RESTRICTIONS ON RESEARCH AWARDS: TROUBLESOME CLAUSES

A Report of the AAU/COGR Task Force

Julie T. Norris, Chair
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Executive Summary

Over the past three years, universities across the country have reported a significant increase of situations where a sponsor has included award language that either restricts the dissemination of research results or the use of foreign nationals without prior approval on certain research projects. This report focuses on current issues relating to such restrictions.

National Security Decision Directive 189 (NSDD 189), issued in the mid 1980's and reaffirmed in November 2001, states that "fundamental research means basic and applied research in science and engineering, the results of which are published and shared broadly within the scientific community…." and indicates that where the national security requires control, the appropriate method of control is classification. Further, NSDD-189 states that "no restriction may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes."

A Task Force of 20 institutions was chartered by the Association of American Universities and the Council on Governmental Relations to focus on award language inconsistent with the above stated policy; to identify controls imposed on research projects that might compromise the fundamental research exemption under current export control regulations; and to assess whether the situation is or is not improving. Specific attention was given to the issue of restrictions on publications and the use of foreign nationals in research projects.

The Task Force analyzed 138 instances where awards included restrictive publication or foreign national language. Of this number, 105 were reported instances of proposed publication restrictions, 47 of which were inclusion of the DFARS 252.204-7000 clause. The remaining 33 situations represented a variety of clauses that restricted the dissemination of research results (primarily restrictions on foreign nationals). The results of those award negotiations are included in the report along with data on the length of time that was required to conclude negotiations. Task Force recommendations are included in the report.

RESTRICTIONS ON RESEARCH AWARDS: TROUBLESOME CLAUSES

A Report of the AAU/COGR Task Force[1]

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Background

Institutions across the country have become increasingly concerned about the inclusion of clauses in research awards (primarily, but not exclusively, government contracts) which restrict publications or the use of foreign nationals on such awards. These regulatory restrictions have been in place for many years but, recently, there has been an increasing concern on campuses that such restrictions may require institutions to apply for and receive export licenses from the State Department or the Commerce Department.

National Security Decision Directive 189 (NSDD 189), issued in the mid 1980's and reaffirmed in November 2001 by the President's National Security Advisor,[2] states that

> 'Fundamental research' means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

Further, the directive includes the following language:

> It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. Each federal government agency is responsible for: a) determining whether classification is appropriate prior to the award of a research

[1]The author thanks Mr. Paul Powell, Assistant Director, Office of Sponsored Programs, Massachusetts Institute of Technology, who aided in the compilation and review of the material submitted by the Task Force schools.

[2] Issued September 21, 1985 and reaffirmed in a letter from Dr. Condoleezza Rice to Dr. Harold Brown on November 21, 2001.

> grant, contract, or cooperative agreement and, if so, controlling the research results through standard classification procedures; b) periodically reviewing all research grants, contracts or cooperative agreements for potential classification. No restriction may be placed upon the conduct or reporting of federally funded fundament research that has not received national security classification, except as provided in applicable U.S. Statutes.

This language has provided the basis for the position taken by institutions of higher education in arguing that it is inconsistent with official U.S. Government policy to prohibit restrictions on the conduct of or reporting on the results from unclassified fundamental research. Institutions have referenced this policy directive over the years in negotiating acceptable terms and conditions of research awards from the federal government. However, beginning in the spring of 2001 institutions began reporting to the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) an increase in the number of awards they were receiving that had restrictive clauses (labeled "troublesome clauses") included in the proposed terms and conditions.

In the spring and summer of 2003, at the request of the Office of Science and Technology Policy (OSTP), AAU and COGR solicited from their member institutions examples of restrictive clauses imposed on research projects and provided that information to OSTP.[3] In an effort to collect more systematically information on the troublesome clauses described further in this document, an AAU/COGR task force was created in August 2003 to expand upon those earlier efforts to track the continuing emergence of troublesome contract clauses and to identify the agencies and organizations from which they originate.

Charge to the Task Force

The Task Force was chartered jointly by AAU/COGR to focus specifically on identifying contract and grant language[4] inconsistent with the Administration's stated policy as outlined in NSDD-189. In addition, the Task Force was asked to identify controls being imposed on research projects that might compromise the fundamental research exemption under current export control regulations,[5] with special emphasis on publications and the

[3] Initial examples of troublesome clauses were transmitted to the OSTP from the AAU on June 9, 2003. Two additional examples were provided on July 17, 2003.

