S. HRG. 106–1104

S. 1712, EXPORT ADMINISTRATION ACT OF 1999

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

APRIL 4, 2000

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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S. 1712, EXPORT ADMINISTRATION ACT OF 1999

TUESDAY, APRIL 4, 2000

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 253, Russell Senate Office Building. Hon. John McCain, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. Good afternoon. We are here today to hear testimony about the proposed Export Administration Act. I am pleased to welcome our panelists, who are well informed about this topic and who can share with us their different perspectives.

Attaining and maintaining the correct balance between globalized trade and protection of our national security is one of the greatest challenges of our time. As important as the substantive determination of what is the right amount of technology transfer to be allowed is the establishment of a process which assures necessary checks and balances to result in the right substantive balance. The balance to be struck between trade and national security is often hard to determine, particularly as technologies are produced and refined ever more quickly. A process that assures a complete, competent, technical and policy review, may not move at the "Internet time" pace that industry desires. Still, compromise on the process in order to meet the demands of trade may unfortunately result in compromised national security.

We are all well aware of some of the flaws of the current export system. Numerous congressional hearings, including one held by this Committee in September 1998, have documented security lapses and illegal or ill-advised technology transfers to China. The highly publicized problems with satellite technology transfers and the apparent linkage to the 1999 campaign finance scandals have created an appearance of impropriety that demands close scrutiny of this export administration authorizing legislation.

It is critical that no aspect of this balancing be driven by, or perceived to be driven by, political contributions or influence. There will be no credibility behind decisions regarding particular export licenses if the process can be distorted, controlled, influenced or biased by improper motivations. Our country will have no confidence that national security is being protected if decisions are made in favor of industry as a result of campaign contributions.

Additionally, investigations by the Inspector Generals of the Departments of Defense, State, and Commerce identified problems in June 1999 which must be addressed fully by the legislation in order to achieve the balance necessary to ensure passage. The Cox Committee recommendations, along with the Inspector Generals' recommendations, highlight specific areas of inquiry and revision to avoid future improprieties or errors in export decisions.

Some of the most pressing questions about the current process, and how S. 1712 would address the same issues, include whether adequate time frames exist for referral of license applications, whether appropriate referrals are being made by the Department of Commerce for commodity classifications, as well as for license applications, whether deemed exports are being appropriately controlled, whether the appeal process is biased, how cumulative impacts of licensing decisions are addressed, whether adequate monitoring and enforcement of license conditions is occurring, and whether sufficient training is provided to licensing officers in each of the agencies.

One example of problems in the current process that must be remedied in new legislation relates to commodity classification referrals from Commerce to State and the Department of Defense (DOD). The June 1999 Inspector General report notes that out of the thousands of commodity classification requests submitted to the Department of Commerce (DOC) between April 1996 and March 1999, the Commerce Department referred only 12 of the requests to DOD for input. A sampling of items which were not referred, and which DOD thought should have been, included two items which could likely be munitions items.

The IGs from both DOC and DOD concurred that this lack of referral is a problem. To quote the IG's report, "The first request was for a ruggedized, portable, encrypted radio. Commerce officials stated that the radio had not been built to military standards and therefore was not a munitions item under the jurisdiction of the International Traffic in Arms Regulations. DOD officials stated that the literature described the radio as militarized and that other radios built by the manufacturer were subject to munitions export licenses. The second request was for the antenna. Commerce officials stated that the antenna was not a munitions item, despite company literature describing it as militarized. DOD officials stated that the literature satisfied International Traffic in Arms Regulations criteria for a 'defense article' and that the manufacturer had a history of exporting products under the munitions export licensing process."

Clearly under the current export process, the Department of Commerce has a great deal of discretion to decide when or whether to refer a commodity classification request. This broad discretion has resulted in a dearth of referrals—and has in fact resulted in classification decisions which are incorrect. How does the process proposed in S. 1712 change this balance or provide additional checks and balances on the discretion of Commerce?

Similarly, the 1999 IG Report identified a bias in the appeal process as a potential problem, at least in some cases. The IG for the Department of Commerce concurred that the appeal committee chair had felt pressured by the Department of Commerce manage-

ment to decide some cases in favor of Commerce, regardless of the input from other agencies. While Commerce officials disputed that there had been any undue influence, the IG concluded that it is critical to the process that the appeal chair be considered objective, and recommended that such influence was not appropriate. How does the process that would be established in S. 1712 avoid any appearance of bias or impropriety in the appeal process?

There are many other examples. I'd like to get specific answers to how the proposed legislation addresses these issues, as well as the other recommendations made by the IGs and the Cox Committee.

We also cannot look at dual-use commodity exports in a vacuum. While this legislation covers only dual-use commodities, we should consider how our policy and process on these dual-use items compares with satellites, munitions and other items covered by different statutes and regulations. Can the overall policy and national security interest be gerrymandered simply by reclassifying items or defining items differently? Can the Secretary of Commerce negate a classification unilaterally, or can any of the other agencies? If we are to achieve our dual goals of promoting free trade while protecting national security, we must be consistent and clear in our licensing programs. I am anxious to hear testimony that will address this concern.

I appreciate the difficulties in balancing which products or services can be exported without damaging national security. These are important and increasingly complex decisions in a world with rapidly changing technologies, demands for exports, and changes in foreign situations. I appreciate the effort that has gone into attempting to balance all of the competing interests in this legislation. Our task today is to produce a review of problems which have been identified before and consider whether they have been adequately addressed. And I thank the witnesses for being here today and look forward to their testimony. Senator Gorton?

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

We are here this afternoon to hear testimony about the proposed Export Administration Act. This is a matter of great importance. I am pleased to welcome our panelists who are well informed about this topic and who can share with us their differing perspectives.

Attaining and maintaining the correct balance between globalized trade and protection of our national security is one of the greatest challenges of our time. As important as the substantive determination of what is the "right" amount of technology transfer to be allowed, is the establishment of a process which assures necessary checks and balances to result in the right substantive balance. The balance to be struck between trade and national security is often hard to determine, particularly as technologies are produced and refined ever more quickly. A process that assures a complete, competent technical and policy review, may not move at the "Internet time" pace that industry desires. Still, compromise on the process in order to meet the demands of trade may unfortunately result in compromised national security.

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Additionally, investigations by the Inspector Generals of the Departments of Defense, State and Commerce identified problems in June 1999 which must be addressed fully by the legislation in order to achieve the balance necessary to ensure passage. The Cox Committee recommendations, along with the Inspector General Recommendations, highlight specific areas of inquiry and revision to avoid future improprieties or errors in export decisions.

Some of the most pressing questions about the current process, and how S. 1712 would address the same issues, include whether adequate time frames exist for referral of license applications, whether appropriate referrals are being made by the Department of Commerce for commodity classifications, as well as for license applications, whether "deemed exports" are being appropriately controlled, whether the appeal process is biased, how cumulative impacts of licensing decisions are addressed, whether adequate monitoring and enforcement of license conditions is occurring, and whether sufficient training is provided to licensing officers in each of the agencies.

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The IGs from both DOC and DOD concurred that this lack of referral is a problem. To quote the IG's report, "The first request was for a ruggedized, portable, encrypted radios. Commerce officials stated that the radio had not been built to military standards and therefore was not a munitions item under the jurisdiction of the International Traffic in Arms Regulations. DOD officials stated that the literature described the radio as militarized and that other radios built by the manufacturer were subject to munitions export licenses. The second request was for an antenna. Commerce officials stated that the antenna was not a munitions item, despite company literature describing it as militarized. DOD officials stated that the literature satisfied International Traffic in Arms Regulations criteria for a 'defense article' (munitions) and that the manufacturer had a history of exporting products under the munitions export licensing process."

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Again, I thank the witnesses for being here today and look forward to their testimony.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Thank you, Mr. Chairman. I find it rather frustrating that we have not been able to deal with this issue decisively. It raises questions both with respect to national security and with respect to our trade policies at a time when we are subject to more and more foreign competition. It is difficult, extremely difficult, for our export industries to operate under the present set of circumstances. Since the expiration of the Export Administration Act more than 5 years ago, the administration has been forced to impose export controls that have not entirely prohibited our high-tech communities and aerospace industries from prospering overseas.

Certainly we shouldn't compromise national security or relax controls that are necessary to ensure the safety of our nation and of our foreign relations. At the same time, export controls are utilized for billions of dollars worth of overseas sales. We need to strike a balance and I think we need to strike it promptly. I support those efforts to strike this needed balance, and I think particularly that Senator Enzi and Senator Graham crafted a bill that does properly deal with security-oriented provisions and ensures that the Secretary of Commerce obtain concurrence from Defense with the creation of a national security control list that provides additional penalties, and for a timely and accurate review of license applications.

I understand they have also made certain compromises with those that feel that the national security provisions in their bill do not go far enough, but I have every hope that we will reach such an accommodation and that we will do so promptly so that we can move forward in a way that is both valuable to our economic interests and does not derogate from our security interests.

[The prepared statement of Senator Gorton follows:]

PREPARED STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

While it is unfortunate that Congress has been unable to reauthorize the expired Export Administration Act, it is quite clear that the longer we loom on this subject matter, the more difficult it becomes for our major trade dependent communities that rely on export control guidelines to conduct business overseas. It places these advancing industries in a dangerous state of flux, while at the same time we require the Administration to establish these weighty and detailed guidelines on their behalf. Meanwhile, all parties involved are expected to accomplish these significant tasks with the utmost interest of national security in mind.

Since the expiration of the Export Administration Act in 1994, the Administration has been forced to impose export control measures that thankfully have not entirely prohibited our high-tech communities and aerospace industries from prospering overseas. Without question the United States should not compromise national security interests or relax those controls necessary to ensure the safety and longevity of international trade or foreign relations. However, recognizing export controls are utilized for billions of dollars worth of overseas sales, we do need to strike a balance between maintaining the sanctity of our national security while permitting trade to flourish.

I support those efforts to strike this needed balance, and in particular believe that Senators Gramm and Enzi have crafted the basis of a bill that not only adds security related provisions, but ensures that the Secretary of Commerce obtain concurrence from the Secretary of Defense with the creation of the National Security Control List, provides for the increase in penalties and the necessary addition of investigators, provides for the timely and accurate review of license applications, and includes a host of other provisions that address these serious concerns.

I understand there is ongoing deliberation and negotiations between the parties of differentiating views on this legislation regarding national security interests, foreign trade desires, and the general future of export controls. I sincerely hope that those parties involved will be successful in establishing this balance necessary for the U.S. to compete and remain secure in a world economy.

The CHAIRMAN. I welcome my two colleagues. We will begin with Senator Thompson. Thank you for being here today and thank you for your involvement in this issue as chairman of a committee that has important oversight of this issue, and one who has a clear understanding about some of the events that took place in the past, which caused, in the view of this Senator at least, significant allegations concerning transfer of national security technology to China. I thank you, Senator Thompson.

