

WHY DOMESTIC PREFERENCE IS INEFFECTIVE: MAKING THE BUSINESS
CASE FOR GLOBALIZED FEDERAL GOVERNMENT PROCUREMENT

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I Introduction

For hundreds of years scholars, politicians, and common folk have debated the issue of whether it is more beneficial for a country to rely on its own citizens for the supplies and services necessary for commerce and the defense of the nation, or whether the market should be open to the world for competition. Historically, the popularity of domestic preference for such supplies and services has waxed and waned, depending in large part on economic conditions. History tends to show that when times are prosperous, consumers appreciate the opportunity to take advantage of world market competition. That's when consumers truly get the best bang for their buck. When times are economically trying, however, many people have feared for their own employment and even resented foreign competition. Under such circumstances, protectionist policies tend to surface.

Economists have long warned against the dangers of a protectionist policy with regard to foreign trade. Nonetheless, that warning has sometimes gone unheeded. There appears to be a current wind of protectionism blowing in the United States, demonstrated by such events as the recent decision as to how contracts are awarded for the reconstruction effort in Iraq. The guidance issued by the Secretary of Defense is that

such contracts are to be awarded to only U.S. and Iraqi companies, and those allies with armed forces contributing to the war effort. Another example of protectionism in the United States today is the politicians who vehemently promise their constituents they will fight to the bitter end to “keep jobs in America.” After a comprehensive review of the domestic and foreign job markets and trade practices, many experts opine that domestic preference works to the detriment of the country imposing the restraint on trade.

The arguments against protectionism and in favor of globalization of defense procurement practices ring of arguments that have been advanced for centuries, and continue to be made. “International cooperation represents a value greater than the sum of its parts.”¹ “If each member [nation] had to develop each capability by themselves their products would not be nearly as good, and the aggregated costs would be staggering.”² It is not difficult to see how international technological access and sharing improve defense research quality.³ If the United States fails to be receptive of

¹ E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), available at http://www.acq.osd.mil/usd/new_speeches/france.doc (last visited June 5, 2004).

² E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), available at http://www.acq.osd.mil/usd/new_speeches/france.doc (last visited June 5, 2004).

³ E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), available at http://www.acq.osd.mil/usd/new_speeches/france.doc (last visited June 5, 2004).

“appropriate international cooperation, integration, alliances, and coalitions in defense acquisition,” some have suggested such behavior would constitute negligence.⁴

As protectionism applies to federal government procurement, the real concern is whether the purchasing agent is able to acquire the goods or services necessary for the end user, of the quality desired, in accordance with the specified timeframe. If it is not possible to achieve these objectives from within the home country, then a protectionist policy serves to hamper the procurement process, rendering the procurement system less efficient and less useful to the end user than it could be otherwise. Consequently, the purchaser finds himself with fewer choices. The result is a failure to provide our armed forces and other federal government consumers with the best choice of goods they demand and deserve. Further, a procurement system that functions based on protectionist policies is not the procurement system the United States should advance to the world as a model, for the reasons set forth above.

This Article delves into the concept of domestic preference and how, although perhaps unexpectedly, domestic preference policies work contrary to intuition. There needs to be a greater awareness of the economics involved in protectionist policy because once that is achieved, the likelihood is that the majority will prefer free trade. A change in policy in federal government procurement toward free trade will be a good business decision.

Obviously, there are concerns beyond those of a strictly business nature in making decisions on federal government procurement policy. They consist of questions of moral

⁴ E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), available at http://www.acq.osd.mil/usd/new_speeches/france.doc (last visited June 5, 2004).

correctness or redistribution of wealth, environmental concerns and protectionism to preserve cultural, to name a few. This Article concerns itself with the business case for free trade in federal government procurement.

This Article begins with a discussion of what domestic preference is and why such a policy has been adopted in the United States. It continues with a review of current laws and legislation that adopt a domestic preference. As can be seen by the legislation, protectionism is currently alive and well in American policy. The section on domestic preference then looks at some current examples of protectionism such as how it is being advocated by politicians, how the Department of Defense handled the award of contracts for the Iraqi Reconstruction effort, and the Department of Homeland Security's prohibition on awarding contracts to corporate expatriates. The section ends with the review of a study on whether the Berry Amendment and the Buy American Act are being effectively enforced.

The Article continues by asserting that protectionism does not achieve its desired goal of protecting domestic interests. First, consideration is given to previous U.S. experiences with protectionism such as the procurement of berets for the United States Army, the "banana wars," and the woes of the U.S. steel industry. The conclusion is that protectionism was ineffective or even detrimental to U.S. interests in each of these examples.

Arguments are then advanced against protectionist policy. In the field of government contracts, it is detrimental to have a policy in place that deprives the buyer of timely and quality goods or services at a reasonable price. That is precisely the effect of protectionism. A critical point in the defense industry is that protectionism hinders the

problem of interoperability of defense weapons systems at a time in history when interoperability between allies has never been more critical on the battlefield. From an economic perspective, protectionism is inefficient and can result in lack of competition. It can cost Americans their jobs, if those jobs are contingent upon exports and foreign markets may close their doors to U.S. imports if there is no reciprocity in trade.

The next section advances globalization in federal government procurement as a good business decision. Reasons supporting globalization include more competitive prices, improvement in the quality of goods and services, a better likelihood of timely delivery, and more overall wealth, both domestically and abroad.

In order to achieve globalized federal government procurement, this section recommends policy changes. The changes in policy should be made after studies are conducted that demonstrate free trade is indeed the path to follow. The studies should be followed with an education of the workforce so the average American worker understands why there will be a loss of jobs, but it will ultimately be beneficial for the majority. The government needs to be ready to assist displaced workers with training for new jobs and unemployment benefits for the interim. Finally, the need for vigorous enforcement of the free trade agreements cannot be over-emphasized. In order to reap the benefits of free trade, foreign countries need to conduct their affairs in accordance with the established agreements.

II Domestic Preference and Protectionism

A What is Domestic Preference?

When a nation pursues a “domestic preference” policy for procurement, it provides previously designated domestic products an automatic favored status in the contract award determination. This economic policy promoting favored domestic industries is oftentimes achieved by regulations that create barriers for foreign businesses. As Professor Dana Frank points out, “Buying American” has been a rallying cry for Americans since the days of Paul Revere and the Boston Tea Party.⁵

In the United States, there recently has been a renewed rallying cry to favor domestic sources in federal government procurement. Domestic preference is found in statutes such as the Buy American Act, which generally requires American materials to be used in items obtained through public contracting for use *within* the United States.⁶ There are some exceptions to the Buy American Act, but they are few in number when viewed in context of the statutory scheme.⁷ Similarly, the Balance of Payments Program provides a preference for the acquisition of domestic products and services for use *outside* the

⁵ Dana Frank, *Buy American: The Untold Story of Economic Nationalism*, 1999, Beacon Press.

⁶ 41 U.S.C. §§10a. American materials required for public use. Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use... .

⁷ ... This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title. 41 U.S.C. §§10a.

United States.⁸ An often-voiced concern about international trade and in favor of protectionism is that the U.S. exports pale in comparison to its imports. As of the month of April 2004, the U.S. Department of Commerce estimated total U.S. exports at \$93.9 billion and imports of \$142.3 billion, with an international goods and services deficit of \$48.3 billion.⁹

Some legislation goes so far as to require one-hundred percent domestic content for certain clothing and supplies purchased by the military.¹⁰ As an example of the type of legislation this Article references as “protectionist”, an analysis of the Berry Amendment is provided. The Berry Amendment to the Buy American Act, as set out at 10 U.S.C. §§ 2533a, “Requirement to buy certain articles from American sources; exceptions,” mandates domestic preference.

The essence of the Berry Amendment is set out at 10 U.S.C. §§ 2533a(a), “Requirement,” with “Covered Items” at 10 U.S.C. §§ 2533a(b). The exceptions follow at 10 U.S.C. §§ 2533a(c-h). The basic requirement at paragraph (a) states:

Except as provided in subsections (c) through (h), funds appropriated or otherwise available to the Department of Defense may not be used for the procurement of an item described in

⁸ The Balance of Payments Program (DFARS 225.3) restrictions are similar to those in the Buy American Act, which apply only within the United States. It was originally intended to lend relief to the balance of payment deficits that resulted from “efforts to restore economies devastated during World War II” as well as for the national security of the United States and allies. Federal Acquisition Regulation; Revisions to Balance of Payments Program, 48 C.F.R. § 25 (2000).

⁹ U.S. Department of Commerce, Bureau of Economic Analysis, Trade in Goods and Services, April 2004, *available at* <http://www.bea.doc.gov/bea/di/home/trade.htm>.

¹⁰ The Berry/Hefner Amendment overrides any exception to the Buy American Act and requires certain items purchased for the military, including tents, military uniforms, and other military supplies be comprised of one-hundred percent domestic content. CITE

subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States.

The “covered items” listed in Section B comprise three categories, to include (1) an article or item; (2) specialty metals, including stainless steel flatware; and (3) hand or measuring tools. The “articles or items” in paragraph (1) include:

(A) food, (B) clothing, (C) tents, tarpaulins, or covers; (D) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).¹¹

The statute provides some exceptions. The availability exception allows a determination from the Secretary of Defense or the secretary of the military department concerned that the quality and quantity of the article needed cannot be satisfied “as and when needed at United States market prices.”¹² The other exceptions include Certain Procurements outside the United States,¹³ Specialty Metals and Chemical Warfare Protective Clothing,¹⁴ Certain Foods,¹⁵ Commissaries, Exchanges, and Other Nonappropriated Fund Instrumentalities,¹⁶ and Small Purchases.¹⁷

¹¹ 10 U.S.C. § 2533a(1)(a)-(e)

¹² 10 U.S.C. §§ 2533a(c).

¹³ 10 U.S.C. §§ 2533a(d)

¹⁴ 10 U.S.C. §§ 2533a(e)

¹⁵ 10 U.S.C. §§ 2533a(f)

¹⁶ 10 U.S.C. §§ 2533a(g)

¹⁷ 10 U.S.C. §§ 2533a(h)

The issue of domestic preference is most certainly a political one.¹⁸ The House of Representatives in the 108th Congress recently considered H.R. 4567, concerning the Department of Homeland Security Appropriations Act for 2005. A motion was offered by Representative Donald Manzullo (R-Illinois) to make the provisions of the Berry Amendment applicable to the Department of Homeland Security. Currently, the Berry Amendment applies only to procurements made by the Department of Defense. The motion was defeated 5 to 6.¹⁹

Amendments to the Buy American Act to address the U.S. domestic source requirements for U.S. weapons and other defense technologies are currently under consideration.²⁰

Domestic preference is actually a form of “protectionism.” Protectionism is the “policy of protecting domestic industries against foreign competition by means of tariffs, subsidies, import quotas, or other handicaps placed on imports.”²¹ Adam Smith cautioned against such a course of action as long ago as 1776, in his timeless, An Inquiry

¹⁸ Frank Chodorov, *Out of Step*, (Devin-Adair, 1962); reprinted at <http://www.fee.org/vnews.php?nid=4368>.

¹⁹ House Report 108-545 available at [http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(hr545\)](http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(hr545)).

²⁰ Senator Mark Dayton, D-Minn., is considering such an amendment to the Senate bill, with concern for industrial base protection. Daily Briefing, *Base Closings, ‘Buy American’ Disputes lie ahead in Defense Debates*, GOV’T EXEC, (May 17, 2004), available at <http://www.govexec.com/dailyfed/0504/051704cdam1.htm>.

²¹ “Protectionism.” *Britannica Concise Encyclopedia*. 2004. Encyclopedia Britannica Premium Service. 1 June 2004 <http://www.britannica.com/ebc/article?eu=401323>.

Into the Nature and Causes of the Wealth of Nations.²² Smith argued compellingly that manufacturers and merchants in search of a monopoly propagated this flawed theory that imposes restraints on the importation of goods, for their own financial gain.²³

Many leading economic experts have long agreed with the assessment that domestic preference is a flawed theory.²⁴ Murray N. Rothbard, a prolific writer on liberties and economics, wrote 25 books and thousands of articles during his 45 year career.²⁵ His view of the importance of international trade and the desirability of avoiding protectionism was

²² Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, (London: Methuen and Co., Ltd., ed. Edwin Cannan, 1904) (1776). Fifth edition, available at <http://www.econlib.org/library/Smith/smWN.html>

²³ “That it was the spirit of monopoly which originally both invented and propagated this doctrine cannot be doubted; and they who first taught it were by no means such fools as they who believed it. In every country it always is and must be the interest of the great body of the people to buy whatever they want of those who sell it cheapest. The proposition is so very manifest that it seems ridiculous to take any pains to prove it; nor could it ever have been called in question had not the interested sophistry of merchants and manufacturers confounded the common sense of mankind. Their interest is, in this respect, directly opposite to that of the great body of the people. As it is the interest of the freemen of a corporation to hinder the rest of the inhabitants from employing any workmen but themselves, so it is the interest of the merchants and manufacturers of every country to secure to themselves the monopoly of the home market.” Book IV, Chapter III, “Of the extraordinary Restraints upon the Importation of Goods of almost all Kinds, from those Countries with which the Balance is supposed to be Disadvantageous”, Part II, “Of the Unreasonableness of those extraordinary Restraints upon other Principles” at IV.3.30. available at <http://www.econlib.org/library/Smith/smWN.html>.

