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COMMENT

ILLEGAL UPON EXIT: EXAMINING AECA'S BAN ON THE REIMPORTATION OF AMERICAN MILITARY FIREARMS

Melissa Burgess *

Any military firearm manufactured in the United States, then exported, cannot return unless the reimportation meets one of three stringent exceptions. Foreign firearms meeting the same specifications are not blocked. The ban applies even when there are no domestic restrictions on ownership of that model, as the prohibition only concerns items made in the United States but outside of U.S. borders. The President has intervened at the last minute to block the importation of some firearms that meet one of the ban's exceptions, M1 Garands and carbines from the Korean War that are "curios" or "relics." Due to such executive intervention and the administrative requirements for reimportations, the proposed Collectible Firearms Protection Act attempts to revise the process, but in light of Export Control Reform it is at best a temporary fix. A more comprehensive change is necessary either to remove the ban altogether, or to preserve its original intent and place American-made firearms currently held outside the United States on an equal legal footing with their foreign and domestic counterparts.

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INTRODUCTION.....	160
I. ORIGINS OF THE BAN ON THE REIMPORTATION OF MILITARY FIREARMS.....	164
A. <i>The Mutual Security Act of 1958</i>	166
B. <i>The Arms Export Control Act of 1976</i>	172
C. <i>The Exceptions to the Ban on the Reimportation of Military Firearms</i>	175
II. THE IMPORT PROCESS: AGENCY APPROVALS AND NOTIFICATION REQUIREMENTS.....	180
III. THE 2013 EXECUTIVE ACTION	183
A. <i>The Executive Action’s Modifications to AECA’s Firearm Reimportation Ban</i>	184
B. <i>Characteristics of the M1 Garand and M1 Carbine</i>	187
IV. AMENDING THE BAN	189
A. <i>Appropriations Provisions</i>	190
B. <i>The Collectible Firearms Protection Act</i>	190
V. CONCLUSION	194

INTRODUCTION

From the beaches of Normandy to the jungles of Vietnam, they accompanied our grandfathers and great uncles everywhere. They were a tool, yes, but also a companion, a lifesaver, and a means of becoming a hero. They parachuted out of planes, stormed out of Higgins boats, and famously helped save Private Ryan.¹ They added

¹ The M1 Garand was the standard-issue service rifle in World War II. LEROY THOMPSON, *THE M1 GARAND 4* (2012). It appears throughout the movie *Saving Private Ryan*, including in the hands of those sent to find Private Ryan. See *M1 Garand Rifle*, *SAVING PRIVATE RYAN ONLINE ENCYC.*, (last updated Jan. 19, 2010); *SAVING PRIVATE RYAN* (1998). Firearms aficionados have a tendency to call the M1 Garand “the Saving Private Ryan gun,” especially when discussing it with the broader public. The author believes this moniker helps non-enthusiasts realize that a Garand is not at all the high-powered black weapon with a pistol grip and a protruding magazine that most people visualize when they hear the term “military firearm.”

to the greatness of the Greatest Generation.² Long since superseded by modern technology and the needs of modern warfare, these legendary firearms have been rendered obsolete for practical military fighting purposes.³

These storied American firearms are the M1 Garand and the M1 carbine. “To the Greatest Generation, and even their kids, the M1 [Garand] defined the word ‘rifle,’ ”⁴ and most modern Americans have seen them in World War II movies fighting Operation Overlord or poking out of foxholes near Bastogne.⁵ History lovers can name the battles; firearms aficionados can tell you which models were used and their place of manufacture. But if you are a history lover, a firearms collector, or both, no matter how much you would like to own one of these celebrated historical instruments, you may never have the chance: the Arms Export Control Act (“AECA”) bans the reimportation of American-made military firearms in all but three situations.

The M1 Garand and M1 carbine were standard issue for members of the United States military for most of three major wars. Millions of these firearms were manufactured between 1936 and the 1960s,⁶ yet today they are hard to find in the United States, and

² TOM BROKAW, *THE GREATEST GENERATION* xxx (1998) (coining the term, “The Greatest Generation”).

³ See CRAIG RIESCH, *U.S. M1 CARBINES, WARTIME PRODUCTION 8* (7th ed., rev. 2007); see also Bob Seijas, *History of the M1 Garand*, THE GARAND COLLECTORS ASS’N, <http://www.thegca.org/history-of-the-m1-garand-rifle> (last visited Sept. 26, 2014).

⁴ CHRIS KYLE WITH WILLIAM DOYLE, *AMERICAN GUN: A HISTORY OF THE U.S. IN TEN FIREARMS* 193 (Jim Defelice ed., 2013).

⁵ See, e.g., *Band of Brothers* (HBO television broadcast Sept. 9, 2001 – Nov. 4, 2001); *SAVING PRIVATE RYAN*, *supra* note 1; *A BRIDGE TOO FAR* (Joseph E. Levine Productions 1977).

⁶ See *Bill Introduced to “Get State Department Out of the Gun Control Business,”* NRA-ILA (June 7, 2013) [hereinafter NRA-ILA State Department], <http://www.nra.org/legislation/federal-legislation/2013/5/bill-introduced-to-get-state-department-out-of-the-gun-control-business.aspx>. For a detailed history of the M1 Garand and M1 carbine, including information about manufacturers, quantities, uses, and dates, see BRUCE N. CANFIELD, *COMPLETE GUIDE TO THE M1 GARAND AND THE M1 CARBINE* (1998).

harder still to find in close to original condition.⁷ But waiting on the other side of the Pacific, there is a collector's and historian's treasure trove of Garands and carbines begging to come home.

From 1950 to 1953, U.S. and South Korean soldiers fought with these firearms in the Korean War.⁸ The United States gave or loaned hundreds of thousands of American-made firearms to South Korea during the war, and South Korea has held on to them ever since.⁹ Sixty years have passed, the firearms are outdated,¹⁰ and the South Korean Defense Ministry would like to upgrade to modern military rifles.¹¹ Aware that there is an eager market for these American-made M1 Garands and M1 carbines in the United States, the Defense Ministry offered to sell them back to American importers.¹²

American collectors and firearms enthusiasts were overjoyed, but the joy was short-lived and quickly replaced by frustration.¹³ AECA and internal U.S. politics collided, and the Republic of Korea and American collectors have borne the brunt of executive branch indecision and technological misinformation. The

⁷ See, e.g., *M1 Garand and M1 carbine store*, CIVILIAN MARKSMANSHIP PROGRAM, <http://www.thecmp.org/Sales/m1garand.htm> (last visited Sept. 26, 2014).

⁸ Lee Tae-hoon, *US allows import of 86,000 M1 rifles from Korea*, THE KOREA TIMES (Jan. 18, 2012), http://www.koreatimes.co.kr/www/news/nation/2012/01/116_103154.html.

⁹ Robert Kyle, *Old guns pose a new risk, thanks to Obama's edict*, AZCENTRAL.COM (Sept. 12, 2013), <http://www.azcentral.com/opinions/articles/20130912obama-south-korea-rifles-kyle.html>.

¹⁰ See, e.g., KYLE WITH DOYLE, *supra* note 4, at 209 (noting that even by the time of the Korean conflict, the Garand was outdated and impractical for military needs: "Being able to squeeze off eight shots without reloading had been a godsend in the 1940s. Now it was not enough by half.").

¹¹ See Tae-hoon, *supra* note 8.

¹² See J.R. Absher, *Bill Takes Aim at Blocked M1 Garand Imports*, SHOOTING ILLUSTRATED (July 16, 2013), <http://www.shootingillustrated.com/index.php/28638/bill-takes-aim-at-blocked-m1-garand-imports/>; S. H. Blannelberry, *US to Import 86,000 M1 Rifles from Korea*, GUNS.COM (Jan. 23, 2012), <http://www.guns.com/2012/01/23/us-to-import-83000-m1-rifles-from-korea/>.

¹³ Aaron Smasel, *'Collectible Firearms Protection Act' fires back at South Korean M1 Import Embargo*, GUNS.COM (Oct. 7, 2010), <http://www.guns.com/2010/10/07/proposed-collectible-firearms-protection-act-returns-fire-over-south-korean-m1-importation-embargo/>.

Obama administration agreed to the reimportation in 2009, opposed it in 2010, decided to allow the Garands but not the carbines to come back home in 2011, and then let the Korean government and American companies start working out an import deal over the next sixteen months.¹⁴ However, President Obama used an Executive action to reverse course yet again in August of 2013.¹⁵ This prolonged flip-flopping raises the question of why the Executive cares that sixty-year-old American-made goods might return home.

Starting with the birth of the AECA ban on the reimportation of American-made firearms and continuing through its three explicit exceptions, this Comment investigates the legal framework of the military firearm import ban at issue in the Korean re-export situation. The Comment examines the reimport approval process, then discusses the impact of a recent Executive action on the import ban. Arguing the importation process needs to be amended for all outdated military firearms, or at least for those deemed curios or relics, the Comment examines the proposed Collectible Firearms Protection Act, which aims to revise the import approval process for curio or relic firearms, in the context of comprehensive export reform. Changing the approval process will streamline importations of outdated firearms, preserve the intent of the original ban, and put American-made firearms currently held outside the United States on an equal legal footing with their foreign and domestic counterparts. However, passage of this Act is an incomplete, temporary solution that fails to address the source of the problem: the unwieldy body of export laws and regulations administered by multiple government agencies having piecemeal control and uncertain foreign and domestic policy goals.

