*

79. *Id.* at 412; *see also* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 374–75 (D.C. Cir. 2022) (opinion of Walker, J., dissenting).

80. 603 U.S. at 412; *see also* 5 U.S.C. § 706 ("The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

v. Madison,[81] holding that courts will "say what the law is."[82] However, in exercising independent judgment, a reviewing court may "seek aid from the interpretations of those responsible for implementing particular statutes."[83] Similarly, the Court relied on precedent from *United States v. Moore*,[84] emphasizing that a reviewing court may consider executive branch interpretations, as they are "masters of the subject" and often the drafters of the laws being interpreted.[85]

Historically, when interpreting broad statutory terms, the Court has applied a deferential standard of review when statutory terms are "applied to specific facts found by the agency."[86] In *Gray v. Powell*,[87] the Court found that the agency had been explicitly granted the authority to make determinations.[88] The Court acknowledged that the agency's conclusions required the informed judgment of industry experts.[89] As a result, the Court held that such delegation should be respected and the agency's conclusions upheld, so long as they represented "a sensible exercise of judgment."[90] Accordingly, when an agency is tasked with interpreting a broad statutory term within its authority, the Court has historically deferred to the agency's expertise to make factual determinations that a reviewing court may be less equipped to assess.

Loper Bright has implications on BIS's deference to make additions to or removals from the Entity List. Changes to administrative law under *Loper Bright* also present listed entities with an opportunity for increased judicial review based on unclear national security determinations.[91] While *Loper Bright* has negative implications on agency deference, the Court's best reading of *Loper Bright* strengthens the argument that a reviewing court may agree

81. 5 U.S. 137 (1803).

82. *See Loper Bright Enters.*, 603 U.S. at 387 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)); *see also Loper Bright Enters.*, 603 U.S. at 400–401 ("[A]gencies have no special competence in resolving statutory ambiguities. Courts do.").

83. 603 U.S. at 371 (quoting Skidmore v. Swift, holding that an agency's interpretations "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance. . .").

84. 95 U.S. 760 (1878).

85. 603 U.S. at 386 (quoting United States v. Moore, 95 U.S. 760, 763 (1878)); *see also* United States v. Am. Trucking Ass'ns., Inc., 310 U.S. 534, 549 (1940) (holding that the Executive Branch's informed judgment could be entitled to "great weight").

86. 603 U.S. at 388.

87. 314 U.S. 402 (1941).

88. *Id.*

89. *Id.* at 413.

90. *Id.*; 603 U.S. at 389 (quoting Gray v. Powell, 314 U.S. 402, 412–13 (1941)).

91. 603 U.S. at 383–384.

with ERC determinations because of the agency's expertise in factual export control and national security determinations.[92] Additionally, the Court in *Loper Bright* further supports agency deference to interpret their own statutes when said interpretations "have remained consistent over time," which "may be especially useful in determining the statute's meaning."[93]

D. Best Reading of Loper Bright

In *Loper Bright*, the Court noted that the "best reading of a statute is that it delegates discretionary authority to an agency," whereby a reviewing court should independently interpret the statute to determine Congress's intent.[94] This holding relies heavily on *Marbury*, where the Court held that a reviewing court's role was to "interpret [an] act of Congress, in order to ascertain the rights of the parties . . . ."[95] Interpreting a statute requires that a reviewing court identify constitutional delegations of authority, clarify the boundaries of those delegations, and ensure that agency actions are consistent with the APA.[96] Additionally, the best reading of a statute can be derived from the agency's consistent and valid interpretations of its own enabling statute.[97] Thus, a reviewing court should determine the 'best' reading of a statute, not a "merely 'permissible' reading."[98]

While the "best reading" of a statute might limit an agency's authority to interpret its statutory terms, a more optimistic interpretation of *Loper Bright* highlights three scenarios where agency deference remains applicable. First, some statutes explicitly delegate authority to agencies to define their terms.[99] Second, Congress can empower an agency through new legislation or

92. *See id.* at 395 (providing that the best reading of a statute "delegates discretionary authority to an agency" and the reviewing court's role is to interpret the statute in accordance with constitutional delegations and ensure the agency has engaged in "reasoned decision-making").

93. *Id.* at 394.

94. *Id.* at 395.

95. Decatur v. Paulding, 39 U.S. 497, 515 (1840); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (recognizing the judiciary's duty to say what the law is, laying the groundwork for judicial review of agency determinations).

96. 603 U.S. at 404.

97. *Id.* at 430–431 (Gorsuch, J., concurring).

98. Van Loon v. Dep't of the Treasury, 122 F.4th 549, 563 (5th Cir. 2024).

99. Shay Dvoretzky, Parker Rider-Longmaid, Boris Bershteyn, Emily J. Kennedy & Steven Marcus, *Supreme Court's Overruling of* Chevron *Deference to Administrative Agencies' Interpretations of Statutes Will Invite More Challenges to Agency Decisions*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (July 9, 2024), https://www.skadden.com/insights/publications/2024/07/the-supreme-courts-overruling-of-chevron-deference [https://perma.cc/A267-E5EN].

amendments to clarify details within the agency's statutory framework.[100] Last, Congress has granted agencies broader regulatory discretion by incorporating terms like "appropriate" or "reasonable" into statutes.[101]

II. *LOPER BRIGHT*'S IMPACT ON ENTITY LIST DETERMINATIONS

The impact of *Loper Bright* on agency deference, particularly regarding the *Chevron* framework, is profound and likely to reshape the authority agencies like BIS have in interpreting statutes tied to national security. Traditionally, the *Chevron* doctrine has allowed courts to defer to agencies' interpretations of ambiguous statutes, assuming the interpretation was reasonable and permissible.[102] National security determinations made prior to *Loper Bright* are preserved under the principle of stare decisis.[103] However, moving forward, *Loper Bright* sets a higher bar for changing the Court's interpretation of a statute.[104] Additionally, *Loper Bright* signals a shift toward reduced judicial deference, especially in cases where statutory interpretation involves significant policy or economic implications.[105]

In recent rulings, the D.C. Circuit and other courts have already begun to question the scope of agency authority without *Chevron* deference.[106] For example, in regulatory disputes involving environmental and healthcare agencies, courts have scrutinized agency decisions under the major questions doctrine, which requires clear congressional authorization for agencies to act on substantial policy issues.[107] This approach may soon apply more widely, affecting BIS's broad discretion in national security-related export controls

100. *See, e.g.*, TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2023).

101. 603 U.S. at 394–395 (noting that Congress's use of broad terms invites agencies to fill statutory gaps, thereby reinforcing their policymaking role).

102. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

103. 603 U.S. at 411–412.

104. *See id.* at 411 (explaining that *Chevron* allowed agencies to "change course even when Congress has given them no power to do so," thus leading the Court to overrule *Chevron* and direct the courts to independently determine whether an agency has acted within its statutory authority).

105. *The Supreme Court's Double Hammer to Agencies:* Loper Bright *and* Corner Post *Set New Precedents for Challenging Federal Agency Action*, CROWELL (Jul. 11, 2024), https://www.crowell.com/en/insights/client-alerts/the-supreme-courts-double-hammer-to-agencies-loper-bright-and-corner-post-set-new-precedents-for-challenging-federal-agency-action [https://perma.cc/CE8K-ZWRV].

106. Katherine Cordry & Brian Pedrow, *Demise of* Chevron *Deference Sends Shockwaves Through Labor and Employment Regulatory Landscape*, JDSUPRA (July 30, 2024), https://www.jdsupra.com/legalnews/demise-of-chevron-deference-sends-4000104 [https://perma.cc/CD92-4ZXB].

107. *Id.*

and the interpretation of enabling statutes governing trade and technology transfer regulations.[108] Ultimately, the impact of *Loper Bright* suggests that courts will more rigorously examine agency interpretations, making it challenging for agencies to act without explicit legislative support, especially in areas like export controls where national security is a core concern.

Recently, the D.C. Circuit has confronted the implications of *Loper Bright* in *Marin Audubon Society v. Federal Aviation Administration*.[109] Here, the court determined that the White House Council on Environmental Quality (CEQ) lacks statutory authority granted by Congress under the National Environmental Policy Act (NEPA) to issue binding regulations.[110] In reviewing this case, the D.C. Circuit found that NEPA did not provide express rulemaking authority, and the authority could not be implied either.[111] This holding is significant in the wake of *Loper Bright* because the Court has unraveled rulemaking authority that CEQ has exercised since the 1970s.[112] While the holding does not invalidate prior CEQ regulations, the court's holding has potentially broad repercussions for federal agencies that can be subject to increased scrutiny of rulemaking authority.[113]

Recent lower court applications of the *Loper Bright* holding showcase how reviewing courts analyze ambiguous statutory terms. In *Van Loon v. Department of the Treasury*,[114] the U.S. Court of Appeals for the Fifth Circuit reviewed the

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108. BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., DON'T LET THIS HAPPEN TO YOU! 21 (2024) [hereinafter BIS, DON'T LET THIS HAPPEN TO YOU!], https://www.bis.gov/media/documents/dlthty-nov-2024-1-7-25 [https://perma.cc/3ZTS-SERD].

109. 121 F.4th 902 (D.C. Cir. 2024); *see also* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497 (2024) (establishing the judiciary's authority to interpret the law, a new principle implemented through *Loper Bright*, in the Court's recent consideration of whether NEPA permits agency reliance on "reasonably foreseeable" effects delegated to the Surface Transportation Board).

110. 121 F.4th at 914–15.

111. *Id.*

112. Bridget C.E. Dooling, *D.C. Circuit Upends CEQ's NEPA Rules*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 12, 2024), https://www.yalejreg.com/nc/d-c-circuit-upends-ceqs-nepa-rules [https://perma.cc/YQ76-6PPD] (noting that Executive Order No. 11,991, signed by President Jimmy Carter, granted the Council on Environmental Quality (CEQ) authority to issue National Environmental Policy Act (NEPA) regulations and directed agencies to comply with those regulations).

113. *See generally* Jeffrey A. Knight, Steve R. Brenner & Bailey Robert Harris, *DC Circuit Rules White House CEQ Lacks Authority to Issue Binding NEPA Regulations*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Nov. 14, 2024), https://www.pillsburylaw.com/en/news-and-insights/washington-dc-white-house-council-environmental-quality-national-environmental-policy-act.html [https://perma.cc/L6C2-HZ9Z].

114. 122 F.4th 549 (5th Cir. 2024).

Department of the Treasury's Office of Foreign Asset Control's (OFAC's) authority under IEEPA to block "property" of a foreign national or entity.[115] The reviewing court was tasked with determining the 'best' reading of the statutory term "property" under Congress's delegated authority via IEEPA.[116] First, the Fifth Circuit Court of Appeals analyzed the term's dictionary definitions contemporaneous with the statute's passage in 1977 to determine its original meaning.[117] Second, the court reviewed whether Supreme Court precedent and historical scholarship have reaffirmed this original meaning.[118] Third, the court assessed the agency's definition of the term, also noting that it is not certain whether this step is required under *Loper Bright* as it somewhat affords agency deference similar to *Chevron*.[119] Lastly, the court used canons of construction to clarify the statutory term, particularly the *noscitur a sociis* canon, providing that "particular words or phrases" should be understood "in relation to the words or phrases surrounding them."[120] Upon review of the term "property" by following the four steps listed above, the court determined that the OFAC exceeded its statutory authority.[121] Therefore, the analysis below will follow the recent Fifth Circuit's framework in *Van Loon* to determine the statutory meaning of "national security" in ECRA.

A. Analyzing ECRA's Term "National Security" Under Loper Bright *Standards*

This section examines the broad statutory term "national security" in ECRA to predict how a reviewing court might interpret "national security." A court's clarification of these terms could significantly impact BIS's scope of authority to add entities to the Entity List, potentially narrowing its discretion. Without *Chevron* deference, the ambiguity of terms like "national security" could invite judicial scrutiny, particularly if the agency's actions are not guided by an intelligible principle or sufficiently clear statutory standards.

115. *Id.* at 554.

116. *Id.* at 563.

117. *Id.* at 563–64.

118. *Id.* at 564–65.

119. *See id.* at 565–66.

120. *Id.* at 566; *see also* United States v. Lauderdale Cnty., Mississippi, 914 F.3d 960, 966 (5th Cir. 2019) ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'") (quoting Yates v. United States, 574 U.S. 528, 543 (2015)).

121. *Van Loon*, 122 F.4th at 571 (reasoning that while "IEEPA grants the President broad powers to regulate a variety of economic transactions . . . its language is not limitless").

1. Plain Meaning of "National Security"

There are different understandings of "national security," all of which depend heavily on the context of the term.[122] This section will define national security within the realm of BIS and export controls. The phrase "national security" does not appear as a standalone entry in public dictionaries. However, "national" is commonly defined as "belonging to or maintained by the federal government" or "relating to a nation."[123] Additional definitions include "concerning or encompassing an entire nation"[124] and "owned and controlled or operated by a national government."[125] These definitions suggest that "national" often describes something under a country's possession or control.