[4] Although the specific charge to the Task Force was to identify restrictive language in both contracts and grants, a review of the submissions indicates that, with only a few exceptions, all the restrictions were with respect to contracts.

[5] The International Traffic in Arms regulations (ITAR) include the following (see paragraph 120.11), "Public domain means information which is published and which is generally accessible or available to the public:….(8) through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered

participation of foreign nationals. An additional goal of the Task Force was to understand if the number of troublesome clauses (or the instances of the same troublesome clause reappearing) was increasing, remaining constant, or decreasing over the period of the report.[6]

Members

Institutions selected to participate in the Task Force represented both public and private institutions. In addition, care was taken to ensure that both large and smaller institutions were included and that there was some geographical balance to the members. The institutions who participated in the study were the following:

California Institute of Technology
Carnegie Mellon University
Duke University
Georgia Institute of Technology
Harvard University
Massachusetts Institute of Technology
Northwestern University
The Pennsylvania State University
Stanford University
Texas A&M University
University of California, Berkeley
University of California, San Diego
University of Cincinnati
University of Colorado, Boulder
University of Maryland, College Park
University of Michigan
University of Minnesota
University of Texas at Austin
University of Wisconsin
Washington University

In addition, the Council on Governmental Relations and the Association of American Universities were instrumental in the activities of the Task Force and provided exceptional comment and guidance throughout the process.

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fundamental research if: (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable." The Export Administration Regulations (EAR) contain similar although less stringent restrictions (EAR 734.8).

[6] The initial period of data collection was scheduled to be August – December 2003 but extended through February 2004.

Methodology

Each participating university was asked regularly to report instances where troublesome clauses have been included in government direct or subawards as well as awards directly from industry.[7] Reporting was accomplished via a web-based form submitted upon first encountering one of the troublesome clauses and then updated during the process of resolving the problem(s) presented by the clause. Summary data on the number of submissions, the type of submission (publication restriction, foreign national restriction, other), and the outcome of negotiation (accepted clause, accepted clause with modification, rejected project along with the time required to reach conclusion) was tabulated periodically throughout the period and is shown in Appendix I. It should also be noted that during the six month period of the task force's review, there did not appear to be a diminution in the number of instances of troublesome clauses being reported.

As the analysis progressed, certain web-based submissions were eliminated. These included restrictions reported on classified contracts as well as restrictions reported on non-research activities. In addition, restrictions from foundations were eliminated as were restrictions imposed by industrial sponsors when using their own resources, rather than federal government "flow-through" funds.[8] Projects with these restrictions, although included in the gross data in Appendix I, were eliminated from the detailed analyses since they did not represent restrictions contrary to the fundamental principles of NSDD-189 and were therefore outside the scope of the study.

Appendix II indicates, by institution, the number of web-based submissions and the number that were included in the detailed analysis.

Restrictions Identified by Institutions

Restrictions were of two general types: 1) Publication restrictions and 2) Restrictions on use of foreign nationals on research projects. Institutions reported the inclusion in proposed contracts of DFAR clause 252.204-7000 more often than any other single restriction. The text of that clause is valuable in understanding the concerns of institutions:

DFARS 252.204-7000 Disclosure of Information[9]

When the Contractor will have access to or generate unclassified information that may be sensitive and inappropriate, include the clause DFARS 252.204-7000.

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[7] The report does not include data for institution-affiliated federally funded research and development centers (FFRDCs) or university affiliated research centers (UARCs).

[8] There were 5 reports of restrictions imposed by industrial firms using their own resources. Of these, two were publication restrictions, two were foreign national restrictions, and one included restrictions on both foreign nationals and publications.

[9] Institutions often see these clauses incorporated into contracts even when they are not required by the prescribing clause.

DISCLOSURE OF INFORMATION (Dec 1991)

(A) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document) pertaining to any part of this contract or any program related to this contract, unless—
(1) The Contracting Officer has given prior written approval; or
(2) The information is otherwise in the public domain before the date of release
(B) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose of the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.
(C) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

Similar concerns arise when conditions (or restrictions) are imposed with respect to the use of foreign nationals on research projects funded either directly by the government or as a subcontractor from a prime contractor. One such clause which appeared in proposed contracts to task force schools is the following:

ARL 52.004-4400 FOREIGN NATIONALS PERFORMING UNDER CONTRACT (Feb 2002)

In accordance with Title 8 U.S.C. 1324a, local Foreign Disclosure Officers (FDOs) may approve access by foreign nationals working on unclassified public domain contracts for the duration of the contract, provided the foreign nationals have appropriate work authorization documentation.

