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

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Summary

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. In order to protect the U.S. industrial base during periods of adversity and war, Congress passed domestic source restrictions as part of the 1941 Fifth Supplemental DOD Appropriations Act; these provisions later became the Berry Amendment. Since then numerous other items have been proposed and/or added. Congress modified the Berry Amendment in Section 832 of S. 1438, the FY2002 DOD Authorization Act, Public Law 107-107. The Berry Amendment is now part of the United States Code, Title 10, Section 2533a. The Defense Federal Acquisition Regulation Supplement (DFARS) was amended to include exceptions for the acquisition of food, speciality metals, and hand or measuring tools when needed to support contingency operations or when the use of other than competitive procedures is based on an unusual and compelling urgency; it was revised in January 2005 to add new items, components, and materials covered under the Berry Amendment.

In the spring of 2001, Congress revisited the Berry Amendment largely in response to a controversy involving the Army's procurement of black berets. DOD had granted the Defense Logistics Agency authority to waive 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 solely domestic beret; this suggested that other violations of the Berry Amendment may have been overlooked or under-reported. This procurement event raised important questions: (1) If the U.S. does not produce a solely domestic item, should DOD procurement be restricted from access to foreign sources? (2) Do procurement policies under the Berry Amendment adequately provide the best value to DOD and the federal government? (3) To what extent do U.S. national security interests justify waivers of the Berry Amendment?

Some policymakers believe that policies like the Berry Amendment contradict 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 views have been the subject of ongoing debate in Congress. In the debate over the passage of the FY2004 defense authorization bill, Representative Duncan Hunter, Chairman of the House Armed Services Committee, sought to strengthen and expand both the Berry Amendment and the Buy American provisions. In the 108th Congress, both the proposed FY2005 National Defense Authorization Act (H.R. 4200), and P.L. 108-287, the FY2005 Department of Defense Appropriations Act, (H.R. 4613), contain provisions that may affect domestic source provisions in the Berry Amendment and the Buy American Act. This report examines the original intent and purpose of the Berry Amendment, legislative proposals to amend both laws and regulations governing the application of domestic source restrictions, as well as options for Congress. The report will be updated as events warrant.

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Major New Developments

The Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) 225.7002 has been revised to include a more nuanced and detailed list of items, components, and materials covered under the provisions of the Berry Amendment.[1]

Public Law (P.L.) 108-287 (H.R. 4613), the FY2005 Department of Defense (DOD) Appropriations Act, was signed into law on August 5, 2004.

P.L. 108-375 (H.R. 4200, the FY2005 DOD Authorization Act), was signed into law on October 28, 2004.

DOD has adopted a final rule, without change, to implement Sections 826 and 827 of the FY2004 National Defense Authorization Act. The interim rule was published in the Federal Register on May 13, 2004, followed by a 60-day comment period. The final rule adds new exceptions to the acquisition of food, speciality metals, and hand or measuring tools when needed to support contingency operations or when the use of other than competitive procedures is based on unusual and compelling urgency.[2]

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[1] According to the DOD policy on Program Acquisition and International Contracting (PAIC), "Unless a specific exception in law applies, the products, components, or materials listed below must be grown, reprocessed, reused, or produced wholly in the United States if they are purchased with funds made available (not necessarily appropriated) to DOD. These rules apply to both prime contractors and subcontractors. The items listed are food, clothing, tents, tarpaulins, covers, natural fibers or yarns, natural fiber products, natural fabrics, synthetic fabrics, fabric blends, individual equipment (covered in Federal Supply Class 8465) made from or containing fibers, yarns, fabrics, or materials (including all fibers, yarns, fabrics, or materials therein), specialty metals (as defined in DFARS 252.225.7014), stainless steel flatware, hand tools, and measuring tools. Office of the Under Secretary of Defense for Acquisition Technology and Logistics, Defense Procurement and Acquisition Policy, revised January 13, 2005. [http://www.acq.osd.mil/dpap/paic/berryamendment.htm].