Similarly, "security" is defined as "freedom from danger" or "the quality or state of being secure."[126] It can also refer to "precautions taken to guard against crime, attack, sabotage, [or] espionage" and "a department or organization responsible for protection or safety."[127] Together, the terms "national" and "security" can be interpreted to mean the protection of a nation from dangers such as crime, attack, or espionage through efforts maintained by national organizations or departments designed to guard against such threats.

The concept of national security is further shaped by its statutory context, with different agencies and statutes defining it based on their unique missions and priorities. For example, BIS defines national security under ECRA with a focus on protecting the United States from technological and economic threats, including criteria related to military capabilities and critical

122. *Compare* U.S. Dep't of Just., Just. Manual § 9-90.000 (2022) (defining national security as "encompass[ing] the national defense, foreign intelligence and counterintelligence, international and internal security, and foreign relations"), *with* Jim Garamone, *Hicks Defines Need to Focus DOD on Climate Change Threats*, U.S. DEP'T OF DEF. (Aug. 30, 2023) https://www.defense.gov/News/News-Stories/Article/Article/3510772 [https://perma.cc/GDW6-F67U] (quoting the Deputy Defense Secretary stating that "[c]limate change is a national security issue").

123. *National*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/national [https://perma.cc/74RU-NUNE] (last visited May 30, 2025).

124. *National*, DICTIONARY.COM, https://www.dictionary.com/browse/national [https://perma.cc/8Y8A-X833] (last visited May 30, 2025).

125. *National*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/national [https://perma.cc/FJ86-63QF] (last visited May 30, 2025).

126. *Security*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/security [https://perma.cc/B5SY-WQ2A] (last visited May 30, 2025).

127. *Security*, DICTIONARY.COM, https://www.dictionary.com/browse/security [https://perma.cc/M2YY-TUET] (last visited May 30, 2025).

technologies.[128] By contrast, the Committee on Foreign Investment in the United States (CFIUS) defines national security under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which emphasizes threats posed by foreign investments, such as access to sensitive personal data, critical infrastructure, or technologies.[129] While these definitions overlap in their emphasis on protecting the nation from external threats, their criteria and scope reflect the distinct objectives of each regulatory framework.

2. How the U.S. Supreme Court and Scholars Have Defined "National Security"

Supreme Court precedent and legal scholars have often defined "national security" by highlighting the term's broad and evolving nature. Generally, the Court has recognized national security as encompassing the protection of the nation's physical security, economic stability, and political sovereignty.[130] For example, in *Holder v. Humanitarian Law Project*,[131] the Court defined national security as the nation's defense and foreign relations and emphasized the government's compelling interest in safeguarding against evolving threats "where information can be difficult to obtain and the impact of certain conduct difficult to assess."[132] In the context of *Holder*, the national security concern derived from foreign terrorist organizations that committed several terrorist attacks, some harming U.S. citizens.[133] Similarly, in *TikTok v. Garland*,[134] the Court noted the government's authority to act decisively in the interest of national security, particularly in the context of data collection by a Chinese-owned company.[135] Thus, these two cases both identify national security concerns as having a nexus between a foreign adversary and

128. 50 U.S.C. § 4811.

129. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51,316 (Oct. 11, 2018) (to be codified at 31 C.F.R. pt. 800).

130. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1574, 1582–83 (2012).

131. 561 U.S. 1 (2010).

132. *Id.* at 34; *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress . . . must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

133. 561 U.S. at 9.

134. 145 S. Ct. 57 (2025).

135. *Id.* at 65 (highlighting national security concerns arising from the scale of TikTok's U.S. consumer base, allowing for the mass collection of personal data and susceptibility of data control by a foreign adversary, namely the Chinese government).

national defense, whether through the exploitation of personal data or the threat of terrorism.[136]

Legal scholars have further expanded the definition of national security, emphasizing its dynamic nature.[137] Scholars often highlight that national security extends beyond traditional military threats to include cybersecurity, climate change, supply chains, and economic stability.[138] Moreover, scholars contend that national security has become a catchall justification for a wide array of government actions, which risks diluting its meaning and enabling overreach.[139]

Both the judiciary and legal scholars illustrate the complex and context-dependent nature of the term "national security." Critics argue that the ambiguity of the term allows it to be wielded selectively, often reflecting political or economic interests rather than genuine threats to national safety.[140] This lack of clarity undermines transparent governing and risks alienating international partners, by acting under the guise of national security but with rooted protectionist intentions. This risk underscores the need for a more precise and transparent understanding of national security

136. *Compare* NAT'L COUNTERINTELLIGENCE & SEC. CTR., OFF. OF THE DIR. OF NAT'L INTEL., NATIONAL COUNTERINTELLIGENCE STRATEGY 2024 15 (2024), https://www.dni.gov/files/NCSC/documents/features/NCSC_CI_Strategy-pages-20240730.pdf [https://perma.cc/6GVA-GCS3] (targeting national security threats toward "adversary capabilities") *with Fact Sheet: President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China*, EXEC. OFF. OF THE PRESIDENT (Feb. 1, 2025), https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-imposes-tariffs-on-imports-from-canada-mexico-and-china [https://perma.cc/6HSH-93VN] (juxtaposing traditional national security threats from adversaries to identifying threats from allies like Canada and Mexico).

137. Kim R. Holmes, *What is National Security?*, THE HERITAGE FOUND. (Oct. 7, 2014), https://www.heritage.org/military-strength-essays/2015-essays/what-national-security [https://perma.cc/7VQ5-NBVH].

138. *See id.* (providing examples of non-military concepts of national security that address threats beyond the scope of traditional military operations).

139. *See generally* DAVID KENNEDY, OF WAR AND LAW 7, 12 (Princeton University Press 2006) (defining the "political context" with the "merger of law and war" making it "difficult to locate a moment of responsible political discretion").

140. *See* Antonia I. Tzinova, Robert A. Friedman & Caroline Grace Howard, *Biden Administration's Blocking Order Sparks Legal Battles*, HOLLAND & KNIGHT (Jan. 17, 2025) https://www.hklaw.com/en/insights/publications/2025/01/biden-administrations-blocking-order-sparks-legal-battles [https://perma.cc/BU2E-687Y] (citing pending litigation from U.S. Steel and Nippon Steel against the U.S. government alleging that the "decision to block the acquisition [of U.S. Steel by Nippon Steel, Japan's largest steelmaker and close U.S. ally] was driven by political motives rather than genuine national security concerns").

to prevent misuse and ensure its application remains consistent with the rule of law.[141]

National security is particularly difficult to define in export control regulations because of its multifaceted nature. The recent statutory language in ECRA provides several specific examples of activities that are deemed to threaten America's national security.[142] However, national security determinations made when adding or removing foreign parties from the Entity List do not always explicitly provide justifications that fit clearly within the statutory text. For example, Fujian Jinhua Integrated Circuit Co., Ltd. was added to the Entity List in October 2018, most likely because of concerns that the company's activities threatened the long-term viability of U.S. semiconductor manufacturing.[143] However, the published justification provided by the ERC stated their determination that the company "poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States."[144] Unlike traditional national security threats, this designation was centered on protecting U.S. economic security.[145] Therefore, definitions of national security in export controls vary by party and often depend on the impact of specific activities or goods on U.S. people, businesses, and safety.

