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The Berry Amendment: Requiring Defense Procurement To Come From Domestic Sources

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Summary

In order to protect the U.S. industrial base during periods of adversity and war, Congress passed a group of "domestic source restrictions" as part of the 1941 Fifth Supplemental National Defense Appropriations Act. These provisions came to be known as the Berry Amendment. On December 13, 2001, Congress codified the Berry Amendment as part of the FY2002 National Defense Authorization Act, P.L. 107-107). The Berry Amendment requires the Department of Defense (DOD) to give preference in procurement to domestically produced, manufactured, or home grown products, notably food, clothing, fabrics and specialty metals. Passed on the eve of World War II, it overrides exceptions added to the Buy American Act during the years following the latter's enactment in 1933. The Berry Amendment was initially established for a narrowly defined purpose — to ensure that U.S. troops would wear military uniforms and consume food products wholly produced within the United States. Since then, numerous other items have been added, such as tents, tarpaulins, and speciality metals.

In the spring of 2001, a controversy arose involving the Army's procurement of black berets that generated renewed interest in the Berry Amendment. DOD granted two waivers of the Berry Amendment in order to purchase berets from foreign sources. However, it was reported that DOD had known for 25 years that no U.S. firm produced a wholly domestic beret, suggesting that other violations of the Berry Amendment may have been overlooked or under-reported. This recent procurement has raised important questions: (1) If the U.S. does not produce a wholly "made in America" beret, should DOD procurement be restricted from access to foreign markets? (2) Do procurement policies under the Berry Amendment restrictions adequately represent the best value to DOD and the federal government? (3) To what extent do U.S. national security interests justify the continued use of the Berry Amendment?

Some policymakers believe that Berry Amendment restrictions are in contradiction to free trade policies, and that the presence and degree of such competition is the most effective tool for promoting efficiencies and improving quality. On the other hand, others believe that key U.S. sectors need the protections afforded by the Berry Amendment. These two conflicting views have been the subject of debate in the 107th Congress. This report examines the original intent and purpose of the Berry Amendment, as well as the present alternatives available to Congress, including elimination of restrictions.

Contents

The Berry Amendment: Requiring Defense Procurement To Come From Domestic Sources

Introduction

Congress and the Department of Defense (DOD) have long debated the need to protect the U.S. defense industrial base by restricting foreign access to U.S. markets through legislation known as "domestic source restrictions."[1] Every defense appropriations bill from 1942-1993[2] has included some mention of a preference for U.S. articles, supplies, and materials.[3] The Berry Amendment contains a number of such source restrictions that prohibit DOD from acquiring food, clothing, fabrics, specialty metals, and hand or measuring tools, that are not grown or produced in the United States.

The recent controversy over the purchase of the Army's black berets has created considerable interest in the Berry Amendment. This report discusses the amendment's original purpose and intent, and the options available to Congress regarding Berry Amendment restrictions.

Controversy Over the Army's Purchase of Black Berets

On October 17, 2000, the Army Chief of Staff, General Eric Shinseki, announced that the black beret would become the standard headgear for the U.S. Army. The Army planned to issue a one-piece beret to each of the 1.3 million active duty and reserve soldiers during the spring of 2001, while a second beret would be issued to each soldier in the fall of 2001. The Army was to pay approximately $23.8

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[1] For a discussion of domestic source restrictions, see "*Defense Acquisition: Rationale for Imposing Domestic Source Restrictions*." GAO/NSIAD-98-191, July 17, 1998, 20 pages.

[2] In a note added to the U.S. Code, the Berry Amendment was made permanent though P.L. 103-139, Nov. 11, 1993.

[3] The Buy American Act (41 U.S.C. 10a through 10d, as amended), enacted in 1933, is the major domestic source restriction governing procurement by all of the federal government. It restricts foreign access to U.S. government procurement by giving preference to domestically produced, manufactured, or home-grown products. For further discussion of the Buy American Act, refer to CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources,* by Cary Skolnik and John Luckey.

million for about 4.7 million berets. DOD awarded the first contract to a U.S. manufacturing firm, Bancroft, an Arkansas-based company that had manufactured military headgear since World War I. Other contracts were awarded to several foreign manufacturing firms; five of the foreign firms had production facilities in the People's Republic of China, Romania, Sri Lanka, and other low-wage countries.