[2] U.S. Department of Defense. DFARS; Berry Amendment Changes. DFARS Case 2003-D099. Published in the Federal Register, Volume 69, No. 180, September 17, 2004.

Background

Congress and DOD have long debated the need to protect the U.S. defense industrial base by restricting certain federal procurement to U.S. markets through legislation known as "domestic source restrictions."[3] Every defense appropriations bill from 1942-2004 has included some mention of a preference for U.S. articles, supplies, and materials. The Berry Amendment, one particular group of domestic source restrictions, was first enacted into law on April 5, 1941, as part of the FY1941 Fifth Supplemental National Defense Appropriations Act, P.L. 77-29. The Berry Amendment was made permanent when P.L. 102-396, Section 9005, was amended by P.L. 103-139, Section 8005. On December 13, 2001, the passage of the FY2002 National Defense Authorization Act codified and modified the Berry Amendment,[4] making it a permanent part of the United States Code. Under the Berry Amendment, the Secretary of Defense has the authority to waive the requirement to buy domestically, under certain circumstances.[5]

The Berry Amendment contains a number of domestic source restrictions that prohibit DOD from acquiring food, clothing, fabrics (including ballistic fibers), specialty metals, and hand or measuring tools, that are not grown or produced in the U.S.[6] The 2001 controversy over the procurement of black berets, as well as domestic source provisions proposed and/or enacted in legislation since that time, have created considerable interest in the Berry Amendment.

The House and Senate versions of the proposed FY2005 DOD Appropriation and Authorization bills contained provisions which would, if enacted, have broadened domestic source restrictions. P.L. 108-287, the FY2005 Department of Defense Appropriations Act, (H.R. 4613), requires the Secretary of Defense to submit to Congress a report on the amount of DOD purchases from foreign entities in FY2005, for which the provisions of the Buy American Act were waived; the bill

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[3] 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.

[4] Within DOD regulations, the Berry Amendment can be found in the Defense Federal Acquisition Regulation Supplement (DFARS), Restrictions on Food, Clothing, Fabrics, Specialty Metals, and Hand or Measuring Tools. See DFARS, Part 225.7002.

[5] 10 U.S.C. 2533(c)(d)(e)(f)(g)(h) Exceptions to the Berry Amendment are: when the Secretary of Defense or the Secretary of the military department determine that satisfactory quality and sufficient quantity of any such article or item or specialty metal cannot be procured as and when needed at United States market prices; procurement outside the United States in support of combat operations; procurement by vessels in foreign waters; emergency procurement of perishable foods by an establishment located outside the United States, for the personnel attached to such an establishment; procurement of specialty metals or chemical warfare protective clothing produced outside the United States, under certain circumstances; procurement which complies with reciprocal agreements with foreign governments; procurement of certain foods; procurement for resales at commissaries, exchanges, and other non-appropriated fund instrumentalities; procurement values that are under the simplified acquisition threshold.

[6] Title 10, United States Code (U.S.C.), Section 2533a, Requirement to Buy Certain Articles from American Sources; Exceptions.

also grants authority to the Secretary of Defense to waive limitations on the procurement of defense items from foreign sources, under certain conditions. For more details, see section on Legislative Actions in the 108th, 107th, and 106th Congresses.

In the debate over the passage of the FY2004 National Defense Authorization Act, Representative Duncan Hunter, Chairman of the House Armed Services Committee, sought to strengthen and expand both the Berry Amendment and the Buy American provisions by making legislative proposals to do the following: (1) tighten the waiver authority granted to the Secretary of Defense; (2) clarify that the Berry Amendment requirements must be met throughout all levels of the procurement process; (3) require DOD and defense contractors to purchase U.S. made machine tools and specialty metals; (4) raise the domestic content threshold from more than 50% to 65%; (5) require the Secretary of Defense to create a list of critical technologies and components vital to our national defense, with a requirement that future items must be 100% domestic in origin; and (6) broaden the number of items covered under the Berry Amendment. Many of these proposals were not adopted in the final bill as enacted.