STATEMENT OF HON. FRED THOMPSON, U.S. SENATOR FROM TENNESSEE, CHAIRMAN, U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

Senator THOMPSON. Thank you very much, Mr. Chairman. And I think that you hit the nail on the head when you said that we are here to attempt to balance legitimate interests that we all have. Commerce and trade on the one hand, national security on the other. I think that this hearing and hearings like this one will go a long way toward that. In August of 1998, after many of the administration's various export control problems came to light, I wrote to the Inspector Generals at six Federal agencies, Commerce, Defense, State, Treasury, Energy and the CIA, and I asked them to take a comprehensive review of U.S. export control practices and then report their findings back to the Governmental Affairs Committee, which I chair.

Their reports and testimony reveal a system full of holes, one that I am afraid clearly favors trade over national security. Their findings we can talk about in some detail if we need to, but they go into my thinking as we approach S. 1712., whose predecessor expired in 1994, establishes an export licensing policy for dual-use items—equipment, materials, technology and know-how that can be used for both commercial and military purposes. In the wrong hands, these items can be used to build weapons of mass destruction, ballistic missiles and other military-related items that threaten the United States.

The Export Administration Act's sponsors argue that this bill brings the United States' export policies out of the Cold War era

and adapts them to the strategic and commercial realities of the 21st century. They contend that this bill protects national security while freeing American businesses to remain competitive in the global marketplace. I respectfully disagree.

The world today is different than it was 10 years ago. The collapse of the USSR reduced tensions, opened new markets, and set the stage for dynamic growth in global trade. The technological genie is definitely out of the bottle and nobody even wants to try to put it back in again. The integration of economics linked to growing markets abroad and the increasing availability of advanced technologies have made it more and more difficult to try to control these dual-use items for national security reasons. Nowhere has this tension been more pronounced than in the computer industry, for example.

But since the end of the cold war, there is another part of this new world equation. And that is that in the new world we are living in, we also have additional threats to our country that have actually increased due to the proliferation of weapons of mass destruction and the means to deliver them. This has been verified repeatedly by the U.S. intelligence community and outside groups like the Rumsfeld Commission and the Deutch Commission.

These threats have been advanced in large part because of the misuse or diversion of sensitive dual-use items such as high-performance computers and advanced machine tools that are often critical to weapons construction, development and testing.

The Cox Committee, for example, found that with regard to China, our export control policies have facilitated the PRC's obtaining of militarily useful technology. With regard to the PRC, which has been described by the U.S. intelligence community as perhaps the worst proliferator of weapons of mass destruction and missile technologies in the world, according to the Cox Committee, high-performance computers are essential to China's nuclear weapons, ballistic missile, intelligence collection and other military programs. The report added that the PRC is convinced that the United States has the most advanced high-performance computer technology and that they seek to acquire as much of it as they can for their military programs.

The Cox Committee report also stated that the Clinton Administration's relaxation of U.S. export controls, poor administrative oversight, and failure to investigate and punish export violators have made matters worse. It is no secret that the licensing requirements for high-performance computers sold explicitly for military use to countries like China and Pakistan have been raised by the Clinton Administration from 2,000 million theoretical operations per second, MTOPS, in 1995, to 12,500 MTOPS today, giving the People's Liberation Army an unprecedented capability to design and build advanced weapons the United States has yet to field. Even more outrageous is the fact that ostensibly civilian end users in China, as if there are any, can purchase computers rated at 20,000 MTOPS, which can give researchers the ability to conduct nuclear blast simulations.

This brings us right back to the Export Administration Act and the need to balance trade and security. The problem with the bill reported out of the Senate Banking Committee is that it codifies

the worst practices of the Clinton Administration and then liberalizes some of them further. It would give unprecedented authority to the Secretary of Commerce. It would bind the hands of the President in controlling exports and conducting foreign policy in ways that I do not think we should. The President can take action, but it provides hoops that he has to jump through before he can take action on behalf of national security. And among other things it creates two new legal categories that would exempt dual-use items from export controls: foreign availability, and mass market status.

In other words, if these items fall into those two new categories created by this bill, there is no export control. They are vague and subjective standards that have been challenged by the GAO and others. And what constitutes mass marketing? Well, the Department of Commerce relying upon technical people within the department, but essentially the Department of Commerce decides what constitutes a mass marketed item. In other words, if a sensitive item is produced abroad or manufactured and marketed in sufficient numbers here in the United States, such as high-performance computers, this bill would prohibit export controls on sales to even countries like China or Pakistan.

By assuming that the threats to our national security are minimal, that dual-use items are impossible to control, and that U.S. businesses are suffering under the weight of onerous export controls, the bill would remove, I believe, the checks and balances critical to an effective export control system.

And the fact is that dual-use items can be controlled. The keys to an effective export control system are simple. Clear rules, trained staff, state-of-the-art resources, intensive background checks, rigorous post-shipment verifications, and tough enforcement. The Governmental Affairs Committee, as I mentioned, discovered in our hearings last summer that I referred to that the Commerce Department has failed on all counts. In fact, out of 190 high-performance computers shipped to China in 1998, a post-shipment verification was conducted on only one of them.

It is absurd to suggest we should now loosen our export administration system because the administration has not bothered to implement it properly. The Cox Committee also pointed out that, when dealing with this question of post-shipment verification, that we finally did, our country finally did reach an agreement with the Chinese that would allow post-shipment verification. They said we were not doing more than we were doing because the Chinese would not let us, and so finally we did get tough enough to say in 1998, we demanded an agreement of some kind to allow us some post-shipment verification. So apparently we have struck an agreement, but the administration will not make it public. They refuse to make the agreement public, apparently, according to the Cox Report, because the Chinese demand that we not make it public to our own citizens. But the Cox Report does go so far as to say they have looked at it and found it inadequate.

And even if sensitive items like high-performance computers can be smuggled out of the country or bought at Radio Shack, there is no reason to let potential adversaries or proliferators buy them in volume, and acquire service and technical support from our best suppliers. Export licenses not only place controls on commodities,

they are an invaluable intelligence collection mechanism. They help us track what dual-use items are being used for, who is using them and how much, and how such items might be configured with other sensitive items to advance a country's military weapons of mass destruction programs. This is important information to have when you are defending the Nation.

Finally, export controls, respectfully, are not hurting businesses or dampening the economy. That is not to say, and I am sure it would not be valid to say, that there are not some administrative hurdles, there are not some time delays, there are not some egregious circumstances which cannot be justified. Clearly all of this needs to be looked at, and where those things are present with regard to nonsensitive items, we need to do something about that in this mix also. That is not what we are talking about.

Fewer than 1 percent of all exports today require licenses and roughly 90 percent of these license applications are approved. The Congressional Research Service, Congress's own nonpartisan research branch, estimates the range of economic loss due to export controls is between $2 to $4 billion annually. That is .04 percent of our $9.2 trillion GDP last year. It is a small price to pay for the benefits of making it harder for rogue nations and others to acquire weapons of mass destruction and missile capabilities, and only a small fraction of what it may ultimately cost to build missile defense systems and acquire other materials necessary to defend against the weapons that these dual-use items may help create.

Obviously, we are going to have to do all of the above now because we are learning—the CIA and Rumsfeld Commission, and all the others are reminding us on a very regular basis—that weapons of mass destruction continue to proliferate. There are a rapidly developing number of rogue nations, of course, which have the capability and means of hitting our troops, hitting our allies, and shortly, the capability of hitting us.

Mr. Chairman, I am a strong believer in free trade. It has been both an engine of growth and prosperity for our great nation since its birth and has created incredible opportunities for millions of Americans. But when it comes to national security, we have to draw the line. I simply believe that rather than loosening export controls now, we should be tightening them.

Now, I am dealing here with a moving target because Senator Enzi, my friend here, knows we have been in discussions about this bill. I am not sure where we stand on it now. If I have mischaracterized any recent changes, he can straighten me out. But the Chairman of the Armed Services Committee, Chairman of the Foreign Relations Committee, Chairman of the Intelligence Committee and myself have all had concerns about this. We still have concerns about this bill that have not yet been satisfied, basically having to do with the involvement of the defense community with regard to some of these decisions.

Export controls are a complex issue which require further study and debate. This matter has also been complicated by the mistrust between Congress and the administration with regard to export controls and trade promotion, especially when it involves China. The Chairman referred to the fact that we went through this controversy about sending this authority, taking it away from State

and sending it over to Commerce, including jet engine hot section technology, satellites and all of that.

We had the Hughes/Loral scandal that is under criminal investigation now. Hughes/Loral is apparently going in for another contract while under investigation. Congress got involved, transferred that authority back from Commerce to the munitions list at State. All of that has gone on. It is been held that it damaged national security, the Hughes/Loral situation.

That is the backdrop, and it has created an atmosphere of distrust with regard to this Administration's handling of these export control matters.

I simply think that rather than rushing the controversial bill—with significant national security implications—through Congress in an election year, that we should postpone this legislation until next year, when we can hopefully get together and through hearings such as this, come to some agreements that will reauthorize the Export Administration Act, which I think needs to be done, too. We should not be operating in an area of this importance on the basis of Executive Orders, and these exporters need some clarity, but we also need to make sure in the very beginning of the process that all those with national security concerns who have had hearings and have had experience are at the table in the beginning, so that those interests can be considered, too. I thank the Chairman.

[The prepared statement of Senator Thompson follows:]

PREPARED STATEMENT OF HON. FRED THOMPSON, U.S. SENATOR FROM TENNESSEE, CHAIRMAN, U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

Later this year, the Senate may consider the Export Administration Act (EAA) of 1999. This legislation, whose predecessor expired in 1994, establishes export licensing policy for "dual-use" items—equipment, materials, technology, and know-how that can be used for both commercial and military purposes. In the wrong hands these items can be used to build weapons of mass destruction (WMD), ballistic missiles, and other military- related items that threaten the United States.

The EAA's sponsors argue that this bill brings the United States' export policies out of the Cold War era and adapts them to the strategic and commercial realities of the 21st Century. They contend that this bill protects national security while freeing American businesses to remain competitive in the global marketplace. I disagree.

The world today *is* different than it was ten years ago. The collapse of the USSR reduced tensions, opened new markets, and set the stage for dynamic growth in global trade. The integration of economies, linked to growing markets abroad, and the increasing availability of advanced technologies have made it more and more difficult to try to "control" these "dual-use" items for national security reasons. Nowhere has this tension been more pronounced than in the computer industry.

But since the end of the Cold War, the threats to our country have actually *increased* due to the proliferation of weapons of mass destruction and the means to deliver them. This has been verified repeatedly by the U.S. Intelligence Community and outside groups like the Rumsfeld and Deutch Commissions. These threats have been advanced in large part due to the misuse or diversion of sensitive "dual use" items-such as high performance computers (HPCs) and advanced machine tools—that are often critical to a weapon's construction, development, or testing.