²⁴ For light reading on protectionism, see Frederic Bastiat (1801-1850), *Economic Sophisms*, “A Petition From the Manufacturers of Candles, Tapers, Lanterns, sticks, Street Lamps, Snuffers, and Extinguishers, and from Producers of Tallow, Oil, Resin, Alcohol, and Generally of Everything Connected with Lighting” (1846), Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., trans. and ed. Arthur Goddard, 1996. First published 1845, in French, available at <http://bastiat.org/en/petition.html>.

²⁵ Ludwig von Mises Institute, Biography of “Murray N. Rothbard: A Legacy of Liberty” (1926-1995), available at <http://www.mises.org/mnr.asp>.

The market economy is one vast latticework throughout the world, in which each individual, each region, each country, produces what he or it is best at, most relatively efficient in, and exchanges that product for the goods and services of others.²⁶

Rothbard believed that “Coerced restraints on trade – such as protectionism-cripple, hobble, destroy trade, the source of life and prosperity.”²⁷ As one “unravel[s] the tangled web of protectionist argument,” he encourages a focus on the fact that protectionism means force in restraint of trade.²⁸ He encourages students of the subject to keep an eye on what ultimately happens to the consumer in a protectionist scenario.

Jagdish Bhagwati, Arthur Lehman Professor of Economics and professor of political science at Columbia University stated, “The fact that trade protection hurts the economy of the country that imposes it is one of the oldest but still most startling insights economics has to offer.”²⁹ Professor Bhagwati, also having served as the economic policy adviser to the director general of the General Agreement on Tariffs and Trade, argues two clear costs of protectionism. One, the costs incurred when a country forces its consumers

²⁶ Murray N. Rothbard, “Protectionism and the Destruction of Prosperity”, *available at <http://www.mises.org/fullarticle.asp?title=Protectionism&month=1>*.

²⁷ Murray N. Rothbard, “Protectionism and the Destruction of Prosperity”, *available at <http://www.mises.org/fullarticle.asp?title=Protectionism&month=1>*.

²⁸ Murray N. Rothbard, “Protectionism and the Destruction of Prosperity”, *available at <http://www.mises.org/fullarticle.asp?title=Protectionism&month=1>*.

²⁹ Jagdish Bhagwati, “Protectionism”, *The Concise Encyclopedia of Economics and Liberty*, <http://www.econlib.org/library/Enc/Protectionism.html>.

to “forgo cheap imports” and, two, the lobbying costs incurred by those inefficient markets seeking protection.³⁰

Based on a study of history and economics, and as will be demonstrated herein, the United States federal government procurement system will not benefit from protectionism. Rather, the policy behind the procurement system should be based on the more forward-looking concept and better business decision of globalization and free trade between nations. Globalization has been defined as the “integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology.”³¹ The definition adopted by the Defense Science Board Task Force on Globalization and Security is

the integration of the political, economic and cultural activities of geographically and/or nationally separated peoples –is not a discernible event or challenge, is not new, but is accelerating. More importantly, globalization is largely irresistible. Thus, globalization is not a policy option, but a fact to which policy makers must adapt.³²

Any procurement system other than one of globalization will be economically less advantageous to the United States. At this point, it is useful to understand why some of our current policy supports protectionism.

³⁰ Jagdish Bhagwati, “Protectionism”, The Concise Encyclopedia of Economics and Liberty, <http://www.econlib.org/library/Enc/Protectionism.html>.

³¹ Jagdish Bhagwati, In Defense of Globalization, Oxford University Press, A Council on Foreign Relations Book, 2004

³² Final Report of the Defense Science Board Task Force on Globalization and Security, Office of the Under Secretary of Defense for Acquisition and Technology, December 1999, available at <http://www.acq.osd.mil/dsb/globalization.pdf>.

B Why Adopt a Protectionist Policy?

1 National Security

The first two reasons for adopting a protectionist policy, national security and the need to maintain a domestic industrial base, are intertwined. Those who argue in favor of a protectionist policy many times advocate their position based on the premise that in order to maintain the necessary advantage for defense of our nation, the United States must have a reliable and ready domestic industrial base. As Adam Smith wrote in 1776,

If any particular manufacture was necessary, indeed, for the defence of the society, it might not always be prudent to depend upon our neighbours for the supply; and if such manufacture could not otherwise be supported at home, it might not be unreasonable that all the other branches of industry should be taxed in order to support it. The bounties upon the exportation of British-made sail-cloth and British-made gun-powder may, perhaps, both be vindicated upon this principle.³³

At times, Congress calls upon executive agencies to investigate whether national security is potentially at risk due to imports of certain goods. The steel industry has been the center of protectionism and controversy for years due to its beleaguered situation. In 2001, a request was made for an investigation and a report was prepared examining the effects of the imports of iron ore and semi-finished steel on national security.³⁴ The

³³Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book IV, Chapter 5, "Of Bounties," IV.5.36, (London: Methuen and Co., Ltd., ed. Edwin Cannan, 1904) (1776). Fifth edition, *available at* <http://www.econlib.org/library/Smith/smWN.html>.

³⁴ The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, U.S. Department of Commerce, Bureau of Export Administration, October 2001, available at <http://www.bis.doc.gov/defenseindustrialbaseprograms/OSIES/2-3-2-Reports/IronNSteelReport010902.pdf>. The request for this investigation was made by Representative James Oberstar (D-Minnesota) and Representative Bart Stupak (D-Michigan).

Secretary of Commerce's finding was that there was no threat to national security due to imports of iron ore and semi-finished steel.³⁵ Specifically, it found the Department of Defense has established domestic preferences that apply to all the steel used in weapons systems. The Department of Commerce found two ways that iron ore and semi-finished steel could threaten national security. One was is by too much domestic dependence on foreign suppliers that might prove unreliable, and the second was if foreign imports threatened the capability of U.S. industry to satisfy national security requirements. The Department of Commerce found neither of these to be real threats.³⁶

2 Preservation of the Domestic Industrial Base

The current position of the Department of Defense concerning the development of procurement sources specifically in the area of advanced military technology cuts against protectionism and cautions against a lone domestic industrial base. It relies instead on globalization. This position requires competition in the global marketplace among the United States and its allies.

In an annual report mandated by 10 U.S.C. § 2504, the Secretary of Defense must inform the Committee on Armed Services of both the Senate and the House of

³⁵ The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, U.S. Department of Commerce, Bureau of Export Administration, October 2001, available at <http://www.bis.doc.gov/defenseindustrialbaseprograms/OSIES/2-3-2-Reports/IronNSteelReport010902.pdf>.

³⁶ The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, U.S. Department of Commerce, Bureau of Export Administration, October 2001, available at <http://www.bis.doc.gov/defenseindustrialbaseprograms/OSIES/2-3-2-Reports/IronNSteelReport010902.pdf>.

Representatives, *inter alia*, of its assessment of “concerns regarding technological and industrial capabilities of the national technology and industrial base.”³⁷

As part of the study, each of the military departments were required to evaluate whether the current industrial base is adequate to meet the demands of warfighter requirements, based on the Joint Staff’s Functional Concepts and Joint Operational Architecture.³⁸ Deficiencies were found to exist in some areas. The Department of Defense is working to develop and execute strategies to resolve the matters.³⁹ One way for the Department of Defense to develop or improve industrial capabilities is through Title III of the Defense Production Act (DPA).⁴⁰ Title III of the DPA provides a means to “create, maintain, modernize, or expand domestic production capability for technology items, components, and industrial resources essential for national defense when such a production capability would not otherwise be available.”⁴¹ Title III serves to stimulate

³⁷ 10 U.S.C. § 2504.

³⁸ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

³⁹ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

⁴⁰ 50 U.S.C. App. 2061 *et.seq.*

⁴¹ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

investment in key technological areas, reduce U.S. need to for foreign supplies, and places the U.S. in a more competitive position with regard to its defense industrial base.⁴²

In the February 2004, “Annual Industrial Capabilities Report to Congress,” the subject of “international suppliers” was addressed.⁴³ Specifically, domestic industrial capabilities were compared with foreign capabilities because the Department of Defense will use suppliers other than those in the U.S., “when such use offers comparative advantages in performance, cost, schedule, or coalition warfighting.” This, of course, must be consistent with national security requirements.⁴⁴ The Department of Defense and “many friendly governments” have reciprocal procurement agreements in place. These agreements allow the friendly countries to cast aside their laws that require buying products nationally. As a result, the friendly countries’ industries compete on the same level as national industries as potential suppliers for the procurement.⁴⁵

The comparison made between the U.S. and foreign technology and industrial capabilities is useful to track U.S. progress in relation to goals established by leadership

⁴² Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

⁴³ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

⁴⁴ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

⁴⁵ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

that the U.S. “be ahead” or “be way ahead” of potential adversaries.⁴⁶ Carefully monitoring this situation aids in reducing the risk associated with using foreign suppliers for critical warfighting needs.⁴⁷

A distinction has been made between the “domestic industrial base” and the “defense industrial base.” Some argue vehemently that the United States can no longer afford to maintain strictly a “defense industrial base.” Those people argue that the defense needs should be satisfied by the domestic industrial base. Whether or not that is entirely realistic, given particular defense needs, is up for debate. Perhaps a single allied industrial base, *infra*, is an idea that merits further contemplation.⁴⁸

Senator John McCain (R-Arizona) recently added a provision to the Armed Services Committee’s bill to study what effect foreign trade has on the defense industrial base.⁴⁹ This is a cautious approach.⁵⁰ From the Committee’s perspective, “much of the disagreement over the current direction of policies for the national technology and

⁴⁶ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

⁴⁷ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf

⁴⁸ Lt Colonel Shannon Sullivan, USAF, “Globalized Security: An Allied Industrial Base for the 21st Century,” Acquisition Review Quarterly, Defense Acquisition University, Spring 2002, *available at* <http://www.dau.mil/pubs/arq/2002arq/SulliSP2.pdf>.

⁴⁹ Daily Briefing, *Base Closings, ‘Buy American’ Disputes lie ahead in Defense Debates*, GOV’T EXEC, (May 17, 2004), *available at* <http://www.govexec.com/dailyfed/0504/051704cdam1.htm>.

⁵⁰ Senator McCain drew criticism in 1996 when he offered an amendment to the defense authorization bill during the Senate Armed Services Committee markup. The amendment sought to grant the Secretary of Defense authority to waive small part Buy American requirements for foreign countries who bought ships from the United States. Tom

industrial base serving national defense stems from the lack of a comprehensive understanding about what is taking place within the base especially at the lower tiers.”⁵¹

It has been argued that “rather than focusing on the maintenance of a surge or mobilization capability within the increasingly small and less relevant DIB [Defense Industrial Base], defense planners should consider how DoD can tap into the commercial industrial base in time of crisis or war.”⁵²

Fear of disruption of the United States industrial base is a valid concern. That fear, along with the risk of substituting DoD-fabricated parts for commercially produced parts were recently cited as reasons for not going forward with a government-owned commercially operated (GOCO) semi-conductor facility.⁵³

What is clear is that an industrial base of some sort must be available for the Department of Defense and its requirements. It remains to be seen in the fairly near future how politicians will structure policy, in turn impacting what the industrial base looks like.

Schoenberg, “Losing Bearings,” American Lawyer Newspapers Group, Inc., New Jersey Law Journal, August 12, 1996.

⁵¹ Commission on the Future of the National Technology and Industrial Base, Report No. 108-260, Committee on Armed Services for the Senate, Subtitle D – Industrial Base Matters; Commission on the Future of the national technology and industrial base (sec. 841) May 11, 2004.

⁵² James R. Schlesinger, Murray Weidenbaum, “Defense Restructuring and the Future of the U.S. Defense Industrial Base, Center for Strategic & International Studies, Washington, D.C., March 1998, available at <http://csis.org/polmil/dibreport.html>.

⁵³ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, available at http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

3 Risk of Advanced Technology Falling Into the Hands of Adversaries

Especially poignant since September 11, 2001, is the argument against global competition in the market for advanced military technology. The concern is the greater potential for United States technology to fall into hands of the adversary. Therefore, any globalization of such sensitive procurements must be limited to close allies for the sake of national security. At the same time, and in a circular fashion, “the future of U.S. national security depends on the U.S. globalizing its defense procurement practices.”⁵⁴

4 Prevent Loss Of Jobs and Add Jobs in the U.S.

The Washington Post recently published an article on the effects of defense spending due to the war effort in Iraq. The spending is resulting in pumping millions of dollars into small or dying towns.⁵⁵ In particular, the textile and apparel industry, which lost 50,000 jobs last year, was up 500 jobs in the first quarter of 2004.⁵⁶ Since civilian

⁵⁴ Robert A. Borich, Jr., *Globalization of the U.S. Defense Industrial Base: Developing Procurement Sources Abroad Through Exporting Advanced Military Technology*, 31 Pub. Cont. L.J. 623, 626-626 Summer, 2002) citing The Honorable James S. Gansler, Speech at World Aerospace and Air Transport Conference (July 20, 2000), in FINANCIAL TIMES 2000; E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), available at http://www.acq.osd.mil/usd/new_speeches/france.doc (last visited June 5, 2004).