In those instances where foreign nationals are required to perform under any resultant contract and employment eligibility documentation was not submitted with an awardee's proposal, the employment eligibility documentation specified at 8 CFR 24a.2 shall be submitted to the Contracting Officer at least two weeks prior to the foreign national's performance for review and approval. Awardees not employing foreign nationals in performance of any resultant contract may disregard this clause.

Another example of a clause whose text poses significant difficulties for universities is the following:

5327.9002 Provisions and clauses.
(a) Insert the clause at 5352.227-9000, Export-Controlled Data Restrictions, substantially as written, in Section I when the acquisition involves export controlled data.

AFMC 5352.227-9000 EXPORT-CONTROLLED DATA RESTRICTIONS (AFMC) (JUL 1997)

(a) For the purpose of this clause,

(1) Foreign person is any person who is not a citizen or national of the U.S. or lawfully admitted to the U.S. for permanent residence under the Immigration and Nationality Act, and includes foreign corporations, international organizations, and foreign governments;

(2) Foreign representative is anyone, regardless of nationality or citizenship, acting as an agent, representative, official, or employee of a foreign government, a foreign-owned or influenced firm, corporation or person;

(3) Foreign sources are those sources (vendors, subcontractors, and suppliers) owned and controlled by a foreign person.

(b) The Contractor shall place a clause in subcontracts containing appropriate export control restrictions, set forth in this clause.

(c) Nothing in this clause waives any requirement imposed by any other U.S. Government agency with respect to employment of foreign nationals or export controlled data and information.

(d) Equipment and technical data generated or delivered under this contract are controlled by the International Traffic in Arms Regulation (ITAR), 22 CFR Sections 121 through 128. An export license is required before assigning any foreign source to perform work under this contract or before granting access to foreign persons to any equipment and technical data generated or delivered during performance (see 22 CFR Section 125). The Contractor shall notify the Contracting Officer and obtain written approval of the Contracting Officer prior to assigning or granting access to any work, equipment, or technical data generated or delivered under this contract to foreign persons or their representatives. The notification shall include the name and country of origin of the foreign person or representative, the specific work, equipment, or data to which the person will have access, and whether the foreign person is cleared to have access to technical data (DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM)).

Data Analysis

The analysis was designed to segment the data into various categories. For example, the source of the restriction was identified as coming from (i) a federal sponsor, either as a primary award from the sponsor, or as a flow-through (either through industry or another institution of higher education), (ii) an industrial sponsor as a flow-through from a federal sponsor or (iii) from another institution of higher education as a flow-through from either industry or a federal agency. In the case of awards from federal agencies, the task force

identified the federal funding source as from (a) one of the DoD/mission agencies (DOE, NASA) (b) Security Agencies (NSA, ARDA, CIA) (c) one of the civilian agencies (NSF, DHHS, etc.), or (d) one of the DOE National Laboratories.

One item the Task Force was unable to address was a comparison among the number of reports of troublesome clauses during this 2003-2004 period and previous periods (e.g., two, five, or more years ago). The anecdotal sense of the Task Force members is that the number of instances has increased since early in 2001 along with difficulty in reaching conclusions satisfactory to both the sponsor and the university, but since comparable data was not kept in earlier periods, any qualitatively or quantitatively supported analysis was not possible.

Case studies are included in Appendix IV which illustrate approaches taken to reach resolution in certain instances. These are by no means all-inclusive but do illustrate institutional considerations in resolving some of these restrictions.

The data is organized in a series of tables which present the data on 138 troublesome clauses in a variety of ways:

Table I is a listing of the various sponsors which included clauses with publication restrictions, foreign national restrictions, or access and dissemination restrictions in proposed awards to the Task Force institutions. The table includes the type of restrictive clause included in the award document.

As the data shows, the greatest number of instances reported of a single restriction is with respect to the DFARS 7000 clause. It is interesting to note that no federal agency included the AFMC 5352.227-9000 foreign national restriction clause in direct awards to universities. However, universities saw it included 13 times when they were subrecipients from an industrial prime award.