To purchase the black berets, the Defense Logistics Agency (DLA)[4] granted two waivers of specific restrictions in the Berry Amendment. The first waiver was granted to DOD so that the Department could purchase military uniforms from foreign sources. DLA granted this waiver when it determined that no U.S. firm could produce a sufficient quantity of one-piece, black berets by the Army's deadline. As a result, there were protests from some segments of domestic manufacturing, military and veterans groups, Congress, and the public. The House Small Business Committee held a hearing on May 2, 2001, to discuss the statutory authority to waive Berry Amendment restrictions, as well as the concerns of the small business community regarding the contract award process.

DLA granted the second waiver to allow Bancroft to retain its contract and continue to produce the black berets for the Army, even though Bancroft used materials from foreign sources. Bancroft, the sole U.S. manufacturer of the one-piece beret, had procured materials from two overseas suppliers, who, in turn, had procured material from other foreign sources. Bancroft's president reported that, as early as 1976, DOD had been notified that some beret materials were procured from foreign sources.

On October 4, 2002, DOD announced that the Bancroft Cap Company of Cabot, Arkansas was awarded a $14.8 million dollar firm, fixed priced contract to manufacture up to 3.6 million black, wool berets for the United States Army and the United States Air Force. The contract is a two-year contract with three one-year options. The contract performance completion date is scheduled for August 3, 2005. There were 154 proposals solicited, and thirteen vendors responded. The contract was administered through the Defense Supply Center, Philadelphia, PA.[5]

Where DOD purchases berets is viewed by some as being of a relatively minor magnitude when compared to where DOD purchases electronics, specialty metals, and other hardware used for logistics support, communications and weapons modernization. However, to certain small businesses, the loss of such a contract to foreign sources is unacceptable.

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[4] The Defense Logistics Agency is a logistics combat support agency whose primary role is to provide supplies and services to American military forces worldwide. See [http://www.dla.mil].

[5] *DefenseLink*. U.S. Department of Defense. Contracts for October 4, 2002.

History of the Berry Amendment

When Was It Enacted and Why?

The Berry Amendment, which dates from the eve of World War II, was established for a narrowly defined purpose: to ensure that U.S. troops wore military uniforms wholly produced within the United States and to ensure that U.S. troops were fed with food products wholly produced in the United States.[6] The Berry Amendment was originally intended to ensure the survival of what were believed to be critical agricultural and dry goods industries that provided the necessities for a nation at war. (Other industries, such as tools and specialty metals, were added later.) To that end, it overrode exceptions added to the Buy American Act of 1933 for products procured by the Department of Defense.

In 1941, House and Senate members held spirited discussions[7] over the passage of what has come to be known as the Berry Amendment, although the precise identity of the author of the amendment remains unknown.[8] Several issues evolved during the debate. Even though the U.S. was not at war, Congress was concerned that the nation be prepared for adversity, and thus provided the impetus for such legislation. Some policymakers were also concerned that despite the enactment of the Buy American Act in 1933, one department of the federal government had reportedly purchased meat from Argentina. Likewise, another department had reportedly contracted to purchase a large quantity of wool, about 50% of which came from foreign sources. Questions were raised over the disposal of some 500,000,000 bushels of surplus wheat, with one policymaker noting that "wheat products and wheat should be purchased from the production here in the United States when we have such a surplus on hand and that our own farmers should be given preference."[9]

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[6] On April 5, 1941, the Berry Amendment was first enacted as part of the Fiscal Year (FY) 1941 Fifth Supplemental National Defense Appropriations Act, P.L. 77-29, Title 10 of the United States Code 2241 note. The Berry Amendment was made permanent when P.L. 102-396, Section 9005, was amended by P.L. 103-139, Section 8005. Since then, Congress has regularly added or subtracted Berry Amendment provisions. On December 13, 2001, the FY2002 National Defense Authorization Act codified and modified the Berry Amendment, repealing Sections 9005 and 8109 of the above-mentioned bills.

[7] An example of a discussion of the issues surrounding the passage of the Berry Amendment can be found in the *Congressional Record*, Vol. 87, Part 15. 77th Congress, 1st Session, p. 2460-2984 and p. 2711 - 2720.