¹⁴ Kyle, *supra* note 10.

¹⁵ See, e.g., Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Executive Actions to Reduce Gun Violence (Aug. 29, 2013) [hereinafter Gun Violence Fact Sheet], <http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence>.

I. ORIGINS OF THE BAN ON THE REIMPORTATION OF MILITARY FIREARMS

The M1 Garands and M1 carbines at issue in the Korean re-export deal were made in America by American companies, and given by the American government to America's allies. Because of their origin, reimporting them onto American soil is illegal. However, if the same model of firearms was manufactured by America's allies, there is no similar provision to prevent their importation. This situation seems to defy logic: items that can be legally manufactured and owned domestically become illegal if they leave the country with government approval. Korea's American-made M1 Garands and M1 carbines thus occupy a perplexing position.

Provided one has met any applicable background check and licensing requirements,¹⁶ one can own a M1 Garand or M1 carbine if it never left the country,¹⁷ or if it left but returned prior to 1958.¹⁸ A

¹⁶ To purchase a long gun such as Garands and carbines, one must be over 18 and pass a background check either through the National Instant Criminal Background Check System ("NICS") or a state equivalent. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(t) (2013); 18 U.S.C. § 922(b)(1) (2013). An increasing number of states require buyers to obtain additional certifications or licenses before purchasing long guns, such as California's Personal Firearms Eligibility Check ("PFEC"), or Illinois' Firearm Owner Identification Card ("FOID"). *See* CAL. PENAL CODE § 30105(a) (West 2012); 430 ILL. COMP. STAT. 65/2 (West 2013).

¹⁷ Such firearms are legal at the federal level unless and until they leave the country. *See* 22 U.S.C. § 2778 (2012); 27 C.F.R. § 447.51 (2013). They remain legal in most states because they fail to qualify as assault weapons under state laws where assault weapon status is based on a one- or two-feature test. Such tests frequently ask whether a semi-automatic firearm has a detachable magazine (sometimes limited to a ten- or fifteen-round capacity) and one or two other features including pistol grips, bayonet lugs, flash suppressors, and collapsible stocks. *See, e.g.* CONN. GEN. STAT. § 53-202a (2014). The M1 Garand uses an eight-round clip instead of a magazine and therefore does not qualify as an assault weapon under the strictest state firearms laws. ARMAMENT RESEARCH, DEV., AND ENG'G CTR., M1 GARAND OPERATION AND MAINTENANCE GUIDE FOR VETERAN AND CIVILIAN SERVICE ORGANIZATIONS, LAW ENFORCEMENT, AND NATIONAL CEMETERIES 27 (2013), available at <http://www.mortuary.af.mil/shared/media/document/AFD-130702-050.pdf>. The standard-issue M1 carbine has a detachable fifteen-round magazine, and later models usually have bayonet-lugs or other features such as folding stocks. U.S. WAR

person can own one if it was given away by his own government to a foreign country and was returned to be used by the military or law enforcement but has since passed into the general stream of commerce.¹⁹ One can own a firearm with all the same specifications but of completely foreign manufacture,²⁰ or of similar specifications but reworked and repaired to such an extent that it is essentially an item of foreign manufacture.²¹ However, such an American-made firearm is illegal to import and own if it is currently outside U.S. borders and is not yet old enough to be considered a curio or relic, or if the foreign government recipient sold it to a foreign third party.²²

This reimport ban becomes even more perplexing when compared with legal provisions controlling the importation of other American-made items, including other defense articles. Firearms and tanks are both considered “significant military equipment,”²³ yet reimporting American-made firearms is expressly banned, while reimporting tanks for a private collection is not. Any U.S. person²⁴ who happens to have the money and storage space can own a

DEP'T, FIELD MANUAL 23-7, U.S. CARBINE, CALIBER .30 M1 1, 5 (May 20, 1942). Even though these carbines share features common to assault weapons, many models of M1 carbines do not meet the relevant assault weapons tests and remain legal in states with strict firearms laws. *See, e.g.*, M.G.L. 140 § 121 (2014).

¹⁸ Importations of these firearms were legal until the military firearm import ban was enacted in the Mutual Security Act of 1958. Pub. L. No. 85-477 § 205(k), 72 Stat. 267 (repealed by Pub. L. No. 94-329, Title II, § 212(b)(1), 90 Stat. 745 (1976)).

¹⁹ This is the case if it was imported pursuant to § 2778(b)(1)(A)(i) (allowing importation for use by a state or local law enforcement agency). There is no general federal prohibition on owning either of these firearms if you are so lucky as to find one for sale. Surplus firearms owned by the Department of Defense can be resold to the public through the congressionally-chartered Civilian Marksmanship Program (“CMP”), one of the functions of which is to sell military firearms to civilians. *See* 36 U.S.C. § 40722(5) (2012). Amendments to the applicable statutes in the 1990s even ordered the Secretary of the Army to transfer certain surplus M1 Garands to the CMP. *See* § 40728(a).

²⁰ *See generally* 22 U.S.C. ch. 39 (2012) (provided that the firearm is lawful for import under the Gun Control Act).

²¹ § 2778(b)(1)(A)(i).

²² It would fail one of the two requirements of § 2778(b)(1)(B).

²³ 22 C.F.R. § 120.7 (2014); *see also* § 121.1, Category I(a), VII(a) (2014).

²⁴ As defined at § 120.15-16 (2014).

Sherman tank.²⁵ Such a person might even be able to have one with operational guns.²⁶ Its presence inside or outside the United States at any time is largely irrelevant—there is no AECA provision specifying that an American-made tank, given by America to a foreign nation, cannot be reimported. Likewise, there is no express prohibition on the reimportation of American-made fighter planes.²⁷ Thus one wonders why firearms given by America to our allies cannot come back when that ally no longer has a use for them. This prohibition first appeared in the Mutual Security Act in the 1950s, and became part of AECA about twenty years later.²⁸

A. *The Mutual Security Act of 1958*

Throughout the 1950s there was a marked increase in the quantity of firearms imported into the United States, from 15,000 entering the country in 1955 to 200,000 arriving in 1958.²⁹ These imports created competition for domestic manufacturers as hunters and target shooters turned to the cheaper imported military rifles, modifying them to meet their sporting needs.³⁰ Meanwhile, domestic production was on the decline,³¹ or at least appeared to be.³² The

²⁵ See Michael M. Phillips, *These Vehicles are Tons of Fun, and Good for Thwarting Road Rage*, WALL ST. J. (Feb. 26, 2013), <http://online.wsj.com/articles/SB10001424127887324432004578302480951570270>.

²⁶ AECA has no express prohibition on the reimportation of tanks. However, a tank owner would need to apply for and obtain a destructive device permit from ATF, and there could be a state or local prohibition against such ownership. *Id.*

²⁷ There is also no express prohibition on ownership of military aircraft, but planes must be stripped of weapons and meet Federal Aviation Administration requirements, including re-classification as vintage or experimental aircraft. See *Vintage & Experimental Aircraft Program*, FED. AVIATION ADMIN., http://www.faa.gov/licenses_certificates/vintage_experimental/ (last modified Nov. 27, 2013).

²⁸ The author is probably not the first to assume that AECA's adoption in 1976 meant that the firearm reimportation ban was originally linked to Cold War arms-trafficking concerns, and that it was an attempt by the U.S. to ensure that American money would not be used to update Soviet weapon systems. Research proved otherwise and inspired this Comment.

²⁹ Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 144 (1975).

³⁰ David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 596 (1987).

³¹ Zimring, *supra* note 29.

Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI"), which counted among its members the likes of Remington Arms, Colt, and Sturm Ruger,³³ lobbied Congress for a ban on imported firearms.³⁴ Firearms importers learned about the proposed legislation by accident after some of their import licenses were held up by the Department of State.³⁵

Throughout March of 1958, manufacturers and importers came before the House Committee on Foreign Affairs with their concerns about the state of the firearms industry.³⁶ The firearms importing community, composed largely of small businesses, feared that proposed amendments to the Mutual Security Act would drive them to serious financial difficulty, if not bankruptcy³⁷—a fear that was realized in the Korean re-export half a century later.³⁸ The importers argued that big-business firearms manufacturers were misrepresenting the robust state of the firearms industry in an effort to decrease competition.³⁹ Arrayed against the small importers was the might of SAAMI, which proposed that the Mutual Security Act be amended to “provide that equipment furnished under the military aid programs may not be reimported into the United States in competition with American industry.”⁴⁰

³² The decline in domestic production of firearms and the state of the firearms market were hotly contested throughout the hearings and debates surrounding the 1958 amendments to the Mutual Security Act. See, e.g., *Mutual Security Act of 1958: Hearings Before the H. Comm. on Foreign Affairs*, 85th Cong. 1455 (1958) [hereinafter *Hearings*].