Table II includes the number of instances of the inclusion of the DFARS 252-204-7000 Disclosure of Information clause, the number of schools who received the proposed clause and whether the institution accepted the clause as written, negotiated alternative language, rejected the clause, as well as instances where the negotiation is still pending.

The data shows that 70% (14) of the Task Force schools received at least one project with the DFARS 7000 clause included. Of these 14 schools, almost one-third (4) accepted the clause as written. However, more than 20% (3) rejected the proposed award because of the inclusion of the clause. Almost half of the total number of task force schools (9), which represents 64% of those receiving the language, were able to negotiate language which permitted them to accept the award. Fifteen percent (7) of the total instances of receipt of the clause are still in negotiation between sponsors and 6 of the participating institutions. It should be noted that of the 18 acceptances of the 7000 clause from Task Force schools, 16 of those were at only two institutions.

Table I

TROUBLESOME CLAUSES CLASSIFIED BY SPONSOR

Sponsor	Total # of instances reported	The 7000 clause	Other publication restrictions	Foreign national restrictions	Other access or dissem. restrictions
DoD	**19**	15	4		
DoE	0				
NASA	**1**		1		
Other Govt	**32**	1	15	14	2
-Security Agencies	11	1	1	9	
-NSF	2			2	
-DOJ	6		3	3	
-DHHS	6		5		
-Fed Res	1		1		1
-HUD	1		1		
-NRC	1		1		
-DOT	2		2		
-FHWA	1				
-ITC	1		1		1
National Laboratories	**4**		4		
DoD via industry	**77**	31	31	13	2
Other sponsors via industry	**5**		3	2	
TOTALS	**138**	**47**	**58**	**29**	**4**

Institutions which accepted the 7000 clause indicated they did so reluctantly and only after long negotiation with the sponsors. In certain cases, the institution indicated that the nature of the research influenced a decision to accept. In other instances, institutions reported that the decision was based on a judgment that in the particular situation there was no harm likely to graduate students or faculty and that there was programmatic value in performing the research. The alternative, these institutions said, would have been to reject the award and the decision to accept the award was made on a non-precedent setting basis.

Table II

PUBLICATION RESTRICTION: The 7000 Clause

Number of instances reported	Number of schools receiving clause	Number of acceptances as proposed	Number negotiating alternative language	Number rejecting awards	Number pending as of 3/1/04
47	14	4 schools; total of 18 acceptances	9 schools; total of 19 with revised language	3 schools; total of 3 awards rejected	6 schools; total of 7 pending

Table III includes similar data on instances of the inclusion of other publication restriction clauses. More than 1/3 of the task force schools (34%) received other publication restriction clauses. In 11 instances (21%), a total of 6 schools accepted the proposed language, while 11 schools of the 16 that received the clause (68%) negotiated alternate language, and 6 schools rejected an award (37% of the schools receiving the language representing 13% of the total instances).

Table III

PUBLICATION RESTRICTIONS: Other Clauses

Number of instances reported	Number of schools receiving clause	Number of acceptances as proposed	Number negotiating alternative language	Number rejecting awards	Number pending as of 3/1/04
51	16	6 schools; total of 11 acceptances	11 schools; total of 27 with revised language	6 schools; total of 6 awards rejected	4 schools; total of 7 pending

Table IV summarizes the foreign national restriction clauses included in proposed awards.

Fifteen of the twenty schools (75%) represented by task force members received clauses with foreign national restrictions. Of these, 4 schools accepted the clause as written, with a total of 8 acceptances. Four schools rejected a total of 4 awards. Nine schools (60% of those receiving this restriction) were able to negotiate acceptable language and 7 schools representing 9 instances are still negotiating language.

Although the number of foreign national restrictions was lower than the publication restrictions, schools report that it is more difficult and more time consuming to negotiate acceptable language with respect to foreign nationals than to negotiate acceptable publication language.

Table IV

FOREIGN NATIONAL RESTRICTIONS

Number of instances reported	Number of schools receiving clause	Number of acceptances as proposed	Number negotiating alternative language	Number rejecting awards	Number pending as of 3/1/04
30	15	4 schools; total of 10 acceptances	9 schools; total of 11 with revised language	4 schools; total of 4 awards rejected	7 schools; total of 9 pending

Table V shows, for the few instances where there was an access/dissemination restriction other than one imposed on the use of foreign nationals, the outcome of those restrictive clauses.