3. How BIS Has Defined "National Security"

Entity List determinations issued by BIS have historically targeted foreign entities whose activities threaten U.S. national security or foreign policy interests.[146] Traditional national security determinations targeted entities

141. *See generally* Elizabeth Goitein & Mike German, *Transparency & Oversight*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/protect-liberty-security/transparency-oversight [https://perma.cc/6PG7-H64U] (last visited May 30, 2025) (arguing that "[e]xcessive secrecy in national security policy undermines the basic functions of democratic self-government").

142. 50 U.S.C. § 4811.

143. Addition of an Entity to the Entity List, 83 Fed. Reg. 54,519 (Oct. 30, 2018) (to be codified at 15 C.F.R pt. 744).

144. *Id.* at 54,520.

145. *Fujian Jinhua Integrated Circuit Company, Ltd. Added to the Entity List Without Committing an Export Violation*, DESCARTES VISUAL COMPLIANCE (May 11, 2018), https://www.visualcompliance.com/blog/fujian-jinhua-integrated-circuit-company-ltd-added-to-entity-list-without-committing-export-violation [https://perma.cc/ZYR8-LV5P] (highlighting the national security concern derived from Jinhua's growth threatens the production of U.S. defense manufacturers).

146. 15 C.F.R. § 744.11.

engaged in the proliferation of weapons of mass destruction.[147] These determinations have originated in multilateral agreements such as the Wassenaar Arrangement, which created an export control framework among forty-two nations to enhance transparency in the export of dual-use goods and conventional weapons.[148] However, BIS has extended the scope to include entities involved in a range of activities that could undermine U.S. economic security and geopolitical stability.[149]

The extended scope of national security determinations can be exemplified by targeting companies that could benefit from foreign military or intelligence capabilities, such as Huawei.[150] This Chinese technology company raised concerns about participation in activities related to espionage, security, and human rights abuses.[151] However, Huawei also held a dominant position in the global telecommunications infrastructure, which could undermine U.S. technology leadership and economic stability.[152]

While national security determinations are expanding, modern national security determinations do not exceed BIS's legal scope of its authority. As noted in *Changji Esquel Textile Co. Ltd. v. Raimondo*,[153] the U.S. Court of Appeals for the D.C. Circuit applied a three-step test to determine whether BIS's placement of the Changji Esquel Textile Company on the Entity List based on human rights violations was *ultra vires*.[154] In the *ultra vires* test, the court

147. *What is the Background and Purpose of the Entity List?*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., https://www.bis.doc.gov/index.php/component/fsj_faqs/faq/105-what-is-the-background-and-purpose-of-the-entity [https://perma.cc/59Y6-C3AZ] (last visited May 30, 2025).

148. *Wassenaar Arrangement*, NUCLEAR THREAT INITIATIVE, https://www.nti.org/education-center/treaties-and-regimes/wassenaar-arrangement [https://perma.cc/PZP3-ZJZG] (last updated May 3, 2025); *see also* BIS, DON'T LET THIS HAPPEN TO YOU!, *supra* note 108, at 9.

149. Press Release, Bureau of Indus. & Sec., Dep't of Com., Commerce Strengthens Restrictions on Advanced Computing Semiconductors to Enhance Foundry Due Diligence and Prevent Diversion to PRC (Jan. 15, 2025), https://www.bis.gov/press-release/commerce-strengthens-restrictions-advanced-computing-semiconductors-enhance-foundry-due-diligence-prevent [https://perma.cc/Y63S-MRSP].

150. *See* Gregory C. Allen, Emily Benson & William Alan Reinsch, *Improved Export Controls Enforcement Technology Needed for U.S. National Security*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 30, 2022), https://www.csis.org/analysis/improved-export-controls-enforcement-technology-needed-us-national-security [https://perma.cc/E4GH-EAY9].

151. Noah Berman, Lindsay Maizland & Andrew Chatzky, *Is China's Huawei a Threat to U.S. National Security?*, COUNCIL ON FOREIGN RELS. (Feb. 8, 2023), https://www.cfr.org/backgrounder/chinas-huawei-threat-us-national-security [https://perma.cc/6SUC-LBUH].

152. *Id.*

153. 40 F.4th 716 (D.C. Cir 2022).

154. *Id.* at 722.

asked (1) whether the agency's power was greater than that delegated to it by Congress, (2) whether the agency's actions were beyond delegated authority and should be invalidated, and (3) whether the agency acted within the bounds of its authority.[155] The court held that Congress delegated reasonable discretion to BIS and that it would be unreasonable for a statute to list all agency powers specifically.[156] Thus, the court found that BIS's authority to implement export controls based on human rights violations was granted using the array of applicable actions necessary to protect U.S. national security.[157]

Courts applying the *Esquel* test should similarly not find recent BIS Entity List designations, based on expansive national security determinations, to be *ultra vires*.[158] Specifically, BIS's power to make national security determinations targeting unconventional activities is no greater than that delegated by Congress because the agency's expertise has identified more strategic actors and items to effectively restrict exports within national security objectives.[159] ECRA also grants broad authority, and similar to the holding in *Esquel*, it is unreasonable for a statute to list all agency powers specifically.[160] Lastly, as a matter of protecting unanticipated national security matters, BIS must have the flexibility to determine changes to what is deemed a national security concern in regard to U.S. exports.

Despite the necessity and permitted authority for BIS to rely on expansive national security justifications, where does the definition of national security end, if at all? "The phrase is vague."[161] The evolving definition of national security has frustrated foreign officials, prompting China's Ministry of Commerce to "accuse[] the U.S. government of 'generalizing' the concept of national security[,] . . . using the term as a cloak for economic aggression against Beijing."[162] Thus, the unclear definition of "national security" has

155. *Id.*

156. *Id.* at 723.

157. *Id.* at 723–25 (deferring national security determinations to the Executive Branch).

158. *See id.* at 722.