³³ *Id.* at 1455, 1458, 1484. According to statements in these hearings, there were twenty-two small arms manufacturers in the United States in 1958, and ten of them were members of the Institute. SAAMI was created in 1926 and exists to this day. See SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC., <http://www.saami.org> (last visited Sep. 26, 2014).

³⁴ See *Hearings*, *supra* note 32, at 1478.

³⁵ *Id.*

³⁶ *Id.* at 1455 (statement of Fred. B. Rhodes).

³⁷ *Id.* at 1455-56.

³⁸ Chris Eger, *Century Arms lays off 41, blames Obama's denial of M1 imports from South Korea*, GUNS.COM (June 9, 2014), <http://www.guns.com/2014/06/09/century-arms-lays-off-41-blames-obamas-denial-of-m1-imports-from-south-korea/>.

³⁹ See *Hearings*, *supra* note 32, at 1455-56.

⁴⁰ 104 CONG. REC. H8729 (daily ed. May 14, 1958) (statement of Rep. Sikes, quoting William Hadley, SAAMI president).

The ban on the reimportation of U.S. origin firearms first appeared in bill form in both houses of Congress in April of 1958.⁴¹ Then-Senator John F. Kennedy introduced S. 3714, an amendment to the Mutual Security Act of 1954 that would ban all imports of arms or ammunition originally manufactured for military purposes.⁴² The bill provided that certain regulations promulgated pursuant to the Mutual Security Act

shall prohibit the importation or re-importation into the United States of arms or ammunition originally manufactured for military purposes, or parts thereof, except those which are curios and antiques and are not in condition to be used as firearms, to be marketed in competition with arms and ammunition of domestic manufacture.⁴³

Unlike other proposals for a military-firearm import ban, Kennedy's version was all-encompassing. It applied to all firearms manufactured for military purposes, regardless of their origin or current ownership. The "curio" firearm provision specified that such firearms must be non-functioning. The final clause of his proposal, with its mention of "market[ing]," "competition," and "domestic manufacture,"⁴⁴ indicates that the purpose of this law was to protect American manufacturers from foreign competition, and was not necessarily intended to keep military firearms out of civilian hands.

While Kennedy's bill did not pass, the idea of a military firearm import ban was far from dead.⁴⁵ The same day that the Senate first saw S. 3714, the House took its first look at H.R. 12181, which contained extensive changes to the Mutual Security Act of 1954.⁴⁶ Among those proposals was an amendment to § 414(b) relating to munitions control that would ban the import of arms

⁴¹ S. 3714, 85th Cong. (2d Sess. 1958); H.R. 12181, 85th Cong. (2d Sess. 1958).

⁴² 104 CONG. REC. S27441 (daily ed. Apr. 28, 1958).

⁴³ *Id.*

⁴⁴ S. 3714.

⁴⁵ Zimring, *supra* note 29 at 146.

⁴⁶ H.R. 12181, 85th Cong. (2d Sess. 1958).

manufactured for military purposes unless the import was for U.S. Armed Forces.⁴⁷

Between April and June 1958, several congressmen heeded the cries of their states' firearms industries, proposing differing incarnations of a military firearm import ban.⁴⁸ During House debates on May 13 and 14, 1958,⁴⁹ congressmen voiced various reasons to enact such a ban, ranging from protecting American jobs, to protecting the public from "unsafe" foreign firearms, and, ultimately, to protecting domestic manufacturers from competition.⁵⁰

By May 26, 1958, H.R. 12181 contained a provision that resembles the current statute more closely than Kennedy's proposed version. The bill provided that the Mutual Security Act regulations at issue

shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies) of any military firearms of United States manufacture, whether or not advanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially

⁴⁷ *Id.* § 204(j). The original House proposal does not signal its inspiration as clearly as Kennedy's Senate version because it fails to mention competition to domestic industry. However, it included an end-user exception for the military that has changed over time but never disappeared. Section 204(j) states that

such regulations shall prohibit the importation or reimportation into the United States (other than for the Armed Forces of the United States) of arms or ammunition originally manufactured for military purposes, or parts thereof, except those which are curios or antiques and are not in condition to be used as firearms.

Id. § 204(j).

⁴⁸ See 104 CONG. REC. H8612 (daily ed. May 14, 1958) (amendment proposed by Mr. Colmer); 104 CONG. REC. H8729 (daily ed. May 14, 1958) (amendment proposed by Mr. Sikes and Mr. Morano).

⁴⁹ Among the more substantive issues debated, Congress disagreed over whether the Mutual Security Act was the right place for such an import ban. See 104 CONG. REC. H8734 (daily ed. May 14, 1958) (statement by Rep. Collier).

⁵⁰ 104 CONG. REC. H8729-30 (daily ed. May 14, 1958) (statements of Reps. Sikes, Morano, and Kearney). Congressman Morano of Connecticut voiced concerns about the recent importation of remodeled old Italian Carcano rifles that had a tendency to blow up and also had a propensity to be used in gun-running. See *id.*

transformed as to become, in effect, articles of foreign manufacture.⁵¹

The new proposal was no longer a broad import ban. It touched only American-made firearms and not those of foreign manufacture. It did not apply to ammunition, unlike Kennedy's proposal to the Senate, and it was concerned solely with reimportation.

In the House version, Kennedy's "originally manufactured for military purposes" limitation became "military firearms" in general. This distinction warrants notice—Kennedy's proposal indicates that the classification of a military firearm is determined by the manufacturer's intended end-use, whereas the House version employs the term with no indication how a firearm receives such a designation—leaving open the possibility that such firearms might one day lose their military purpose. However, the Kennedy bill's allowance for curio and antique firearms also hints that a strict intent-based definition is not reasonable as end-use and technology can change, while the House version does not seem to recognize that changing technology should lead to an exception for outdated firearms.

In keeping with creating a ban only on reimportation, the bill allows American-made firearms back in if they were reworked or repaired to such an extent that their American origins are essentially unrecognizable. This allowance is likely due to implicit recognition that extensive foreign work removes such firearms from being competitive products and places them in their own class of foreign reworks, making them equivalent to new imports. Or perhaps it was added in recognition of the fact that many ex-military rifles on both sides of the Atlantic were being reworked into hunting rifles.⁵²

⁵¹ H.R. 12181, 85th Cong. § 8(m) (2d Sess. 1958) (as reported by Rep. Green, May 26, 1958) (amending § 414(b) of Title IV of the Mutual Security Act of 1954).

⁵² It is not uncommon to find high-end custom hunting rifles built on extensively reworked military rifle actions such as Mausers and Enfields. See STEVEN DODD HUGHES, CUSTOM RIFLES IN BLACK & WHITE 3-4 (1999); see also Hardy, *supra* note 30, at 596.

By the beginning of June 1958, the import ban language had undergone further alterations. The latest version of the amendment stated that the licensing requirements at issue

shall prohibit the return . . . of any military firearms of United States manufacture furnished to foreign governments by the United States under this Act or any other foreign assistance program of the United States⁵³

The other provisions of the ban remained as they were in the version from May 26.

The executive branch weighed in on both the House and Senate versions, saying that it believed such an import ban was unnecessary.⁵⁴ Of the two variations, it preferred the Senate version, believing it to be more in line with the reason for enacting a ban: protecting domestic small arms manufacturers in the domestic market.⁵⁵ The executive opinion further stated that both versions of the ban were problematic from an administrative standpoint because it was hard to trace the origins of firearms provided before and during World War II, particularly since many had changed hands several times.⁵⁶ The executive branch advocated limiting the ban to firearms that left the country in May 1947 or later.⁵⁷

Congress did not heed these concerns. By the time the bill crossed the President's desk on June 30, 1958, the prohibition again extended to "military firearms or ammunition,"⁵⁸ but the ban was limited to those items supplied under foreign assistance programs. Two exceptions to the prohibition were included: the firearms or ammunition could come back in if the end users were the Armed

⁵³ H.R. 12181, 85th Cong. § 8(k) (2d Sess. 1958) (as ordered to be printed with amendment of the Senate, June 6, 1958) (emphasis added).

⁵⁴ STAFF OF CONFERENCE COMM., 85TH CONG., MUTUAL SECURITY ACT OF 1958: COMPARING THE HOUSE BILL WITH THE SENATE AMENDMENT 49 (Comm. Print 1958) [hereinafter Conf. Comm. Print].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Mutual Security Act of 1958, Pub. L. No. 85-477, § 205(k), 72 Stat. 267 (repealed by Pub. L. No 94-329, Title II, § 212(b)(1), 90 Stat. 745 (1976)).

Forces of the United States or of one of its allies, or if the items were extensively modified and therefore essentially foreign.⁵⁹ Over time, the end-user exception for Armed Forces of the United States and its allies expanded to include a reimport exception for domestic law enforcement,⁶⁰ but the ban remained otherwise untouched for decades.