Take, for example, the People's Republic of China (PRC), which has been described by the U.S. Intelligence Community as perhaps the worst proliferator of WMD and missile technologies in the world. According to the Cox Committee report, HPCs are essential to China's nuclear weapons, ballistic missile, intelligence collection and other military programs. The report adds that "The PRC is convinced that the United States has the most advanced HPC technology" and that the PRC "seeks to acquire as much of it as it can" for its military programs.

The Cox Committee report also stated that the Clinton Administration's relaxation of US export controls, poor administrative oversight, and failure to investigate and punish export violators have made matters worse. It is no secret that the licens-

ing requirements for HPCs being sold explicitly for *military* use to countries like China and Pakistan, have been raised by the Clinton Administration from 2,000 million theoretical operations per second (MTOPS) in 1995 to 12,500 MTOPS today, giving the People's Liberation Army an unprecedented capability to design and build advanced weapons the United States has yet to field. Even more outrageous is the fact that ostensibly "civilian" end users in China—as if there are any—can purchase computers rated at 20,000 MTOPS, which can give researchers the ability to conduct nuclear blast simulations.

This brings us right back to the Export Administration Act and the need to *balance* trade and security. The problem with the bill reported out of the Senate Banking Committee is that it codifies the worst practices of the Clinton Administration, and then liberalizes them even further. It would give unprecedented authority to the Secretary of Commerce; bind the hands of the President in controlling exports and conducting foreign policy; and, among other things, create two new legal categories that would exempt "dual-use" items from export control: "foreign availability" and "mass market status"—vague and subjective standards that have been challenged by the GAO and others. In other words, if a sensitive item is produced abroad *or* manufactured and marketed in sufficient numbers here in the United States—such as high performance computers—this bill would prohibit export controls on sales to even countries like China or Pakistan.

By assuming that the threats to our national security are minimal, that "dual use" items are impossible to control, and that U.S. businesses are suffering under the weight of onerous export controls, the bill would remove the checks and balances critical to an effective export control system.

The fact is, dual use" items *can* be controlled. The keys to an effective export control system are simple: clear rules, trained staff, state of the art resources, intensive background checks, rigorous post shipment verifications, and tough enforcement. The Governmental Affairs Committee, which I chair, discovered in hearings we held last summer that the Commerce Department has failed on all counts. In fact, out of the 190 high performance computers shipped to China in 1998, a post shipment verification was conducted on only one of them. It is absurd to suggest that we should now dismantle our export control system because this Administration hasn't bothered to implement it properly.

And even if sensitive items like high performance computers can be smuggled out of the country or bought at Radio Shack, this is no reason to allow potential adversaries or proliferators to buy them in volume—and acquire service and technical support from our best suppliers. Export licenses not only place controls on commodities, they are an invaluable intelligence collection mechanism: they help us track "what" dual use items are being used for, "who" is using them, and "how" such items might be configured with other sensitive items to advance a country's military and WMD programs. This is important information to have when you are trying to defend the nation.

Finally, export controls are not hurting business or dampening the economy. Fewer than 1% of all exports today require licenses, and roughly 90% of these license applications are approved. The Congressional Research Service, Congress' own non-partisan research branch, estimates the range of economic loss due to export controls at only $2–4 billion annually, or no more than .04% of our $9.2 *trillion* GDP last year. This is a small price to pay for the national security benefits of making it harder for rogue nations and others to acquire WMD and missile capabilities—and only a small fraction of what it may ultimately cost to build missile defense systems and acquire other military hardware necessary to defend against the weapons these "dual use" items may help create.

I am a strong believer in free trade. It has been an engine of growth and prosperity for our great nation since its birth, and has created incredible opportunities for millions of Americans. But when it comes to national security, we must draw the line. Rather than loosening export controls as this new EAA does, we should be *tightening* them.

Export controls are a complex issue which require further study and debate. This matter has also been complicated by the mistrust between the Congress and the Administration with regard to export controls and trade promotion, especially when it involves China—lest we forget the Loral/Hughes satellite escapade in 1995–96 that seriously damaged our national security. Rather than rush a controversial bill, with significant national security implications, through the Congress in an election year, we should postpone this legislation until next year, when a new President can work with Congress to find a responsible solution that balances trade and security.

PERFORMANCE LEVELS OF COMPUTERS THAT SUPPORT SELECTED APPLICATIONS OF MILITARY SIGNIFICANCE

Computor Performance Level (MTOPS)	Applications
4,000 to 6,000	Joint Attack Strike Aircraft design; nonacoustic antisubmarine warfare sensor development; advanced synthetic aperture radar computation
8,000 to 9,000	Bottom-contour modeling of shallow water in submarine design; some synthetic aperture radar applications; algorithm development for shipboards' infrared search and track
10,457 to 21,125	Nuclear blast simulation
15,500 to 17,500	Computational fluid dynamics applications to model the turbulence around aircraft under extreme conditions
20,000 to 22,000	Weather forecasting; impact of blasts on underground structures; advanced aircraft design
21,125+	Submarine design; shallow water acoustics analysis
24,000+	Automatic target recognition template development
=120,000	Multi-line towed array signal processing

Source: Building on the Basics: An Examination of High-Performance Computing Export control Policy in the 1900s (1995) and High-Performance Computing, National Security Applications, and Export Control Policy at the Close of the 20th Century.

HIGH PERFORMANCE COMPUTER (HPC) EXPORTS
TO TIER III COUNTRIES
(India, Pakistan, Middle East, Former Soviet Union, China, Vietman, Central Europe)

DATE CHANGED	LICENSE REQUIRED FOR MILITARY USE	LICENSE REQUIRED FOR CIVILIAN USE	REVIEW PERIOD
S. 1712	?	?	30 Days (Reid Amdt)
August 2000 (likely)	40,000 MTOPS (est.)	?	Six Months (law)
February 2000	12,500 MTOPS	20,000 MTOPS	Six Months (law)
July 1999	6,500 MTOPS	12,300 MTOPS	Six Months (law)
October 1995	2,000 MTOPS	7,000 MTOPS	18–24 Months (policy)
April 1994	(no category)	500 MTOPS	18–24 Months (policy)
September 1993	(no category)	194 MTOPS	18–24 Months (policy)

The CHAIRMAN. I thank you, Senator Thompson. I just wanted to ask you one question because you became very well-known for a number of other things, but one was to investigate the connection between transfer of U.S. technology and campaign contributions that came in from China and other sources. Do you find it interesting that those who now seem to be sponsoring this return to Commerce of this authority, are also opposed to even outlawing foreign contributions to American political campaigns, even though we have the Foreign Corrupt Practices Act which prevents American companies and corporations from contributing to foreign political campaigns? I wondered if you had a comment on that?

Senator THOMPSON. Well, that, that is somewhat ironic. I find it difficult to understand how there could be any opposition to foreign contributions of any kind. We know that, that there were some. Even more appropriate to this particular area are the domestic contributions. We all know that Mr. Schwartz was an extremely large contributor, contemporaneous with the consideration of his companies of getting control over satellites transferred to Commerce. We know Mr. Ron Brown was very active in this regard, that Mr. Armstrong was writing the President and telling him, you know, that he had better loosen up, he needed to remind him, that he was a big supporter of his. And all of the—all of the wrong messages in a manner that had to do, that ultimately our own intelligence community has concluded jeopardized or harmed national security.

At the end of the day, we sent that technology over there, left it unattended and apparently wound up harming national security. So that is, you know, I don't want to—we are in the last months of this administration. I have got enough battles going on with whom, my record on all of this is historical. I don't want to beat a—any kind of a horse in this regard. But it absolutely makes no sense to me that we negotiate with this administration at this time on the details of an Export Administration Act. Period.

The Chairman: Hong Kong representative of China Aerospace, Chinese Lieutenant Colonel Liu Chao-Ying, provided $50,000 in cash from the Chinese military to a Clinton aide in exchange for good things from the President, according to congressional inves-

tigators, and President Clinton waived export restrictions for Loral and let China satellite be launched on a Chinese rocket. You know, I think there is a very clear connection there. I was on a program on Sunday with Mr. LaBella, who articulated that this Attorney General did not even discuss with him a memo that he sent to the Attorney General of the United States recommending the appointment of an independent counsel, also that of the Director of the FBI, and a lot of it had to do with transfer of technology to China and perhaps other countries.

So now, the way I understand this legislation, we are going to go back and give that same authority to the Department of Commerce, is that correct?

Senator Thompson: Well, the Department of Commerce has more authority than I think that it should. I don't want to overstate my case but yes, what goes on the control list, for example, basically is something the Department of Commerce controls. And surely, it should not have—unless that has been changed recently—surely it should not have unilateral control of that. That it is just one example.

But the Chairman points out that in the history of this, there are a couple of things that are very important. There were two tracks here. One is that you had money coming in from places like the Chinese military, Madam Lu, and others who were highly connected, her father was military, a high-ranking official and all of that. Money coming in to the DNC. You had four or five people who were raising tremendous amounts of soft money for the DNC with close connections with the People's Republic of China, historical connections. One of them was recently convicted, Maria Hsia, who our Committee determined was—with FBI acquiescence, that we cleared it with—was an agent of the Chinese government.

You had all of those, all of those things going on, all of the money coming in from these various sources. The other thing that we know is going on from the Cox Committee Report is that for a long time, China has had a very intense program and endeavor, at all levels, to try to get our technology as best they can. We know about the Los Alamos situation. What we are learning more and more about is how they go about their business in getting little pieces of information from numerous people, rather than having one big spy somewhere. We know the industrial espionage that is going on, and we know from the Cox Committee Report what they are doing now with some of the things that we are sending them.

The biggest problem that I have is what we do not know with what we are doing, with what we are sending them. We supposedly control these MTOP levels, and they are going up all the time. You can argue about how fast they ought to go up; clearly more and more are involved in commerce, you cannot easily keep control of it. To a certain extent, you have got to allow MTOP levels to increase. But they tell us that the Chinese are bundling these computer capabilities so they are getting MTOP levels far beyond, in all probability, of what we even suspect they are acquiring, which will allow them, of course, additional support for their military and nuclear programs and all of that. And now we know that we have basically no end user verification.

We have two systems. One is civilian use, one is military use. There is no civilian use over there. If we send it over to civilian use and give them higher MTOP levels, it is in the hands of the military and that is already the case up to—I think the latest may be 20,000 MTOPS. It keeps going up all of the time. The assumption is that the request will be made in August of this year for 40,000 MTOP level for military use.

So you have those two things going on historically. All of which just tells me not that we try to build a wall around our Nation—not that we cut off exports or make things so onerous to businesspeople who obviously and legitimately want to trade abroad, even with Tier III countries. There are a lot of other countries that do not present these problems. We are essentially talking about Tier III countries here—that we not do all of that, that we have a proper balance. And if all it does is buy us a little time when we are trying to develop a national missile defense, if all it does is buy us a little time, then it is well worth the effort to have an export control policy that does not get so carried away on the trade side of the equation in these times of peace and prosperity, where people really do not think we have any problems or threats anymore, that does not get so carried away there that we overlook our long-range national security concerns.