This report discusses the Berry Amendment's original purpose and intent, controversies, and options available to the current Congress regarding domestic source restrictions under the Berry Amendment.

Controversy Over the Berry Amendment

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 million for about 4.7 million berets. DOD awarded the first contract to 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)[7] 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, Members of Congress, and the public. The House Small Business Committee held a hearing on May 2, 2001, to discuss the statutory authority

[7] 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].

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 was a two-year contract with three one-year options. There were 154 proposals solicited, and thirteen vendors responded. The contract is administered through the Defense Supply Center, Philadelphia, PA.[8]

By some, where DOD purchases its berets is viewed as a relatively minor matter, when compared to where it purchases its 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 can be unacceptable.

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 solely produced in the United States.[9] Other industries, such as tools and specialty metals, were added later. Originally enacted on the eve of World War II, it overrode exceptions added to the Buy American Act of 1933[10] for products procured by the Department of Defense.

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

[9] 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. The Berry Amendment is now codified at 10 U.S.C. 2533a. Since codification, no legislative changes have been made to the Berry Amendment.

[10] See discussion on the Buy American Act, in this report.

In 1941, House and Senate Members held spirited discussions[11] 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.[12] Several issues were raised 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."[13] 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.

Largely as a result of the controversy surrounding the procurement of the black berets, Representative Walter B. Jones introduced a bill to amend Title 10 of the United States Code, thus making the Berry Amendment a permanent provision of law. On April 3, 2001, Representative Jones introduced H.R. 1352, the purpose of which was to codify and modify the provisions of the Berry Amendment. At the introduction of the bill, Representative Jones stated that the black beret controversy and the decision of the Defense Logistics Agency to waive the Berry Amendment provisions and allow the procurement of berets from foreign sources highlighted the need to review the current law and look for ways to improve the effectiveness of the law. H.R. 1352 would also add a requirement that the Secretary of Defense notify the House and Senate committees on Appropriations, Armed Services, and Small Business before a waiver is made. The provisions of H.R. 1352 were enacted into law as part of the FY2002 National Defense Authorization Act, P.L. 107-107.

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[11] 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.

[12] 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 had been elected president of the International Printing Pressmen and Assistants' Union in 1907, a position he held until his death in 1948.

[13] Statement of James Francis O'Connor, Representative from Montana, March 21, 1941, during congressional debate over the 1941 Fifth Supplemental National Defense Act (see *Congressional Record*, Vol. 87, Part 15. 77th Congress, 1st Session, p. 2564.)

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

The Buy American Act (BAA) and the Berry Amendment are often confused, and the terms are sometimes used interchangeably. The BAA, 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.[14] 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, primarily for food, clothing, and specialty metals.

The two major differences between the BAA and the Berry Amendment are: (1) The BAA applies only to federal government contracts to be carried out within the U.S., while the Berry Amendment, which is for defense contracts only, is not limited to contracts within the U.S.; and (2) The BAA requires that "substantially all" of the costs of foreign components not exceed 50% of the cost of all components (thus, an item can be of 51% domestic content and still be in compliance with the BAA) while the Berry Amendment requires that items be 100% domestic in origin.

It should be noted that there are a number of other domestic source provisions which generally govern specific types of procurement; these provisions are not covered by the BAA or the Berry Amendment. These provisions will not be covered in this report but must be considered when determining whether or not a specific domestic source provision affects a particular type of procurement.[15]

What Is The Relevance of the Berry Amendment Today?

The controversy over the waiver of Berry Amendment restrictions to procure the Army's black berets raised questions about its value in the contemporary setting. It is argued that 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.

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[14] 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 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 John Luckey.