B. The Arms Export Control Act of 1976

Years after the passage of the Mutual Security Act, growing concern over a need for comprehensive arms export control legislation led Congress to enact AECA, which amended various laws including the Foreign Assistance Act of 1961 and the Foreign Military Sales Act.⁶¹ Among its many provisions, AECA added the military firearm import ban as it existed in the Mutual Security Act to a new chapter of the Foreign Military Sales Act.⁶² While the language of the ban remained essentially intact, the curio provision that appeared with Kennedy's initial proposal for an import ban eventually resurfaced in a less draconian form.⁶³

AECA gives the President the power to control the import and export of defense articles and services in the interest of promoting world peace and furthering the foreign policy objectives of the United States.⁶⁴ It provides that decisions utilizing this power

⁵⁹ *Id.*

⁶⁰ Foreign Assistance Act of 1967, Pub. L. No. 90-137 §403, 81 Stat. 445, 463 (codified as amended at 22 U.S.C. ch. 32 (2012)).

⁶¹ International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. § 2751 (2012)); Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination over Arms Sales*, 1 AM. U. INT'L L. REV. 291, 297 (1986).

⁶² International Security Assistance and Arms Export Control Act, § 212(a)(1). A comprehensive explanation of AECA is beyond the scope of this Comment; for a more detailed treatment of AECA's history and purpose, see Tompa, *supra* note 61, at 291-304. The decision to retain the ban appears conscious, and was not debated during any hearings. S. REP. NO. 94-605, at 51 (1976) (Conf. Rep.).

⁶³ Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329-88 § 8142 (codified as amended at 22 U.S.C. § 2778(b)(1) (2012)) (making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1988).

⁶⁴ 22 U.S.C. § 2778(a)(1).

must take into account factors such as arms races, development of weapons of mass destruction, and support of international terrorism.⁶⁵ AECA further stipulates that such decisions must consider possible prejudicial effect on international agreements.⁶⁶ It provides for import and export licenses for manufacturers, exporters, and importers of defense articles and defense services, places certain conditions on what can and cannot leave or enter the country, and provides for Executive notification of the same.⁶⁷ AECA requires that anyone other than a U.S. government officer who wishes to be involved in international arms transactions must register as a manufacturer, importer, or broker and must abide by its implementing regulations,⁶⁸ which include the International Traffic in Arms Regulations (“ITAR”).⁶⁹

AECA then requires that such implementing regulations

shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this Act or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.⁷⁰

This provision declares that all military firearms or ammunition manufactured in the United States and provided to a foreign government through an official U.S. program presumptively cannot re-enter their country of origin. Two exceptions to the military firearm import ban are explicitly stated: the restriction does not apply if the United States military, a U.S. ally’s military, or state or

⁶⁵ § 2778(a)(2).

⁶⁶ *See id.*

⁶⁷ § 2778.

⁶⁸ § 2778(b)(1)(A)(i)-(ii); *see also* 22 C.F.R. § 122.1, 129.1 (2013).

⁶⁹ 22 C.F.R. § 120.1 (2014).

⁷⁰ § 2778(b)(1)(A)(i).

local law enforcement will use the firearms; it also does not apply if the firearms were modified in a foreign country to such an extent that they can be considered foreign firearms. The statute points out that mere improvement or an increase in value during the firearm's sojourn abroad does not affect its importability.

Depending on how one interprets "any other foreign assistance or sales program," AECA has an implicit exception to the import ban. The statute does not address the importability of military firearms or ammunition that the United States supplied by some means other than a formal AECA or other foreign assistance or sales program, nor does it address the importability of items the United States may have given to non-governmental entities. This means the import ban does not apply to firearms that the United States could have supplied to groups like the French Resistance in World War II. It also means that the ban might not apply to firearms the United States informally transferred during a war. Nor would it apply to firearms that troops left behind accidentally or in an emergency, or that they handed to allies on the battlefield. Informal transfers of this sort may have been a wartime practice or custom. But by definition a practice is not a program, meaning firearms transferred in such manners are arguably exempt from the ban.⁷¹

A later amendment created a third explicit exception to the military firearm import ban. AECA provides under § 2778(b)(1)(B) that

[t]he prohibition . . . shall not extend to any military firearms (or ammunition, components, parts, accessories, and attachments for such firearms) of United States manufacture furnished to any foreign government by the United States under this Act or any other foreign assistance or sales program of the United States if—

⁷¹ See, e.g. OXFORD ENGLISH DICTIONARY (2d ed. 2008) (defining "practice" as something "usual" or "customary" while "program" is defined as "a planned series"). While it is unlikely that there are stockpiles of such weapons, American collectors or historians may find them more interesting than the Korean Garands and carbines because of their unique stories.

(i) such firearms are among those firearms that the Secretary of the Treasury is, or was at any time, required to authorize the importation of by reason of the provisions of section 925(e) of title 18, United States Code (including the requirement for the listing of such firearms as curios or relics under section 921(a)(13) of that title); and

(ii) such foreign government certifies to the United States Government that such firearms are owned by such foreign government.⁷²

In essence, this third exception allows importation of military firearms and ammunition if they satisfy two conditions: they must qualify as curios or relics, and the original foreign government recipient must still own them.⁷³

C. The Exceptions to the Ban on the Reimportation of Military Firearms

Of the three express exceptions to the import ban, two have existed since it became law. The first exception has expanded to include a new category of end users, while the second remains unchanged. The third exception appeared in various forms when Congress discussed creating the import ban, but it did not become part of AECA for another thirty years. This third exception, concerning curio or relic firearms, is the provision at issue in the Korean Garand and carbine re-export.

1. The Armed Forces and Law Enforcement End-User Exception

The first exception to the military firearm import ban is the only one with an end-user requirement: “[s]uch regulations shall prohibit the return . . . (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) . . . of any military firearms or ammunition.”⁷⁴ Under this exception, American-manufactured items qualifying as military

⁷² § 2778(b)(1)(B)(i)-(ii).

⁷³ § 2778(b)(1)(B).

⁷⁴ § 2778(b)(1)(A)(i).

firearms or ammunition that the United States gave to a foreign government can re-enter the country so long as the military or a state or local law enforcement agency will be using them.

AECA does not place a restriction on what type of party undertakes the importing as long as the end-user requirement is met. A private importer can transfer the firearms to the Armed Forces of the United States, but it is not clear whether that only includes transfers made directly to the Army or Navy, or whether it also includes transfers to individual members of the Armed Forces.⁷⁵ On the other hand, a state or local law enforcement agency can own the reimported military firearms, but individual law enforcement officers cannot because the statute expressly exempts agencies, and only agencies, from the ban. This means that an individual law enforcement officer could personally own a certain military firearm if it never left the country,⁷⁶ but he could not own one if it left and re-entered. Federal law enforcement agencies such as the FBI are not included in any of the exempted end-user categories.

2. Firearms Essentially of Foreign Manufacture

The second import-ban exception states that “[t]his prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.”⁷⁷ This exception has been in place since the enactment of the import ban and remains untouched. Until 1971, implementing regulations for AECA contained a specific definition

⁷⁵ Firearms statutes and regulations containing provisions specific to military and law enforcement frequently distinguish between or expressly include either category in their official, group capacity and each member in their individual capacities. *See, e.g.*, 18 U.S.C. § 922(v)(4)(A) (1994) (expressly exempting law enforcement officers “whether on or off duty” from provisions of the 1994 Assault Weapons Ban); N.Y. PENAL LAW § 265.20(a)(1)(a)-(b) (McKinney 2014); CONN. GEN. STAT. § 53-202b(b)(1) (2014).

⁷⁶ Many military-grade firearms are available for sale to law enforcement, either as new or government surplus arms. Some federal and state laws restrict the ownership of certain weapons to law enforcement agencies, but in certain states individual law enforcement officers can own firearms with military capabilities that are not available to the general public.

⁷⁷ § 2778(b)(1)(A)(i).

of this provision: substantial transformation, as applied to rifles and carbines, meant that the firearms had been either rechambered for a higher caliber or charge cartridge, or had received a new action.⁷⁸ The only other guidelines as to the meaning of “substantially transformed” appear in the clause preceding this import-ban exception: articles with enhanced value or improved condition due to their sojourn abroad are not exempted from the ban,⁷⁹ so the law requires something more to qualify as substantial transformation.

The 1968 implementing regulations specified that “[o]ther changes, such as rebarreling, modification of stocks, or grips, rebluing, or replacing of sights, singly or together, are not sufficient to so substantially transform the weapons as to become, in effect, articles of foreign manufacture.”⁸⁰ While these particular regulations are no longer extant, when taken together with AECA’s language they indicate that substantial transformation is achieved only if the firearm becomes altogether a different firearm than it was in its original configuration. Such transformation would make a Garand of little interest to a collector wishing to obtain an authentic piece of history.

3. Curio and Relic Firearms

While a curio exception to the military firearm import ban was proposed when the measure first appeared in Congress in 1958, the exception was not codified in AECA until 1988.⁸¹ Kennedy’s original proposal had envisioned allowing curios or antiques that were no longer in working condition.⁸² As Congress noted at that

⁷⁸ 22 C.F.R. § 121.02(a) (1968). The 1971 version no longer contained this definition. “Substantial transformation” for imported American-made firearms appears to have been the subject of litigation just once, and the court there referred back to the 1968 definition. *See A. N. Deringer, Inc. v. United States*, 524 F.2d 1215 (C.C.P.A. 1975).