⁵⁵ Jonathan Weisman, “Across America, War Means Jobs; Defense Spending Pumps New Life Into Small or Dying Towns, Washington Post, May 11, 2004, at A01.

⁵⁶ The bad news for the apparel industry is that the number of U.S. jobs has decreased from 900,000 in 1990 to currently less than 300,000. What Accounts for the Decline in Manufacturing Employment?, Economic and Budget Issue Brief, Congressional Budget

textile demand is met mostly through imports, the “Buy American” military demands are the likely driving force behind the net job gain.⁵⁷ When Congress waives “Buy American” requirements for certain foreign countries, small business manufacturers and workers face the threat or reality of the loss of their jobs.

In November 2003, Congresswoman Rosa DeLauro (D-Connecticut) expressed concern to her constituents that in the last two years the United States has lost over 2.6 million manufacturing jobs, many of those in Connecticut.⁵⁸ “We need to be doing all we can in Congress to help our manufacturers keep jobs here in the United States.”⁵⁹ Representative DeLauro suggests tightening up the Buy American Act and increasing domestic content requirements will help restore the United States manufacturing base.⁶⁰

Office, February 18, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5078&sequence=0>

⁵⁷ Jonathan Weisman, “Across America, War Means Jobs; Defense Spending Pumps New Life Into Small or Dying Towns, Washington Post, May 11, 2004, at A01.

⁵⁸ “DeLauro Meets with Local Manufacturers and Presents Plan to Save Connecticut Jobs”, Press Release, November 17, 2003, *available at* http://www.house.gov/delauro/press/2003/ct_jobs_plan_11_17_03.html. Many jobs have been lost in Representative DeLauro’s home state. Her corresponding protectionist approach demonstrates why Congress is so often inclined to adopt protectionist policies. Such policies appeal to the local population and local special interest groups. Protectionist policies approach problems of manufacturing, for example, in a short-sighted manner, not as the result of any in-depth understanding of the long-term impact on U.S. foreign trade practices.

⁵⁹ “DeLauro Meets with Local Manufacturers and Presents Plan to Save Connecticut Jobs”, Press Release, November 17, 2003, *available at* http://www.house.gov/delauro/press/2003/ct_jobs_plan_11_17_03.html.

⁶⁰ “DeLauro Meets with Local Manufacturers and Presents Plan to Save Connecticut Jobs”, Press Release, November 17, 2003, *available at* http://www.house.gov/delauro/press/2003/ct_jobs_plan_11_17_03.html.

She also strongly opposed offset contracts, which she believes takes jobs away from Americans and wreaks havoc with the U.S. industrial base.⁶¹

It is undisputed the manufacturing industry in the United States has lost a record number of jobs in the last several years. The Congressional Budget Office (CBO) published figures showing that three million manufacturing industry jobs were lost from July 2000 to January 2004.⁶² The CBO blames the recession in part for the loss of jobs, but is of the opinion there will not be as many manufacturing jobs in the future as there once were.⁶³ Some experts say the next U.S. industry to lose jobs will be the service industry.⁶⁴

⁶¹ “DeLauro Meets with Local Manufacturers and Presents Plan to Save Connecticut Jobs”, Press Release, November 17, 2003, *available at* http://www.house.gov/delauro/press/2003/ct_jobs_plan_11_17_03.html.

⁶² What Accounts for the Decline in Manufacturing Employment?, Economic and Budget Issue Brief, Congressional Budget Office, February 18, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5078&sequence=0>

⁶³ Reasons advanced for such belief are: 1) growth in productivity has outpaced growth in demand; 2) consumers are spending more on services than on goods; 3) countries paying lower wages are competing with the U.S.; and, 4) manufacturers are using contract and temporary laborers. What Accounts for the Decline in Manufacturing Employment?, Economic and Budget Issue Brief, Congressional Budget Office, February 18, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5078&sequence=0>

⁶⁴ Lael Brainard and Robert E. Litan, “Offshoring” Service Jobs: Bane or Boon and What to Do?, Policy Brief #132—2004, *available at* <http://www.brook.edu/printme.wbs?page=/comm/policybriefs/pb132.htm>

Even so, as will be seen *infra*, it is not unexpected that the expansion of trade will have such an effect as nations produce the “goods and services they can produce efficiently relevant to other countries.”⁶⁵

C “Protectionism” distinguished from “Economic Isolationism”

Protectionism is the advantage given to the home nation industry or service provider, with the possibility that a foreign firm could still be awarded the contract. The foreign firm stands at a disadvantage but nonetheless can still compete for the procurement. The level of protectionism built into the procurement policy will directly impact the chances for award of the contract to a competitive bidder. Conversely, a policy of economic isolationism generally slams the doors of the home nation on the rest of the world in terms of foreign businesses being allowed to compete for the procurement.

Isolationism is the natural state of man, inherent in his makeup.⁶⁶ It has been said that free trade is natural, but protectionism is political.⁶⁷ Economic isolationism might consist of tariffs, quotas, embargoes, or other means in which the government can

⁶⁵ What Accounts for the Decline in Manufacturing Employment?, Economic and Budget Issue Brief, Congressional Budget Office, February 18, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5078&sequence=0>

⁶⁶ Frank Chodorov, *Out of Step*, (Devin-Adair, 1962); reprinted at <http://www.fee.org/vnews.php?nid=4368>.

⁶⁷ Frank Chodorov, *Out of Step*, (Devin-Adair, 1962); reprinted at <http://www.fee.org/vnews.php?nid=4368>.

interfere with international trade.⁶⁸ An economically isolated country chooses a course of isolation over free trade or even protectionism. “Economic isolationists” were recently described by Representative David Dreier (R-California), as “people who want to pull up the drawbridge and shift back to the era of little or no trade.”⁶⁹

In the United States, we are currently experiencing some forms of protectionism, but the policies do not rise to the level of isolationism. The United States has however pursued policies favoring isolationism in the past. Economic isolationism was recently denounced by President Bush.⁷⁰ His stated position is the United States must reject economic isolationism. President Bush believes the United States cannot expect to have a growing economy if it is isolated from the world.⁷¹ With regard to trade barriers, he stated:

You hear a lot of talk about trade and the way to deal with certain problems is to wall us off from the world. I think it's wrong. I think it's bad policy.... Rather than building barriers, we need to break down barriers so that the American entrepreneur and American companies can sell American products on every continent in the world. The best policy to make sure jobs stay here at home and somebody can find a job, is to open

⁶⁸ Frank Chodorov, Out of Step, (Devin-Adair, 1962); reprinted at <http://www.fee.org/vnews.php?nid=4368>.

⁶⁹ Paul Blustein, The Washington Post, “Trade Chief, Democrats Spar Over ‘Isolationist’ Label, March 12, 2004; page E01. *available at* <http://www.washingtonpost.com/ac2/wp-dyn/A51968-2004Mar11>.

⁷⁰ President Bush stated, “The old policy of economic isolationism is a recipe for economic disaster. America has moved beyond that tired, defeatist mind-set, and we’re not going back.” Office of the Press Secretary, The White House, Jobs and Economic Growth, “Opening New Markets for America’s Workers”, March 10, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/03/print/20040310-1.html>.

⁷¹ President Bush, Comments to the United States Hispanic Chamber of Commerce, “Opening New Markets for America’s Small Business”, Washington, D.C., March 24, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/03/print/20040324-18.html>.

up markets for U.S. products. See, pessimistic people say, we can't compete, therefore, let's throw up the walls. Optimistic folks say, we can compete with anybody just so long as the playing field is even. And good policy says, let's make the playing field even.⁷²

Economists have also rejected the utility of economic isolationism. Classic economic theory of man's material desires and the impact of isolation was presented by Frederic Bastiat, a great contributor to the field of economics and advocate of free trade, in Economic Harmonies.⁷³ His conclusion was that a single man does not have enough time to produce all the items it takes to satisfy his material desires. Bastiat said,

If we examine successively the material objects that serve to satisfy our wants, we shall recognize that all or nearly all of them require for their production more time, a greater part of our lives, than we can expend without renewing our strength, that is to say, without satisfying our wants.⁷⁴

Bastiat also theorized about man existing in a state of isolation and how such circumstances would require his expenditure of all his energies on survival, which in turn would prohibit him from making progress on any other fronts:

Let us go back and imagine a man in the state of isolation reduced to earning a living by hunting. It is easy to see that if, every evening, he ate

⁷² President Bush, Comments to the United States Hispanic Chamber of Commerce, "Opening New Markets for America's Small Business", Washington, D.C., March 24, 2004, available at <http://www.whitehouse.gov/news/releases/2004/03/print/20040324-18.html>.

⁷³ Frederic Bastiat, Economic Harmonies, Introduction by Dean Russell, Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., trans. W. Hayden Boyers, ed. George B. de Huszar, 1996, available at <http://www.econlib.org/library/Bastiat/basHar0.html#Introduction,%20by%20Dean%20Russell>.

⁷⁴ Frederic Bastiat, Economic Harmonies, Chapter 3, para. 3.100, "Man's Wants", Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., trans. W. Hayden Boyers, ed. George B. de Huszar, 1996, available at <http://www.econlib.org/library/Bastiat/basHar3.html#Chapter%203>.

all the game he had caught during the day, he would never be able to undertake any other type of work, such as building a hut or repairing his weapons; all progress would be out of the question for him.⁷⁵

If progress is a goal, economic isolationism is not the answer. History teaches valuable lessons from which we should carry something away. For example, although it is not clear whether The Great Depression was caused by economic isolationism or made worse by it, the U.S. followed a foreign policy of economic isolationism in the 1920's and 1930's. Economically, many people suffered greatly as a result, both in the United States and abroad.⁷⁶ To keep from repeating such a perilous misstep, the United States should steer clear of a policy of economic isolationism.

D Current Laws and Legislation Concerned with Domestic Preference

Congress proposed legislation for the FY 2004 Defense National Authorization Act which would have required major defense acquisitions to use only machine tools made in the U.S. It also proposed legislation to direct the Defense Department to buy weapons and equipment with at least 65 percent U.S. content, which is 15 percent more than the

⁷⁵ Frederic Bastiat, Economic Harmonies, Chapter 3, para. 3.102, "Man's Wants", Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., trans. W. Hayden Boyers, ed. George B. de Huszar, 1996, *available at* <http://www.econlib.org/library/Bastiat/basHar3.html#Chapter%203>.

⁷⁶ U.S. Commerce Secretary Donald L. Evans, "Remarks to Manufacturing Tomorrow in Minneapolis, Minneapolis, (as prepared for delivery), April 5, 2004, *available at* http://www.commerce.gov/opa/press/2004_Releases/April/5_Evans_ManufTomorrow_re_m.htm; The White House Home Page, Past Presidents, Calvin Coolidge, *available at* <http://www.whitehouse.gov/history/presidents/cc30.html>.

current requirement.⁷⁷ Ultimately, Congress did not include the domestic preference requirements, but did require studies and reports on the matter.

The proposed legislation for the FY 2005 Defense National Authorization Act includes language concerning the defense industrial base and language preferential to domestic sources. Specifically, it addresses “Defense Trade Reciprocity,”⁷⁸ and includes “Amendments to Domestic Source Requirements,”⁷⁹ a “Grant Program for Defense Contractors to Implement Strategies to Avoid Outsourcing of Jobs,”⁸⁰ and Preference for Domestic Freight Forwarding Services.⁸¹

The stated policy with regard to Defense Trade Reciprocity is “that procurement regulations used in the conduct of trade in defense articles and defense services shall be

⁷⁷ Amy Svitak, “Negotiations Under Way on Defense ‘Buy American’ Deal,” *Congress Daily*, September 12, 2003, available at <http://www.govexec.com/dailyfed/0903/091203cdam1.htm>. Secretary of Defense Donald Rumsfeld indicated the limitations would have too damaging of an effect and would recommend President Bush veto the legislation if Congress were to present it the President.

⁷⁸ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 811, Defense Trade Reciprocity, available at <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁷⁹ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 812, Amendments to Domestic Source Requirements, available at <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁸⁰ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 814, Grant Program for Defense Contractors to Implement Strategies to Avoid Outsourcing of Jobs, available at <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁸¹ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 815, Preference for Domestic Freight Forwarding Services, available at <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

based on the principle of *fair trade and reciprocity* consistent with United States national security, including the need to ensure comprehensive manufacturing capability in the United States defense industrial base for military system essential items.”⁸² (Emphasis added). The essence of this provision is the eventual elimination of offset agreements in defense trade, with the near-term goal of gaining an equal amount of reciprocity under current offset agreements.