[15] See 41 U.S.C. 10a through 10d, and 10 U.S.C. 2533, Determinations of Public Interest under the Buy American Act. 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 John Luckey. For further discussion of defense domestic source provisions not covered by the Buy American Act or the Berry Amendment, refer to Title 10 of the United States Code.

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, certain items like chemical warfare protective clothing (composed of ballistic fibers, made from textiles) may 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 some 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.[16]

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 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 may depend on DOD for their viability. According to congressional testimony, U.S. textile and apparel industries combined have lost approximately 540,000 jobs during the 1990s.[17]

Some would argue that the Berry Amendment is still relevant today because of the tragic events of September 11, 2001. There are also concerns over the possibility of future acts of terrorism and the safety and security of the nation's food supply. Some specialty metals and steel products, items covered under the Berry Amendment, are produced by distressed U.S. industries. One such company, Bethlehem Steel, one of the largest U.S. steel manufacturers, filed for Chapter 11 bankruptcy protection, in part because of the competition from cheaper, foreign-made and possibly subsidized steel.[18] Additionally, the procurement of certain items like

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[16] According to Leslie G. Sarasin of the American Frozen Food Institute (AFFI), "The Berry Amendment required DOD to procure foods, entirely of U.S. origin ingredients. Often, DOD was forced to reject multi-ingredient, commercially available food items processed in the U.S. because the domestic origin of all ingredients and components of the product could not be demonstrated. This policy put DOD at odds with common commercial practice in the food industry, which typically follows U.S. tariff law in determining questions of foreign origin, and limited its access to the widest possible selection of products." Memorandum to the Defense Acquisition Regulations Council on AFFI comments on DOD's proposed interim rule regarding modification of the Berry Amendment, June 21, 2002. See DFARS Case 2002-D002, at [http://www.affi.com/policy.asp].

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

[18] Behr, Peter. Bethlehem Steel Files for Bankruptcy; Struggles With Competition From Imports, Labor Costs Exacerbated by Aftermath of Attacks. *Washington Post*, October 16, 2001, p. E01. Bethlehem Steel, a 97-year old company based in Bethlehem, PA, was the 25th 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

(continued...)

ballistic fibers (found in body armor, which is critical to the protection of U.S. military troops) is restricted to domestic producers under the Berry Amendment. Generally, proponents of the Berry Amendment have argued that these types of restrictions are necessary to maintain a viable industrial base, and that the Berry Amendment serves as some protection for critical industries by keeping them healthy and viable in times of peace and war.

However, critics argue that the Berry Amendment can undercut free market competition and may produce other negative effects, such as reducing business incentives to modernize, causing inefficiency in some industries due to a lack of competition, and causing higher costs to DOD (because the military services may pay more for "protected" products than the market requires). Critics also contend that the Berry Amendment promotes U.S. trade policies that might undermine international trade agreements.[19]

For these reasons, some believe that this is not the time to change the provisions of the Berry Amendment, arguing that the U.S. should maintain its current capacity, at a minimum, to feed and clothe its military forces.

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[18] (...continued)
obligation of $1.85 billion dollars.

[19] The delays associated with the procurement of body armor for U.S. troops in Iraq have been a source of congressional criticism during the 108th Congress. According to Vice Admiral Keith W. Lippert, United States Navy, who is the Director of the Defense Logistics Agency, the Army has adequately equipped all of the U.S. troops with the Interceptor Body Armor. In his testimony on March 30, 2004, before the House Armed Services Subcommittee on Readiness, he reported that "As we prepared (for Operation Iraqi Freedom), we built on lessons learned from previous conflicts. Our preparations were good in some areas, but needed to improve in others. I've discussed our joint planning with the Services in advance of the operation. In some cases, actual demand for items exceeded projections. For example, the Small Arms Protective Inserts — the SAPI plates you've all heard about — the estimated FY2003 requirements were seventeen million dollars. For a very good reason, the protection of our American war fighter — The Army increased their requirement for Interceptor Body Armor. Today all troops in Iraq are equipped with Interceptor Body Armor. To meet the increased requirement, funded requisitions began coming to us in January 2003. By November 2003, we actually bought three hundred seventy million dollars of the SAPI plates - using exigency contracts, awarded within thirty days, with an average delivery beginning within eighty-three days. The Army Audit Agency conducted a special inspection of body armor and found that we were timely in making awards and that quality products were delivered on time. However, SAPI production right now is constrained by the availability of raw materials, mainly the ceramic tiles contained in the plates. At present, known worldwide production of qualified ballistic packages is limited to twenty-five thousand SAPI sets (or fifty thousand plates) per month."