Table V

OTHER ACCESS/DISSEMINATION RESTRICTIONS

Number of instances reported	Number of schools receiving clause	Number of acceptances as proposed	Number negotiating alternative language	Number rejecting awards	Number pending as of 3/1/04
7	6	2/2	3 schools; total of 3 with revised language	2 schools rejecting 2 awards	

For seventy-four (74) of the reported instances, institutions included data on how long it took to reach resolution on the clause language. That data is presented in Table VI.

In 25% of the instances, resolution was achieved in less than one month, ranging from 1 day to the entire month. However, in 75% of the cases (55 of 74) resolution took more than a month with 45% taking between 1 and 3 months. More disturbing is that of the 55 cases, an equal number to those resolved inside a month (19, or 25%) took between 3 and 6 months, and in three cases it took more than 6 months.

Table VI

TIME DELAY TO RESOLUTION

Less than 1 month	1-3 months	3-6 months	More than 6 months	Total
19	33	19	3	74

One example from one university illustrates the significant problems encountered with time delays in reaching at outcome (whether negotiated language or rejection of the award). In addition, although not factored into the discussion below, there is significant administrative time requirements in an institution's sponsored programs office, by the principal investigator, and by personnel at sponsoring agencies (both administrative and programmatic) which are not value-added activities.

The example:
Institution A was collaborating with an industrial partner (B) in response to a DOD solicitation. At the time the proposal was submitted by the institution, it was made clear to the industrial partner that—if the proposal were accepted for award—the subcontract could not include any restrictions on either the publications or the use of foreign nationals.

Despite the fact the university made it clear at the proposal stage it could not accept these restrictions, the award from DOD to the prime and from the prime (B) to the institution A included these restrictions. Although both restrictions were addressed throughout the negotiation, the foreign national issue was, both the university and the industrial prime thought, resolved. Specifically, after two months, it appeared to both parties that there would be no foreign national restriction imposed by DOD on the subaward. It took seven months to reach a resolution on the publication issue, i.e., negotiate alternative language to the 7000 clause. Once that had been done, the prime was advised by DOD that no foreign nationals could be used on the program and negotiations resumed on that issue. This is a multimillion dollar subaward for the university, and the university is central to the industrial prime being able to perform. Discussions are still ongoing between the university, DOD, and the industrial prime, it is becoming increasingly evident that the university will reject the subcontract because DOD is adamant about the foreign national restriction.

Relationship to Export Controls

There are a number of institutions of higher education whose policies preclude the acceptance of restrictions on publications and a smaller number whose policies do not allow acceptance of clauses which restrict access to or the dissemination of data resulting from research activities (including restrictions on foreign nationals). When institutions operate within these policies, the basic and applied research they are performing on campus within the borders of the United States are exempt from the requirements of the

export control regulations.[10] In such cases, licenses are not required to allow foreign nationals who are not permanent residents of the United States to participate in the research activities. When accepting restrictions, institutions may be required to seek and be granted export control licenses to allow their own graduate students and postdoctoral students and faculty who are foreign citizens to participate in the research projects ("deemed" exports). The amount of time which can elapse while waiting for such licenses to be granted can vary from a few weeks to a few months to years and the effect on the research program can be significantly adverse.

Conclusions

Assuming the experience of the participating institutions is reasonably typical,[11] the most disturbing outcome revealed by the data is the substantial negative impact on the conduct of basic and applied research of value to the nation which normally takes place in institutions of higher education in the United States. The nation and industry depend on universities to do this research, which is not frequently pursued in other sectors, in order to sustain the nation's leadership position in education and innovation. Institutions have as a cornerstone of their activities and values openness and the unfettered transmission of knowledge through educational activities and the creation of new knowledge through research and scholarly activities. Most institutions (and all but one in the study population) have a formal policy against accepting restrictions on publications; a lesser number, but certainly a majority of the task force institutions, have either formal policies or institutional practices that preclude restrictions on foreign nationals who engage in research at their institutions.[12] Even when an institution and a sponsor are finally able to negotiate acceptable language, the time delay (often counted not in days, but in weeks and months) can have a substantial negative impact on the research and the students who do that research.

In many instances, institutions were able to accept language only after extensive negotiations that included significant interchange not only with various levels within the agency's contracting hierarchy but also, and equally importantly, with program officials at the agencies. The involvement of program officers was, as reported in some of the data, critical to a mutually agreeable outcome.