The CHAIRMAN. I thank you, Senator Thompson. I know you have to go. And I appreciate the fact that you took the time to be here before the Committee today. Senator Enzi, welcome.

STATEMENT OF HON. MIKE ENZI,
U.S. SENATOR FROM WYOMING

Senator Enzi: Thank you, Mr. Chairman. I think that probably when Senator Thompson was speaking and talking about the experience of the people that objected to this bill, that he was probably referring to how short a time I have been in the Senate. I was Senator number 100 just 3 years ago. I am now the Subcommittee Chairman for International Trade and Finance and was assigned this as soon as I got that position in the beginning of my sophomore years. I tried to find out why I had been assigned it and decided that since Senator Johnson is the ranking member on that Committee, and neither of us have foreign borders or an ocean and hardly any exports, that we have to be the security people involved in this. It is a much more detailed and difficult situation than I ever imagined as we started on it. And as a result of your questions and the statements that Senator Thompson has made, I would ask that my statement be a part of the record, but I would rather address the things that have been brought up.

The CHAIRMAN. Without objection.

Senator THOMPSON. And mine too, Mr. Chairman.

The CHAIRMAN. Without objection.

Senator Enzi: I would mention in the time that I have worked on this I have gotten to talk to a lot of senators that have worked on this issue before. I have read all the previous literature that has been out and I am always astounded at how much the Senate puts out on any given issue. And this act did expire in 1994 and there have been 11 attempts since that time to pass this bill. It had not made it out of Committee before last year. But there is a lot of tes-

timony and expertise that is available that can be read on what the problems are and why it did not proceed that far, and I am just trying to keep this from being number 12.

From talking to senators, people in industry, people in the administration, I have got to say that I am impressed with the deep concern and care there is for national security. Particularly in a time when we are enjoying so much economic success; that always makes it easier to overlook security. We have not done that in this bill.

The EAA did expire in 1994, and most of the problems that are mentioned happened since 1994. We are operating under Executive Orders. All of the reports that have been mentioned previously mentioned that our difficulty is that we are operating under Executive Orders. It does not give the proper authority to any of the people that are necessary to do the things that need to be done to assure the best national security.

Where are we now? We have probably passed the window for being able to debate any kind of an EAA bill other than some small amendment to an appropriations bill because we are now in the budget process. We know how long that will take; then we will be in the appropriations process, we know how long that takes; so probably once again we will fail to plug the holes that are obvious in all of the reports.

I fear that we are trying to achieve a utopia and utopias, first of all, do not work and second of all, do not pass around here. I am also running into a lot of confusion because it is so detailed. One of the confusions is that there are actually three lists. I am only dealing with one of the three lists. The other two are the munitions list and the satellite list. This bill does not govern those items. This is the dual-use items. These are the things that could have some military use, but are market items.

Executive Orders have created quite a few problems. One of those problems is penalties. We did a little analysis of one of the convictions that had been done recently. In that particular instance, the maximum fine will be $132,000 in administrative fines. Criminal fines will be about $600,000. These companies spend more on an ad than it is going to cost them for penalties under the present Executive Orders that we are working under, and the only way we can change that from Executive Orders is to pass a bill.

Now, this bill has penalties in it. Penalties have gotten everybody's attention. Penalties are a backbone for enforcing and getting people's attention and getting compliance. That same company would have had $12 million in administration fines and $120 million in criminal fines. The bill also provides for imprisonment for acting outside of the balance of this law, imprisonment. And it can be, with multiple violations, up to a lifetime in prison. That has gotten everyone's attention. That is essential in the EAA.

Process has been mentioned. I have been down, I have watched how the process works, I have read the reports, I read the Cox Commission report while it was still—while all of it was still classified to see if we were on the right track with what we were doing. We recognized that there had to be a better appeals process. The current appeals process chaired by the Commerce Department would require a person who is dissenting to find their boss, and get

their boss to understand it well enough to file an appeal within a very limited period of time.

The way we have done it now, we looked at a number of different processes that we could do, but the one that there was universal appeal for was one that would allow the person who was on that operating Committee to appeal it himself. He has already been there, he has already heard the data. He fills out the papers, he files the papers, it moves on up, and it requires concurrence by Department of Defense, Secretary of State, and Department of Commerce at some point in the process, if it gets appealed that high. But we have allowed the appeals process to take into consideration the things that have been addressed and to plug those holes.

On enforcement, I mentioned the penalties already. One of the things that we are trying to achieve with this bill is to make enforcement possible. Right now, we are trying to enforce everything in the world, and it isn't working. The way that we came up with was to come up with a priority system, a mechanism where we can concentrate on those things with the greatest danger to the United States first, and those things that probably cannot be controlled and have much less danger last.

It still provides for watching out for all of them. We have foreign availability. Foreign availability is not a new concept. Foreign availability was in the 1979 Act. We have kept it in the Act. Under foreign availability, there has been one item that has matched foreign availability in the time that that has been in possession since 1979.

We do have a new name for a process, mass market. Again, it is to get to this prioritization so that we can work on things with the most exposure. Mass market goes under the concept that if you are already selling it in Wal-Mart and Best Buy and Circuit City and everyplace else in the Nation, that it can be purchased in quantity by any number of people and it can get in foreign hands. And there is no way to do the enforcement to make sure that it does not get purchased in those establishments easily.

So we have concentrated on post-shipment verification. We have tightened the noose on post-shipment verification. We have a mechanism to make sure that the post-shipment verification is allowed by companies and by countries, but we put a priority on it.

Then we have done all these things for security; why would the industry be interested in it? There is only one thing that helps industry in this. I guess it has got more than one name but it is the same characteristic. They want stability, reliability, and predictability. Those are all common characteristics that help the business community to operate with greater capability. Stability, reliability, predictability. And we have a system where we think we can protect what needs to be protected, but still provide those parts.

I would mention that this has been through the Banking Committee, as I am sure you are aware. There are people on the Banking Committee from a number of other Committees in the U.S. Senate who worked tediously on this bill, and I say that because of the amount of detail that is in it. It did pass the Banking Committee 20 to nothing. There have been some discussions since that time that perhaps the bill could be divided up and done in little

pieces here and there. That is, that is a possible scenario, but I do not think it is a possible action.

First of all, if we do it in kneejerk ways, I think we will wind up with a skewing actually away from national security. If we do the bill in total and then look at additional ways that other things can be done, that has potential. Why won't it pass on a kneejerk, one at a time basis? I read the rest of the legislation. I looked at the other examples of how we tried to do this. And I noted that it is easier to defeat a bill than it is to pass a bill and that is exactly what has happened. When it skews too far one side, the other side gets the votes together at one point in the process, to have a majority of the votes, and that ends any discussion on the bill.

We have worked hard for balance. I hope that that balance is there. We have been taking suggestions on it throughout the entire process and trying to work them in, but again, trying to make sure that it is a balance that will work and that will pass so that we can get those higher penalties, better enforcement, and a more workable process in place. And I thank the Chairman for the time.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF HON. MICHAEL B. ENZI
U.S. SENATOR FROM WYOMING

Thank you, Mr. Chairman and Ranking Member, for allowing me the opportunity to testify before this panel regarding S.1712, the Export Administration Act of 1999.

Let me begin by emphasizing the need to reauthorize the expired Export Administration Act (EAA) of 1979. The EAA provides authority to control exports for dual-use items, or items which are used for commercial applications but could also be used for military purposes. For six years the Congress has failed to update and reauthorize this important Act. Instead, our export control laws have been implemented by Executive Orders under the authority of the International Emergency Economic Powers Act (IEEPA).

This inaction by Congress is inexcusable and irresponsible. It has created an increasingly dangerous situation. IEEPA was not intended to allow the President to maintain export controls indefinitely without congressional authorization. S.1712 would correct this situation and place our export control system on firm statutory ground. It strengthens national security by granting the Department of Defense more involvement than was given to them in the expired Act.

There are other reasons it is vital to reauthorize the EAA, however, I will give only brief mention to them. *First,* the U.S. has difficulty convincing other countries, even our strongest allies, of the importance of multilateral controls when the Congress has not passed a law authorizing the use of export controls. *Second,* the Department of Commerce provides assistance to countries, such as the former Soviet republics, so these countries might implement an export control system to stem the proliferation of certain technologies. The lack of statutory export control authority in the U.S. sends the signal to these countries that we are not serious about controlling dual-use items. And finally, S.1712 would place specific criteria on the exercise of export control authority, and require transparency and accountability from the executive branch. Without Congressional action, the executive branch has the ability to use any criteria for control, decontrol, decision-making, risk assessment—you name it—for the entire export control regime. Bottom line: the export control system will change as Administrations change, unless we reauthorize the EAA.

In crafting a new EAA, we examined the problems identified with the current export control framework and the recommendations of the Defense Science Board, the Cox commission report, and the commission to study the Proliferation of Weapons of Mass Destruction. We also studied the EAA of 1979 and used it as our baseline. Keep in mind that this Act helped bring us through a particularly dangerous period of the Cold War.

S.1712, as unanimously reported from the Senate Banking Committee, is good for national security. As I mentioned earlier, it restores the expired authority to control the export of commercial items. The bill contains several provisions that allow for the protection of sensitive technologies, regardless of any other provision in the bill.

I refer to these as "carve-outs". These checks and balances are placed throughout the bill.

Section 201(c) of the bill allows controls to be imposed on any item that could contribute to the proliferation of weapons of mass destruction or the means to deliver them, based on the end use or end user.

Section 309 of the bill also allows the control of any item in order to comply with international obligations. I have heard several individuals, including one who testified at the most recent Armed Services Committee hearing, claim S.1712 would decontrol items that we would not want decontrolled. One assertion by this witness was that this bill would decontrol triggers contained in kidney stone machines that can also be used for nuclear weapon triggers. However, he even admitted that this item is controlled by the Nuclear Suppliers Group! Therefore, under Section 309 of the bill, these machines would still be controlled to certain end users and for certain uses because of its control under an international obligation.

S.1712 strengthens the role of the Department of Defense. The bill requires concurrence in the making of the national security control list, and we have agreed to explicitly state that concurrence would also be required when taking an item off the list. Additionally, at the first level of interagency dispute resolution, a representative from any department or agency present can escalate any decision made by the Chair. Currently, only the head of that agency is able to request escalation of a decision. In addition, the bill requires each member to clearly state the reasons for his or her position and the reasons are entered into the minutes. The minutes will give the Congress much better oversight of the process, including who attended the meetings and the reasoning for the decisions. This greatly increases transparency and accountability.

The bill toughens criminal and civil penalties. It increases penalties significantly from the levels of IEEPA, making exporters think twice before exporting without the proper authorization. An exporter will no longer simply calculate the fines for noncompliance with the law as a cost of doing business. Under S.1712, the fine levels are set high enough to deter any exporter from shipping without proper license.