⁷⁹ § 2778(b)(1)(A)(i).

⁸⁰ § 121.02(c).

⁸¹ Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329-88 § 8142 (1988) (codified as amended at 22 U.S.C. § 2778(b)(1) (2012)) (making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1988).

⁸² S. 3714, 85th Cong. (2d Sess. 1958).

time, no one wanted to import a firearm, even an antique one, if it did not work—its value and interest lay in it being in working condition, whether or not the American owner would ever decide to fire it.⁸³

In a 1984 amendment to the Gun Control Act (“GCA”), Congress ordered the Attorney General to approve all imports of firearms designated “curio” or “relic.”⁸⁴ However, a large number of such curio or relic firearms that Americans wanted to import were military firearms subject to the AECA import ban. For several years after the curio exception became law, one part of the United States Code ordered the Attorney General to approve imports of firearms that another part of the Code told the Department of State and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) to deny, so the conflicting provisions meant that the approval order could apply only to foreign-origin firearms.⁸⁵ In 1988, Congress brought AECA in line with the GCA, creating the § 2778(b)(1)(B) curio and relic exception to the military firearm import ban so that the two laws did not conflict.⁸⁶

As of 1988, AECA provides that the Secretary of the Treasury is required to authorize the importation of certain firearms furnished to foreign governments under foreign assistance programs, among them firearms designated as curio or relic, if the foreign government can certify that it still owns them.⁸⁷ The definition of what constitutes a curio or relic firearm falls to the Attorney General,⁸⁸

⁸³ 104 CONG. REC. H8732 (1958) (statement by Rep. Broyhill).

⁸⁴ Trade and Tariff Act of 1984, Pub. L. 98-573 § 233, 98 Stat. 2978, 2991-92 (codified as amended at 19 U.S.C. § 2411 (1996)).

⁸⁵ Mark Barnes, *The Legal Side: V18N1*, SMALL ARMS REVIEW (Feb. 1, 2014), <http://www.smallarmsreview.com/display.article.cfm?idarticles=2200>.

⁸⁶ See also *Senator Jon Tester and Representative Cynthia Lummis Introduce Bills to Protect the Importation of Historically Significant U.S.-Made Rifles*, NRA-ILA (March 23, 2011) [hereinafter *NRA-ILA Tester and Lummis*], <http://www.nraila.org/news-issues/fact-sheets/2011/senator-jon-tester-and-representative-c.aspx>.

⁸⁷ 22 U.S.C. § 2778(b)(1)(B)(i) (2012).

⁸⁸ 18 U.S.C. §§ 921(a)(13), 925 (2012).

who has exercised the power to define these firearms through ATF's rulemaking process.⁸⁹

A firearm is a curio or relic if it meets any one of three possible tests laid out in Title 27 of the Code of Federal Regulations.⁹⁰ A curio or relic is a firearm that is fifty years old, or has been certified as a curio or relic of interest to a firearms museum, or it derives a substantial part of its monetary value from, among other possibilities, its association with an historical period or event.⁹¹ According to ATF, firearms automatically attain curio and relic status on their fiftieth birthday; no special classification or certificate is necessary to prove a firearm has attained this status, though ATF will make a classification if requested.⁹² ATF maintains a Curios or Relics List, but a firearm can be a curio or relic even if it does not appear on the ATF list.⁹³

The M1 Garands and carbines that Korea desires to re-export to the United States should be at least sixty years old, as Korea most likely received them no later than 1953.⁹⁴ They are of interest because of their association with the Korean War and WWII.⁹⁵ The South Korean Defense Ministry still owns these firearms, satisfying the second element of the curio or relic exception to the import ban.⁹⁶ Presumptively there is no reason to deny such an import. Yet the import was denied in 2009, partially approved in 2010, and then fell victim to an Executive action in 2013.⁹⁷

⁸⁹ *Id.*; see also 27 C.F.R. § 478.26 (2014).

⁹⁰ 27 C.F.R. § 478.11 (2013).

⁹¹ *Id.*

⁹² BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ATF PUBLICATION 5300.11, FIREARMS CURIOS OR RELICS LIST (2007), available at <http://www.atf.gov/files/publications/firearms/curios-relics/p-5300-11-firearms-curios-or-relics-list.pdf>.

⁹³ *Id.*

⁹⁴ See Tae-hoon, *supra* note 8.

⁹⁵ See NRA-ILA Tester and Lummis, *supra* note 86.

⁹⁶ 22 U.S.C. § 2778(b)(1)(B)(ii) (2012).

⁹⁷ See Kyle, *supra* note 10.

II. THE IMPORT PROCESS: AGENCY APPROVALS AND NOTIFICATION REQUIREMENTS

One might wonder why the White House is involved in American companies trying to reimport sixty-year-old American products, but the provisions of AECA, the Foreign Assistance Act, and internal U.S. politics have all played a role. As noted above, AECA gives the President the authority to control the import and export of defense articles and services and provide foreign policy guidance concerning the same.⁹⁸ “Defense articles” includes firearms as well as firearms parts and components, so firearms are subject to presidential import and export control.⁹⁹

In 1977, the President delegated the authority to control arms imports and exports to various agencies, including to the Secretary of State, the Secretary of Defense, and the Secretary of the Treasury.¹⁰⁰ The original delegation was repealed and replaced on March 8, 2013, by Executive Order.¹⁰¹ The Secretary of State currently controls the export and temporary import of defense articles and defense services through the Bureau of Political-Military Affairs,¹⁰² while the Attorney General, through ATF and under the guidance of the views of the Secretary of State,¹⁰³ controls their permanent import.¹⁰⁴

⁹⁸ § 2778(a)(1).

⁹⁹ 27 C.F.R. § 447.21 (2013).

¹⁰⁰ See Exec. Order No. 11,958, 3 C.F.R. § 79 (1977); see also 22 C.F.R. § 120.1 (2014). Some authority was also delegated to the Director of the Arms Control and Disarmament Agency and the Secretary of Commerce. See also Johanna Reeves, *Retransfers of U.S.-Origin Firearms Part 1*, F.A.I.R. TRADE GROUP (Oct. 2011), available at <http://www.reevesdola.com/wp-content/uploads/2012/03/FAIR-Trade-Article-3-Retransfers.pdf>.

¹⁰¹ Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013).

¹⁰² § 120.1. The Directorate of Defense Trade Controls (“DDTC”) fulfills these duties for all items regulated by ITAR’s United States Munitions List. 22 C.F.R. § 121.1 (2014).

¹⁰³ Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013).

¹⁰⁴ § 120.18. The regulations of 27 C.F.R. § 447.21, administered by ATF, are the implementing regulations governing permanent imports for Section 38 of the Arms Export Control Act of 1976, which includes the ban at issue here. Section 447.21

Military firearms subject to the AECA reimportation restriction at issue in this Comment left the United States through direct commercial sales or under military assistance programs.¹⁰⁵ In order to receive firearms under such a program, the foreign country had to consent to obtain the U.S. President's prior approval before it could retransfer any of those firearms to a third party.¹⁰⁶ In some cases where the foreign country purchased the firearms from the United States, it does not have to obtain this prior consent for a retransfer, but this exemption applies only when certain conditions are met. For example, the recipient must be a North Atlantic Treaty Organization member state.¹⁰⁷ However, if the firearms were a grant from the United States, the Foreign Assistance Act requires that the foreign country return them to the United States when it no longer needs them, unless the President consents to their disposal in a different manner.¹⁰⁸

In order to bring firearms into the United States, an importer must submit an Application and Permit for Importation of Firearms, Ammunition and Implements of War ("Form 6") to ATF.¹⁰⁹ When a company wishes to import U.S.-origin firearms that left the United States under a military assistance program, the company must obtain authorization from the Department of State before submitting the Form 6.¹¹⁰ This step in the import approval process has a tendency to become drawn out, and can take months or even years,¹¹¹ because the Department of State needs to know how the foreign government obtained the firearms in order to determine what retransfer consent

contains the United States Munitions Import List, which specifies all of the items subject to permanent import control under AECA.

¹⁰⁵ 22 U.S.C. §§ 2314, 2753(a) (2012); *see also* Reeves, *supra* note 100.

¹⁰⁶ §§ 2314, 2753(a); *see also* *Intrac Arms. Int'l, L.L.C. v. Albright*, 1998 U.S. Dist. LEXIS 21858, at *12 (D.D.C. Dec. 28, 1998). The first retransfer consent statute was enacted as part of the Mutual Defense Assistance Act of 1949. Pub. L. No. 81-329, 63 Stat. 714, 717 (repealed 1954). Because the Republic of Korea received the Garands and carbines in the 1950s, presumably it would have had to agree to such conditions.

¹⁰⁷ § 2753(b)(2). While prior approval for a transfer is not required if all the conditions of § 2753(b) are met, the country must nevertheless notify the United States within thirty days of the transfer pursuant to § 2753(b)(5).