Current Application of the Berry Amendment

Department of Defense Views of the Berry Amendment

DOD officials have expressed contrasting views about the necessity for the Berry Amendment. Former Secretary of Defense Richard Cheney[20] 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 existing mobilization base planning under the Defense Production Act.[21] 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, 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.[22]

Legislative Actions in the 108th, 107th, and 106th Congresses

A number of domestic source provisions governing the Berry Amendment were proposed and/or enacted into law during the 108th, 107th, and 106th sessions of Congress. A common theme among the bills was the broadening of the authority of the Secretary of Defense to waive the exceptions to the Berry Amendment when the Secretary of Defense believes that there is a compelling reason to procure items from foreign sources.

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

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

[22] 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.

The House version of H.R. 4200, the proposed FY2005 DOD Authorization bill, contained a provision that would have limited the ability of the Secretary of Defense to purchase defense items from countries that impose offset regulations or policies on purchases of defense items from the United States. The Senate version of H.R. 4200 did not contain this provision. The final version contains a provision that requires the Secretary of Defense to develop a defense acquisition trade policy designed to eliminate any adverse impact of offset agreements in defense trade. Another provision in the House version of the bill would have required the Secretary of Defense to delay phasing out of the restriction of acquisition of polyacrylonitrile (PAN) carbon fiber from foreign sources for three years. The Senate version did not contain this provision. The final version contains a provision that would delay the phase out of the domestic source restriction for PAN carbon fibers for 30 days, after the Secretary of Defense provides to the House and Senate Armed Services Committees a report on an assessment of the domestic and international industrial structure that produces PAN carbon fibers and market trends for the product.

The Senate version of H.R. 4200 contained a provision that would have provided the Secretary of Defense the authority to waive the application of statutory domestic source requirements and domestic content requirements for those countries who have signed a Declaration of Principles on defense trade with the United States. The House version of the bill contained no such provision; the Senate receded.

The House version of H.R. 4200 contained a provision that would have amended the Berry Amendment to require the Secretary of Defense to notify Congress and the public when the Secretary of Defense exercised certain waiver authority. The Senate version of the bill contained no such provision; the House receded.

P.L.108-287, the Fiscal Year (FY) 2005 Department of Defense (DOD) Appropriations Act, (H.R. 4613), prohibits the procurement of carbon alloy, or armor steel plate not melted and rolled in the United States (U.S.) or Canada, unless this restriction is waived by the appropriate departmental Secretary within the Department of Defense; requires the Secretary of Defense to submit to Congress a report on the amount of DOD purchases from foreign entities in FY2005, for which the provisions of the Buy American Act were waived; prohibits the spending of appropriated funds unless the entity is in compliance with the Buy American Act; prohibits the procurement of ball and roller bearings from foreign sources unless the restriction is waived by the Secretary of Defense; prohibits the purchase of any supercomputer unless manufactured in the United States; and grants authority to the Secretary of Defense to waive limitations on the procurement of defense items from foreign sources, under certain conditions.

The FY2004 National Defense Authorization Act (P.L. 108-136) amends the Berry Amendment by making exceptions for the procurement of covered items for the purpose of contingency operations and for unusual and compelling urgency of need. In addition, the act makes 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, and grants 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 set for manufacturers in the national technology industrial base.