The bill is also good for trade. It streamlines the controls and makes the system more transparent for exporters and the Congress. It provides guidance to the executive branch to develop a stronger multilateral export control regime. The bill also creates a framework compatible with the high-tech economy. It attempts to remove ineffective controls by decontrolling items that are readily available from foreign sources or are available at a mass-market (commodity) status. Government regulation has always lagged behind industry. This is even more the case today as the pace of technology is greatly outstripping the ability of any government to effectively control mass-market items. The Final Report of the 1999 Defense Science Board Task Force on Globalization and Security said,

> "Protection of capabilities and technologies readily available on the world market is, at best, unhelpful to the maintenance of military dominance and, at worst, counterproductive . . . DOD must put up higher walls around a much smaller group of capabilities and technologies."

I urge my colleagues to work with Chairman Gramm, Ranking Member Sarbanes, Senator Johnson and me to reauthorize the EAA this year. We all deeply care about the national security of the United States. The Banking Committee regularly addresses issues relevant to national security, especially the economic security of the nation. We do not want a re-control of many items, as some members would strongly support. Several of the suggestions by critics of the bill would effectively do this.

We have been reasonable and have listened to everyone's concerns. We have tried to address every concern without upsetting the balance in the bill. We must look the big picture. The country will be better served if a balanced EAA is passed. Critics are speeding down a one-way street that dead ends in the status quo. Most everyone agrees that the status quo is not where we want to end up.

It would not be good public policy to "fix" the system in a piece-meal or knee-jerk manner as Congress has already attempted to do in several areas of export control policy. The Congress must resist the feel good temptation to pass a bill that only increases penalties. It will not fix the underlying problems with the current system that I identified at the beginning of my testimony.

Reasonable people may disagree even given the same facts. But reasonable people should be able to agree it is good policy to reauthorize the EAA. Leaving a broken system in place for one day longer leaves our country open to serious national security risks. S.1712 is good for the national security of this great nation and it is not in the best interests of the United States to delay reauthorization another year.

COMPARISON OF MAXIMUM PENALTIES FOR EXPORT VIOLATIONS IN A RECENT INDICTMENT[1]

	EAA of 1979 Now expired	IEEPA Current law	*EAA of 1999* *S. 1712*
CRIMINAL FINES	$600,000	$132,000	*$120 million*
ADMINISTRATIVE FINES	$132,000	$132,000	*$12 million*

[1] U.S. companies may also face other charges, such as conspiracy and false statement which each carry a $500,000 fine.

Selected Quotes on the Reauthorization of the Export Administration Act

"The Select Committee recommends that the appropriate committees report legislation to reenact the Export Administration Act, with particular attention to re-establishing the higher penalties for violation of the Act that have been allowed to lapse since 1994."

—Cox Committee on Technology Transfer to China, May 1999

"The dual-use licensing process would be best served through the reenactment of the EAA."

—Joint Inspector Generals' Interagency Review of the Export Licensing Processes for Dual-Use Commodities and Munitions, June 1999

"Congress should enact and the President should sign a new Export Administration Act, reflecting the post-CoCom export control regime, and containing substantially greater penalties than now apply to export control violations."

—The Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 1999

"Protection of capabilities and technologies readily available on the world market is, at best, unhelpful to the maintenance of military dominance and, at worst, counterproductive (e.g., by undermining the industry upon which U.S. military-technological supremacy depends) . . . DOD must put up higher walls around a much smaller group of capabilities and technologies."

—Final Report of the Defense Science Board Task Force on Globalization and Security, December 1999

The CHAIRMAN. Thank you very much, Senator Enzi. Thank you for all your hard work on this issue. And I thank you and Senator Thompson for being here. Thank you very much.

Senator ENZI. Thank you.

The CHAIRMAN. The next panel is the Honorable James Bodner, Principal Deputy Under Secretary of Defense for Policy, Department of Defense, Mr. John Holum, the Senior Advisor to the Secretary of State for Arms Control and International Security, and the Honorable William Reinsch, the Under Secretary of Export Administration, Department of Commerce. Please come forward.

Mr. Bodner, we will begin with you. Welcome back before the Committee. It is good to see you again.

STATEMENT OF JAMES M. BODNER, PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE (POLICY)

Mr. BODNER. Thank you, Mr. Chairman. I believe I submitted a more complete statement for the record. I would like to summarize that for presentation here.

The CHAIRMAN. Thank you. Without objection, all the witnesses' complete statements will be made part of the record.

Mr. BODNER. Mr. Chairman, I appreciate the chance this afternoon to appear before the Committee to discuss the Export Administration Act. DOD views the enactment of an effective Export Administration Act as important for national security. And we look

forward to working with you, this Committee and others in the Congress to produce the best possible legislation.

As Senator Thompson and Senator Enzi mentioned, for nearly 6 years we have operated within the regulatory framework for export control that is based on the provisions of the last EAA carried forward by Executive Order. We think the time has come to update that framework and establish it in law so that we have the tools we need to exercise effective controls in the face of a rapidly changing world.

From the Pentagon's perspective there are certain critical principles that underline effective Export Administration Act. First we need to have a strong basis in law that identifies U.S. security interests as the primary underpinning for U.S. export controls. Second, for controls to be effective in protecting and promoting our national security objectives, the underlying authority must provide sufficient flexibility in establishing and implementing controls. The pace of change in technology as well as in the economic and security environment requires a system that is both agile and adaptable. Third, while controls are considerably more effective if they are implemented on a multilateral basis the law needs to maintain a sufficiently broad basis for imposing unilateral controls when necessary. There are in fact circumstances under which the United States must be able to take unilateral action.

As you know, Mr. Chairman, DOD bears special responsibility for national security. We work closely with our interagency colleagues, particularly at the State Department and Commerce Department to prevent, slow and counter the proliferation of weapons of mass destruction and their means of delivery and more generally the diffusion of technologies that could adversely affect our military edge.

Preserving our military technological advantage involves not only limiting the acquisition of critical technology by potential adversaries but it also involves promoting a vibrant, innovative public sector that can continue to support cutting edge research, development and production. We in fact enhance our national security by ensuring that U.S. industry can engage in legitimate international trade and investment and that our scientists, engineers and other researchers can collaborate with international counterparts.

Moreover, given that we generally conduct military operations in concert with friends and allies, promoting national security requires that we both have effective export controls and effective mechanisms for international industrial collaboration in defense products. We aim to widen the gap with potential adversaries while at the same time closing the gap with allies and those with whom we expect to conduct military operations in the future. Both of these are essential to national security.

Now one key to accomplishing both objectives is to ensure that the export control system is as efficient as possible. At DOD over the last year, year and a half we have taken numerous steps to improve our role within the current export control system. We have reformed our internal organization and our procedures to reduce significantly the license review times and to improve the quality of reviews by focusing on the most sensitive, complex cases. We have also improved the efficiency and quality of the interagency national disclosure process that DOD chairs, and on a related front we have

reengineered the foreign military sales program to be more efficient, transparent and responsive.

In that context we believe that enactment of an effective Export Administration Act is another key element in assuring that our export control system meets our national security requirements.

We know that the United States is not the only source of key technologies. Therefore it is essential that we work with our export control partners to maintain multilateral export control regimes, to strengthen other nations' export control systems and to encourage other countries to adopt policies and practices that reflect our shared security interests. We favor a statutory framework for export controls that highlights existing multilateral nonproliferation regimes such as the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group and the Wassenaar Arrangement.

A critical element in any export control system is a comprehensive export control list. U.S. and multilateral control lists serve as a foundation for national security export controls; and to be effective, control lists must comprise only those items for which there is a clear and compelling national security rationale. Under the current regulatory framework, DOD participates actively in the interagency and multilateral processes that define these lists. We do so by providing critical assessment of how specific items relate to military capabilities. This is an open and transparent process that affords all relevant agencies an opportunity to address their concerns, and when consensus cannot be reached, to escalate issues up to the President if necessary for resolution.

I would note that the same is true for the system of reviewing export license applications which is also open and transparent. Such a structure enables DOD to play its important role in an effective manner and it illustrates the core principle that an Export Administration Act should have applied generally to the export control process to which DOD can make a contribution.

DOD believes that an EAA to be effective must contain sufficient flexibility for the President and his senior advisors at DOD, State and Commerce to impose special controls or to maintain controls on items of particular importance to national security.

With that, Mr. Chairman, I'd like to commend this Committee and the Senate for its hard work on trying to draft an Export Administration Act that meets the needs of the Nation. I would note that we still have some distance to cover as the previous testimony suggested but I am hopeful that agreement can be reached soon on effective legislation that can gain broad enough support to be passed and enacted. Thank you.

The CHAIRMAN. Thank you very much, Mr. Bodner. Mr. Holum, welcome.

[The prepared statement of Mr. Bodner follows:]

PREPARED STATEMENT OF JAMES M. BODNER, PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE (POLICY)

Mr Chairman, Members of the Committee, good afternoon. I appreciate the opportunity to appear before this Committee today to discuss the Export Administration Act.

The Department of Defense views the passage of an Export Administration Act (EAA) as important, and we hope will it be accomplished as early as possible in this session of Congress. Although there is a good deal that we are able to do within the present regulatory framework—which is based on the provisions of the lapsed EAA carried forward by Executive Order—we believe that the time has come to update that framework and provide us with the tools that we need to do the job more effectively. We are very interested in working with this Committee and others in the Congress to produce the best possible legislation.

There are several critical elements which I believe must be kept in mind in consideration of an Export Administration Act. First, we need a strong policy basis in the law that recognizes U.S. security interests as the primary underpinning for U.S. export controls. Second, in order for controls to be effective in protecting and promoting our national security objectives, it is essential that the underlying authority provide substantial flexibility in both establishing and implementing controls. As Members of this Committee most particularly can appreciate, the increasing pace of change in technology and the economic and security environment requires a system that can adapt quickly to changing needs and circumstances. Third, while controls are considerably more effective if they are implemented on a multilateral basis the law needs to maintain a sufficiently broad basis for imposing unilateral controls when necessary. There are circumstances where the U.S. must take unilateral action.

Working closely with other USG agencies, most importantly the Departments of State and Commerce, DOD's role in U.S. government export control policy and implementation focuses primarily on two closely-linked objectives: (1) slowing—and, where possible, countering—the proliferation of weapons of mass destruction (nuclear, chemical, biological) and their means of delivery, and (2) preventing and slowing the spread of products, commodities and technologies which can adversely affect U.S. national security, particularly where there could be a resultant loss of superior military capabilities.

We recognize, however, that our approach on controls must balance those objectives with a number of other national security objectives, including close cooperation with allies and friends.

Preserving our military technological advantage involves not only limiting the acquisition of critical technology by potential adversaries, but also promoting a vibrant, innovative private sector that supports defense research, development and production. Our national security is thus enhanced by ensuring U.S. industry can engage in legitimate international trade and investment. It is also enhanced by our scientists, engineers and other researchers being able to collaborate with their counterparts around the world. This has always been the case, but in an era in which we must rely increasingly on commercial products, technologies and processes to sustain and improve military capabilities it is all the more important that our industry be able to compete effectively in world markets for sales, talent and capital.