159. *Id.*; *see also* OFF. OF DIR. OF NAT'L INTEL., VISION 2015: A GLOBALLY NETWORKED AND INTEGRATED INTELLIGENCE ENTERPRISE 4 (2008), https://apps.dtic.mil/sti/tr/pdf/ADA487171.pdf [https://perma.cc/FG5A-HLUS] (stating that the intelligence community has expanded its list of national security concerns because of a growing array of emerging missions, including "infectious diseases, science and technology surprises, financial contagions, economic competition, environmental issues, energy interdependence and security, [and] cyberattacks").

160. 40 F.4th at 723–24.

161. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1402 (2009).

162. Alex Lawson, *US-China Feud Simmers As Beijing Unveils New Export Curbs*, LAW 360

rippling effects on international relations and limits the ability of foreign entities to effectively comply with vague terms. However, scholars have noted that the scope of national security extends beyond traditional military threats to encompass "unconventional strategic concerns" aimed at targeting entities and activities vital to protecting U.S. national security.[163]

The expansion of the BIS Entity List to cover national security concerns beyond traditional military threats has had several positive effects in curtailing adversaries' military and technological advancements. By limiting foreign entities' access to U.S. goods and technology, BIS effectively restricts adversarial states' capabilities to acquire dual-use technologies and advanced equipment that could enhance their military strength.[164] This targeted approach prevents hostile countries from using U.S.-origin technology to develop sophisticated weaponry, cyber capabilities, and surveillance systems, contributing to global security by narrowing adversaries' resources.[165]

Moreover, the Entity List now includes entities involved in non-traditional national security risks, such as artificial intelligence, semiconductor manufacturing, and quantum computing, which are increasingly critical for modern military and intelligence operations.[166] By cutting off access to these technologies, BIS strategically targets adversaries' capacity to gain a competitive edge in emerging technology sectors.[167] This preemptive measure not only bolsters U.S. technological superiority but also safeguards global supply chains and arguably the ethical use of these technologies, underscoring the effectiveness of expansive national security

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(Dec. 3, 2024, 5:26 PM) https://www.law360.com/articles/2268563/us-china-feud-simmers-as-beijing-unveils-new-export-curbs [https://perma.cc/MN43-F6G9] (noting that foreign officials are "willing to strengthen dialogue . . . in the field of export control and jointly promote the security and stability of the global industrial chain and supply chain").

163. *See* Chesney, *supra* note 161, at 1402-03 (listing examples of "unconventional strategic concerns" including violence, "pandemic preparedness, resource shortages, and economic crises"); Wolf et al., *supra* note 28.

164. Gregory C. Allen, Emily Benson & William Alan Reinsch, *Improved Export Controls Enforcement Technology Needed for U.S. National Security*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 30, 2022), https://www.csis.org/analysis/improved-export-controls-enforcement-technology-needed-us-national-security [https://perma.cc/QX58-FFN9].

165. Press Release, Bureau of Indus. & Sec., Dep't of Com., Commerce Releases Clarifications of Export Control Rules to Restrict the PRC's Access to Advanced Computing and Supercomputing Items and Semiconductor Manufacturing Equipment (Apr. 4, 2024), https://www.bis.gov/press-release/commerce-releases-clarifications-export-control-rules-restrict-prcs-access-advanced-computing [https://perma.cc/9MV6-UKSA].

166. Implementation of Additional Export Controls, 88 Fed. Reg. 73,458 (Oct. 25, 2023) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 742, 744, 746, 748, 758, 770, 772, and 774).

167. *Id.*

determinations in a world where military power increasingly depends on technological infrastructure.[168]

4. Canons of Construction

In tandem with the four steps above to define the meaning of ambiguous statutory terms, a reviewing court under the *Loper Bright* holding must consider traditional canons of construction.[169] Common canons of construction include examining the statute's legislative history, statutory precedents, and textual analysis.[170] A court's textual analysis includes researching the statute's plain language to determine its meaning.[171] Oftentimes, courts will rely on dictionary definitions of statutory terms.[172] It is also fundamental to analyze the words of a statute in their context and within the broader statutory framework.[173] Additionally, when interpreting congressional intent, Justice Scalia emphasized in *Whitman v. American Trucking Ass'ns*[174] that Congress does not conceal "elephants in mouseholes," meaning it does not make significant changes to a regulatory scheme through vague language or peripheral provisions.[175]

Defining "national security" requires applying canons of construction within the context of ECRA and BIS's broader mission.[176] For example, national security in ECRA is mentioned nineteen times in the context of a wide range of activities to achieve this goal of protecting national security.[177] Activities surrounding the statutory term national security include but are not limited to the following activities: (1) controlling the transfer of items relating to the proliferation of weapons of mass destruction and terrorism, (2)

168. *Id.*

169. *See* Van Loon v. Dep't of the Treasury, 122 F.4th 549 (5th Cir. 2024) (providing an example of a Fifth Circuit court's process to define ambiguous statutory terms after *Loper Bright*). *See generally* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016) (identifying traditional interpretive canons and how these approaches clarify the meaning of statutory and constitutional text).

170. *See generally* Eskridge, *supra* note 169.

171. *Id.* at 56.

172. *Id.* at 58.

173. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989).

174. 531 U.S. 457 (2001).

175. *Id.* at 468.

176. Van Loon v. Dep't of the Treasury, 122 F.4th 549, 566 (5th Cir. 2024) (identifying a canon of construction to aid a court's understanding of statutory terms comes from the "noscitur a sociis," meaning that a term should be understood in relation to the words surrounding them).

177. 50 U.S.C. §§ 4801, 4811, 4812, 4813, 4814, 4815.

preserving military superiority, (3) protecting human rights and democracy, (4) targeting national security controls towards core technologies, and (5) maintaining a competitive leadership in global markets including science, technology, engineering, and manufacturing.[178] These activities grant BIS broad authority to define national security and identify threats across a wide range of activities.

While national security lays the foundation for the implementation of export controls, an explicit provision providing congressional intent for implementing export controls on the basis of economic security does not exist.[179] However, the provision in ECRA that upholds a competitive leadership in global markets could give leeway for the agency to limit exports to foreign adversaries on the basis of economic security.[180] One might argue that invoking economic security would be more honest and less prone to challenge than invoking the elephant of national security in less obvious circumstances or marginal cases.

III. ADMINISTRATIVE SAFEGUARDS

A. Skidmore *Deference*

In the context of BIS Entity List determinations, one potential framework can be found in the case *Skidmore v. Swift & Co.*[181] This so-called *Skidmore* deference provides a framework for courts to consider agency fact-finding based on its persuasiveness rather than deferring automatically to agency interpretations.[182] Under *Skidmore*, courts give weight to an agency's determinations based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[183] This standard applies particularly to BIS's Entity List decisions, where factual findings—such as whether an entity poses a national security risk—are based on thorough research and expertise in

178. 50 U.S.C. § 4811.