The proposed Section 812, “Amendments to Domestic Source Requirements,” proposes a notice requirement when “covered items”⁸³ will be procured under either the “Availability Exception”⁸⁴ or the “Exception for Specialty Metals and Chemical Warfare Protective Clothing.”⁸⁵ The notice requirement is that

- (1) Funds appropriated or otherwise available to the Department of Defense may not be used to enter into a contract to procure an item described in subsection (b) pursuant to an exception set forth in subsection (c) or (e) until--
 - (A) a notification of the intent to apply such exception is submitted to Congress and posted on the website maintained by the General Services Administration known as FedBizOpps.gov (or any successor site); and
 - (B) a period of 15 days has expired after the date on which such notification is so submitted and published.

⁸² H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 811(a), Defense Trade Reciprocity (Amending 10 U.S.C. §2532a, “Defense Trade Reciprocity”) *available at* <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁸³ 10 U.S.C. §2533a(b)

⁸⁴ 10 U.S.C. §2533a(c)

⁸⁵ 10 U.S.C. §2533a(d)

With regard to the exception for procurements outside the United States in support of combat operations,⁸⁶ proposed paragraph (2) of Section 812 would require

In any case in which the Secretary of Defense or the Secretary of the military department concerned intends to apply or applies the exception set forth in subsection (d) (1), the Secretary concerned shall submit to Congress a notification of such intent or such application during the period beginning six months before the date of application of such exception and ending six months after the date of application of such exception.

Although the current Administration does not oppose the proposed domestic source requirements for the FY 2005 Defense National Authorization Act, the Administration has voiced its opposition to some of the specific rules associated with the reporting requirements for the chemical warfare protective clothing exception⁸⁷ and an amendment to the word “clothing”⁸⁸ in the text of the Berry Amendment.

Further protective legislation is found in H.R.4200. Section 814 would provide grants for qualifying defense contractors who employ strategies such as cost-cutting

⁸⁶ 10 U.S.C. §2533a(d)(1)

⁸⁷ The White House position is that the notification requirement for 10 U.S.C. 2533a(e), the exception for chemical warfare protective clothing, is too burdensome. The Administration contends “Delaying purchases of chemical warfare protective clothing for such notification would severely impact the warfighter in situations of unusual and compelling urgency.” Statement of Administration Policy, H.R. 4200 – National Defense Authorization Act for Fiscal Year 2005, (House), Representatives Hunter (R) CA and Skelton (D)(MO), May 19, 2004, *available at* <http://www.whitehouse.gov/omb/legislative/sap/108-2/hr4200sap-h.pdf>.

⁸⁸ The Administration further opposes the expansion of the broad statutory domestic preference language in Section 812(b) for textile products. Section 812(b) would amend the sole word “clothing” as a covered item at 10 U.S.C. § 2533a(b)(1)(B) to state “clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof)”.

measures, retraining programs, technology development, and plant upgrades to avoid the outsourcing of jobs.⁸⁹

A new preference for “Domestic Freight Forwarding Services” is found at Section 815. It would give a preference to “any freight forwarder that...is owned and controlled by citizens of the United States and offers services at fair and reasonable rates.”⁹⁰ The services covered under this Section apply to “transportation services to, from, or within, Iraq or Afghanistan, and warehousing, logistics, or other similar services performed within Iraq or Afghanistan.”⁹¹

These examples go to prove that there are many protectionist measures in U.S. legislation. If the U.S. is to move out of the protectionist quagmire, these preferences must be forced out of our laws and legislation.

⁸⁹ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 814, “Grant Program for Defense Contractors to Implement Strategies to Avoid Outsourcing of Jobs,” *available at* <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁹⁰ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 815(a), “Preference for Domestic Freight Forwarding Services,” *available at* <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

⁹¹ H.R. 4200, “National Defense Authorization Act for Fiscal Year 2005”, Subtitle B—United States Defense Industrial Base Provisions, Section 815(b), “Preference for Domestic Freight Forwarding Services,” *available at* <http://thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108SDwFxp:e456701:>

E Current Examples of Protectionism

1 Protectionism Advocated by Politicians

There is a disturbing trend in the federal government to pursue a policy of domestic preference. Based on the economy and historical patterns however it is not surprising. After the technology “bubble burst” in 1999 and the terrorist attacks of 2001, the U.S. economy undeniably suffered.

U.S. workers do not want to see their jobs go overseas to foreign workers who earn lower wages. The political representatives of those U.S. workers want to appease their voters. As a result, politicians support protectionism and promise to keep jobs at home. What they may fail to understand is this course of action may ultimately cost the U.S. more in terms of jobs in the long run.⁹² The observation has been made that since the time of World War II, there is an increasing trend in the legislature to generally shift away from protectionism with the exception of a few areas, such as textiles and steel.⁹³ Even assuming there has been a shift away from protectionism since that time, a brief perusal of the daily newspapers shows protectionism is still on the mind of the politicians and their constituents.

⁹² For example, it is estimated that the Reagan Steel “Voluntary Export Restraint” (VER) saved 16,900 jobs in the steel industry, but that 52,400 people lost their jobs in industries that utilized steel. Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int’l L. & Econ.* 539, at 558.

⁹³ Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1 at 3, Winter 2004.

2 Iraqi Reconstruction Contracts

Federal government procurement is currently experiencing protectionism in the Iraqi Reconstruction and relief contracts, totaling a whopping \$18.6 billion dollars.⁹⁴ On December 5, 2003, Paul Wolfowitz, Deputy Secretary of Defense, issued a Memorandum (hereinafter “ Wolfowitz Memo”), which limited the contracts to sources from the United States, Iraq, coalition partners, and force contributing nations to the occupation in Iraq.⁹⁵ The Wolfowitz Memo takes the form of a Determination and Findings pursuant to 41 U.S.C. § 253(c)(7) and 10 U.S.C. § 2304(c)(7), implemented by FAR 6.302-7, to limit competition.

The Iraqi reconstruction contracts consist of 24 construction and services Indefinite Delivery/ Indefinite Quantity contracts, one overall program management contract to oversee the total effort, and one Indefinite Delivery/ Indefinite Quantity contract to equip the new Iraqi army. The two attachments to the Wolfowitz Memo included a list of all the prime contracts and the countries whose firms were allowed to compete for the work.

These contracts are paid for by U.S. taxpayers. Public Law 108-106 appropriated funds from the Iraqi Relief and Reconstruction Fund (IRRF) to “upgrade and rebuild the

⁹⁴The funds were appropriated to the President pursuant to H.R. 3289 under the Emergency Supplemental Appropriations Act for Defense and For the Reconstruction of Iraq and Afghanistan, 2004, Title II, Iraq and Afghanistan Reconstruction and International Assistance, Chapter 2, Iraq Relief and Reconstruction Fund, January 7, 2003, *available at* <http://www.congress.gov/cgi-bin/query/C?c108:/temp/~c108AIYsU3>.

⁹⁵ Text of the Wolfowitz Memo is *available at* http://www.usembasy.it/file2003_12/alia/a3121005.htm “Iraq Reconstruction Contracts for Firms from Supporting Nations, December 5, 2003”.

electrical sector, public works and water, military courts and borders, building, housing and health, transportation, communications, and oil infrastructure.”

Although competition for these Reconstruction contracts is limited, within the limitation, the competitive procedures in FAR 6.102 are required.

The limited competition for contracts was justified under FAR 6.302-7 as “necessary for the protection of the essential security interests of the United States.” The Determination and Findings continued, “Limiting competition for prime contracts will encourage the expansion of international cooperation in Iraq and in future efforts.”⁹⁶

The response from the Office of the U. S Trade Representative, Spokesman Richard Mills was, “Purchases on behalf of the Coalition Provisional Authority (CPA) are not covered by international trade procurement obligations because the CPA is not an entity subject to these obligations. Accordingly, there is no need to invoke the ‘essential security’ exception to our trade obligations.”

Nevertheless, competition for the contracts was limited.

3 Department of Homeland Security Prohibition on Contracts with Expatriates

In 2002, legislation was passed which prohibits the Department of Homeland Security (DHS) from entering into contracts with corporate expatriates.⁹⁷ The statute is aimed at keeping DHS contracts from American businesses that move their operations

⁹⁶ Text of the Wolfowitz Memo is available at http://www.usembasy.it/file2003_12/alia/a3121005.htm “Iraq Reconstruction Contracts for Firms from Supporting Nations, December 5, 2003”.

⁹⁷ Prohibition on Contracts with Corporate Expatriates, 6 U.S.C.S. § 395 (2004).

overseas to avoid paying U.S. income tax. Those businesses in turn argue that in order to stay competitive in the global market, they need to incorporate at least part of their business outside the United States.

The statutory prohibition is against contracting with “a foreign incorporated entity which is treated as an inverted domestic corporation under subsection (b).”⁹⁸ An inversion, in simple terms, is when a corporate entity, established in another country, buys an established American company.⁹⁹

The statutory language defines an inverted domestic corporation as one that meets all three of the following criteria. It is an inverted domestic corporation if “pursuant to a plan (or series of related transactions)—

- (1) the entity completes [after Nov. 25, 2002], the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership;

The first requirement then, is that the corporation in the foreign country essentially buys out the domestic business.

- (2) after the acquisition at least 80 percent of the stock (by vote or value) of the entity is held--
 - (A) in the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; or
 - (B) in the case of an acquisition with respect to a domestic partnership, by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership; and

⁹⁸ Prohibition on Contracts with Corporate Expatriates, 6 U.S.C.S. § 395 (2004).

⁹⁹ John S. Barry, Corporate Inversions: An Introduction to the Issue and FAQ, May 30, 2002, available at <http://taxfoundation.org/reinforcement.html>

The second requirement is that once the domestic business is purchased by the corporation in the foreign country, 80% of the stock is held by former shareholders or former partners, because of their holdings in the domestic corporation or partnership.

- (3) the expanded affiliated group which after the acquisition includes the entity does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expanded affiliated group.

Finally, if the American business that was purchased by the corporation in the foreign country does not have “substantial business activities” in that foreign country when it is compared to the new expanded affiliated group, then it is considered an inverted domestic corporation.

Some tax gurus argue the answer does not lie in denying U.S. companies certain contracts. Rather, they take the position that the U.S. corporate tax code is mind-numbing and too great a compliance burden for U.S. companies competing in the global market. As a result, companies are forced to incorporate elsewhere. A better approach than denying contracts may be to reform the tax code that is driving businesses away.¹⁰⁰ At least for the time being, U.S. companies are stuck with legislation prohibiting DHS contracts with corporate expatriates.

¹⁰⁰ John S. Barry, Corporate Inversions: An Introduction to the Issue and FAQ, May 30, 2002, available at <http://taxfoundation.org/reinforcement.html>

4 Enforcement of Berry Amendment and Buy American Act

The Bureau of Industry and Security (BIS), Department of Commerce, was tasked to report to Congress on several topics, including whether the Department of Defense was effectively enforcing the requirements under the Berry Amendment and the Buy American Act.¹⁰¹ BIS conducted a survey, asking firms in the particular industries whether they were of the opinion that the Berry Amendment and the Buy American Act were being effectively enforced by the Department of Defense.¹⁰²

Of those 185 firms that sell items to DoD which are covered under the Berry Amendment and responded to the survey, 68% (125 firms) said the Berry Amendment restrictions were being effectively enforced by DoD, and 32% said it was not being effectively enforced.¹⁰³ Of those 184 firms that sell items to DoD which are covered under the Buy American Act and responded to the survey, 72% (132 firms) said the Buy American Act restrictions were being effectively enforced by DoD, and 28% said the

¹⁰¹ The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm> The charter was specifically to conduct a "comprehensive study on the health, competitiveness, and the contribution of the U.S. textile and apparel industry to the U.S. economy and in particular to the U.S. armed forces."

¹⁰² The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, Chapter V, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm>

¹⁰³ The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, Chapter V, Table V-1, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm>

restrictions were not being effectively enforced.¹⁰⁴ When asked for specific instances of ineffective enforcement, firms were for the most part hard pressed to provide examples. Eleven of the firms responding to the Buy American Act survey were able to cite examples of garments made overseas and use of foreign raw materials in the manufacture of items made for military use.¹⁰⁵

One troubling aspect of this study is the response given by the majority of firms when they were interviewed by BIS. The firms indicated that “because of extremely strong foreign competition in the commercial textile and apparel industries, U.S. defense suppliers are increasingly dependent on regulations such as the Berry Amendment for their survival.”¹⁰⁶ This response is troubling because of the economic principle of comparative cost advantage. That principle basically says that if nations are going to benefit from free trade, Country A should specialize in producing and trading the good which it produces the best and Country B should concentrate on producing and trading the good which it is “least worse” at producing.¹⁰⁷

¹⁰⁴ The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, Chapter V, Table V-1, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm>

¹⁰⁵ The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, Chapter V, para. B.2, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm>

¹⁰⁶ The U.S. Textile and Apparel Industries: An Industrial Base Assessment, Report to Congress, Chapter V, para. C.1, October 2003, *available at* <http://www.bxa.doc.gov/DefenseIndustrialBasePrograms/OSIES/DefMarketResearchRpts/TextileExecSum03.htm>

¹⁰⁷ Steve Suranovic, Associate Professor of Economics and International Affairs, The George Washington University, Washington, D.C., *The Theory of Comparative Advantage, Overview, Chapter 40, available at* <http://internationalecon.com/v1.0/ch40/40c000.html>

If the U.S. textile and apparel industries are just squeaking by based on protectionist measures, then the U.S. is not producing and trading what it produces best. There is an economic efficiency problem when a majority of firms who conduct business with DoD in the textile and apparel industry state in no uncertain terms that their businesses survive due to protectionist measures. The business question is whether American taxpayers really want to fund that economic inefficiency.