¹⁰⁸ § 2314(a)(4).

¹⁰⁹ *See* Reeves, *supra* note 100.

¹¹⁰ *Id.*

¹¹¹ *Id.*

statutes apply. Given that most of these imports concern firearms dating from the 1950s or earlier, it can be difficult to obtain this information. Sometimes records simply are not available,¹¹² an issue that the executive branch foresaw in 1958 and had voiced as a reason not to enact the ban.¹¹³ The import cannot proceed without this data: the Department of State must determine whether the firearms revert to the U.S. government pursuant to Foreign Assistance Act provisions, or whether the foreign country is allowed to sell them and keep the proceeds pursuant to AECA provisions.¹¹⁴ Once the importing company provides this information and receives an authorization letter from the Department of State, it can then proceed to submit a Form 6 to ATF.¹¹⁵ If ATF approves the Form 6, the company has two years in which to import the firearms.¹¹⁶

In some cases, such as the Korean re-export, the foreign government owner approaches the Department of State pursuant to its retransfer consent agreement. The Bureau of Political-Military Affairs handles such requests and passes them on to other offices within the Department of State, depending on the program through which they left the country.¹¹⁷ If the firearms were part of a government-to-government sale, then the Office of Regional Sales and Arms Transfers reviews the request.¹¹⁸ If they left the United States under a direct commercial sale, the Directorate of Defense Trade Controls (“DDTC”) takes over.¹¹⁹ Once the appropriate office has reviewed the request, it is sent back for final review by the Assistant Secretary for Political-Military Affairs or the Under Secretary for Arms Control and International Security along with a processing recommendation.¹²⁰

¹¹² *Id.* As noted above, the executive branch pointed out the difficulty of this tracing process when it first saw this provision in the Mutual Security Act. *See* Conf. Comm. Print, *supra* note 54.

¹¹³ Conf. Comm. Print, *supra* note 54.

¹¹⁴ 22 U.S.C. §§ 2314, 2753(a) (2012).

¹¹⁵ *See* Reeves, *supra* note 100.

¹¹⁶ 27 C.F.R. § 447.43(a) (2014).

¹¹⁷ *See* Reeves, *supra* note 100.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Import permission is not guaranteed even if all of the necessary levels of the Department of State approve the retransfer. The foreign government must find an American company that wishes to import the goods,¹²¹ and the American company must obtain ATF approval of its Form 6 import application. Pursuant to Executive Order 13637, ATF is required to be “guided by the views” of the Department of State in these matters, but Department of State authorization does not translate to automatic ATF approval of a Form 6 import application.¹²² Even when both ATF and the Department of State have approved an import, as happened in the Korean re-export, domestic U.S. politics and policy goals might prompt the White House to intervene at any step in this process.¹²³

III. THE 2013 EXECUTIVE ACTION

On August 29, 2013, the President announced two new “common-sense” Executive actions to reduce gun violence, one of which directly impacts the military firearm import provisions of AECA.¹²⁴ The purpose of these actions is “to keep dangerous firearms out of the wrong hands and ban almost all re-imports of military surplus firearms to private entities.”¹²⁵ As the announcement notes, only 250,000 firearms have been imported under the AECA ban since 2005,¹²⁶ and all of them were subject to Department of State and ATF import approval. The Executive action promotes what it considers a new policy: it will deny requests by private entities to bring military-grade firearms back into the United States, excepting only museums from this ban.¹²⁷

¹²¹ Foreign governments cannot possess defense articles in sovereign U.S. territory.

¹²² Exec. Order No. 13,637, 78 Fed. Reg. 16,130 (Mar. 13, 2013); Reeves, *supra* note 101; *see also* letter from Robert Talley, Executive Director of F.A.I.R. Trade Group, to Kenneth Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (Aug. 6, 2009), *available at* <http://www.fairtradegroup.org/FAIR%20ATF%20USG%20Letter%208-6-09.pdf>.

¹²³ Eger, *supra* note 38.

¹²⁴ Gun Violence Fact Sheet, *supra* note 15.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

A. The Executive Action's Modifications to AECA's Firearm Reimportation Ban

Due to the strict requirements in place under AECA and the Foreign Assistance Act, absent this Executive action reimports of military surplus firearms are already banned. Such military firearms can defeat the presumptive ban that has been in place since 1958 and return legally to the United States only if they meet one of the three exceptions: military or law enforcement end user, extensive modification in a foreign country, or curio or relic status.¹²⁸ If the firearm satisfies one of the three conditions, the importer must then obtain approval from the Department of State and ATF before bringing the item into the country.

Because an import ban has been in place since 1958, this Executive action is not creating a new ban. Instead, it eliminates parts of the already narrow exceptions to the existing ban. None of the AECA exceptions remain intact, though each one is affected in a different manner. The military or law enforcement end-user exception at first seems untouched. However, private parties now cannot undertake imports on behalf of these end users. Local law enforcement and the Department of Defense remain free to continue importing sixty-year-old rifles that are functionally obsolete as a military firearm. If the Department of Defense does bring in the Korean Garands and carbines, there is nothing to stop it from turning around and selling them to the American public through the Civilian Marksmanship Program,¹²⁹ which would override the purpose behind the Executive action.

Under this new iteration of the ban, the status of firearms that have been modified so extensively that they are considered

¹²⁸ 22 U.S.C. § 2778(b)(1)(A)-(B) (2012).

¹²⁹ It would not be surprising if a domestic resale restriction was eventually placed on law enforcement or the Department of Defense imports in order to achieve the Executive action's purported goal of keeping such firearms off the streets. However, at least in the case of the M1 Garands and the M1 carbines, that would create a confusing legal scenario where a private citizen could buy such a firearm if available on the domestic open market, but could not buy the same thing that the U.S. military or a police department wanted to surplus.

foreign is less certain. While the Executive action does not appear to touch this exception directly, in effect it may be eliminating it as an import exception. It is unlikely that either the military or law enforcement has much use for firearms that have undergone extensive reworking in a foreign country. Apart from repairs, work completed on a military rifle in a foreign country was more likely than not undertaken to make it better for sporting purposes.¹³⁰ Such rifles may be of interest to hunters and collectors, but their usefulness to military and law enforcement is doubtful.

The curio or relic exception to AECA's import ban is the hardest hit by the President's Executive action. AECA allows the importation of curios or relics so long as the original foreign recipient can prove possession.¹³¹ This AECA exception does not specify an end-user condition: the only requirement is that the firearm be among those that the Secretary of the Treasury can approve for import.¹³² A firearm obtains curio or relic status in part because it is of interest to a firearms museum,¹³³ but AECA does not require that a museum undertake the importation, nor does it specify that museums are the only parties authorized to buy such firearms. Because the Executive action makes only "a few exceptions such as for museums" to the import ban, it effectively inserts a museum end-user requirement into AECA.¹³⁴ The Executive action does not explain how a museum can go about importing such a firearm if private importing businesses are shut down by this ban.¹³⁵

Whatever its intentions may be, this Executive action ignores the purpose of the original military firearm import ban, and runs

¹³⁰ An excellent example would be the modification of Enfield rifles from the World War I era. See HUGHES, *supra* note 52.

¹³¹ § 2778(b)(1)(B)(ii).

¹³² § 2778(b)(1)(B)(i).

¹³³ 27 C.F.R. § 478.11 (2013).

¹³⁴ Gun Violence Fact Sheet, *supra* note 15.

¹³⁵ A firearms museum may have a collector's Type 03 Federal Firearms License ("FFL"). A Type 03 license does not allow importation, so the museum would have to find a licensed importer in order to obtain a firearm from a foreign entity. If private importers are no longer allowed to bring in such firearms, a museum wishing to obtain a particular rifle would be without recourse unless it is able to obtain a Type 08 importer's license.

counter to the decision-making parameters AECA provides the Executive. The provision was added to the Mutual Security Act of 1958 to protect domestic firearms manufacturers from foreign competition in the domestic market.¹³⁶ AECA limits the President's decision-making powers regarding arms imports and exports to concerns about arms races, weapons of mass destruction, and international terrorism, and requires him to take account of international treaties in his decisions.¹³⁷ The Executive action, however, views AECA's § 2778 ban as a crime-fighting measure filled with loopholes that need to be tightened.¹³⁸

In doing so, it confuses the purpose of AECA's ban with those of the other major federal laws regulating firearms: unlike AECA, the National Firearms Act of 1934 and the Gun Control Act of 1968 are laws whose primary purpose is to fight crime.¹³⁹ Due to this confusion, the Executive action oversteps the bounds of power delegated to the President. AECA gives the Executive power to control arms imports and exports in order to further foreign policy objectives, not domestic crime-control policies. Operating at a domestic level, the Executive action hopes to keep military-grade firearms off our streets, not realizing or perhaps ignoring the fact that the firearms most affected by the AECA import ban have been militarily obsolete for over half a century.¹⁴⁰ Even if Executive power in this area was properly used to promote domestic safety policies,

¹³⁶ See, e.g., 104 CONG. REC. H8729-30 (daily ed. May 14, 1958).

¹³⁷ See § 2778(a)(2).