H.R. 2658, the FY2004 Department of Defense Appropriations Act (P.L. 108-87), includes the following key provisions: (1) restrictions on the procurement of carbon, alloy, or armor steel plating; (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; and (6) waiver of the Buy American Act when there are reciprocal defense procurement agreements with certain foreign countries. Also, P.L. 108-87 requires reports to Congress on the amount of foreign purchases made in FY2003, and on contracts for Iraq reconstruction and recovery efforts that are funded in whole or part with DOD funds.

The final version of the FY2004 National DOD Authorization Act (P.L. 108-136) includes a variety of domestic source provisions. Section 813 requires the Secretary of Defense to establish a "Military System Essential Breakout List" of critical technologies and components vital to our national defense, including the origin of each item; Section 821 identifies and lists foreign countries that restrict the sale of military goods or services to the U.S. because of counter-terrorism or military operations, and contains a prohibition on the procurement of items from certain identified countries; Section 822 provides an incentive program for major defense acquisition programs to use machine tools and other capital assets produced within the U.S.; Section 824 requires the Secretary of Defense to conduct a study of the adequacy of the beryllium industrial base; Section 826 amends the Berry Amendment by making exceptions for the procurement of covered items for the purpose of contingency operations, when the procurement is under circumstances described as of an unusual and compelling urgency. Section 827 grants an exception to the Berry Amendment for procurement of waste and byproducts of cotton and wool fiber for use in the production of propellants and explosives, and Section 828 grants an exception to 10 U.S.C. 2534 for the procurement of ball bearings and roller bearings used in foreign products.[23]

The Defense Transformation for the 21st Century Act of 2003 (S. 927) was introduced on April 28, 2003, and referred to the Senate Armed Services Committee. Some provisions of S. 927 were passed in the FY2004 National DOD Authorization Act.

H.R. 4546, the FY2003 National DOD Authorization Act (P.L. 107-314), extended an Army pilot program that permitted the sale of manufactured articles and

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[23] 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other than United States Goods.

the services of certain industrial facilities without regard to domestic source restrictions (see Section 111).[24] The act required the DOD Inspector General to annually review the pilot program and submit a report to Congress; in the DOD Inspector General's review, the effectiveness of the Army pilot program was lauded, and recommendations were made to improve the program.[25]

Several provisions affecting the Berry Amendment were enacted in the FY2003 Department of Defense Appropriations Act (H.R. 5010, P.L. 107-248). Section 8016 prohibited 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 U.S.; Section 8030 prohibited 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 U.S. or Canada. Section 8033 requires DOD to submit a report to Congress on the amount of purchases from foreign entities in FY2003. Section 8046 required that any expenditure of funds be in compliance with the Buy American Act and authorized the Secretary of 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. Section 8060 prohibited the procurement of ball and roller bearings, unless produced by a domestic source and being of domestic origin.

In the conference report which accompanied H.R. 5010 (H.Rept. 107-732), 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 any commercial aircraft leased under the Boeing Lease Program. The Lease Program permitted Boeing to use foreign-sourced specialty metals, such as Russian titanium, on military aircraft.

Critics of the Boeing Lease Program argued that the decision to use Russian titanium bypassed the Berry Amendment, which required DOD to give preference to domestically produced, manufactured, or home grown products, notably food, clothing, fabrics, and specialty metals. The language of H.Rept. 107-732 acknowledged 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. [26]

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

[25] U.S. Department of Defense. Audit on the Status of Extended Pilot Program on Sales of Manufactured Articles and Services at Army Industrial Facilities. Office of the Inspector General, Report No. D-2003-103.PDF, June 27, 2003, 23 p.

[26] See H.Rept. 107-732 for a discussion on the"Application of the Berry Amendment to Multi-Year Aircraft Lease Pilot Program." For further discussion on the Boeing tanker lease proposal, see CRS Report RL32056, *The KC-767 Tanker Lease Proposal: Key Issues for Congress*, by Christopher Bolkcom, Coordinator, September 2, 2003, 86 p.