We also recognize that allied and coalition operations, of increased importance to us and to our allies, require a high degree of interoperability. This means sharing information, transferring technology (both from us and to us) and cooperating in R&D, production and testing. It also means, increasingly, that we consider defense contractors in allied countries as assets alongside as our own defense contractors. We find, however, that it is ever more difficult to convince other nations that we are serious in our efforts to improve defense capabilities in NATO (and in other contexts) when our allies are questioning the reliability of the U.S. as a supplier. To achieve interoperability with our allies and enhance cooperation more broadly, we are working to modernize our export control procedures, as well as improve our approaches to disclosure processes, defense industrial base and FMS procedural reforms. We believe that an Export Administration Act much like that under consideration in the Senate can help us in improving these important aspects of our relationship with allies and friends.

The United States is not the only supplier of many key items and technologies. Important know-how is diffused among a number of countries. To have effective export controls that meet our security interests, we need the cooperation of other supplier nations. In this regard, DOD strongly favors working closely with our export control partners to foster and sustain multilateral export control regimes, to increase the effectiveness of other nations' export control systems and to encourage other countries to adopt policies and practices consonant with shared security interests. An updated statutory framework for U.S. export controls should highlight the existing multilateral non-proliferation regimes such as the Nuclear Suppliers Group,

the Missile Technology Control Regime, the Australia Group and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is needed. At the same time we need a strong statutory basis for controls we share with other nations which are suppliers of comparable items and technologies but not necessarily within a "formal" regime or framework. It is particularly important, given the speed of technological change and the current security environment, that we have a strong basis in law for the support of multilateral efforts.

One of the key elements of any effective export control system is a comprehensive export control list. U.S. and multilateral control lists serve as the foundation for all national security and non-proliferation export controls. We believe that in order for control lists to be effective, there must be a clear and compelling national security, non-proliferation or foreign-policy rationale for all items on the list. In that regard, DOD participates actively in the interagency and multilateral processes that define these lists and brings to bear the critical assessments of how items relate to military capabilities. This is an open and transparent process that affords all relevant agencies an opportunity to address their concerns and, when consensus is not reached, to escalate issues for resolution. The same is true for the system for reviewing export license applications, which is also open and transparent.

These generally applicable principles should be embodied in an Export Administration Act that is ultimately enacted. Such a process will ensure that DOD plays its proper role in an effective manner.

We also believe that an EAA must contain sufficient flexibility for the President and his senior advisors in DOD, State and Commerce to impose special controls or to maintain controls on items of particular importance to national security.

Much hard work has been done by Senators to draft an EAA that meets the needs of our Nation. I am hopeful that agreement can be reached soon on legislation that can be passed and enacted into law.

STATEMENT OF JOHN D. HOLUM, SENIOR ADVISER FOR ARMS CONTROL AND INTERNATIONAL SECURITY AFFAIRS, DEPARTMENT OF STATE

Mr. HOLUM. Thank you, Mr. Chairman. It's a pleasure to be back. And thank you for the opportunity to provide the views of the Department of State on the Export Administration Act. The administration has been working extensively with Congress to develop legislation that carefully and properly balances our goals of protecting U.S. national security and foreign policy interests while supporting U.S. economic leadership and assuring the security of the U.S. and its friends and allies. At every step of this process, talks between Congress and the administration have been constructive and open-minded, which will undoubtedly result in a better final bill.

The State Department fully recognizes that U.S. exports, particularly in high technology fields, are important not only to the prosperity of the American people but also to the security and foreign policy of the United States. In an environment where our defense and foreign policy resources are stretched to the limit, we rely upon the innovative and productive capacity of the U.S. economy to provide new and more efficient tools to ensure a decisive technological advantage over our potential adversaries. Export performance is a key factor in U.S. industry's ability to grow and invest in these new technologies. However, with U.S. technological leadership also comes a great responsibility.

Our adversaries, particularly those countries that are attempting to develop weapons of mass destruction, missile systems and advanced conventional weapons, can also derive great benefit from dual-use technologies. Export controls therefore are a balancing

act, or an exercise in risk management. The objective is to maintain an export control system that encourages exports while also fulfilling our international nonproliferation obligations and preventing dangerous technology transfers.

We in government have well-defined responsibilities and authorities aimed at ensuring that trade is conducted in a manner that promotes U.S. foreign policy objectives and national security interests. We also have an obligation to exporters of dual-use goods and technology to create an environment that does not unnecessarily hinder industry's ability to compete in the global marketplace. Our approach to the new EAA is to craft a bill that reaches this balance.

A major responsibility in the State Department is to ensure that any legislation will allow us to continue to exert leadership and to fulfill our obligations in the multilateral export control regimes. Any legislation on export controls needs to provide this and future administrations with the flexibility to negotiate strong export controls on a multilateral basis. Unilateral controls are sometimes necessary, but multilateral controls clearly are preferable. If legislation prevents us from adhering strictly to these international regimes, they will cease to be viable, cutting off our main avenues for achieving effective multilateral controls on sensitive transfers.

With that in mind, the State Department believes that any new legislation needs to avoid provisions that: inadvertently weaken existing multilateral regimes and hamper our ability to encourage other countries to adopt stringent export controls; or unduly restrict our ability to implement foreign policy controls or are duplicative of existing sanctions authority.

With those criteria in mind, State has followed the progress of a number of key aspects of the draft EAA, including penalty provisions, mass market and foreign availability provisions, exceptions to foreign policy controls, definition of State's role, and sanctions provisions. We look forward to working closely with Congress to finalize these and other provisions in this important legislation. The State Department appreciates congressional efforts to undertake a thorough review of this extremely complex subject and produce a new EAA.

Export controls, as I have said, implicate both the American economy and international security as a cornerstone of our nonproliferation and arms control efforts. The Department of State welcomes the opportunity to work with the Committee on this complex but essential task. Thank you.

[The prepared statement of Mr. Holum follows:]

PREPARED STATEMENT OF JOHN D. HOLUM, SENIOR ADVISER FOR ARMS CONTROL AND INTERNATIONAL SECURITY AFFAIRS, DEPARTMENT OF STATE

Thank you for the opportunity to provide the views of the Department of State on the Export Administration Act ("EAA"). We welcome the Congress' interest in revising and updating the now lapsed EAA. The Administration has worked extensively with various committees to address our concerns with the draft legislation. We stand ready to work with the Congress as a whole to develop legislation that carefully and properly balances our goals of protecting U.S. national security and foreign policy interests while supporting U.S. economic leadership and assuring the security of the U.S. and its friends and allies. At every step of this process, we feel that the dialogue between the Congress and the Administration has been constructive and open-minded, which will undoubtedly result in a better final bill.

Let me start by emphasizing that the State Department fully recognizes that U.S. exports, particularly in high-technology fields, are important not only to the prosperity of the American people, but also to the national security and foreign policy of the United States. In an environment where our defense and foreign policy resources are stretched to the limit, we rely upon the innovative and productive capacity of the U.S. economy to provide new and more efficient tools to ensure a decisive technological advantage over our potential adversaries. Much of the innovation upon which we rely comes from private sector efforts to develop new products and systems for commercial purposes. Export performance is a key factor in U.S. industry's ability to grow and invest in these new technologies.

However, with U.S. technological leadership also comes a great responsibility. Just as the U.S. military derives great benefit from dual-use technologies, so can our adversaries, particularly those countries that are attempting to develop weapons of mass destruction, missile systems and advanced conventional weapons.

Export controls, therefore, are a balancing act, or more appropriately, an exercise in risk management. The only way to be sure that the transfer of U.S. technology cannot threaten our interests would be to stop all exports of high-technology goods. That would be just as disastrous as having no controls over such goods. The only sensible alternative is to maintain an export control system that encourages exports while providing the capability to fulfill our international nonproliferation obligations and to prevent dangerous technology transfers.

We in government have well-defined responsibilities and authorities aimed at ensuring that trade is conducted in a manner that promotes U.S. foreign policy objectives and national security interests. We also have an obligation to exporters of dual-use goods and technology to create an environment that does not unnecessarily hinder industry's ability to compete in the global marketplace. Accordingly, our comments on the shape of the new EAA are directed at crafting a bill that appropriately reaches this balance.

Any revision to the EAA should ensure that we retain strong curbs to combat the proliferation of weapons of mass destruction and their means of delivery, the accumulation of destabilizing advanced conventional weapons, and the export of items useful for terrorists.

A major responsibility of the State Department in this process is to ensure that any legislation will allow us to continue to exert leadership and to fulfill our obligations in the multilateral export control regimes. At the same time, the new EAA must allow us the flexibility to impose unilateral controls on items to achieve critical U.S. foreign policy goals. Provisions in the new EAA—particularly those that provide exemptions to controls—need to be carefully considered with these interests in mind. Before focusing on provisions of particular interest to State, I would like to say a bit more about our participation in multilateral regimes.

Multilateral Regimes

Broadly speaking, U.S. objectives in multilateral regimes are the same as our export control policy as a whole—balance economic considerations with the national security requirement to prevent the proliferation of dangerous military technologies, particularly those related to weapons of mass destruction, missiles, and advanced conventional weapons. All agencies share these objectives.

Specific U.S. objectives regarding the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime, and the Wassenaar Arrangement are developed through interagency working groups involving all relevant agencies, including the Intelligence Community. The Department of State chairs these groups and is responsible for attempting to reconcile interagency positions and resolve conflicting points of view. If necessary, disputes are escalated through the NSC process.

State generally leads the U.S. delegations to these multilateral regime meetings. The delegations generally include all interested agencies and, on occasion, representatives of U.S. industry as well.

All the multilateral export control regimes work by consensus. Any changes require the acquiescence of all participating states. This can, of course, be a cumbersome process. While all participants in the multilateral regimes have agreed to the basic underlying principles that the regimes embody, there are often serious differences on specific issues. Progress often involves significant diplomatic efforts not only on the part of our delegations at the meetings but also our embassies and Washington officials from all relevant agencies.

Above all, it should be recognized that participation in the multilateral regimes is in the national security interest of the U.S. Any legislation on export controls needs to provide this and future Administrations with the flexibility to negotiate strong export controls on a multilateral basis. Although unilateral controls are sometimes necessary, we agree strongly with the assertion that multilateral controls

are preferable. If legislation prevents us from adhering strictly to these international agreements, these regimes will cease to be viable, cutting off our main avenues for achieving effective multilateral controls.

Therefore, we must be mindful of the interrelationship between our domestic controls and multilateral objectives. If we do not maintain credible domestic controls on dual-use technologies, or if our domestic legislation or unilateral actions appear to give competitive advantages to our exporters, our regime partners will not be receptive to U.S. proposals to strengthen multilateral controls. In short, maintaining multilateral discipline and cooperation is essential to both our nonproliferation and commercial interests.