¹³⁸ This Executive action is an extension of twenty-three others that the President declared after the Newtown, Connecticut shootings to help law enforcement fight crime. See, e.g., Progress Report, The White House, *Progress Report on the President's Executive Actions to Reduce Gun Violence* at 1, 4 (Dec. 2, 2013), available at http://www.whitehouse.gov/sites/default/files/docs/november_exec_actions_progress_report_final.pdf; Josh Lederman, *Powers Limited, Obama, Biden Seek Action on Guns*, ASSOCIATED PRESS (Aug. 29, 2013), <http://bigstory.ap.org/article/ap-exclusive-obama-offers-new-gun-control-steps>.

¹³⁹ Pub. L. No. 90-618 § 101, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. ch. 44 (1968)) ("The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence."); see also Michael A. Bellesiles, *Firearms Regulations: A Historical Overview*, 28 CRIME & JUST. 137, 174-75 (2001).

¹⁴⁰ Lederman, *supra* note 138.

the characteristics of the firearms at issue make one question the effectiveness of the restrictions imposed by the Executive action.

B. *Characteristics of the M1 Garand and M1 Carbine*¹⁴¹

Both the Garands and carbines at issue in the Korea deal are of value primarily due to their age and historical significance.¹⁴² They are sought after by collectors, firearms enthusiasts, and veterans.¹⁴³ M1 Garands are used in color guards and shooting matches: in the former, their use is largely ceremonial, not functional; in the latter, specialized match models are generally used, and even those are often extensively reworked and modified.¹⁴⁴ Outside of those two scenarios, a Garand or carbine might be used for hunting or target shooting. However, they tend to be prized for their place in history far more than for their current end-uses.

Despite having been designed expressly for military purposes, the M1 Garand was notably excluded from the 1994 assault weapons ban,¹⁴⁵ as well as from attempts to reintroduce that ban.¹⁴⁶ It is a heavy, wood-stocked rifle that uses relatively expensive .30-06 cartridges.¹⁴⁷ It can be legally owned even under some of the strictest

¹⁴¹ See CANFIELD, *supra* note 6, for a more detailed explanation of the characteristics and history of these firearms. See KYLE WITH DOYLE, *supra* note 4, at 191-214, for a short history of the Garand.

¹⁴² See NRA ILA State Department, *supra* note 6. This is evidenced in part by the quantity of books and collectors' guides extant detailing the history of the M1 Garand and M1 carbine, identifying manufacturers, serial numbers, how to discern whether a given rifle's components are original or repaired, and even where it might have seen action. See, e.g., CANFIELD, *supra* note 6.

¹⁴³ Kyle Roerink, *Lummis wants M1 rifles to get import OK*, CASPER STAR-TRIB. (June 6, 2013), http://trib.com/news/local/govt-and-politics/lummis-wants-m-rifles-to-get-import-ok/article_5e483682-5d4c-51b6-b8c5-c5435b4e1187.html.

¹⁴⁴ *Id.*; CANFIELD, *supra* note 6, at 143.

¹⁴⁵ Symposium, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinal Critique*, 60 HASTINGS L.J. 1285, 1304 & n.151 (2009).

¹⁴⁶ See S. 150, 113th Cong. (1st Sess. 2013).

¹⁴⁷ .30-06 ammunition generally retails for \$1.00-2.00 whereas the ammunition for an AR15/M16-type rifle (5.56x45NATO/.223) costs about half that. *Rifle Ammunition*, CABELAS.COM, http://www.cabelas.com/catalog/browse/rifle-ammunition/_/N-1100190/Ns-CATEGORY_SEQ_104532480?WTz_I=SBC%3BMMcat104792580%3Bcat104691780 (last visited Sep. 27, 2014).

state laws that classify assault weapons based on whether they contain various features: it lacks a pistol grip and a protruding or detachable magazine, instead using a drop-in eight-round capacity clip, and its one offending feature is a bayonet lug.¹⁴⁸ If one has been used recently in a crime, it was a rare occurrence, as Garands do not register on U.S. government crime statistics compilations.¹⁴⁹

The semi-automatic M1 carbines are smaller, lighter, and less powerful than the M1 Garands because they were developed for use by non-combat troops and soldiers weighed down by other cumbersome gear.¹⁵⁰ The carbines use fifteen or thirty-round magazines, and many models from later years come with a bayonet lug, while versions used by airborne troops have folding stocks.¹⁵¹ Like the Garands, one can legally possess the carbines even in states with strict firearms laws, though certain models may fall into the assault weapon category in states with more restrictive assault weapons tests.¹⁵² Collectors and other firearms enthusiasts desire them for many of the same historical reasons that they value Garands.¹⁵³

¹⁴⁸ State assault weapons laws tend to regulate magazines, not clips. See, e.g. CONN. GEN. STAT. § 53-202a (2014).

¹⁴⁹ See Talley, *supra* note 122; see also Lederman, *supra* note 138 (“The ban will largely affect antiquated, World War II-era weapons that, while still deadly, rarely turn up at crime scenes, leaving some to question whether the new policy is much ado about nothing. ‘Banning these rifles because of their use in quote-unquote crimes is like banning Model Ts because so many of them are being used as getaway cars in bank robberies.’”).

¹⁵⁰ *Rifle Sales – Carbine*, CIVILIAN MARKSMANSHIP PROGRAM, <http://thecmp.org/Sales/carbine.htm> (last visited Sep. 20, 2014).

¹⁵¹ See *id.*; see also RIESCH, *supra* note 3.

¹⁵² Opinions differ as to the rationale for denying the import of Korean Garands and carbines, as well as the later decision to allow the return of the Garands but not the carbines. Reasons include fears of illicit use if so many firearms are imported all at once, concern that the carbines can use high-capacity magazines, and the possibility that someone could easily convert the carbines into automatic weapons. See, e.g. *Obama Administration Reverses Course, Forbids Sale of 850,000 Antique Rifles*, FOX NEWS (Sept. 1, 2010), <http://www.foxnews.com/politics/2010/09/01/obama-administration-reverses-course-forbids-sale-antique-m-rifles/> (highlighting that the only response given by any federal agency is that the guns could “fall into the wrong hands”).

¹⁵³ See, e.g., KYLE WITH DOYLE, *supra* note 4.

Despite the fact that these firearms do not qualify as assault weapons under even some of the strictest state tests, and the fact that both have been militarily obsolete for decades, the Obama administration seems to view both the Garands and carbines as military-grade firearms prone to criminal use, and utilized the provisions of this Executive action to deny the Korean re-export.¹⁵⁴ But the Executive action ignores the fact that any imported firearm, including these Garands and carbines, can be sold only in accordance with the restrictions of the Gun Control Act, and where applicable, the National Firearms Act, as well as state laws, just like any other domestic firearm. It assumes that because the military used these firearms sixty years ago, criminals are likely to be the new primary end user, and completely ignores both history and the resale requirements contained in domestic law. The technological confusion evinced by the Executive action, and its misunderstanding of the purpose of the import ban, indicate that this provision of AECA is ripe for amendment.

IV. AMENDING THE BAN

In 2009, the President announced the Export Control Reform Initiative (“ECR Initiative”), which aims to strengthen national security while adapting export regulations to the changing economic and technological landscape.¹⁵⁵ This initiative recognizes that America’s current export control regime dates from the Cold War, if not before, and proposes a multi-phase strategy for streamlining export control and bringing it up to date.¹⁵⁶ The plan

¹⁵⁴ Wilson Ring, *Vermont Importer Lays Off 41, Blames White House Denial of Deal with South Korea*, ASSOCIATED PRESS (June 6, 2014), <http://bigstory.ap.org/article/vermont-gun-importer-lays-41-blames-rules>; Justin Peters, *Banning the Reimportation of Obsolete Military Rifles Won’t Curb Gun Violence*, SLATE.COM (Aug. 30, 2013, 1:51 PM), http://www.slate.com/blogs/crime/2013/08/30/executive_action_gun_control_banning_the_reimportation_of_obsolete_military.html.

¹⁵⁵ *About Export Control Reform*, EXPORT.GOV, http://export.gov/%5C/ecr/eg_main_047329.asp.

¹⁵⁶ Press Release, The White House, Office of the Press Secretary, Fact Sheet on President’s Export Control Reform Initiative (Apr. 20, 2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>.

realizes that comprehensive reform will require both time and legislation.¹⁵⁷ Prior to the 2013 Executive action, lawmakers had already addressed the military firearm import ban in appropriations bills and proposed legislation; however, if passed, the proposed legislation would at best be a temporary solution to the problem while Congress considers comprehensive export reform.

A. Appropriations Provisions

While Congress has not yet considered a complete repeal of the ban, in recent years it has made some effort to protect curio and relic firearms that are subject to the reimport prohibition. In 2012, for instance, the Consolidated and Continuing Appropriations Act stipulated that ATF could not use any taxpayer funds to change the definition of a curio or relic or remove a firearm from the existing curio or relic list.¹⁵⁸ The Act further ordered that no government department, agency, or instrumentality could use appropriated funds to cover the administrative expenses or salary of any individual to deny a curio or relic import.¹⁵⁹ This latter prohibition also appears in appropriations bills for later years, including the proposed Commerce, Justice, and Science Appropriations bill for 2015.¹⁶⁰ But these provisions do not prevent an import application from being shuffled from government office to government office or from gathering dust on a desktop, constituting an effective denial. Nor do they prohibit the White House from intervening whenever it assumes that doing so will constitute an effective domestic crime-control measure.