III Protectionist Policy is Ineffective

A Previous U.S. Experiences with Protectionism

1 The Berry Amendment and the Army's Berets

As discussed *supra*, the Berry Amendment restricts Department of Defense procurement of specified goods to those produced in the United States, with a few exceptions. When DoD wants to procure clothing, for example, the clothing must have been produced in the U.S. In October 2000, as part of the ongoing Army transformation, Army Chief of Staff General Eric Shinseki determined all Army soldiers would wear the beret as part of their uniform by June 2001.¹⁰⁸ The problem encountered was with such a short procurement window, no American apparel companies were able to compete for the contracts.¹⁰⁹

¹⁰⁸ “CSA Sends – The Army Black Beret”, *available at* <http://www.army.mil/features/beret/beret.htm>.

¹⁰⁹ Press Release of Senator Sessions [Senator Jeff Sessions (R-AL)] – “Sessions Unveils Critical GAO Report on Pentagon Black Beret Controversy” *available at* <http://sessions.senate.gov/pressapp/record.cfm?id=180171>.

The Defense Logistics Agency (DLA), the agency responsible for the Army's procurement of the berets, therefore by-passed normal contracting procedures and waived the requirements of the Berry Amendment.¹¹⁰ The contracts were ultimately awarded to companies in China and other third-world countries.¹¹¹ Despite DLA's efforts, the berets were nonetheless delivered late. As of August 2001, just over 750,000 black berets had been delivered.¹¹² By December 2001, about 2.1 million berets had been received by the Department of Defense, with another 1.6 million yet to be delivered.¹¹³

As a result of the botched Army beret procurement and the public outcry about DoD unnecessarily skirting the Berry Amendment requirements, DoD decided not to allow the Under Secretary of Defense (Acquisition, Technology and Logistics) and the Service Secretaries to delegate their authority to approve Berry Amendment waivers.¹¹⁴

This procurement demonstrates how protectionist policy was intended to protect American workers but failed to do so. It shows how the legal requirement to buy American products was waived with apparently little difficulty. The question remains

¹¹⁰ General Accounting Office, Report dated December 2001, Author: Jeff Sessions. Abstract, available at <http://www.stormingmedia.us/90/9027/A902793.html>.

¹¹¹ Press Release of Senator Sessions [Senator Jeff Sessions (R-AL)] – “Sessions Unveils Critical GAO Report on Pentagon Black Beret Controversy” available at <http://sessions.senate.gov/pressapp/record.cfm?id=180171>.

¹¹² The Clothesline, August 2001, Director of Clothing and Textiles, United States Army, available at <http://ct.dscp.dla.mil/ClothesLine/08line.html>.

¹¹³ General Accounting Office, Report dated December 2001, Author: Jeff Sessions. Abstract available at <http://www.stormingmedia.us/90/9027/A902793.html>.

¹¹⁴ General Accounting Office, Report dated December 2001, Author: Jeff Sessions. Abstract available at <http://www.stormingmedia.us/90/9027/A902793.html>.

whether a Berry Amendment waiver with a less than compelling justification in a not-so-high-profile procurement would have ever resulted in any action whatsoever.

2 High Priced Bananas

The United States banana industry felt the stinging bite of protectionism when the European Union imposed a quota system on banana imports in the 1990's.¹¹⁵ This protectionist measure of implementing a quota system was used by the European Union to favor the particular banana growers and producers with which their Union has historical ties.¹¹⁶

As background, trade in bananas exceeds 2.5 billion tons annually, with the United States and the European Union accounting for two-thirds of all imports.¹¹⁷ The banana industry is an oligopoly with five dominant growers, including Chiquita, Dole,

¹¹⁵ “USTR Kantor Makes Preliminary Decision that EU Banana Regime Harms U.S. Interests; Initiates Section 301 Investigation of Colombian and Costa Rican Banana Export Practices,” Public Affairs Office, United States Mission to the European Union, January 9, 1995, available at <http://www.ustr.gov/releases/1995/01/95-04>.

¹¹⁶ Briefing Note on the EU/US Banana Dispute, History of the Dispute, Department of Trade and Industry, UK, June 2000, available at http://www.bananalink.org.uk/trade_war/trade_war_main3.htm#ref.

¹¹⁷ “Oligopolies, Fair Trade, Bananas and Protectionism”, January 19, 2004, available at http://www.bized.ac.uk/current/mind/2003_4/190104.htm. Biz/ed is a provider of internet-based learning materials for the economics and business education community based at the Institute for Learning and Research Technology, University of Bristol, United Kingdom.

Del Monte, Noboa and Fyffes.¹¹⁸ There is no question that the banana industry workers out in the field are exploited.¹¹⁹

The main point however, is that Europe has close ties with former colonies in African, Caribbean and Pacific countries, or “ACP” countries, some of which are large producers of bananas.¹²⁰ The European Union designed a new plan in 1993 to encourage banana trade with ACP countries under very favorable terms.¹²¹ Bananas produced in Central and South America are referred to as “dollar bananas” because countries in the Americas are influenced to a great extent by the American dollar. Further, U.S. based companies such as Chiquita and Dole are closely tied to the banana producers in Central and South America.¹²²

¹¹⁸ “Oligopolies, Fair Trade, Bananas and Protectionism”, January 19, 2004, available at http://www.bized.ac.uk/current/mind/2003_4/190104.htm. Biz/ed is a provider of internet-based learning materials for the economics and business education community based at the Institute for Learning and Research Technology, University of Bristol, United Kingdom.

¹¹⁹ “Oligopolies, Fair Trade, Bananas and Protectionism”, January 19, 2004, available at http://www.bized.ac.uk/current/mind/2003_4/190104.htm. Biz/ed is a provider of internet-based learning materials for the economics and business education community based at the Institute for Learning and Research Technology, University of Bristol, United Kingdom.

¹²⁰ Briefing Note on the EU/US Banana Dispute, History of the Dispute, Department of Trade and Industry, UK, June 2000, available at http://www.bananalink.org.uk/trade_war/trade_war_main3.htm#ref.

¹²¹ Briefing Note on the EU/US Banana Dispute, History of the Dispute, Department of Trade and Industry, UK, June 2000, available at http://www.bananalink.org.uk/trade_war/trade_war_main3.htm#ref.

¹²² “Oligopolies, Fair Trade, Bananas and Protectionism”, January 19, 2004, available at http://www.bized.ac.uk/current/mind/2003_4/190104.htm. Biz/ed is a provider of internet-based learning materials for the economics and business education community based at the Institute for Learning and Research Technology, University of Bristol, United Kingdom.

Unfortunately, the European Union attempts at protectionism worked to their detriment, resulting in a six-year-long dispute at the World Trade Organization by the United States and Chiquita. The claims were that the European Union's practices were discriminatory and inconsistent with World Trade Organization rules.¹²³ A stated concern of the European Union in defense of its actions was to "level the playing field" since the costs for ACP countries to produce bananas is sometimes twice as much as "dollar banana" countries due to differing terrain and facilities.¹²⁴

In 2000, The World Trade Organization found the European Union's quota system to be illegal in that it discriminated against United States banana companies located in Central America. An agreement was finally reached in 2001, but not before the United States took what was characterized as retaliatory measures. Those measures included the imposition of World Trade Organization-authorized retaliatory duties in the amount of \$191 million dollars imposed on European Union products.¹²⁵

¹²³ "U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors", Office of the United States Trade Representative, July 1, 2001, *available at* <http://www.useu.be/Categories/Bananas/BananaUSSanctionsEUJuly1.html>.

¹²⁴ "Oligopolies, Fair Trade, Bananas and Protectionism", January 19, 2004, *available at* http://www.bized.ac.uk/current/mind/2003_4/190104.htm. Biz/ed is a provider of internet-based learning materials for the economics and business education community based at the Institute for Learning and Research Technology, University of Bristol, United Kingdom.

¹²⁵ "U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors", Office of the United States Trade Representative, July 1, 2001, *available at* <http://www.useu.be/Categories/Bananas/BananaUSSanctionsEUJuly1.html>.

The agreement requires the European Union to move to a tariff-only system, replacing the complex quota system, by not later than 2006.¹²⁶ The tariffs will not apply to ACP countries, with other banana producers paying approximately \$90 on each ton of imported bananas.¹²⁷ Some financial analysts are of the opinion that the banana wars may not be over. The European Union seems to be considering tariffs between two and four times those already imposed on banana producers from Central and South America.¹²⁸ The reader will recall this banana quandary is the result of the presumably well-intentioned implementation of a protectionist policy.

3 U.S. Steel Jobs Protected by Essentially Closed Market

Due to the dire situation the U.S. steel industry found itself in after years of economic crisis, and pressure from the steel industry for action, President Bush requested the United States International Trade Commission (ITC) review the situation. Steel companies had been declaring bankruptcy, thousands of workers were being laid off, and the market was flooded with cheap imports.¹²⁹ The ITC recommended raising tariffs by

¹²⁶ “Banana Imports: Commission proposes to Open Tariff-Only Negotiations,” EU Business, June 2, 2004, *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/707&format=PDF&aged=0&language=EN&guiLanguage=en>.

¹²⁷ “EU Executive Moves to End Banana Trade Dispute”, EU Business, June 2, 2004, *available at* <http://www.eubusiness.com/afp/040602110542.c0n2jayb>.

¹²⁸ Brent Borrell, “No one Can Afford a New Banana Drama”, Financial Times, April 20, 2004, USA Edition 1, London, England, *available at* <http://www.intecon.com.au/pdf/FT%20article.pdf>.

¹²⁹ “Bush Backs Steel Tariffs”, March 5, 2002, *available at* <http://www.cnn.com/2002/BUSINESS/03/05/steel/index.html?related>.

up to 40% in December 2001, which the European Union “forcefully condemned.”¹³⁰ Sanctions of up to 30% were implemented in March 2002,¹³¹ “in part to give a troubled and bankruptcy-ridden domestic steel industry breathing space to restructure.”¹³² The World Trade Organization declared the tariffs illegal in November 2003.¹³³

Although the tariffs were intended to be in place for three years¹³⁴, President Bush was forced to remove them sixteen months early.¹³⁵ The threat from the European Union was sanctions that would amount to a trade war.¹³⁶ Upon removal of the tariffs, the Administration commented that as a result of the protectionist measures, the “domestic

¹³⁰ “EU Forcefully Condemns US International Trade Commission’s Recommendation to Virtually Close US Steel Market to Imports from Rest of the World”, Brussels, Belgium, December 10, 2001, *available at* http://trade-info.cec.eu.int/doclib/docs/2004/april/tradoc_115491.pdf.

¹³¹ “EU Draws up Steel Sanctions List,” March 23, 2002, *available at* <http://www.cnn.com/2002/WORLD/europe/03/23/steel>.

¹³² “U.S. Steel Chief Blasts Lifting of Sanctions,” December 4, 2003, *available at* <http://www.forbes.com/2003/12/04/1204automarketscan08.html>.

¹³³ WTO Appeals Panel: U.S. Steel Duties Illegal, November 10, 2003, *available at* <http://www.foxnews.com/story/0,2933,102637,00.html>

¹³⁴ Matthew J.S. Graham, “Special Protection is Not the Solution to Save Domestic Steel: A Critique of the Bush Steel Initiative” 12. Minn. J. Global Trade 199 (Winter, 2003), for a criticism of President’s Bush’s three-part Steel Initiative.

¹³⁵ “Bush Administration Lifts Steel Tariffs; EU in Turn Lifts Threat of Trade Sanctions,” December 4, 2003, *available at* <http://www.cnn.com/2003/ALLPOLITICS/12/04/elec04.prez.bush.steel/index.html>.

¹³⁶ “Bush Administration Lifts Steel Tariffs; EU in Turn Lifts Threat of Trade Sanctions,” December 4, 2003, *available at* <http://www.cnn.com/2003/ALLPOLITICS/12/04/elec04.prez.bush.steel/index.html>.

steel industry is more efficient, more competitive, and more profitable. Exports have increased and workers' pensions have been saved.”¹³⁷

In November 2003, the World Trade Organization appeals panel upheld the findings from the WTO July 2003 report.¹³⁸ The conclusion was the United States did not show the steel industry was harmed by a “sudden flood of cheap imports.”¹³⁹ That standard was required under WTO rules before tariffs could have been legally imposed.¹⁴⁰ Once again, protectionism found itself at the root of what many would consider an unfavorable policy decision.