179. *Whitman*, 531 U.S. at 468 (emphasizing that Congress does not conceal "elephants in mouseholes" that allow agencies to make significant regulatory decisions based on vague statutory language); *but see* Memorandum, America First Investment Policy, EXEC. OFF. OF THE PRESIDENT (Feb. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/ [https://perma.cc/J49X-FF7C] (declaring recently that "[e]conomic security is national security" under the Trump Administration).

180. 50 U.S.C. §§ 4811(1)(A)-(1)(B), 4811(3).

181. 323 U.S. 134 (1944).

182. *See id.*

183. *Id.* at 140.

evaluating national security threats.[184] Courts may be more inclined to accept these findings when they are well-reasoned and grounded in contemporary assessments of national security risks, allowing BIS to adapt its determinations to modern security challenges without automatically invoking the *Chevron* standard.

The factors of *Skidmore* deference—like the agency's thoroughness and consistency with past and future pronouncements—bolster BIS's fact-finding credibility, particularly in longstanding interpretations of national security risks.[185] Courts may see consistency in BIS's determinations as a sign of stability and reliability, aligning with a form of stare decisis for agency policy. This makes BIS's determinations more persuasive, even without *Chevron*-level deference, by providing a reasoned basis for listing entities that align with factual, evidence-based standards and national security expertise, allowing BIS to maintain authority in Entity List determinations post-*Loper*.

IV. ENTITY LIST DUE PROCESS CONCERNS

Several administrative hurdles have resulted from Entity List determinations that complicate compliance for foreign entities and jeopardize increased judicial review post-*Loper Bright*. For example, once a foreign entity is placed on the Entity List, affected parties have minimal administrative recourse.[186] The administrative authority of BIS's Entity List provides an exception to traditional notice-and-comment because this regulation involves military and foreign affairs functions of the United States.[187] Additionally, appeals to final ERC Entity List determinations can be subject to egregious time delays.[188] Lastly, additions to the Entity List are

184. *See* BIS, DON'T LET THIS HAPPEN TO YOU!, *supra* note 148; *see also* Eichensehr, *supra* note 6 (noting that in the context of collecting evidence and drawing inferences to make a finding of national security concerns, "the lack of competence on the part of the courts is marked . . . and respect for the Government's conclusions is appropriate" (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010) (omission in original))).

185. Eichensehr, *supra* note 6.

186. *See* Yuanyou (Sunny) Yang, *Can An Entity Be Removed From the Entity List?*, PORTER WRIGHT MORRIS & ARTHUR LLP 1-2 (July 27, 2020), https://www.porterwright.com/content/uploads/2020/08/International_CanAnEntityBeRemovedFromtheEntityList072720.pdf [https://perma.cc/GLK6-RYPK] ("Decisions made by the ERC are final and do not allow for administrative appeals."). ERC reviews a request for removal from the Entity List, but if the entity is denied removal, the entity can file a civil action with a U.S. district court. *Id.*

187. 50 U.S.C. § 4821(a); 5 U.S.C. § 553(a)(1) (providing that notice-and-comment rulemaking does not apply to "military or foreign affairs function[s] of the United States").

188. *BIS Website–Is There an Appeals Process for Listed Entities? If So, How Does it Work?*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM. [hereinafter *BIS Website*], https://www.

listed in the *Federal Register* using broad national security determinations and with little specificity or area for mitigation by the affected party.[189]

A. Removal Process

The following six steps are taken for a listed foreign entity to be removed from the Entity List and to no longer be subjected to additional export licensing requirements. First, a listed entity must submit a request for removal in writing and by mail to the Chair of the ERC.[190] Second, ERC members must then review and vote unanimously on the request.[191] Third, the ERC must review and provide a written decision within thirty days of receiving the removal request.[192] If an ERC-member agency is not satisfied with the decision, it can appeal the decision to the Advisory Committee on Export Policy (ACEP), which can be later appealed to the Export Administration Review Board (EARB), and finally, the matter can be appealed to the President.[193] Throughout the ERC's review and final decisions, information obtained throughout their operations is not publicly available.[194] Last, an entity is effectively removed from the Entity List when the ERC approves the appeal and a formal notice of removal is published in the *Federal Register*.[195]

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bis.doc.gov/index.php/component/fsj_faqs/faq/129-is-there-an-appeals-process-for-listed-entities-if-so-how-does-it-work [https://perma.cc/J838-NUF4] (last visited Apr. 3, 2025) (providing that BIS also "conducts an internal review of all appeals prior to referral to the ERC that may add to" time delays).

189. *See, e.g.*, Addition of an Entity to the Entity List, 83 Fed. Reg. 54,519, 54,520 (Oct. 30, 2018) (to be codified at 15 C.F.R. § 744); *see also* Complaint, Camel Group Co., v. United States, 1:25-CV-00022-LWW (Ct. Int'l Trade, 2025) (challenging the defendants for adding Camel Group to the Uyghur Forced Labor Prevention Act (UFLPA) List under the APA, arguing that the federal agency did so "without ever disclosing its basis for doing so and . . . [later] denying [the] Plaintiff's request to be removed from the UFLPA List without providing a reasoned explanation or justification").

190. *See* 15 C.F.R. § 744 (Supp. No. 4 2022); Yang, *supra* note 186, at 2 (adding that a removal request should provide detailed reasons for why the entity should be removed and the entity should "consider proactively implementing and developing export compliance programs").

191. 15 C.F.R. § 744 (Supp. No. 5 2022) (stating that "the ERC will also specify the section or sections of the EAR that provide the basis for that determination"); Yang, *supra* note 186 (detailing favorable factors that the ERC considers when voting to remove entities such as "(1) cooperation with the U.S. government, and (2) assurance of future compliance with EAR").

192. 15 C.F.R. § 744 (Supp. No. 5 2022); 15 C.F.R. § 756.2 (2021).

193. 15 C.F.R. § 744 (Supp. No. 5 2022).

194. 50 U.S.C. § 4820(h)(1).

195. *BIS Website*, *supra* note 188.