The failure to reach timely resolution of these troublesome clauses creates hardships, sometimes quite severe. Delays may cause students not to be hired to work on projects and may delay significantly completion of theses and dissertations. Faculty and researchers are often forced to turn their attention and talents toward research projects that do not involve these difficulties. For a sponsoring agency, delays may unduly

[10] See Department of State International Traffic in Arms Regulations (22 CFR 120-130) and Department of Commerce Export Administration Regulations (15 CFR 730-774)

[11] The institutions in the study were deliberately chosen to represent the full spectrum of institutions receiving funding from the government. Although some institutions reported relatively few instances of troublesome clauses, institutions with major DOD/Security Agency funding reported a far greater instance of difficulty both in the receipt of troublesome clauses and in the time frame to resolution.

[12] See Appendix III for one institution's rationale for not accepting troublesome clauses on its campus.

restrict an agency in its mission to have research performed in line with programmatic expectations.

From the data collected by the task force during the reporting period, there was no lessening in the frequency of the inclusion in proposed awards of clauses which restrict publications and the use of foreign nationals in research projects. Further, with the recent attention to issues surrounding the labeling of projects as SBU (sensitive but unclassified) there is increasing concern that the difficulties institutions have in negotiating these clauses will expand.

Recommendations

NSDD-189 is a clear statement to agencies and universities that basic and applied research should be free from publication or other restrictions and that the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. This policy was reaffirmed in November 2001 in a letter from Dr. Condoleeza Rice to Dr. Harold Brown. **We recommend, therefore, that agencies adhere to the spirit of this principle and not impose publication and foreign national restrictions.**

In recent months, several task force members have been encouraged by the increased understanding by personnel, from both the government and industry, of the university issues as they relate to these restrictions. This has resulted, in some instances, in an agency recognizing the difference between the basic and applied research that is done at a university and the development and commercialization work that is subsequently done by an industrial partner who is subject to restrictions. Some sponsors have structured awards to recognize that difference. Although the research may seem on a superficial review to be similar, the motivation and purpose for doing the research are quite different in industry and academia. Industry pursues research to bring products to market and make a profit. Academia does not pursue research for this purpose, but rather engages in years of research to increase knowledge. The history of academic research in the United States and elsewhere establishes that openness and free exchange of ideas among diverse researchers are essential to fundamental scientific and engineering discoveries. Government restrictions are incompatible with academic research. **We recommend that all agencies be encouraged to make similar distinctions in the awarding of contracts and the approval of university subawards from industrial prime awards. Further, we recommend that agencies make clear to industrial prime awardees that the restrictive publication and foreign national clauses they receive do not have to be passed down to university subawardees when the purpose of the funding to the university subawardee is for basic research. One specific recommendation in this regard is to revise the DFARS "prescription" guidance to provide that the 7000 clause is not to be used in contracts for university research, either direct or as a flowdown.**

In summary, then, we urge the Office of Science and Technology Policy to work with agencies and universities to build needed flexibility into the research enterprise so that agreements may be negotiated in a mutually acceptable and timely manner and the significant research undertaken by universities not be impacted by needlessly bureaucratic restrictions.

APPENDIX I

Summary of Number of Troublesome Clauses Reported by Task Force Schools (raw data, by category)

Restriction	Accepted as Proposed	Negotiated Alternate Language	Rejected Award	Negotiation in Progress	Total
		October 14, 2003			
FAR 7000 clause	3	4	2	11	20
Other publication	4	3	2	3	12
Foreign national	4	4		2	10
Data access/diss.	1	1		1	3
Miscellaneous		3		2	5
TOTALS	**12**	**15**	**4**	**19**	**50**
		October 31, 2003			
FAR 7000 clause	14	11	2	9	36
Other publication	11	9	2	9	31
Foreign national	9	6	1	6	22
Data access/diss.	1	2		6	9
Miscellaneous		5		3	8
TOTALS	**35**	**33**	**6**	**33**	**107**
		December 31, 2003			
FAR 7000 clause	14	16	3	19	52
Other publication	11	10	2	16	39
Foreign national	10	**7**	1	10	28
Data access/diss.	1	2	1	6	10
Miscellaneous		11		4	15
TOTALS	**36**	**46**	**7**	**55**	**144**

February 28, 2004

	Total number of submissions	Accepted as Proposed	Negotiated Alternate Language	Rejected Award	Negotiation in Process	Total
FAR 7000 clause	47	18	19	3	7	47
Other publication	71	11	27	6	7	51
Foreign national	40	9	11	4	9	33
Data access/ dissemination	7	2	3	2	0	7
Miscellaneous	15	0	0	0	0	0
TOTALS	**180**	**40**	**60**	**15**	**23**	**138**