B Arguments against Protectionist Policy

1 Buyer Potentially Deprived of Timely, Quality Products at Reasonable Price

It is certainly no surprise that buyers who procure items and end users who benefit from those items expect them to be of good quality, delivered on time and available for purchase at a reasonable price. There are a variety of ways the government demonstrates the importance of these factors.

¹³⁷ “Bush Administration Lifts Steel Tariffs; EU in Turn Lifts Threat of Trade Sanctions,” December 4, 2003, *available at* <http://www.cnn.com/2003/ALLPOLITICS/12/04/elec04.prez.bush.steel/index.html>.

¹³⁸ WTO Appeals Panel: U.S. Steel Duties Illegal, November 10, 2003, *available at* <http://www.foxnews.com/story/0,2933,102637,00.html>

¹³⁹ WTO Appeals Panel: U.S. Steel Duties Illegal, November 10, 2003, *available at* <http://www.foxnews.com/story/0,2933,102637,00.html>

¹⁴⁰ WTO Appeals Panel: U.S. Steel Duties Illegal, November 10, 2003, *available at* <http://www.foxnews.com/story/0,2933,102637,00.html>

Past performance scores in competitive awards pursuant to Federal Acquisition Regulation (FAR) Part 15 can be enhanced by a showing of commitment to customer satisfaction, adherence to contract schedules, and timely delivery of goods.¹⁴¹

The government considers quality important enough that it has standard FAR clauses that impose a greater duty on the contractor to perform inspections geared toward the insurance of quality.¹⁴² If the government is forced to settle for items that do not rise to the level of quality the government desires however, due to a protectionist measure, that protectionist measure is detrimental to the procurement system.

Both case law and FAR clauses demonstrate the importance of contractual items being delivered on time. The government indeed has recourse for goods delivered late. A late delivery might result in no consequence to the contractor or he might bear the risk of both the impact of time and cost, depending on the reason for the delay.¹⁴³ Nonetheless, it may be the case that delivery could be timely made by a foreign company, but due to protectionist measures, that company cannot compete for the procurement. The result may be a company in the United States might be the only choice the procurement official has, and that company cannot deliver in accordance with the government's desired schedule.

¹⁴¹ Sunita Subramanian, "The Implications of the FAR Rewrite For Meaningful Discussions of Past Performance," 26 Pub. Cont. L. J. 445, Spring 1997, citing *Daun-Ray Casuals, Inc.*, Comp. Gen. B-255217.3, July 6, 1994, 94-2 CPD P 42, at 4.

¹⁴² See, for example, FAR 52.246-2, Inspection of Supplies- Fixed Price, FAR 52.246-4, Inspection of Services- Fixed Price, FAR 52.246-2, Inspection of Construction.

¹⁴³ John Cibinic, Jr., and Ralph C. Nash, Jr., *Administration of Government Contracts*, Ch. 6, Delays, 3rd Ed., 1995, The George Washington University.

Finally, as will be shown in the next section, the price the government ends up paying a domestic firm as a result of protectionist policy is not likely to be as competitive a price as if there were free trade. In addition to FAR clauses and case law, government officials and experts echo the desire for procured items to be timely, quality goods at a fair and reasonable price.

David Nash, Director, Program Management Office, Coalition Provisional Authority, recently briefed the status of the Iraqi Reconstruction contracts. One of the points he was forceful to make was "...often I meet with Iraqi contractors, and I tell them it's the bottom line: no—we want quality construction, we want it on time, and no corruption."¹⁴⁴

Dr. Steven Kelman, former Administrator of the U.S. Office of Federal Procurement Policy and currently the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Public Management at Harvard University's John F. Kennedy School of Government has commented on the importance of these issues as well. In an article he authored concerning multiple award task and delivery order contracts and the resulting competitive pressure, he confirmed the benefit that such an arrangement can bestow on the government. It can "bring about better prices, higher quality, and more timely delivery of goods and services."¹⁴⁵

¹⁴⁴ "David Nash Briefs Reporters on the Progress of Reconstruction Efforts In Iraq," May 24, 2004, *available at* <http://www.defenselink.mil/photos/May2004/040524-D-9880W-029.html>.

¹⁴⁵ Dr. Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 *Pub. Cont. L. J.* 249 (Winter 1998).

If there is a protectionist policy in the procurement process, chances are the buyer won't be able to buy exactly what he wants. Or, it's almost guaranteed to cost more. Or, it might not get there on time....

2 Economically, It's Inefficient

The fact that protectionism is overall economically a bad policy is a point that has been made throughout this article. It is ironic that protectionism is commonly implemented to achieve a better domestic economic situation when precisely the opposite is likely to result. The effects of protectionism may not be entirely intuitive. In fact, the Department of Defense has been accused of having “no loyalty to U.S. producers” when U.S. manufacturers perceived foreign countries might be awarded American contracts.¹⁴⁶

Economic efficiency can be defined as “a relationship between ends and means.”¹⁴⁷ If a situation is inefficient, the desired ends could “be achieved with less means, or ... the means employed could produce more of the ends desired.”¹⁴⁸ *Less* and *more* refer to less and more value.¹⁴⁹ Some protectionists argue there are causes other

¹⁴⁶ Tom Schoenberg, “Losing Bearings,” American Lawyer Newspapers Group, Inc., New Jersey Law Journal, August 12, 1996.

¹⁴⁷ Paul Heyne, “Efficiency”, The Concise Encyclopedia of Economics and Liberty, available at <http://www.econlib.org/library/Enc/Efficiency.html>.

¹⁴⁸ Paul Heyne, “Efficiency”, The Concise Encyclopedia of Economics and Liberty, available at <http://www.econlib.org/library/Enc/Efficiency.html>.

¹⁴⁹ Paul Heyne, “Efficiency”, The Concise Encyclopedia of Economics and Liberty, available at <http://www.econlib.org/library/Enc/Efficiency.html>.

than utilitarian economic efficiency to be considered in whether protectionist measures are beneficial.¹⁵⁰ This article however is concerned with purely economic efficiency.

Some very compelling economic arguments against protectionism include:

a) products cost more; b) it costs too much to save the jobs and more jobs are lost than are saved by the process; and, c) the government is subsidizing inefficiency, which in turn impacts economic growth and everyone's standard of living.¹⁵¹

Products cost more. The reason is companies are not forced to be competitive due to the subsidies they receive. Therefore, they can be less frugal, efficient, and business-smart and still make sales at higher prices due to lack of international competition.

It costs too much to save the jobs and more jobs are lost than saved. For example, one study showed that in order for an American to keep a textile job in 1990, under protectionist measures, the American taxpayers actually paid between \$50,000 and \$134,686.¹⁵² As cited *infra*, while 16,900 jobs were saved under the Voluntary Restraint Program in 1984 in the steel industry, 52,400 jobs in industries that used steel were

¹⁵⁰ Karsi Kish, Protectionism to Promote Culture: South Korea and Japan, A Case Study, 22 U. Pa. J. Int'l Econ L. 153 at 154, Spring 2001 (advocating the protectionism is valid to preserve culture) and Ari Afilalo, Not in My Backyard: Power and Protectionism in U.S. Trade Policy, 34 N.Y.U. J. Int'l L. & Pol. 749 at 752 (arguing that U.S. boycott of foreign products based on environmental grounds constitutes protectionism).

¹⁵¹ Robert W. McGee, An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe, 26 Geo. Wash. J. Int'l L. & Econ. 539, at 542, 545-546, 549-554.

¹⁵² Robert W. McGee, An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe, 26 Geo. Wash. J. Int'l L. & Econ. 539, at 556-557, citing William R. Cline, The Future of World Trade in Textiles and Apparel 205 (rev. ed. 1990).

lost.¹⁵³ That is because the net effect of protectionism is lost jobs.¹⁵⁴ Outsourcing of U.S. jobs is what economists have accepted as a “logical extension of free trade.”¹⁵⁵

The government is subsidizing inefficiency. Simply put, when the government protects industries that have trouble competing with more efficient foreign companies, those inefficient industries are being subsidized.¹⁵⁶ Directly related to economic efficiency are the concepts of economic growth and standard of living, which should be of interest to the average American worker.¹⁵⁷

With all these reasons why protectionism is economically efficient, some still do not agree that free trade is the best policy. A divergent view point has been offered; that is, trade liberalization may not be a better policy for the majority.¹⁵⁸ Professor Thomas argues that free trade could be expected to lead to lower wages generally in the United

¹⁵³ Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int'l L. & Econ.* 539, at 545, citing Arthur T. Denzau, *How Import Restraints Reduce Employment 2* (Center for the Study of Am. Business Pub. No. 80, 1987).

¹⁵⁴ Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int'l L. & Econ.* 539, at 545.

¹⁵⁵ Event Summary: *Preparing America to Compete Globally: A Forum on Offshoring*, The Brookings Institution, March 3, 2004, *available at* <http://www.brook.edu/printme.wbs?page=/comm/op-ed/20040303offshoring.htm>.

¹⁵⁶ Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int'l L. & Econ.* 539, at 545.

¹⁵⁷ Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int'l L. & Econ.* 539, at 545.

¹⁵⁸ Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1, Winter 2004.

States.¹⁵⁹ This is so due to the factor-price equalization theorem, which says international trade will cause equalization in land, labor and capital factors among the nations.¹⁶⁰

Since the U.S. has very expensive labor in comparison to other nations, the median wages for labor could be expected to decline, with higher echelon wages increasing.¹⁶¹ In order for trade liberalization to be favorable for the majority, there would have to be some redistribution of wealth, with those who own capital reinvesting in a sort of “trickle-down” economics.¹⁶²

This argument does not go so far as to say protectionism results in a better economy. It just makes the point that if the benefits from liberal trade are going to be enjoyed by the majority of people, the government must do something to redistribute the wealth. Redistribution of wealth acquired from liberalized trade may be a desirable course of action. Some advocate however that any type of redistribution of wealth amounts to a moral wrong due to the state acting outside its legitimate function.¹⁶³ If given a choice between redistributed wealth as a result of free trade or protectionism with

¹⁵⁹ Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1 at 20, Winter 2004.

¹⁶⁰ Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1 at 18, Winter 2004, citing Dominick Salvatore, *International Economics* 7, at 124(6th ed. 1998).

¹⁶¹ Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1 at 18, Winter 2004.

¹⁶² Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 *Harv. J. on Legis.* 1 at 18, Winter 2004.

¹⁶³ Robert W. McGee, *An Economic Analysis of Protectionism in the United States With Implications for International Trade in Europe*, 26 *Geo. Wash. J. Int'l L. & Econ.* 539, at 542, citing Robert Nozick, *Anarchy, State and Utopia* 272 (1974).

its many unattractive attributes, it is this author's contention the U.S. is further ahead pursuing free trade.

3 Lack of Competition in U.S.

A rather extreme argument has been advanced that if the United States were to open up the limit on foreigners as prime contractors, the increased competition would lower costs and the quality of defense articles would improve.¹⁶⁴ Obviously, such measures would have to be calculated and conservative to protect national security.¹⁶⁵ There is however something to be said for some amount of competition in the defense industry, which has been historically protected, principally for reasons of national security. For a more detailed review of the issue of national security risks and globalization, see section IV (A)(2), *infra*.

The main concern with a lack of competition in the United States is whether, with all the defense mergers and consolidations in the not-too-distant past, there will continue to be innovation and competition sufficient to keep the United States in the forefront of advanced technology in weaponry and other defense articles. Over the past 20 years,

¹⁶⁴ Ivan Eland, "Reforming a Defense Industry Rife with Socialism, Industrial Policy, and Excessive Regulation, Policy Analysis No. 421, December 20, 2001, *available at* <http://www.cato.org/pubs/pas/pa-421es.html>.

¹⁶⁵ Some argue that laws such as the "Buy American Act" do not serve national security interests but instead are a ruse for protecting the interests of a small number of particular business firms. James R. Schlesinger, Murray Weidenbaum, "Defense Restructuring and the Future of the U.S. Defense Industrial Base, Center for Strategic & International Studies, Washington, D.C., March 1998, *available at* <http://csis.org/polmil/dibreport.html>.

more than 75 United States defense specialized firms/divisions merged into five major defense firms, or prime contractors.¹⁶⁶

If the Europeans are allowed to compete in our defense procurements, it will encourage the innovation and competition necessary to keep the industry on the cutting edge. Europeans are specifically mentioned because they have been staunch U.S. allies. Further, the United States cannot afford to have its advanced technology to fall into the hands of the adversaries (see section II B,3, *supra*).

4 Problems with Interoperability

One important reason to abandon protectionism and embrace globalization in government procurement is due to military interoperability, which is especially critical in times of armed conflict. Interoperability is defined as “the ability of two or more systems or components to exchange data and use information.”¹⁶⁷ The Department of Defense has stated its desire for interoperability between allies:

in order to provide the best capability to the warfighter, the Department wants to promote interoperability with its allies and take full advantage of the benefits offered by access to the most innovative, efficient, and competitive suppliers—worldwide. It also wants to promote consistency and fairness in dealing with its allies and trading partners while assuring

¹⁶⁶ Lt Colonel John D. Driessnack, USAF and Major David R. King, Ph.D., USAF, “An Initial Look at Technology and Institutions on Defense Industry Consolidation,” Defense Acquisition Review Journal, Defense Acquisition University, Jan-Apr 2004, citing Commission on the Future of the Aerospace Industry, 2002, available at <http://www.dau.mil/pubs/arq/2004arq/Driessnack.pdf>.