[8] Legislative reference specialists suggest (but are not certain) that the amendment may have been named after George Leonard Berry (D-TN), who was appointed to serve the remainder of an unexpired U.S. Senate term (1937-38) due to the death of Nathan Buchman, and was defeated for election in the Democratic presidential primary of 1938. At age 24, Senator Berry was elected president of the International Printing Pressmen and Assistants' Union in 1907, a position he held until his death in 1948. Senator Berry may have lobbied for so-called Berry Amendment restrictions during his year in Congress, although no congressional records have been found to support that argument.

[9] Statement attributed to James Francis O'Connor, Representative from Montana, March 21, 1941, during congressional debate over the 1941 Fifth Supplemental National Defense Act

(continued...)

In an expression of that concern, the original version of the House bill added a provision which required the purchase of American agricultural products in fulfilling national defense needs. (The Senate version initially deleted the provision, but later reinstated it, broadening the bill to include all agriculture.) The bill was enacted into law on April 5, 1941.

What Is Its Relevance Today?

The recent controversy over the waiver of Berry Amendment restrictions to procure the Army's black berets has raised questions about its value in the contemporary setting. Arguably, it may no longer be practical, from the standpoints of economic efficiency and trade policies, for DOD to bar procurement from foreign markets. Therefore, it is argued, the Berry Amendment restrictions may not always represent the best value to DOD or the federal government, nor is there always a justifiable national security interest to preserve certain items currently under the Berry Amendment. Nevertheless, U.S. workers and businesses have an expectation that Congress will consider their interests in determining procurement policies.

A number of Berry Amendment restricted items may be in line with the original purpose and intent, based on the end use products that are produced. For example, items like chemical warfare protective clothing (composed of fibers from textiles) warrant further study. Specialty metals may be critical and vital to the war-fighting effort if they are used for "high-tech" electronics and communications. Food restrictions, on the other hand, are not critical and may make it more difficult for DOD to take advantage of commercial business practices. In an increasingly globalized economy, many food suppliers find it difficult to adhere to this restriction as it deviates from standard commercial business practices, so they may decline to sell to DOD. Many food suppliers who sell to DOD claim they are often forced to adopt unique, costly, and inefficient business practices to do business with the defense sector.

Economic, social, and political factors come into play when examining the purpose and intent of the Berry Amendment. If the U.S. becomes dependent on purchasing equipment and supplies from foreign sources, what prevents an adversary from cutting off U.S. access to such items, or to refusing to build militarily critical items in times of crisis or conflict? Another argument for maintaining the Berry Amendment restrictions is that they often benefit small, minority-owned and disadvantaged businesses which depend on DOD for their survivability. According to recent congressional testimony, U.S. textile and apparel industries combined have lost approximately 540,000 jobs within the last 10 years.[10]

Some would argue that the Berry Amendment is still relevant because of the tragic events of September 11, 2001. Specialty metals and steel products, items covered under the amendment, need the protection of the U.S. market today.

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[9] (...continued)
(see *Congressional Record*, Vol. 87, Part 15. 77th Congress, 1st Session, p. 2564.

[10] Statement of Evan Joffe, Marketing Manager of Springfield, LLC, before the House Committee on Small Business, May 22, 2001.

Bethlehem Steel, one of the largest U.S. steel manufacturers, has recently filed for Chapter 11 bankruptcy protection, in part because of the availability of cheaper, foreign-made and subsidized steel.[11] There are also concerns over the possibility of future acts of terrorism and the safety and security of the food supply. Some believe that this is not the time to change the provisions of the Berry Amendment, that the U.S. should maintain its current capacity, at the minimum, to feed and clothe its military forces.

How Does The Buy American Act Differ From the Berry Amendment?

The Buy American Act (BAA),[12] enacted in 1933, is the principal domestic preference statute governing most procurement by the federal government; while the Berry Amendment, enacted on the eve of World War II, governs DOD procurement only. The BAA seeks to protect domestic labor by giving preference to domestically produced, manufactured, or home-grown products in government purchases, with certain exceptions. The Berry Amendment overrides many of these exceptions, notably for food, clothing, and specialty metals.