Provisions of the EAA

With that background in mind, I'd like to mention some of the general provisions that might be a part of a new EAA. In particular, any new legislation needs to avoid provisions that:

- inadvertently weaken existing multilateral regimes and hamper our ability to encourage other countries to adopt stringent export controls; or
- unduly restrict our ability to implement foreign policy controls or are duplicative of existing sanctions authority.

With those criteria in mind, State has followed the progress of a number of key aspects of the draft EAA, including:

- Penalty provisions
- Mass Market and Foreign Availability provisions
- Exceptions to Foreign Policy Controls
- Definition of State's role
- Sanctions provisions

We look forward to continuing to work with the Congress on these and other issues in this important legislation.

Conclusion

The State Department appreciates Congressional efforts to undertake a thorough review of this extremely complex subject and produce a new EAA. Export controls not only have an effect on the health of the American economy—they have a global impact in that they are in many ways the cornerstone of our nonproliferation and arms control efforts. As we move further into an era in which the lines between military and civilian goods grow increasingly blurred, it is important that our export controls balance the need of American enterprises to compete overseas on an equal footing with the need to protect present and emerging national security interests.

The Department of State welcomes the opportunity to work with the Committee on this complex, but essential, task.

The CHAIRMAN. Thank you, sir. Mr. Reinsch.

STATEMENT OF WILLIAM A. REINSCH, UNDER SECRETARY FOR EXPORT ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. REINSCH. Thank you very much, Mr. Chairman. I am glad to be back. It is tempting in this situation to take some time to comment on some statements made by the previous panel such as the comment that we had made—the Commerce Department made only one end-use visit in China. In fact, we have made 60, and have more scheduled.

But rather than go down a list, I would hope that perhaps later you might ask us to comment on some of the comments from the other panelists because there are some other points, I think when we deal with—as Senator Enzi said, it is a question of details in many respects. It is a very complicated issue, it is a complicated bill, as you well know. I think it is important that we all be working with the same set of details as we go forward.

But let me, if I may, just give an abbreviated version of my statement, beginning with what I think we are trying to do in the administration as far as our concept of export controls is concerned.

Our vision, if you will, is to continue to maintain military superiority in the face of more diffuse adversaries and less multilateral agreement on precise security threats. We seek to maintain the gap between our capabilities and those of our adversaries by both retarding their progress and accelerating our own. What has changed in recent years is the relative balance of those two tactics, as economic globalization has accelerated the pace of technological change and made export controls more difficult to implement and enforce.

That means our national security has become increasingly reliant on our economic health and security.

Our military's increasing reliance on microprocessor technology, primarily in computers and telecommunications, means that their technology driver is the civilian sector, not the military contractor. That means, in turn, that our military strength is directly tied to the health of the civilian companies that produce the products the Pentagon buys and invent the technology that it relies on.

At the same time the reality is that our military does not buy enough to keep our companies healthy. In fact, it is exports that keep the U.S. HPC and other high-tech companies thriving. More than 50 percent of the sales of these companies are exports. Failure to export means fewer profits being rolled into R&D on next generation technologies and fewer funds available to address particular defense-related concerns.

Thus, we believe that in many cases the equation has become: Exports equal healthy high-tech companies equal a strong defense. If export controls cripple our high-tech companies by denying them the right to sell, you set back our own military development and with it our security. The key and growing reality in these kinds of cases is the capacity of our adversaries to make these products themselves or to obtain them from those who buy outside the circle of multilateral control regimes. In the case of computers, for example, China as well as India and others have the capacity to make these machines themselves. While they do not—and cannot—manufacture to compete with U.S. companies, they can make machines that will function at performance levels sufficiently high to provide the military capabilities they seek. Denying them U.S. products simply encourages their own development and product.

Moreover, our lead in many of these sectors is not based on our monopoly of the technology; rather it is based on quality and efficiency of our production. Close a market and we will create viable competition where there is very little now. And that competition, as we learned in so many other sectors in the past 30 years, will not stop with China or India but will move on to compete head-to-head against us elsewhere to the long term detriment of our global leadership.

In other words we believe that in some cases, the biggest loser in the face of closed markets is not the Chinese but the Pentagon, whose access to cutting edge goods and technologies will be slowed, and the United States, whose technological leadership will face new challenges from new suppliers.

In these cases we think the key security issue is the United States' continued ability to stay at the cutting edge of developing and producing these technologies. The challenge for government is

to identify trends in these sectors that could compromise our capacity and then to take steps to prevent that from happening. This is very different from the cold war approach of simply denying a very wide band of much slower moving technologies and products to clearly identified adversaries.

Now with respect to the EAA, continuing to operate under emergency authority creates a number of problems for us. First, as mentioned by Senator Enzi, our penalties are substantially lower than those available for violations that occurred under the old EAA of 1979. But even those penalties are too low, since they have been eroded in the last 20 years by inflation. The longer we are under the International Emergency Economic Powers Act, which is our current statutory basis, the more companies will begin to think of the lower penalties merely as a cost of doing business.

Another limitation of IEEPA concerns our enforcement agents' police powers, and my statement details that problem at greater length. Third, the longer the EAA lapse continues, the more likely we will be faced with challenges to our authority. For example, IEEPA does not have an explicit confidentiality provision like that in the Export Administration Act or similar provisions in the various bills that are pending, including the one under discussion today.

The prediction I made in 1997 that the Department's ability to protect from public disclosure information concerning license export applications, the licenses themselves, and related export enforcement information is likely to come under increasing attack on several fronts—that prediction has come true.

The Department is currently defending two separate lawsuits brought under the Freedom of Information Act seeking public release of export licensing information subject to the confidentiality agreements of our law. If we cannot defend the confidentiality of this proprietary information, we will face increased business reluctance to cooperate with our system. Similarly, the absence of specific antiboycott references in IEEPA has led some respondents in antiboycott cases to argue—thus far unsuccessfully—that the Department of Commerce has no authority to implement and enforce the antiboycott provisions of the EAA and the Export Administration Regulations.

Finally, we have noticed abroad that our failure to enact a new law sends the wrong message to our regime partners, many of whom we have urged to strengthen their export control laws and procedures. As part of our cooperation with the former Soviet Union and Warsaw Pact countries, for example, we have urged them to enact strong export control laws. Our credibility is diminished by our own lack of a statute.

Now in 1994 the Administration proposed to revise the EAA and to refocus the law on the new security threat we face—the proliferation of weapons of mass destruction—without sacrificing our interest in increasing exports, reducing our trade deficit, and maintaining global competitiveness in critical technologies. Congress did not act on that bill, but in 1996 the House passed H.R. 361, which made several significant improvements to the EAA which were similar to those contained in the Administration's bill. Those improvements include control authority updated to address current

security threats, increased discipline on unilateral controls, and enhanced enforcement authorities. It also contained provisions consistent with administration reforms and of the licensing and commodity jurisdiction processes which are largely embodied in Executive Order 12981, which was issued in late 1995. That order makes clear that all agencies with a stake in the outcome, namely my colleagues here as well as the Department of Energy, have a seat at the table. Commerce manages the system, as it always has, but State, Defense and Energy may review any license they wish and take their concerns through a dispute settlement process that goes all the way to the President. It is a tribute to the effective management of the system and the good faith agencies have demonstrated in working with us that all agencies have agreed on an outcome, in these license applications, more than 90 percent of the time, and conduct their reviews on average in less than half the allotted time that the Executive Order gives them. Thus far all differences of view have been resolved at the assistant secretary level, and none have had to go to the Cabinet or to the President in this Administration.

Now, the Senate did not act on the House-passed bill in 1996, but as observed earlier the Senate Banking Committee reported out S. 1712 last September. While different in structure from the House-passed bill, it updates control authority to address current security threats and contains other useful provisions, such as enhanced enforcement authorities and significantly higher penalties. It is also largely consistent with the Administration's reforms of the licensing and commodity jurisdiction process.

We appreciate the constructive, bipartisan approach taken by the Committee's leadership—Senators Gramm, Sarbanes, Enzi and Johnson. And we understand that they have done an exceptional job in the wake of a very difficult subject. Despite their efforts, however, we understand that S. 1712 continues to be the subject of discussions between the Banking Committee and interested members of other committees, as Senator Thompson observed. The Administration has not yet taken a position on S. 1712 pending the outcome of those discussions, but we look forward to a successful outcome that would enable the bill to be considered on the Senate floor.

In closing, Mr. Chairman, let me simply say that we need an EAA that allows us to effectively address our current security concerns while maintaining a transparent and efficient system for U.S. exporters. The Administration and the House, via H.R. 361, and the Senate Banking Committee, in S. 1712, have agreed on many of the salient issues, such as focusing on multilateral controls, further discipline on unilateral controls and the licensing process and enhanced enforcement. These reforms would facilitate the proper balance for controlling dual-use items while minimizing the burden on exporters. My preference is to take up reauthorization of an EAA that would build on a consensus already achieved and further enhance our security in the way I defined in the beginning of my statement.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Reinsch follows:]

PREPARED STATEMENT OF WILLIAM A. REINSCH, UNDER SECRETARY FOR EXPORT ADMINISTRATION, DEPARTMENT OF COMMERCE

Thank you for the opportunity to testify on the Export Administration Act (EAA). Since the EAA's August 1994 expiration, we have maintained our system for controlling the exports of dual-use goods and technologies through a combination of emergency statutory authority—the International Emergency Economic Powers Act (IEEPA), executive orders, and regulations. As I noted in past testimony, the Cold War has ended, and the need for an EAA that reflects this reality is long overdue.

Reauthorizing and modernizing the EAA will provide U.S. businesses an updated legal framework in which to operate. A legal framework which recognizes the current realities of a fast-paced highly competitive global market, and helps to ensure our national security by controlling sensitive dual-use technologies. Moreover, it would preclude some of the legal challenges that are now being brought under IEEPA and would enhance our credibility in international fora.

I want to begin with an explanation of the logic that has guided this Administration's thinking on dual-use export controls and then focus on three key points: the complications of continuing to operate under the IEEPA and how a new EAA could alleviate those complications; the Administration's proposed revisions to the EAA as well as the significant features of H.R. 361, passed by the House in 1996; and S. 1712, reported last fall by the Senate Committee on Banking, Housing and Urban Affairs.

Post-Cold War Export Controls

Although the end of the Cold War has handed us a more complex world with a more diffuse set of adversaries and less multilateral agreement on what to do about them, our goal of maintaining military superiority has not changed, and we still seek to achieve it by maintaining the gap in capabilities between ourselves and our adversaries. That gap is sustained and expanded through policies that retard our adversaries' progress, such as export controls, and through those that help us run faster—increased research, development and acquisition of advanced technologies here at home—not to mention the sound economic policies that have produced the longest period of economic growth in our history.