¹⁶⁷ Lt Colonel John A. Hamilton, Jr., USA, Capt Jerome D. Rosen, USAF, and Maj Paul A. Summers, USAF, “An Interoperability Road Map for C4ISR Legacy Systems,” Acquisition Review Quarterly, Defense Acquisition University, Winter 2002, citing Institute of Electrical and Electronics Engineers, Inc., standard 610.12-1990 (standard glossary of software engineer terminology, p.42) Piscataway, NJ, available at <http://www.dau.mil/pubs/arq/2002arq/Hamilton.pdf>

that the U.S. defense industrial base is sufficient to meet its most critical defense needs.¹⁶⁸

Military interoperability is a complicated objective to achieve. As military experts explain, just because systems can exchange all the data does not mean those systems will be interoperable. “If the speed of the exchange is too slow to support the operational requirements, then the so-called interoperability will not be of operational value.”¹⁶⁹

One concept that would resolve both the issue of interoperability and the nearly-cost prohibitive venture of maintaining a defense industrial base is to create an allied industrial base. This would consist of “managing integrated industrial resources, relaxing trade controls, and cooperating in program development.”¹⁷⁰

If the concept of a single allied industrial base seems too radical, at a minimum, federal government procurement should be moving toward a free trade approach and leaving protectionism as part of a history lesson that has educated us. The way for federal procurement to move toward free trade is through policy and regulation. It is therefore up to the policy makers to step up to the challenge.

¹⁶⁸ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

¹⁶⁹ Lt Colonel John A. Hamilton, Jr., USA, Capt Jerome D. Rosen, USAF, and Maj Paul A. Summers, USAF, “An Interoperability Road Map for C4ISR Legacy Systems,” Acquisition Review Quarterly, Defense Acquisition University, Winter 2002, *available at* <http://www.dau.mil/pubs/arq/2002arq/Hamilton.pdf>

¹⁷⁰ Lt Colonel Shannon Sullivan, USAF, “Globalized Security: An Allied Industrial Base for the 21st Century,” Acquisition Review Quarterly, Defense Acquisition University, Spring 2002, *available at* <http://www.dau.mil/pubs/arq/2002arq/SulliSP2.pdf>.

With more globalized trade, our European allies can begin to compete for U.S. contracts, which will in turn create interoperability because it is more efficient to design articles compatible with both U.S. and European systems.

5 Several Million American's Jobs Depend on Exports

To continue down the path of protectionism could mean not only the jobs of the 6.4 million people employed by foreign companies in America. It could also cost as many as 10 million American jobs that exist due to exports.¹⁷¹ The World Trade Organization reports that 12 million people in the United States have jobs that are due to exports.¹⁷² Although there is disparity in the numbers, it is clear that many, many households in the United States rely on international trade.

6 Foreign Markets May Deny Access to American Companies

If the United States were to stay the course pursuing a policy of domestic preference, contrary to its overall best interest, it could expect similar treatment in return. That could result in American companies being denied access to foreign markets.

¹⁷¹ U.S. Commerce Secretary Donald L. Evans, "Remarks to Manufacturing Tomorrow in Minneapolis, Minneapolis, (as prepared for delivery), April 5, 2004, *available at* http://www.commerce.gov/opa/press/2004_Releases/April/5_Evans_ManufTomorrow_re m.htm.

¹⁷² Ten Benefits of the WTO Trading System, No. 7., Trade Stimulates Economic Growth, and that Can Be Good News for Employment, *available at* http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b07_e.htm.

French defense executives have considered such action. French aerospace sales dropped two percent in 2002, with sales in the civilian sector dropping five percent.¹⁷³ The French discovered the defense industry imported 10.5 billion euros of defense products from the U.S., while they exported only 700 million euros worth of defense goods to the U.S.¹⁷⁴ The French aerospace industry association, “GIFAS”¹⁷⁵ suggested something along the lines of a “Buy European” campaign, similar to the “Buy American” program as a possible solution.¹⁷⁶ The significance is the French were looking domestically for an answer to a resolution for their situation. The hope is they will look toward an arrangement with allies, along with the rest of Europe to be better prepared for the coalition battles to come.

¹⁷³ Aerospace Daily, “French Defense Executives Urge Action to Curb U.S. Arms Exports,” March 12, 2003.

¹⁷⁴ Aerospace Daily, “French Defense Executives Urge Action to Curb U.S. Arms Exports,” March 12, 2003.

¹⁷⁵ “GIFAS” or, Groupement Des Industries Francaises Aeronautiques et Spatiales, is the French aerospace industries association. Their website indicates they have over 220 members, ranging from prime contractors and system suppliers to small specialist companies. See http://www.gifas.asso.fr/metasite/site.cil?clang=2,csite=1129&default_noeuddepart=13533,clang=2

¹⁷⁶ Aerospace Daily, “French Defense Executives Urge Action to Curb U.S. Arms Exports,” March 12, 2003.

IV Globalized Federal Government Procurement

A It's a Good Business Decision

1 Prices Will be More Competitive

A study cited recently by the Brookings Institution showed that the net cost savings of moving some jobs offshore is about 50 percent (wage differences were sometimes 80 to 90 percent higher in the U.S., but costs of communication and coordination were factored into the equation).¹⁷⁷ That in turn can result in a substantial savings, some of which can be expected to be passed on to the consumer.

In fact, the consumer is expected to see savings in the apparel industry sometime after January 2005. That is when quotas that have been in place for decades on apparel imports from low cost manufacturing countries are set to expire.¹⁷⁸ It is projected that one-third of quota savings will be realized by the consumer while another third will be kept as profit and the last third will be reinvested in improving products.¹⁷⁹ This is a good example of how the disappearance of protectionism helps the buyer obtain goods at a better price.

¹⁷⁷ Lael Brainard and Robert E. Litan, "Offshoring" Service Jobs: Bane or Boon and What to Do?, Policy Brief #132—2004, citing study provided by consulting firm of McKinsey and Company, *available at* <http://www.brook.edu/printme.wbs?page=/comm/policybriefs/pb132.htm>

¹⁷⁸ Stephanie Anderson Forest in Dallas, with Nanette Byrnes in New York and bureau reports, "When Quotas End, Who Gets the Goodies?" July 12, 2004, *available at* http://www.businessweek.com/magazine/content/04_28/b3891075_mz011.htm.

¹⁷⁹ Stephanie Anderson Forest in Dallas, with Nanette Byrnes in New York and bureau reports, "When Quotas End, Who Gets the Goodies?" July 12, 2004, *available at* http://www.businessweek.com/magazine/content/04_28/b3891075_mz011.htm.

RAND conducted research on U.S. Government policy and the effects of globalization on the defense aerospace industry in 2001.¹⁸⁰ The study concluded, *inter alia*, that one of the benefits of globalization is lower costs as a result of exports. Exports lower costs of new equipment through economies of scale and reduce the cost of older equipment by keeping production lines open for replacement parts.¹⁸¹

One of the benefits of international competition is that U.S. firms will not become complacent, but will stay innovative and competitive. This was one of the conclusions reached by The Office of the Deputy Under Secretary of Defense for Industrial Policy, in its “Study on Impact of Foreign Sourcing of Systems,” in January 2004. The report declared successful the use of foreign sources for procurement of defense articles and reported no detrimental impact on long-range readiness. Long-range readiness was one factor initially prompting the study. “Recent operations in Iraq raised concerns that foreign nations might restrict or preclude shipments of defense articles for DoD applications during internationally unpopular engagements.”¹⁸²

¹⁸⁰ Mark A. Lorell, Julia Lowell, Richard M. Moore, Victoria Greenfield, Katia Vlachos, *Going Global? U.S. Government Policy and the Defense Aerospace Industry*, RAND, 2002, available at <http://www.rand.org/publications/MR/MR1537/MR1537.sum.pdf>

¹⁸¹ Mark A. Lorell, Julia Lowell, Richard M. Moore, Victoria Greenfield, Katia Vlachos, *Going Global? U.S. Government Policy and the Defense Aerospace Industry*, RAND, 2002, available at <http://www.rand.org/publications/MR/MR1537/MR1537.sum.pdf>

¹⁸² Office of the Deputy Under Secretary of Defense for Industrial Policy, “Study on Impact of Foreign Sourcing of Systems,” January 2004, available at http://www.acq.osd.mil/ip/docs/study_impact_foreign_sourcing_of_systems.pdf.

Several benefits of using foreign sources were cited in the study, including the benefit of foreign competition. The study showed the use of non-U.S. suppliers had the following benefits:

- (1) permits the Department to *access state-of-the-art technologies and industrial capabilities*;
- (2) promotes *consistency and fairness* in dealing with U.S. allies;
- (3) encourages development of *interoperable weapons systems*;
- (4) encourages development of mutually beneficial industrial linkages that *enhance U.S. industry's access to global markets*; and
- (5) exposes U.S. industry to *international competition*, helping to ensure that U.S. firms remain innovative and efficient.¹⁸³

(Emphasis added).

2 Quality of Goods and Services Will Improve

“This new national security era, with its new international security relationships, demands innovation, practical near-term responses, and efficient resourcing. That’s where international industrial partnerships can, and must, play a crucial role.”¹⁸⁴

The innovation and competition from a policy of international trade will result in a selection of better quality products and services for the consumer. Further, international trade will result in greater access to foreign technology by U.S. companies.

¹⁸³ Office of the Deputy Under Secretary of Defense for Industrial Policy, “Study on Impact of Foreign Sourcing of Systems,” January 2004, *available at* http://www.acq.osd.mil/ip/docs/study_impact_foreign_sourcing_of_systems.pdf.

¹⁸⁴ The Honorable Michael W. Wynne, Under Secretary of Defense, Acquisition, Technology & Logistics (Acting), “The Case for Transatlantic Cooperation: A U.S. Perspective” U.S.-U.K. Defense Industry Symposium, London, U.K., June 2, 2004, *available at* <http://www.acq.osd.mil/usd>.

It's logical that the greater the competition, the better quality goods the federal government procurement official and others will be able to acquire. We have seen this phenomenon within the United States. When there is plenty of competition, we are more likely to end up with the quality product we originally set out to buy.

3 Timely Delivery is More Probable

With more competitors in line for the federal government's business (and dollars), it stands to reason that the government delivery schedule is more likely to be met. This is with the caveat that there's never a guarantee. Take for example the Army beret procurement. The Army contracted with firms overseas because the U.S. firms could not meet the delivery schedule. The rest of the story was that the foreign firms did not end up meeting the delivery schedule after all. One incentive to meet delivery schedules in a timely fashion is the past performance rating under FAR Part 15. Although there is no guarantee of timely delivery, chances are certainly enhanced with a greater pool of contractors and past performance ratings which have a meaningful impact on future contract awards.

4 More Overall Wealth, Domestically and Abroad

a Financial Impact on U.S.

Chairman of the Federal Reserve Board, Alan Greenspan believes that to a large degree, the globalization we have witnessed has been driven by advances in

technology.¹⁸⁵ He argues the expanding markets have increased competition and render government intervention and protectionism ineffective, although “some government regulation is practiced virtually everywhere.”¹⁸⁶ He further asserts technology has resulted in the increase in living standards in much of the world, including the United States.¹⁸⁷

Globalization will improve the balance sheets of competitive American companies in that there will be greater opportunities for export, which in turn could be expected to open up different employment opportunities in the United States.

Even though living standards in many places may increase and different jobs emerge, U.S. workers need to understand as international trade further develops there will be a natural shift in the type of jobs available. One reason is that other countries may be more efficient with regard to a particular good or service. Another reason is because in technology, most of the rate of return results in cost reduction, which amounts to a reduction in labor costs.¹⁸⁸ Some economists believe while lower wage earners will lose

¹⁸⁵ Remarks by Chairman Alan Greenspan, “Global Economic Integration: Opportunities and Challenges,” At a Symposium by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming, August 25, 2000, *available at* <http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

¹⁸⁶ Remarks by Chairman Alan Greenspan, “Global Economic Integration: Opportunities and Challenges,” At a Symposium by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming, August 25, 2000, *available at* <http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

¹⁸⁷ Remarks by Chairman Alan Greenspan, “Global Economic Integration: Opportunities and Challenges,” At a Symposium by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming, August 25, 2000, *available at* <http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

¹⁸⁸ Remarks by Chairman Alan Greenspan, “Global Economic Integration: Opportunities and Challenges,” At a Symposium by the Federal Reserve Bank of Kansas City, Jackson

their jobs, higher wage earners' incomes will actually increase. An important aspect of globalization is for companies and workers to possess the required amount of flexibility to change with the times.

b Financial Impact Abroad and Wealth in International Cooperation

As previously stated, much of the world is living at a higher economic standard due to international trade.¹⁸⁹ Countries in Western Europe and Japan are making adjustments in policies and China and Russia are moving toward market capitalism in large part because of the higher standard of living achieved through the competitive market.¹⁹⁰ When the U.S. is involved in international trade, not only are financial benefits abroad realized, but the U.S. benefits from the spreading of democracy and American values.