BIS's internal appeals process affords limited transparency and constrained due process, which could give listed foreign entities the power to challenge BIS and ERC national security determinations. Typically, BIS's decisions were given *Chevron* deference to interpret their own ambiguous statutes, but in the wake of *Loper Bright*, agency determinations might be subject to stricter scrutiny.[196] Thus, this Comment implores the agency to provide "specific and articulable facts" that directly indicate the conduct that was or is contrary to national security when adding, removing, and modifying entities to the Entity List.[197]

B. Time Delays

Foreign entities placed on the Entity List often wait years to be removed from the List. The EAR sets forth the procedures for the ERC to remove entities and provides an explicit requirement that the "ERC will vote on each [removal] proposal no later than 30 days after the chairperson first circulates" the proposal.[198] Despite the possibility of postponing the vote to remove an entity from the Entity List, the ERC has extended far beyond the stated thirty days to decide whether to remove a listed party. For example, Hefei Bitland Information Technology Co. Ltd. was added to the Entity List on July 22, 2020, and waited four years to be removed.[199] Upon removal, the ERC reasoned that Hefei Bitland's removal was "based on information BIS received pursuant to § 744.16 of the EAR and the review the ERC conducted . . . ."[200] Similarly, Vortex Electronics, FIMCO FZE, and Hosoda Taiwan Limited were not removed from the Entity List until three years after being placed on the List.[201]

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196. *See generally* Complaint, Camel Grp. Co., v. United States, No. 25-00022 (Ct. Int'l Trade, 2025) (exemplifying a complaint raised by a UFLPA listed entity based on APA due process concerns).

197. 15 C.F.R. § 744.11(b) (2024).

198. 15 C.F.R. § 744 (Supp. No. 5 2024).

199. Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List, 85 Fed. Reg. 44,159, 44,164 (July 22, 2020) (to be codified at 15 C.F.R. § 744); Addition of Entities, Revision of an Entry, and Removal of Entries on the Entity List, 89 Fed. Reg. 84,460, 84,461 (Oct. 23, 2024) (to be codified at 15 C.F.R. § 744).

200. Addition of Entities, Revision of an Entry, and Removal of Entries on the Entity List, 89 Fed. Reg. 84,460, 84,461 (Oct. 23, 2024) (to be codified at 15 C.F.R. § 744).

201. Addition and Modification of Certain Persons on the Entity List; and Removal of Certain Persons From the Entity List, 79 Fed. Reg. 55,998, 56,004 (Sept. 18, 2014) (to be codified at 15 C.F.R. § 744); Removal of Certain Entities From the Entity List; and Revisions of Entries on the Entity List, 82 Fed. Reg. 44,514, 44,515 (Sept. 25, 2017) (to be codified at

One potential implication of a time delay is drastic negative economic impacts on listed foreign entities that rely on U.S. exports to support their businesses. Expanding the scope of the procedural deadlines established in the EAR may also be contested. For instance, in *Transpacific Steel LLC v. United States*,[202] the U.S. Court of Appeals for the Federal Circuit scrutinized the Executive Branch's failure to comply with statutory deadlines when exercising § 232 authority to declare a national security concern.[203] In addition, ECRA explicitly provides that "licensing decisions are made in an expeditious manner, with transparency to applicants on the status of license . . . ."[204] Thus, BIS should adapt its procedures to abide by the congressional intent provided by ECRA, which leads to the reasonable conclusion that the ERC should increase transparency with its voting process after a listed entity submits a removal proposal.

However, this begs the question, to whom is transparency afforded? Within the reading of the statute, transparency is afforded to "*applicants*," and they are owed a "reason for denying any license or request for authorization."[205] However, information specifically providing the ERC's reasons for removing entities from the Entity List is often not published.[206] This is primarily to protect the integrity and confidentiality of federal decisions to target foreign adversaries. Nevertheless, the lack of public transparency runs the risk of decreasing compliance with export controls based on definitions of national security that continue to adapt based on the current perception of threat.

V. RECOMMENDATIONS TO REVISE THE ENTITY LIST PROCEDURES

The abovementioned reasons highlight the substantive and procedural challenges of adding foreign parties to the Entity List based on broad national

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15 C.F.R. § 744); Addition of Certain Persons to the Entity List, 79 Fed. Reg. 44,680, 44,686 (Aug. 1, 2014) (to be codified at 15 C.F.R. § 744); Addition of Certain Persons to the Entity List, 80 Fed. Reg. 22,638, 22,641 (Apr. 23, 2015) (to be codified at 15 C.F.R. § 744); Addition of Certain Entities; Removal of Certain Entities; and Revisions of Entries on the Entity List, 83 Fed. Reg. 3,577, 3,578 (Jan. 26, 2018) (to be codified at 15 C.F.R. § 744).

202. 4 F.4th 1306 (Fed. Cir. 2021).

203. *Id.* at 1309, 1317 (quoting the U.S. Court of International Trade's prior finding that "[w]hatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute's procedures"); *see also* BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10372, EXPIRED AUTHORITY?: FEDERAL COURT SUGGESTS SOME LIMITS TO THE PRESIDENT'S AUTHORITY TO IMPOSE TARIFFS 1–2 (2019).

204. 50 U.S.C. § 4815(a)(2).

205. *Id.* (emphasis added).

206. 50 U.S.C. § 4820(h)(1).

security determinations. These determinations, made by BIS and the ERC in regulating export controls, are critical to ensuring that important decisions remain within the purview of experts who possess specialized knowledge in export compliance and national security risks.[207] BIS and ERC staff bring extensive experience and technical expertise, enabling them to assess complex emerging technologies and geopolitical threats that impact U.S. national security.[208]

Accordingly, the following recommendations aim to strengthen the ERC's process to reduce the risk of a reviewing court narrowly redefining national security in a way that could limit the effectiveness of export controls. These recommendations also seek to provide foreign parties with greater clarity and support in improving compliance efforts while addressing the procedural hurdles that may arise during the Entity List designation process.

A. Increase Transparency

BIS should increase transparency when placing foreign entities on the Entity List. The agency can achieve this by explaining with particularity why the foreign entity's activities pose a risk to U.S. national security.[209] Sharing the factual findings underlying a listing decision will help ensure that BIS retains control over national security determinations while offering foreign entities a path to mitigate risks and align with U.S. national security concerns.

More transparency can also be achieved by specifying which agencies the ERC relied on to make Entity List determinations. Because the ERC is a culmination of several agencies, each with a separate set of regulations to follow and differing views of what constitutes a national security concern, not knowing which agency was relied on to make an Entity List determination makes it difficult to track all relevant pieces of compliance.[210]

The ERC should also increase transparency in its decisionmaking process by clearly citing the specific provisions in ECRA that support the national security or foreign policy rationale for each action taken to add or remove entities from the Entity List. By grounding its determinations in the statutory text, the ERC can provide greater clarity to stakeholders, including

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207. *See, e.g.*, *Office of National Security Controls (ONSC)*, BUREAU OF INDUS. & SEC., DEP'T. OF COM., https://www.bis.gov/ONSC#office-leadership [https://perma.cc/9P4J-H5CP] (last visited May 30, 2025).