Current Application of the Berry Amendment

Department of Defense Views of the Berry Amendment

Department of Defense officials have expressed conflicting opinions about the necessity for the Berry Amendment. Former Secretary of Defense Richard Cheney[13] issued a 1989 report to Congress called "The Impact of Buy American Restrictions Affecting Defense Procurement." The report suggested that an alternative to the Berry Amendment would be a specifically targeted approach to provide DOD with the ability to establish assured sources of supply for mobilization purposes through

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[11] Bethlehem Steel, a 97-year old company based in Bethlehem, PA, is the 27th steel company to file for bankruptcy protection since 1998. The company listed $4.3 billion dollars in assets, $6.75 billion dollars in liabilities, including an unfunded health care obligation of $1.85 billion dollars. Factors which reportedly have contributed to the demise of company include 1) the Asian currency crisis, which created a surge in foreign steel imports; 2) rising production costs; 3) falling market prices due to the availability of cheaper imported steel; 4) rising pension and other benefit costs which were negotiated during periods of downsizing and massive layoffs. Others have noted that the "dumping" of foreign steel products may represent a threat to those strategic interests. Bethlehem Steel closed down its final steel plant operation in 1995, having suffered a decline from 300,000 employees during World War II to about 13,000 employees today. With regard to another key manufacturing industry, it may be noted that the Berry Amendment does not apply to imported petroleum products.

[12] 41 U.S.C. 10a through 10d. For further discussion of the Buy American Act, see CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by Cary Skolnik and John Luckey.

[13] Secretary of Defense, March 1989 - January 1993.

existing mobilization base planning under the Defense Production Act.[14] The report concluded that "statutory and regulatory policies and other federal and DOD acquisition regulations like the Berry Amendment, which prohibit or impede foreign-source participation in U.S. defense contracting, constitute a considerable departure from the concept of full and open competition."

In 1997, the DOD Acquisition Reform Executive Focus Group's final report called for the elimination of some Berry Amendment restrictions on food, clothing, and textiles, while retaining restrictions on specialty metals and measuring tools.

A former DLA Deputy Director, Major General (Ret.) Charles R. Henry, recently testified that the Berry Amendment was critical to the maintenance of a "warm" U.S. industrial base during periods of adversity and war. He summed up his opinion, as follows:

> The point here is that, through the Berry Amendment, our defense procurement establishment is able to maintain a stable of independent, competing producers who understand the mil-specs of different items and who have the commitment to service the U.S. military. They are there for our military when there is a surge in requirements — as there was with Desert Storm — and they must be there during peacetime.[15]

Congressional Actions Affecting the Berry Amendment

H.R. 4546, the FY2002 DOD Authorization Act (P.L. 107-314), extends an Army pilot program that permits the sale of manufactured articles and the services of certain industrial facilities without regard to domestic source restrictions (see Section 111).[16] The DOD Inspector General is required to review the pilot program and submit to Congress a report no later than July 1, 2003.

Several provisions affecting the Berry Amendment were enacted in H.R. 5010, the FY2003 DOD appropriations bill (P.L. 107-248). Section 8016 prohibits the procurement of welded shipboard anchor and mooring chain 4 inches in diameter and under, unless manufactured from components that are substantially manufactured in the United States; Section 8030 prohibits the procurement of carbon, alloy or armor steel plates, for use in any DOD-controlled, government-owned facility, unless the materials were melted and rolled in the United States or Canada; Section 8033 requires DOD to submit a report to Congress on the amount of purchases from foreign entities in FY2003; Section 8046 requires that any expenditure of funds be in compliance with the Buy American Act, and would authorize the Secretary of

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[14] For further discussion on the Defense Production Act, see CRS Report RS20587, *Defense Production Act: Purpose and Scope*, by David E. Lockwood, updated June 22, 2001, 6 p.

[15] Testimony before the Oversight and Investigations Subcommittee, House Committee on Education and the Workforce. *Hearing on Federal Prison Industries' Proposed Military Clothing Production Expansion - Assessing Existing Protections for Workers, Business, and FPI's Federal Agency Customers.* October 5, 2000.

[16] This provision was initially enacted in Section 141 of the FY1998 Defense Authorization Act (P.L. 105-85; 10 U.S.C. 4543 note)

Defense to determine whether persons convicted of intentionally affixing "Made in America" labels on products not made in America should be debarred from DOD contracting; and Section 8060 prohibits the procurement of ball and roller bearings, unless produced by a domestic source and of domestic origin.