In the 107th Congress, the proposed FY2002 National Defense Authorization Act (H.R. 2586) contained 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.[27] The Senate later passed an amended version 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. An amended waiver requirement became law when the Berry Amendment was codified through the passage of the FY2002 National Defense Authorization Act (P.L. 107-107).

The 106th Congress acted to tighten certain Berry Amendment provisions. The FY1998 National Defense Authorization Act[28] directed the DOD Office of the Inspector General 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 and the Buy American Act. The first audit found that 59 percent of those contracts reviewed did not include the appropriate contract language (or 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. A second audit was later conducted. The second audit found that approximately 60% of all contract actions reviewed did not include the appropriate contract clauses to implement the Buy American Act nor the Berry Amendment. [29]

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

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

[29] U.S. Department of Defense. Audit of the Procurement of Military Clothing and Related Items by Military Organizations. Office of the Inspector General. Report No. 99-023, October 29, 1998, 53 p. The House Armed Services Committee requested that a second audit be conducted because of the number of violations identified in the DOD Inspector General's Report No. 99-023. As a result of the second audit, The Inspector General recommended that the Acquisition Executives for the Army, Navy, Air Force, and the U.S. Special Operations Command establish review procedures or additional training for solicitations and contract awards made subject to the Buy American Act and the Berry Amendment, and that the Assistant Secretaries for Financial Management and the Comptroller of the Army and Air Force investigate these matters for potential violations under the Antideficiency Act. For further discussion about the second audit, see U.S. Department of Defense. Audit of the Buy American Act Issues on Procurements of Military Clothing. Office of the Inspector General. Report No. D-2002-066PDF. March 20, 2002, 76 p.

Other Views

Some proponents of the Berry Amendment believe that the U.S. military should not be dependent on foreign sources for critical textile products and that dependency on foreign sources for military items could lead to problems with supply, demand, delays, and a potentially adversarial relationship with suppliers during times of war or military mobilization. Furthermore, some believe that the Berry Amendment should be expanded to include other important industries and that new federal agencies like the Department of Homeland Security should be covered by the provisions of the Berry Amendment.

However, others (i.e., some domestic and foreign companies) have criticized 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. Some critics of the Berry Amendment also 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 developing countries. They contend that the Berry Amendment promotes U.S. trade policies that undermine the international trade agreements. 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. On the other hand, critics have also expressed concern over the increased levels of imported, ready to wear goods, and the prevalent "sweat shop conditions" of foreign markets.

A GAO report has questioned whether the Berry Amendment is 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 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.[30]

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[30] Contract Management: DLA Properly Implemented Best Value Contracting for Clothing and Textiles and Views the 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.

Options for Congress

The Army's black beret controversy, which revealed that the berets are not 100% domestic in origin, and the resulting waiver of Berry Amendment restrictions to allow DLA to procure the berets from foreign sources raised questions which have not been settled, as to the original purpose, intent, and value of the Berry Amendment. Congress may choose to examine the domestic source restrictions under the Berry Amendment and other procurement provisions and to determine whether they help or hurt the defense industrial base, including relationships with foreign trading partners.

Option 1: Take no action, retain the Berry Amendment as enacted

Congress may choose to take no action, to retain the current provisions of the Berry Amendment as enacted in law.

Option 2: Eliminate Some Selected Restrictions

Congress might eliminate some selected restrictions, such as the restrictions on food. Eliminating the restrictions on purchasing food items (with less than 100% domestic content) would allow U.S. food suppliers to use more commercial business practices that are more cost effective. This move would arguably promote more competition and interest in selling food to DOD. For example, some in DOD believe that elimination of the food restriction would allow food suppliers a greater and more practical latitude to use foreign ingredients and processing, in line with current commercial practice. 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. The Pentagon believes that the food provisions of the Buy American Act would continue to provide U.S. food suppliers a significant advantage over foreign suppliers.