208. *Id.*

209. To align with *Skidmore* deference, BIS should provide a more substantial factual basis for its national security determinations, similar to the Committee on Foreign Investment in the United States' (CFIUS) "Ralls Letter" derived from Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296, 308–11 (D.C. Cir. 2014), which addressed due process concerns.

210. *See supra* notes 46-47 and accompanying text.

exporters, compliance professionals, and foreign entities, about the legal basis for its decisions. This increased transparency would also help BIS and the ERC retain the discretionary authority to restrict exports that threaten the national security and foreign policy interests of the United States.

Lastly, the ERC can increase transparency by submitting reports to Congress, aligning with the existing congressional mandates requiring its member agencies to provide annual reports on national security determinations.[211] For example, FIRRMA increases CFIUS's transparency by mandating the agency submit annual reports to Congress.[212] Within each annual report, CFIUS is required to "include a list of all concluded reviews and investigations, information on the nature of the business activities of the parties involved, [and] . . . information about the status of the review or investigation . . . ."[213] Separately, CFIUS provides a less detailed report for public release.[214] In an effort to increase transparency and export compliance, BIS and the ERC should release a similar annual report to Congress and the public outlining their work in addressing national security concerns.[215]

B. Increase Time to Review National Security Concerns

The EAR currently provides a procedural guideline for the ERC to vote on each removal proposal within thirty days after member agencies review.[216] The ERC frequently extends this time by years to ultimately remove listed entities from the List.[217] Thus, continuing to portray a false standard that removal proposals will be reviewed and unanimously decided within thirty days is unrealistic compared to precedent decisions that extended years. Also, it is important to recognize that while ECRA emphasizes transparency and prompt decisionmaking, national security determinations have far-reaching implications for protecting our democracy, public safety, critical infrastructure, and national stability amid evolving global threats. Therefore, these decisions must be based on thorough investigations.

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211. *See, e.g.*, 50 U.S.C. § 4565(a)(3)(B) (referencing CFIUS's statute mandating the agency to submit a report to Congress on the results of a national security investigation).

212. *Id.*; JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 33–34 (2020).

213. JACKSON, *supra* note 212, at 34.

214. *Id.* at 33.

215. *Modernizing Export Controls: Protecting Cutting-Edge Technology and U.S. National Security*: *Hearing Before the H. Comm. on Foreign Affs.*, 115th Cong. 8 (2018) [hereinafter *Modernizing Export Controls Hearing*] (statement of Kevin J. Wolf, Partner, Akin Gump Strauss Hauer & Feld, LLP) ("For regulations to work, all parties involved must know what [is] and is not captured by a control.").

216. 15 C.F.R. § 744 (Supp. No. 5 2024).

217. *See supra* Part IV.B.

In efforts to provide more transparency and prompt decisionmaking, the ERC should provide more clarity on a realistic time frame to review and vote on a removal proposal by issuing a Frequently Asked Questions (FAQ), individually communicate their expected timeframe, or amend the language in the EAR to extend the time to review removal proposals. This has been done before in an adjacent agency conducting national security investigations. Specifically, FIRRMA has increased CFIUS's permitted time to conduct national security investigations from thirty to forty-five days.[218] Thus, the ERC should extend its national security review process to sixty days, which could be more reasonable in conjunction with expanding the funding and staffing within the ERC to make crucial national security determinations.

C. Increase Funding and Staffing

The Entity List is a valuable tool in restricting foreign adversaries' access to U.S. dual-use goods and technology that could enhance their military capabilities. Given the importance of the ERC's role in making these national security determinations, it is essential that the Committee has sufficient resources to carry out its mission effectively. However, the ERC currently operates with limited staff, which may hinder its ability to respond swiftly to emerging threats. To strengthen enforcement of export controls and safeguard national security, the ERC should proactively seek increased funding for additional personnel. This could include advocating for congressional appropriations and leveraging public-private partnerships.

The exact number of ERC personnel is not publicly disclosed, as it includes representatives from multiple agencies beyond BIS.[219] To remove a party from the Entity List, all member agencies must unanimously assess the entity's national security risks. While the ERC itself is small, its decisions are informed by a broader network of investigators and subject matter experts across five member agencies.[220] This highlights the significant workload involved in coordinating input and expertise from multiple agencies to ensure well-founded determinations.

Increasing funding within the ERC is critical to the success of the Entity List. Experts in the field have testified that "[g]iven the (legitimate) increase in attention to analyzing emerging technologies, . . . more resources are

218. JACKSON, *supra* note 212, at 12.

219. *See supra* Part I.A (listing ERC members).

220. *Export Administration Contact Directory*, BUREAU OF INDUS. & SEC., DEP'T OF COM. (2022), https://www.bis.doc.gov/index.php/documents/about-bis/3284-export-administration-contact-directory-with-added-numbers-060723/file [https://perma.cc/7XCP-AHZX] (listing merely three staff members on the ERC).

needed for [staffers] to do this work . . . ."[221] Again, agencies addressing national security concerns have significantly increased employment and funding. Specifically, changes to FIRRMA increased staffing to address the increase of work and involved a twenty-million-dollar annual appropriation to support CFIUS's work.[222] Thus, "for the sake of our national security," the ERC should request additional appropriations and staff to analyze the risks posed by exporting U.S. critical technology to foreign parties.[223]

CONCLUSION

The evolving use of the term "national security" to justify additions to the Entity List increases the risk of a reviewing court narrowly redefining the term, potentially undermining the protective intent of the export controls. Procedurally, the process for removing foreign parties from the Entity List raises challenges, including concerns over retaliatory due process and limited transparency. To address these risks, it is essential to implement targeted improvements. Increasing funding and staff for the ERC would enhance its capacity to handle complex cases more efficiently. Extending the regulatory time provided for issuing final decisions on removal requests would ensure thorough evaluations. Additionally, improving transparency around decisionmaking processes would build greater stakeholder confidence while encouraging compliance by foreign parties. These measures will strengthen the Entity List framework, preserve the integrity of export controls, and ensure continued alignment with U.S. national security objectives.

221. *Modernizing Export Controls Hearing*, *supra* note 215, at 10 (statement of Kevin J. Wolf, Partner, Akin Gump Strauss Hauer & Feld, LLP).

222. JACKSON, *supra* note 212, at 12.

223. *Modernizing Export Controls Hearing*, *supra* note 215, at 10 (statement of Kevin J. Wolf, Partner, Akin Gump Strauss Hauer & Feld, LLP).