In H.Rept. 107-732, the conference report that accompanies H.R. 5010, House and Senate conferees discussed the application of the Berry Amendment to the Multi-Year Aircraft Lease Pilot Program, which was authorized in H.R. 3338, the FY2002 DOD Appropriations Act (P.L. 107-117). Congress later approved Section 308 of H.R. 4775, the FY2002 DOD Supplemental Appropriations Act (P.L. 107-206) to clarify Berry Amendment restrictions on the use of foreign sourced specialty metals in commercial aircraft to be leased under this program.

Critics of the Boeing lease agreement say that the decision to use Russian titanium bypasses the Berry Amendment, which requires DOD to give preference in procurement to domestically produced, manufactured, or home grown products, notably food, clothing, fabrics, and specialty metals. The language of H.Rept. 107-732 acknowledges that Congress concurred with the views of the Air Force and that the decision to use foreign-sourced specialty metals was based on certain unique financial and time-sensitive requirements. The lease agreement would permit Boeing to use foreign sourced specialty metals, such as Russian titanium, on military aircraft.[17]

Last year, the FY2002 Defense authorization bill (H.R. 2586) had a provision that, if enacted, would have codified the Berry Amendment, modified it to require advance congressional notification of all waivers, and included parachutes on the list of items covered.[18] The Senate later passed an amendment that would codify certain Berry Amendment requirements. To resolve the waiver issue, House and Senate conferees stated their expectation that DOD would comply with waiver notification requests from the House or Senate and ensure that no U.S. manufacturer could provide the required item in sufficient quantity or quality before granting a future waiver to the Berry Amendment. The waiver requirement became law through the passage of the FY2002 National Defense Authorization Act (P.L. 107-107). Another measure affecting the granting of waivers was referred to the Senate Armed Services Committee.[19]

The 106th Congress acted to tighten certain Berry Amendment provisions. The FY1998 National Defense Authorization Act[20] directed the DOD Office of the Inspector General (OIG) to conduct an audit of the FY1998 procurement of military clothing by the Army, Navy, Air Force and Marine Corps to determine whether contracting officers complied with the Berry Amendment. The audit found that 59% of those contracts reviewed did not include the appropriate contract language (or

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[17] See H.Rept. 107-732 for a discussion on the"Application of the Berry Amendment to Multi-Year Aircraft Lease Pilot Program."

[18] Section 805, H.R. 2586.

[19] S. 766.

[20] P.L. 105-85, enacted November 18, 1997.

clause) to implement the Berry Amendment, resulting in some 43 violations valued at $1.4 million, and concluded that many of the violations occurred because contracting officials were not fully knowledgeable of the requirements of the Berry Amendment. The audit findings noted that DOD procurement officials had agreed to issue policy guidance to contracting officers, emphasizing the importance of complying with the Berry Amendment.

Other Views

Views on the efficacy of the Berry Amendment restrictions vary. Some domestic and foreign companies criticize the Berry Amendment, stating that it undercuts free market competition, may promote discriminatory practices, robs businesses of incentives to modernize, causes inefficiency in some industries due to a lack of competition, and results in higher costs to DOD because the military services pay more for "protected" products than the market requires. At times, the views of both groups (as to whether the United States should open or close certain industrial markets to competition) sometimes converge and conflict at once.

Critics of the Berry Amendment argue that the U.S. will lose its technological edge in the absence of competition, and alienate foreign trading partners, thereby provoking retaliations and loss of foreign sales. They assert that the Berry Amendment will ultimately reduce the ability of the U.S. to negotiate and persuade its allies to sell or not sell to Third-World countries. They contend that the Berry Amendment promotes U.S. trade policies that undermine the international trade agreements. Critics have also expressed concern over the increased levels of imported, ready to wear goods, and the prevalent "sweat shop conditions" of foreign markets. Furthermore, restrictions on food mean that in most cases it is illegal for DOD to purchase an item or food if it is a foreign item or if it has any foreign ingredient or processing.

Major New Developments

Several new and pending legislative initiatives may affect the breadth, depth, and scope of domestic source provisions under the Berry Amendment.