APPENDIX II

INSTITUTIONAL REPORTING OF TROUBLESOME CLAUSES AND NUMBER INCLUDED IN ANALYSIS

Institution	# Reported in Database
California Institute of Technology	2
Carnegie Mellon University	10
Duke University	5
Georgia Institute of Technology	22
Harvard University	3
Massachusetts Institute of Technology	18
Northwestern University	3
The Pennsylvania State University	16
Stanford University	3
Texas A&M University	6
University of California, Berkeley	9
University of California, San Diego	4
University of Cincinnati	22
University of Colorado, Boulder	11
University of Maryland, College Park	15
University of Michigan	8
University of Minnesota	6
University of Texas at Austin	6
University of Wisconsin	8
Washington University	3
TOTAL	**180**

Of the 180 reported cases of troublesome clauses, 138 were selected for detailed analysis in this report. Not included were clauses reported on classified contracts (where the fundamental research exemption is not available), on non-research sponsored programs, on awards from commercial entities using their own funds, from foundations, and other miscellaneous submissions which, when analyzed, did not fit the parameters of this study.

APPENDIX III

INSTITUTIONAL RATIONALE

The Massachusetts Institute of Technology (MIT) is one of the Task Force schools. Within the last two years, MIT has reviewed its policies and procedures with respect to accepting restrictions on its grants and contracts.

MIT issued a report entitled "In The Public Interest: Report of the ad hoc Faculty Committee on Access to and Disclosure of Scientific Information" on June 12, 2002. That report stated that "MIT, to fulfill its mission, must have an open intellectual environment. Education and scholarship are best served through the unconstrained sharing of information and by creating the opportunities for free and open communication…..National security, the health of our nation, and the strength of our economy depend heavily on the advancement of science and technology and on the education of future generations. The well-being of our nation will ultimately be damaged if education, science, and technology suffer as a result of any practices that indiscriminately discourage or limit the open exchange of ideas." That report is available on the web at http://web.mit.edu/faculty/reports/publicinterest.pdf.

APPENDIX IV

CASE STUDIES

Two of the case studies that reference clauses reported by several of the task force schools are adapted from the document "Export Controls and Universities: Information and Case Studies" written and published by the Council on Governmental Relations in February 2004. They are included with express permission from the Council.

CASE #1
Proposed Publication Restriction

Scenario

A Principal Investigator (PI) is doing basic research in the field of remote sensing. Your institution receives a research contract from the Department of Defense (DOD) as well as a subcontract from another university in support of this work. Both agreements incorporate the following clause:

DFARS 252.204-7000 Disclosure of Information.
As prescribed in 204.404-70(a), use the following clause:
DISCLOSURE OF INFORMATION (DEC 1991)
(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—
(1) The Contracting Officer has given prior written approval; or (2) The information is otherwise in the public domain before the date of release. (b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.
(c) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

Analysis and Comment

This clause would restrict publications. The research to be performed falls under ITAR Category XV and if the restrictive publication clause is not modified, a license from the State Department would be required to export the technical data or to use foreign nationals on the research program. The publication clause seeks to control any and all unclassified information, regardless of medium, that the government believes may be sensitive and inappropriate for release to the public. If accepted without substantive changes, the research the PI is conducting would no longer qualify as fundamental research and would therefore not fall under the exemption afforded under export control laws and any transmission of the data (oral, written, or visual representation) generated by the project or the final results to any foreign national will be a deemed export and will require a license from the State Department before making a disclosure. Further, the PI will have to get prior approval to publish. NSDD 189 states, as a matter of federal policy, that papers or other publications resulting from unclassified contracted fundamental research are exempt from the prepublication controls. NSDD further states that when national security requires controls on publication,

the mechanism that must be used to restrict the dissemination of information generated during federally-funded fundamental research in science, technology, and engineering at colleges, universities, and laboratories is classification. In other words, NSDD 189 stands for the proposition that no restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes (NSDD189).

Some universities have successfully requested the deletion of 252.204-7000 and, in most cases, accepted a 30-day review and comment period.