Likewise, Congress could eliminate or modify the clothing restriction, allowing DOD to find the best item for the most competitive price.[31] DOD has reportedly known for 25 years that it does not produce a solely domestic beret.[32] One alternative would be for restricted items to be classified according to a prioritized system, with "high-tech" and "low tech" classifications, which each could have different waiver

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[31] However, the American Manufacturing Trade Action Coalition [http://www.amtacdc.org] advocates for the preservation of the Berry Amendment and the Buy American Act, so that the U.S. military does not become dependant on foreign sources for critical textile products.

[32] At the May 2, 2001 hearing before the House Committee on Small Business, Ms. Michele Goodman from Atlas Headwear, Inc. (a small business supplier based in Phoenix, Arizona) testified that American companies could have fulfilled the Army's black beret requirement had DLA's Defense Supply Center of Philadelphia been given enough time to proceed properly, and had the U.S. Army been more open minded about the type of beret it wanted. Her company attempted to bid for the beret contract, without success. See the prepared statement of Michele Goodman, "Black Beret Procurement: Business as Usual at the Pentagon?" House Committee on Small Business, May 2, 2001.

requirements. Some military uniform components, such as the beret, could be classified as "low-tech," and therefore could be procured without a waiver. This option would be opposed by groups such as the American Manufacturing Trade Action Coalition and the National Council of Textile Organizations.

Option 3: Adopt a "Componency Standard"

Congress might revise the Berry Amendment and amend the provisions to say that manufactured articles are considered domestic if "substantially all" of their components have been mined, produced, or manufactured domestically. This is similar to the requirements of the Buy American Act and could eliminate future procurement issues like those encountered in the Army black beret procurement.

Such a provision was proposed in the House-passed version of H.R. 1588, the FY2004 National Defense Authorization Act. Section 829, titled "Requirement Relating to Purchases by Department of Defense Subject to Buy American Act," would have broadened the definition of what makes an item "domestic" in origin. In Section 829, an item was defined as domestic and covered under the Buy American Act if it was at least 65% domestic in origin. Adoption of this provision would have provided DOD the authority to procure items that may be a combination of both domestic and foreign in origin. This provision alone would represent a significant departure from the 100% domestic requirement of the Berry Amendment, and more closely parallel the provisions of the BAA.[33] However, this provision was dropped in the final version of the bill.

Option 4: Study the Lessening or Elimination of Provisions

Congress could solicit the opinions of trade associations, labor organizations, and industry experts on the 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) supports the preservation of the Berry Amendment. AAFA believes that the controversy surrounding the procurement of the berets has helped shore up support for such a change in the law. 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.[34]

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[33] The Buy American Act requires the federal government to procure items that are "substantially" composed of domestic materials, while the Berry Amendment requires that the Department of Defense procure items that are wholly (100%) domestic.

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

Option 5: Study What Percentage of Domestic Clothing, Textiles, Food, and Specialty Metals Is Sold to the Military

Congress might 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 explore the impact of Berry Amendment restrictions on U.S. relationships with foreign trading partners.

Option 6: Appoint a "Berry Amendment Commission"

Congress might 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 recommendations to the Congress. The commission could determine whether current coverage of the Berry Amendment is appropriate or whether it should be expanded or contracted.

Option 7: Audit and Investigate Berry Amendment Contracts

Congress could investigate all military procurement contracts for compliance with the Berry Amendment. Noting that congressional testimony suggested that DLA had known that the Bancroft Cap Company has used foreign suppliers for the past twenty-five years implies that there may be other similar instances that have been overlooked or under-reported. Congress could direct the Government Accountability Office[35] or the DOD Inspector General to conduct an audit of a representative sample of contracts awarded for each restricted item under the Berry Amendment, including whether end products incorporated materials from foreign sources.

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[35] Effective July 7, 2004, the General Accounting Office's legal name is the Government Accountability Office.