On Thursday, March 4, 2004, the Senate passed S.Amdt. 2660 (as an amendment to S. 1637, a bill to amend the Internal Revenue Code of 1986) by a vote of 70-26. The amendment, referred to as the "Jumpstart Our Business Strength (JOBS) Act, was proposed by Senator Dodd to "protect United States workers from competition of foreign workforces for performance of Federal and State contracts."[21] In general, the measure would prohibit most federal civilian agencies from procuring goods or services from companies that perform "offshore outsourcing," which sends jobs overseas. Exceptions are made for certain agencies, such as the Departments of Defense and Homeland Security, and for selected programs at the Department of

[21] S.Amdt. 2660 as agreed to by the Senate, as it appears in the *Congressional Record*, S2206, March 4, 2004.

Energy, as well as exceptions for certain other items that may be unavailable within the United States.[22]

H.R. 2658, the FY2004 Defense Appropriations Act, was signed into law on September 30, 2003 (P.L. 108-87.) Key provisions include Buy American provisions such as the following: (1) restrictions on the procurement of carbon, alloy, or armor steel plating (Section 8030); (2) prohibitions on the application of Buy American requirements to the procurement of any fish, shellfish, or seafood products during FY2004; (3) prohibitions on the purchase of welded shipboard anchor and mooring chain 4 inches in diameter and under, unless the anchor and mooring chain are manufactured in the United States from components that are substantially manufactured in the United States; (4) prohibitions on the procurement of carbon, alloy, or armor steel plate that were not melted and rolled in the United States or Canada, for use in any government-owned facility under DOD's control; (5) prohibitions against the use of certain funds without compliance with the Buy American Act (Sections 8033 and 8045); and (6) waiver of the Buy American Act when there are reciprocal defense procurement agreements with certain foreign countries.

Other provisions of the FY2004 Defense Appropriations Act will require reports to Congress on the amount of foreign purchases made in FY2003 (Section 8033) and on contracts for Iraq reconstruction and recovery efforts that are funded in whole or part with DOD funds (Section 8169).

The FY2004 National Defense Authorization Act (P.L. 108-136) includes a variety of domestic source limitations. Section 826 amends what is known as the Berry Amendment (Title 10, U.S.C., Section 2533a) by making exceptions for the procurement of covered items for the purpose of contingency operations and for "unusual and compelling urgency of need." Section 827 amends 10 U.S.C. 2533a (f) by making the procurement of waste and byproducts of cotton and wool fiber for use in the production of propellants and explosives inapplicable to the requirements of the Berry Amendment. Finally, Section 828 amends 10 U.S.C. 2534 (Miscellaneous limitations on the procurement of goods other than United States goods) by granting certain exceptions for the procurement of ball bearings and roller bearings, procured for use in foreign products, that is produced by a company that does not satisfy the requirements for manufacturers in the national technology industrial base.

Some provisions of S. 927, the Defense Transformation for the 21st Century Act of 2003, have been incorporated into the Senate-passed version of H.R. 1588.

A GAO report has questioned whether the Berry Amendment was sufficient protection for the defense industrial base and whether alternatives and solutions exist to keep critical industries healthy and viable in times of peace and war. The report was in response to a request from the House Armed Services Committee, directing GAO to determine whether DLA is properly implementing applicable statutory and regulatory guidance for *best value* purchases and to solicit DLA views on the

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[22] Gruber, Amelia. Senate Approves Restrictions On Offshore Outsourcing. *Government Executive*, March 5, 2004, 2 p.

domestic clothing and textile supplier base. GAO officials acknowledged that the Berry Amendment was a positive factor in helping DOD to maintain a domestic supplier for some of DOD's unique military needs; however, officials pointed out that the overall domestic clothing and textile industry was in decline due to declining employment and production levels, as well as the implementation of various free trade agreements that may affect different levels of the domestic supply chain. As a result, DLA has initiated a study to examine both clothing and textile industries.[23]

Options for Congress

The Army's "black beret" controversy, over the waiver of Berry Amendment restrictions to procure the Army's black berets, raised several questions as to the original purpose, intent, and value of the Berry Amendment. Legislation introduced during the 106th and 107th Congresses suggests that Congress may choose to take this opportunity to examine whether policies, such as the Berry Amendment, help or hurt the defense industrial base. Numerous approaches have been advocated, including, but not limited to, the following.