B. The Collectible Firearms Protection Act

In 2011 and again in 2013, Representative Cynthia Lummis of Wyoming introduced an amendment to AECA's military firearm

¹⁵⁷ *Id.*

¹⁵⁸ Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 609.

¹⁵⁹ *Id.*

¹⁶⁰ See Commerce, Justice, Science, and Related Agencies Appropriations Bill, H.R. 4660, 113th Cong. (2nd Sess. 2014).

import ban.¹⁶¹ The proposed Collectible Firearms Protection Act would change the exception codified in 22 U.S.C. § 2778(b)(1)(B) so that certification of ownership by a foreign government is no longer required to import military firearms classified as curios or relics.¹⁶² Instead of documentation of government ownership, the person seeking import authorization would merely have to show that the firearms are lawfully possessed under the laws of the exporting country.¹⁶³

The proposed act would also add a new provision to § 2778(b).¹⁶⁴ The addition would allow curio or relic firearms to be brought in by a licensed importer without requiring the importer to obtain Department of State or Department of Defense approval for the transfer of such firearms from the foreign party to the importer.¹⁶⁵ It would exempt the importer from having to pay any proceeds of the transfer to either the Department of State or the Department of Defense.¹⁶⁶ These provisions would apply notwithstanding any other law, regulation, or executive order.¹⁶⁷

This bill may reach too far in some ways, yet not far enough in others towards fixing the import ban. The Department of State currently reviews these transfers not due to concerns about crime

¹⁶¹ Collectible Firearms Protection Act, H.R. 2247, 113th Cong. (1st Sess. 2013); Collectible Firearms Protection Act, H.R. 615, 112th Cong. (1st Sess. 2011).

¹⁶² H.R. 2247 § 2(a)(2)(C); H.R. 615 § 2(a)(2)(C).

¹⁶³ H.R. 2247 § 2(a)(2)(C); H.R. 615 § 2(a)(2)(C).

¹⁶⁴ H.R. 2247 § 2(a)(3):

Notwithstanding any other provision of law, regulation, or Executive order, any such firearms described in subparagraph (B) may be imported into the United States by an importer licensed under the provisions of chapter 44 of title 18, United States Code, without the importer or the person described in subparagraph (B)(ii)—

(i) obtaining authorization from the Department of State or the Department of Defense for the transfer of such firearms by the person to the importer; or

(ii) providing payment to the Department of State or the Department of Defense of any of the proceeds of the transfer of such firearms by the person to the importer.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

control and military firearms running rampant on the streets, but because some of these firearms were provided under foreign assistance programs.¹⁶⁸ If the United States gave the firearms away as a grant, American taxpayers footed the bill. The foreign government had to agree to certain terms to receive the firearms.¹⁶⁹ At least in some cases, those terms specified that the recipient government must notify the U.S. President before the firearms could be transferred to a third party, and Department of State approval is the current substitute for direct presidential notification pursuant to Executive Order 13637.¹⁷⁰ The present import denial problem is not the mere fact of the Department of State notification requirement; rather, it is the poorly informed political reason behind the approval or disapproval of a request for import authorization.

Such importations would be quicker and possibly cheaper for the U.S. government if the Department of State was not involved, like Lummis' bill envisions, as it would remove an entire agency from the approval process. Importers would be happier, and countries like the Republic of Korea who recognize a historical interest of the American public would not be buffeted about by the changing whims of the White House. Foreign and domestic government officials would not need to search for documents that may or may not exist showing how the firearms ended up on that foreign soil. The Department of State could stop worrying about fifty-year-old firearms whose practical military worth is obsolete.

If the Department of State is removed from this process, importers would still have to certify to the Attorney General, presumably through ATF,¹⁷¹ that the firearms were not illegal foreign stockpiles.¹⁷² Importers would remain subject to the strict laws and regulations in place for all firearms imports, including ATF pre-

¹⁶⁸ See 22 U.S.C. §§ 2314, 2753(a) (2012).

¹⁶⁹ § 2753(a), (g).

¹⁷⁰ See Exec. Order No. 13,637, 27 C.F.R. § 478 (2014).

¹⁷¹ The Attorney General would most likely delegate this to ATF as he has done with his other firearms and explosives-related regulatory powers. See generally § 478.27 (delegating the authority to ATF to define and exclude objects as "destructive devices," and license those involved in firearms and ammunition importation and manufacturing).

¹⁷² H.R. 2247 § 2(a)(3); see also 22 U.S.C. § 2778 (2010).

approval, Customs and Border Protection clearance, and ATF post-import notifications.¹⁷³ Domestic purchasers of such firearms would continue to be subject to all federal and state background check and licensing requirements, just as for any other firearm purchase, so any resulting influx of curio or relic firearms would not cause a sudden flood of illegal firearms transfers.

While the proposed Collectible Firearms Protection Act would require a concurrent change to the notification requirements of the Foreign Assistance Act or the pertinent aid provisions of AECA,¹⁷⁴ it may be the most plausible temporary route to amending firearms import law, as it will reach farther and be more effective than the various appropriations bills. The current ban is perplexing because firearms appear to be one of very few items that are illegal to reimport to the United States,¹⁷⁵ and the ban applies only to domestically-manufactured firearms that our government happens to have given away to a foreign country. Any imported firearm is subject to all of the ownership restrictions in place for firearms of domestic manufacture, so removing the ban and allowing a private company to import a military firearm without any of AECA's § 2778 restrictions will not permit unauthorized persons to buy a military-grade firearm.¹⁷⁶

The extant angst over firearms in America and the continuing push for stricter gun control likely foreclose any attempt to repeal the military firearm import ban completely, making this proposed bill all the more attractive, especially to firearms owners and importers. However, when Congress considers comprehensive export control reform, the ban on the reimportation of American

¹⁷³ See § 478.112 (listing requirements for importers, including filing an ATF Form 6A (Release and Receipt of Imported Firearms, Ammunition and Implements of War)).

¹⁷⁴ *E.g.* 22 U.S.C. §§ 2314, 2753 (2010).

¹⁷⁵ The author is aware of no other reimportation prohibitions for defense articles, and knows of only one other reimportation prohibition involving non-defense articles, though that provision specifically allows the original manufacturer to reimport its U.S.-origin pharmaceuticals. See 21 U.S.C. § 381(d) (2012).

¹⁷⁶ See § 2778(b)(2)(B); H.R. 2247 § (2)(a)(3) (amending but not replacing other laws regarding firearms sales and highlighting that other law respecting firearms sales to individuals will remain in effect).

military firearms, at a minimum, should be thoroughly rewritten. If it is completely eliminated, such firearms would not suddenly run rampant on America's streets, as possession would still be subject to the provisions of the National Firearms Act and the Gun Control Act. If it is only rewritten, it should be removed from AECA or its successor and retained in revised form as a provision of the Gun Control Act, so that reimported firearms are subject to the same burden of ATF regulation as their domestic counterparts, instead of facing additional burdens merely because the United States once shared them with a foreign government.

V. CONCLUSION

Americans wish to possess M1 Garands and M1 carbines such as those currently held in Korea because of what they symbolize. Collectors want to hold American history in their hands. Shooting enthusiasts want to preserve and pass on a symbol of heroism, to remind a younger generation of how their grandfathers and great-grandfathers became America's Greatest Generation. ACEA's military firearm import ban did not intend to prevent us from holding history; it intended, perhaps unwisely, to protect domestic small arms manufacturers from competition.

Today, the firearms that most frequently come up against this ban are curio or relic arms whose military usefulness is past. Domestic manufacturers cannot fear them as competition because it is impossible to manufacture a sixty-year-old firearm, and a replica is of limited purpose when an M1's value lies in its age and provenance more than its features. The recent Executive action overlooks AECA's decision-making restrictions, fails to account for the nature of the firearms at issue, ignores the complex workings of firearms import and ownership laws already in place, and interferes with laws dating back fifty years without respecting their original purpose.

Recent appropriations protections have had limited effect, and the proposed Collectible Firearms Protection Act unconsciously intrudes on the requirements of foreign assistance laws. If those intrusions are remedied, the proposed Act can serve as a temporary solution to the import ban and will preserve both the intent of the

original ban and the rationale for the ban's curio and relic exception. However, as Congress considers comprehensive export control reform, it should take heed of the original discussions that gave rise to the ban, and consider carefully the purpose of such a ban, the need for its preservation in light of the Gun Control Act and National Firearms Act, and the proper body of law for administering such a ban. Such deliberation will encourage fair treatment of foreign governments who wish to comply with restrictions we imposed on them, and will ensure that Americans can better preserve their history and continue to honor the heroes and tools that shaped the Greatest Generation.