There are two important elements of any prepublication review clause: (1) establish a precise time limit for the government review, and (2) limit the scope of the review to a review for the inclusion of (a) classified information, in the case of the government, and (b) to the information that could jeopardize patent rights and clearly identified proprietary or confidential information of the sponsors, in the case of private industry (provided none of the proprietary information is marked by industry as export-controlled).

CASE #2
Proposed Publication Restriction

Scenario

A small company has received SBIR funding from the Army and issued a subcontract to an institution of higher education. The Principal Investigator, a professor in the mechanical and aerospace engineering department, will be helping the company develop and fabricate components for ground effect machines (GEMS). The company will need to provide export-controlled data (called "technical data" in the ITAR) in order for your institution to assist with the effort. Neither party expects that the university team will be involved in the manufacturing of the final product to be delivered to the Army by the company. Several of the students and post docs who will be working on the project are foreign nationals, as is the Principal Investigator, who is British. The agreement contains the following clause:

H-6 Dissemination of Information
a. There shall be no dissemination or publication, except within and between the Contractor and any subcontractors, of information developed under this contract or contained in the reports to be furnished pursuant to this contract without prior written approval of the COTR.

Analysis and Comment

There is a publication approval requirement as an award condition. Because the restriction on publication pertains to "information developed under this contract," it will capture university generated data that otherwise would be (presumably) in the public domain, in addition to information provided to the university by the company (which has every right to restrict disclosure of its own information, which is not in the public domain to begin with). The sponsor is providing "technical data," a term of art used in the ITAR to indicate information that is subject to ITAR control, to the university research team. Nominally this is a fundamental research project but it fails on the ground of being subject to disclosure restrictions.

While it is possible that the faculty may not be directly performing any ITAR related work, the project team will be given access to ITAR data. Accepting this prior approval clause will eliminate the fundamental research exclusion and require the university to obtain licenses for the foreign nationals to work on the project.

CASE #3
Foreign National Restriction

Scenario

In submitting a proposal in response to a Request for Proposal (RFP) the Representations and Certifications to be submitted by the institution included the following:

352.204-9004 Statement of Non-Foreign Affiliation (Aug 1996)

(c) Will non-U.S. citizens be required to work on any resultant contract? Yes__, No__. Should the offeror intend to use any non-U.S. citizens on any resultant contract, their names and their last country of citizenship must be included below:

_____
_____
_____
_____

Notice: This Agency may prohibit non-U.S. citizens from all or certain aspects of the work to be performed under any resulting contract. The fact that the Offeror intends the use of non-U.S. citizens on any resulting contract will not necessarily disqualify the company from consideration.

The resulting contract included the following clause:

H.2. Foreign Nationals (FORNAT)
No foreign nationals may work on this contract until approval from the Government (Contracting Officer) have been received.

Analysis and Comment

The requirement to include the names and countries of citizenship for non-U.S. citizens proposed to be used on any resultant contract implied that there might be a foreign national restriction imposed. Some institutions will provide the names and citizenship of foreign nationals, others will not.

In this particular instance, the institution contacted the contracting officer to ask how the certification would be handled in three instances:

(a) the name of a foreign national was provided in the certification
(b) the certification indicated that no foreign national would be used
(c) the certification indicated that no foreign national would be used but, subsequent to award, a foreign national was selected to work on the project

The contracting officer said that in example (a), they would perform a background check and either approve or disapprove the use of the foreign national and a clause to that effect would be included in the formal contract. In example (b), no foreign national restriction clause would appear in the formal contract. In example (c), the contracting officer indicated that that would be a material change in the certification and that the institution would be required to submit a new certification indicating the use of a foreign national, at which time the contract would be amended to include the foreign national restriction clause and the individual would be subject to the requisite background check. Furthermore, the representation and certification was subsequently modified by the Agency to include the following statement: THE CONTRACTOR SHALL NOTIFY THE CONTRACTING OFFICER IN WRITING IF ANY OF THE ABOVE INFORMATION CHANGES DURING THE PERFORMANCE OF ANY RESULTANT CONTRACT.

This case study is included as an example of the difficulties institutions face after the award of a contract when the original contract is free from either publication or foreign national restrictions. In such cases, most institutions will have negotiated a termination for convenience clause in the agreement which will permit ending a research project prior to its normal termination date. Of course, such actions can cause hardships to the students, the faculty, the institution and the sponsoring agency.

One institution reported that the negotiation period was between 1 and 2 months (limited because it occurred at the end of a federal fiscal year) and resulted in the institution's rejection of the award.