Eliminate Some Selected Restrictions

Congress could eliminate the food restrictions, allowing U.S. food suppliers to use business practices that are more cost effective. This move would arguably promote more competition and interest, particularly among U.S. food suppliers, in selling food to DOD. For example, some in DOD now believe that if Congress were to allow the food restriction to be withdrawn, food suppliers would have greater and more practical latitude to use foreign ingredients and processing, if needed, similar to the way they do business selling to other large commercial customers in the United States. Many food suppliers find this restriction to be the least practical, and even trade associations of food suppliers have stated that this restriction makes it more difficult to do business with DOD. DOD believes that the food provisions of the Buy American Act would continue to provide U.S. food suppliers a significant advantage over foreign suppliers selling to the Defense Department.

Likewise, Congress could eliminate or modify the clothing restrictions, freeing DOD to find the best item for the most competitive price. It has been suggested that DOD has reportedly known for 25 years that the U.S. does not produce a 100%, wholly domestic beret. One alternative would be for restricted items to be classified according to "high-tech" and "low tech" classifications with different waiver requirements. Some military uniform components, like the beret, could be classified as "low-tech."

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[23] Contract Management: DLA Properly Implemented Best Value Contracting for Clothing and Textiles and Views and Supplier Base as Uncertain. Report to the Chairman and Ranking Minority Member, Committee on Armed Services, House of Representatives. U.S. General Accounting Office, GAO-03-440, February 2003. 18 p.

Adopt a "Componency Standard"

Congress could revise the Berry Amendment and include a requirement that manufactured articles are considered domestic if "substantially all" of their components have been mined, produced, or manufactured domestically. "Substantially all" could mean that the cost of foreign components must be less than 50% of total costs. This is similar to the requirements of the Buy American Act, and could eliminate future procurement missteps like the Army black beret procurement.

Study the Lessening or Elimination of Provisions

Congress might solicit the opinions of trade associations, labor organizations and industry experts on selected use of Berry Amendment restrictions and use of the waiver requirement. Many industry experts say that this approach is preferable to an "all or nothing" stance taken by some interest groups.

The American Apparel and Footwear Association (AAFA), the national trade association for the apparel, footwear, and fashion industries and their suppliers, supports the preservation of the Berry Amendment. AAFA believes that the controversy surrounding the procurement of the Army's black berets has helped shore up support for the provision. The association has suggested that Congress might want to consider whether one particular restriction adversely impacts a U.S. company or its workers that might have become dependent upon the provisions of the Berry Amendment for their economic well-being.[24]

Study to Determine What Percentage of Domestic Clothing, Textiles, Food and Specialty Metals Is Sold to the Military

Congress could determine whether these markets are wholly dependent on the military or whether they represent a statistically significant portion of the total market. For example, during Desert Storm the apparel and textile industry proved that its surge capacity could rapidly respond to a major contingency and a sudden call-up for servicemen and women. The industry started with nine manufacturers producing two million camouflage fatigues in 1988; by 1991, the number of manufacturers increased to sixteen, producing some five million camouflage fatigues. Congress may also want to confer with NAFTA and WTO representatives on the impact of Berry Amendment restrictions on United States relationships with trading partners.

Appoint a "Berry Amendment Commission"

Congress could appoint a commission to study the effects of the Berry Amendment restrictions on the U.S. industrial base, national security, and the military's war-fighting capability. The commission could assess the economic, social, and political impact of current restrictions and make a recommendation to the

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[24] AAFA Legislative Update, March/April/May 2001.

Congress on a longer-term solution. The commission could determine if every item under the Berry Amendment warrants inclusion.

Audit and Investigate Berry Amendment Contracts

Congress could investigate all military procurement contracts for purchases in accordance with the Berry Amendment. Noting that DLA has reportedly known that the Bancroft Cap Company has used foreign suppliers implies that there may be other similar instances that have been overlooked or under-reported. Congress could direct the General Accounting Office or the DOD Inspector General to conduct an audit of a representative sample of contracts awarded for each restricted item, including whether end products incorporated materials from foreign sources.