Partnering between countries in the defense industry can also result in wealth abroad. A new international acquisition strategy that will likely serve as a model in the future is the strategy employed in the Joint Strike Fighter program which has

Hole, Wyoming, August 25, 2000, *available at*
<http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

¹⁸⁹ Remarks by Chairman Alan Greenspan, "Global Economic Integration: Opportunities and Challenges," At a Symposium by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming, August 25, 2000, *available at*
<http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

¹⁹⁰ Remarks by Chairman Alan Greenspan, "Global Economic Integration: Opportunities and Challenges," At a Symposium by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming, August 25, 2000, *available at*
<http://www.federalreserve.gov/boarddocs/speeches/2000/20000825.htm>

international industrial participation.¹⁹¹ An in-depth study looked at the partner countries and major industrial suppliers to review strategic approaches and financial impact on the countries involved, and determined the financial impact on the countries is substantial in terms of “revenue, earnings and return on investment.”¹⁹² This provides not only wealth abroad, but wealth in terms of international cooperation, the importance of which cannot be overstated.

Just three months after the events of September 11, 2001, the Under Secretary of Defense addressed the France-U.S. Defense Industry Business Forum and had the following comments on international cooperation:

To many Americans, international cooperation in wartime is a bit of a ‘Hobson’s Choice,’ offering more drawbacks than benefits. I respectfully suggest to my countrymen that this is a misconception. International Cooperation is of critical importance to the mission of the Department of Defense.

These days especially, it is an inescapable predicate to so many of our military activities abroad. This is not a bad thing because, quite simply, we get more out of it than we put into it... If the math in that statement does not add up, it is because international cooperation represents a value greater than the sum of its parts.¹⁹³

¹⁹¹ Office of the Secretary of Defense, “Annual Industrial Capabilities Report to Congress,” February 2004, *available at* http://www.acq.osd.mil/ip/docs/ind-cap-annual-report-to-congress_2004.pdf.

¹⁹² Joint Strike Fighter (JSF) International Industrial Participation Study, A Study of Country Approaches and Financial Impacts on Foreign Suppliers, June 2003, *available at* http://www.acq.osd.mil/ip/ip_products.html. The JSF program “was conceived as an international acquisition program in order to attract financial investment and technological innovation from partner countries, as well as to partner early with governments whose military Services were likely users of this state-of-the-art coalition forces platform.”

¹⁹³ E.C. Aldridge, Speech at the France-U.S. Defense Industry Business Forum (Dec. 10, 2001), *available at* http://www.acq.osd.mil/usd/new_speeches/france.doc.

Research demonstrates the potential financial gains both domestically and abroad that can be achieved through international trade. Additionally, the possibilities for international cooperation have never been greater.

B Resulting Need for Policy Change

1 Educate and Prepare the Workforce

The process by which free trade and offshoring result in workers in affected industries facing the threat of losing their jobs has been coined as the process of “creative destruction.”¹⁹⁴ Many workers will face the prospect of taking lower paying jobs with a reduced lifetime earning potential.¹⁹⁵ The Bush administration perceived the need for U.S. workers to have their concerns heard. It established the Manufacturing Council to facilitate regular contact between the manufacturing industry and the government.¹⁹⁶ Although there is value in having concerns voiced, that does not change the economic situation.

Rather than trying to prevent U.S. companies from employing lower wage earners in foreign countries, a preferable approach to U.S. job security is to expand domestic

¹⁹⁴ Lael Brainard and Robert E. Litan, “Offshoring” Service Jobs: Bane or Boon and What to Do?, Policy Brief #132—2004, *available at* <http://www.brook.edu/printme.wbs?page=/comm/policybriefs/pb132.htm>.

¹⁹⁵ Lael Brainard and Robert E. Litan, “Offshoring” Service Jobs: Bane or Boon and What to Do?, Policy Brief #132—2004, *available at* <http://www.brook.edu/printme.wbs?page=/comm/policybriefs/pb132.htm>.

¹⁹⁶ Remarks by Secretary Donald L. Evans, Announcement of Manufacturing Council, Grand Rapids, MI, June 15, 2004, *available at* http://www.commerce.gov/opa/speeches/Evans/2004/June_15_Evans_ManufacturingCouncil.htm.

training and educational opportunities.¹⁹⁷ A similar approach applies to moving from a protectionist federal government procurement policy to one of free trade.

To make such a dramatic policy change less disruptive and chaotic, the American workers should be educated on why the changes are being made. They should also be prepared in terms of how to find assistance and leads on new employment if their job is lost as a result of the change in policy. In the short term, assistance programs will be required. A few are already in existence, such as the Trade Adjustment Assistance for Workers.

The Trade Adjustment Assistance for Workers is a benefits program for those workers who are “unemployed as a result of increased imports from, or shifts in production to, foreign countries.”¹⁹⁸ Some of the benefits include income support, relocation allowances, job search allowances, and a health coverage tax credit.¹⁹⁹ A program has also been instituted for companies facing foreign competition. The Trade Adjustment Assistance for Workers program should arguably be expanded to apply to service workers and others who are currently or will soon be facing a similar impact to their industry as a result of free trade.

¹⁹⁷ Berta Gomez, Washington File Staff Writer, “Experts Warn Against Protectionism as Cure for Job Outsourcing,” March 10, 2004, *available at* <http://www.useu.be/Article.asp?ID=1A442D90-5F72-4183-94CE-E4B53CF5B0A3>.

¹⁹⁸ Trade Act Programs: Trade Adjustment Assistance for Workers, *available at* <http://www.doleta.gov/tradeact/>

¹⁹⁹ Trade Act Programs: Trade Adjustment Assistance for Workers, *available at* <http://www.doleta.gov/tradeact/>

Another program for workers over 50 years old is the Trade Promotion Authority Act.²⁰⁰ That program is targeted at older Americans who have lost their jobs due to trade. The main goals of the program are to get the workers employed again as quickly as possible in a different industry.²⁰¹

The Trade Adjustment Assistance for Firms program is a form of federal assistance whereby the government pays half the cost of consultants for innovations that work toward improving a manufacturer's competitiveness.²⁰²

President Bush's stated policy is to promote job growth through free markets, enforce trade agreements and increase assistance for displaced U.S. workers.²⁰³ These programs work toward his goal of assisting the displaced American workers.

2 Stop Protectionist Legislation and Dismantle the Buy American Act

Immediate change can be instituted by having policy makers cease the addition of more protectionist measures to current domestic preference legislation. Some legislators

²⁰⁰ "Trade Act of 2002", Title I, Trade Adjustment Assistance Program, Section 246 (19 U.S.C. § 2318) Demonstration Project for Alternative Trade Adjustment Assistance for Older Workers, P.L. 107-210. The text can be found at <http://www.tpa.gov/TPA-text.htm>.

²⁰¹ "Trade Act of 2002," Title I, Trade Adjustment Assistance Program, Section 246 (19 U.S.C. § 2318) Demonstration Project for Alternative Trade Adjustment Assistance for Older Workers, P.L. 107-210.

²⁰² Trade Act Programs: Trade Adjustment Assistance for Firms, *available at* <http://www.taacenters.org>

²⁰³ Berta Gomez, Washington File Staff Writer, "Experts Warn Against Protectionism as Cure for Job Outsourcing," March 10, 2004, *available at* <http://www.useu.be/Article.asp?ID=1A442D90-5F72-4183-94CE-E4B53CF5B0A3>.

are currently proposing just such measures for the Fiscal Year 2005 Defense National Authorization Act, *supra*. Additionally, the Buy American Act should be repealed.

As the Director of Defense Procurement and Acquisition Policy, Department of Defense, Diedre Lee explained, "...the Buy American Act provides the framework for government procurement of domestic and foreign products."²⁰⁴ Therefore, the Buy American Act is the legislation that should be initially targeted, with other protectionist legislation to follow. In order to move toward free trade in federal government procurement, the policies which serve as barriers must be removed. The impact of the repealed Buy American Act should have a very visible impact since the federal government is the single biggest consumer in the United States.²⁰⁵

To some extent, we have already seen some impact of changes to the Buy American Act through the use of waivers.²⁰⁶ Under such waivers, foreign firms are allowed to compete for Department of Defense contracts.²⁰⁷ The waiver allows companies from certain foreign countries to avoid the otherwise 50 percent evaluation

²⁰⁴ "U.S. Representative Todd Akin (R-Missouri), Holds Hearing on Federal Procurement Policy and Small Business," July 22, 2003, Federal Document Clearing House, Inc., Copyright 2003 FDCH e-Media, Inc.

²⁰⁵ "U.S. Representative Todd Akin (R-Missouri), Holds Hearing on Federal Procurement Policy and Small Business," July 22, 2003, Federal Document Clearing House, Inc., Copyright 2003 FDCH e-Media, Inc.

²⁰⁶ Through the Government Procurement Act, trade agreement acts, NAFTA, and Memoranda of Understanding (which promote standardization and interoperability of defense equipment with our allies and friendly governments); waivers to the Buy American Act are permitted. "U.S. Representative Todd Akin (R-Missouri), Holds Hearing on Federal Procurement Policy and Small Business," July 22, 2003, Federal Document Clearing House, Inc., Copyright 2003 FDCH e-Media, Inc.

²⁰⁷ "U.S. Representative Todd Akin (R-Missouri), Holds Hearing on Federal Procurement Policy and Small Business," July 22, 2003, Federal Document Clearing House, Inc., Copyright 2003 FDCH e-Media, Inc.

premium applied to their products, if their products fail to meet the Buy American Act definition of a “domestic end product.”²⁰⁸

3 Vigorously Enforce the Policy

For free trade to function as intended, participating countries have to follow the rules that come in the form of a trade agreement. That is, if a country is involved in the exports goods and has industries that take advantage of being awarded foreign contracts, then that country must reciprocate. It must allow entry into its market through imports and allow other countries to compete for its procurements. For example, India is many times cited as an example of having high barriers to entry into its service markets.²⁰⁹ If a given country does not allow entrance into their market, or makes it prohibitively complicated, there must be recourse. The recourse comes in the form of action under the applicable trade agreement.

The government has even established a task force in order to assist the manufacturing industry. The Unfair Trade Practices Task Force has been put in place to aggressively enforce trade agreements.²¹⁰

²⁰⁸ “U.S. Representative Todd Akin (R-Missouri), Holds Hearing on Federal Procurement Policy and Small Business,” July 22, 2003, Federal Document Clearing House, Inc., Copyright 2003 FDCH e-Media, Inc.

²⁰⁹ Lael Brainard and Robert E. Litan, “Offshoring” Service Jobs: Bane or Boon and What to Do?, Policy Brief #132—2004, *available at* <http://www.brook.edu/printme.wbs?page=/comm/policybriefs/pb132.htm>.

²¹⁰ Remarks by Secretary Donald L. Evans, Announcement of Manufacturing Council, Grand Rapids, MI, June 15, 2004, *available at* http://www.commerce.gov/opa/speeches/Evans/2004/June_15_Evans_ManufacturingCouncil.htm.

Section 181 of the Trade Act of 1974²¹¹ as amended (along with various other laws) requires an annual report on significant foreign trade barriers be provided to the President of the United States and to Congress.²¹² The report is to provide “an inventory of the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights.”²¹³ This report serves as a means for eliminating such barriers and help the U.S. enforce U.S. trade laws.²¹⁴

Reports such as these go a long way toward assisting free trade progress the way it is intended in order to achieve the desired results.

V Conclusion

Free trade is a smart business policy for federal government procurement. Whether everyone agrees it should be or not, the economy is moving toward one of free trade and has been for several years. The choice is to either take action now or react to events after the fact.

²¹¹ 19 U.S.C. § 2241.

²¹² 2004 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, <http://www.ustr.gov/reports/nte/2004/foreword.pdf>.

²¹³ 2004 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, <http://www.ustr.gov/reports/nte/2004/foreword.pdf>.

²¹⁴ 2004 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, <http://www.ustr.gov/reports/nte/2004/foreword.pdf>.

As a world leader, the United States needs to step up to the challenge. Federal government procurement officials ought to be in a position where they can buy the best quality item, and have it delivered according to their schedule, at a reasonable price.

There is no doubt American workers will continue to be affected. It is the obligation of their political representatives to ensure they are prepared for the potential loss of jobs. The preparation includes providing an understanding of why the job market will be shifting, and providing solutions as to how the workers will retrain or find other employment. It also includes unemployment compensation for the interim.

Changes should be implemented in federal government procurement policy to move out of the old protectionist mode, left over from the era of the Great Depression, and move toward more fully globalizing government procurements. Additional protective amendments to the already protectionist legislation need to be halted. Repeal of the Buy American Act is an enormous step in the right direction. Although change may not be easy, globalization of federal government procurement will in time serve the majority interests.