What has changed is the relative balance of those two tactics, as economic globalization has accelerated the pace of technological change and made export controls more difficult to implement and enforce. That means our national security has become increasingly reliant on our economic health and security.

The ubiquity of some critical technologies and the ease of their transfer makes export controls much more difficult. For example, microprocessors, which are the key ingredient for High Performance Computers (HPCs) as well as PCS, have become a commodity product widely available throughout the world from numerous sources. The technology to "cluster" these computers is also readily available through the Internet.

Our military's increasing reliance on microprocessor technology—primarily in computers and telecommunications—means that their technology driver is the civilian sector, not the military contractor. That means, in turn, that our military strength is directly tied to the health of the civilian companies that produce the products the Pentagon buys and invent the technologies it relies on.

At the same time, our military does not buy enough to keep our companies healthy. In fact, it is exports that keep the U.S. HPC and other high-tech companies thriving. More than 50% of the sales of these companies are exports. Failure to export means fewer profits being rolled into R&D on next generation technologies and fewer funds available to address particular defense-related concerns.

Thus, we believe that in many cases the equation has become: exports=healthy high-tech companies=strong defense. If export controls cripple our hi-tech companies by denying them the right to sell, you set back our own military development and thus our security.

A key—and growing—reality in all these cases is the capacity of our adversaries to make these products themselves or to obtain them from those who lie outside the circle of multilateral control regimes. In the case of computers, for example, China, as well as India and others, have the capacity to make these machines themselves. While they do not—and cannot—manufacture to compete with U.S. companies, they can make machines that will function at performance levels sufficiently high to provide the military capabilities they seek. Denying them U.S. products simply encourages their own development and production—which was precisely the effect of the Reagan Administration's decision to deny India HPCs.

Moreover, our lead in many of these sectors is not based on our monopoly of the technology; rather it is based on the quality and efficiency of our production. Close

a market and we will create viable competition where there is very little now. And that competition, as we have learned in so many other sectors over the past thirty years, will not stop with China or India but will move on to compete head to head against us elsewhere to the long term detriment of our global leadership.

In other words, in some cases, the biggest loser in the face of closed markets is not the Chinese but the Pentagon, whose access to cutting edge goods and technologies will be slowed, and the United States, whose technological leadership will face new challenges from new suppliers.

In all these cases, we think the key security issue is the United States' continuing ability to stay at the cutting edge of developing and producing these technologies. The challenge for government is to identify trends in these sectors that could compromise our capacity and take steps to prevent that from happening. This is very different from the Cold War approach of simply denying a very wide band of much slower moving technologies and products to clearly identified adversaries.

The Need for a Revised Export Administration Act

Continuing to operate under emergency authority raises the possibility of increasing legal and political complications. Operating under authority of IEEPA, as we have done on a number of occasions, including for the past five and one-half years, complicates our ability to function and leaves important aspects of our system increasingly at risk of legal challenge. In addition, operating under emergency authority can undercut our credibility as leader of the world's efforts to stem the proliferation of weapons of mass destruction.

Legal Limits

In some significant areas, we have less authority under IEEPA than under the EAA of 1979. The penalties for violations of the Export Administration Regulations that occur under IEEPA, both criminal and civil, are substantially lower than those available for violations that occur under the EAA of 1979. Even the EAA penalties are too low, having been eroded over the past 20 years by inflation. The Administration's proposed revised EAA significantly increased these penalties, as did H.R. 361 and S. 1712. The longer we are under IEEPA, or even the EAA of 1979, the more the deterrent effect will be eroded, and companies will begin to think of the lower penalties merely as a cost of doing business.

Another limitation of IEEPA concerns the police powers (e.g., the authority to make arrests, execute search warrants, and carry firearms) of our export enforcement agents. Those powers lapsed with the EAA of 1979. Our agents must now obtain Special Deputy U.S. Marshal status in order to exercise these authorities and function as law enforcement officers. While this complication can be overcome, doing so consumes limited resources that would be better used on enforcement. The Administration's proposed EAA, H.R. 361 and S. 1712 would continue these powers.

Finally, the longer the EAA lapse continues, the more likely we will be faced with challenges to various aspects of our authority. For example, IEEPA does not have an explicit confidentiality provision like that in section 12(c) of the EAA of 1979 or similar provisions in the Administration's proposal, H.R. 361 and S. 1712. The prediction I made in 1997—that the Department's ability to protect from public disclosure information concerning export license applications, the export licenses themselves, and related export enforcement information was likely to come under increasing attack on several fronts—has come true. The Department is currently defending two separate lawsuits, brought under the Freedom of Information Act, seeking public release of export licensing information subject to the confidentiality provisions of section 12(c). Similarly, the absence of specific antiboycott references in IEEPA has led some respondents in antiboycott cases to argue—thus far unsuccessfully—that BXA has no authority to implement and enforce the antiboycott provisions of the EAA and Export Administration Regulations.

Policy Ramifications

The lapse of the EAA also has policy ramifications. Although we have made great progress in eliminating unnecessary controls while enhancing our ability to control truly sensitive exports, industry has the right to expect these reforms to be certain and permanent. For example, while the Administration is implementing the President's executive order on the licensing process, which increases the discipline and timeliness of that process, a statutory foundation for that process would send an important message to U.S. exporters that these reforms will not be rolled back. Our exporters will then have the certainty they need to plan their export transactions.

In addition, failure to enact a new EAA sends the wrong message to our regime partners, many of whom we have urged to strengthen their export control laws and procedures. As part of our export control cooperation with the former Soviet Union

and Warsaw Pact countries, we have urged them to enact strong export control laws. Our credibility is diminished by our own lack of a statute.

Recent Attempts to Revise the Export Administration Act

The Administration's Proposal

In February 1994, the Administration proposed a revised EAA that refocused the law on the new security threat we face—the proliferation of weapons of mass destruction—without sacrificing our interests in increasing exports, reducing our trade deficit, and maintaining global competitiveness in critical technologies. Our bill emphasized the following principles: (1) a clear preference for export controls exercised in conjunction with the multilateral nonproliferation regimes; (2) focus on economic security by increased discipline on unilateral controls; (3) a simplified and streamlined export control system; (4) strengthened enforcement; and (5) expanded rights for exporters to petition for relief from ineffective controls.

H.R. 361—The Omnibus Export Administration Act of 1996

H.R. 361 made several needed and significant improvements to the EAA which were similar to those contained in the Administration's 1994 proposal. These improvements include control authority updated to address current security threats, increased discipline on unilateral controls, and enhanced enforcement authorities. H.R. 361 also contained provisions consistent with Administration reforms of the licensing and commodity jurisdiction processes which are largely embodied in Executive Order 12981, issued in December 1995. That order makes clear that all agencies with a stake in the outcome have a seat at the table. Commerce manages the system, as it always has, but State, Defense, and Energy may review any licenses they wish and take their concerns through a dispute settlement process that goes all the way to the President. It is a tribute to the effective management of the system and the good faith agencies have demonstrated in working with us that all agencies agree on an outcome more than 90% of the time and conduct their reviews on average in less than half the allotted time. Thus far, all differences of view have been resolved at the assistant secretary level, and none have had to go to the Cabinet or the President.

We did have concerns, however, about H.R. 361's terrorism, unfair impact, antiboycott private right of action, and judicial review provisions. We also believe that certain provisions raised constitutional issues.

S. 1712-The Export Administration Act of 1999

The Senate Banking Committee reported S. 1712 in September of last year. While different in structure from H.R. 361, it also updated control authority to address current security threats and contains other useful provisions, such as enhanced enforcement authorities, and significantly higher penalties. It is also largely consistent with the Administration's reforms of the licensing and commodity jurisdiction process.

We also appreciate the constructive, bipartisan approach taken by the Committee's leadership—Senators Gramm, Sarbanes, Enzi and Johnson. The unanimous support for the bill in their committee is testimony to the way they have handled a difficult, controversial subject. Despite their efforts, however, we understand that S. 1712 continues to be the subject of discussions between the Banking Committee and interested members of other Senate committees. The Administration has not yet taken a position on S. 1712 pending the outcome of those discussions, but we look forward to a successful outcome that would enable the bill to be considered on the Senate floor.

Conclusion

We need an EAA that allows us to effectively address our current security concerns while maintaining a transparent and efficient system for U.S. exporters. The Administration and the House, in H.R. 361, and the Senate Banking Committee in S. 1712 agreed on many of the salient issues, such as focusing on multilateral controls, further discipline on unilateral controls and the licensing process, and enhanced enforcement. These reforms would facilitate the proper balance for controlling dual-use items while minimizing the burden on U.S. exporters. My preference is to take up reauthorization of an EAA that would build on the consensus already achieved and further enhance our security in the way I defined it at the beginning of my statement.

The CHAIRMAN. Thank you, Mr. Reinsch, and I think your suggestion is appropriate. I would like to begin with Mr. Bodner and ask if he or Mr. Holum or you have a response to the concerns

raised by Senator Thompson in his comments. You do not have to, Mr. Reinsch obviously wishes to, but if you do not or Mr. Holum does not, that is fine with me.

Mr. BODNER. Perhaps you will want to proceed with Mr. Reinsch, and then John and I might have comments.

The CHAIRMAN. OK, fine. Mr. Reinsch.

Mr. REINSCH. Well, I wanted to stick to facts, Mr. Chairman. There are issues that are questions of opinion, and we can discuss those. But I want——

The CHAIRMAN. I think it is important for you to respond, as you said.

Mr. REINSCH. Let me just say on computers the control numbers we are dealing with are not 12,000 and 25,000. They are 6,500 and 12,300. Those went into effect on January 23rd. We are currently reviewing further numbers. The higher numbers Senator Thompson alluded to in the absence of Congressional intervention will go into effect on August 14th, but they are not in effect now. The bill does not move commercial communications satellites back to the Department of Commerce. In fact the bill, S. 1712, has nothing to do with commercial communication satellites. I have heard some rumors that there may be some senators who will make that proposal, but that is not part of that bill, and we have not seen any such legislation that has been proposed as far as I know.

The Department of Commerce does not now and would not under this bill unilaterally add or remove items from the control list. That is an interagency exercise which we undertake with my two colleagues here, and we make joint decisions. Likewise in the licensing process as I described, the Department of Commerce does not unilaterally issue export licenses, unless we are talking about the relatively small number of items in which our sister agencies have told us they are not interested in reviewing those applications. One of the things that the Executive Order issued in December 1995 did was tell agencies that they can see anything they want. Agencies have the right to tell us they want to see everything. After that Executive Order was issued the number of licensed referred to other agencies jumped from 52 percent to 94 percent. It has since fallen down a little bit because agencies have decided they do not want to look at certain things because it does not affect their equities, and we are now referring somewhere between 85 and 90 percent of our licenses.

Even so, they all go out; they all fan out in the process, are widely distributed and the decisionmaking is a joint process in which—as I said this gets obscured in the debate—but we actually agree 90 percent of the time on these things, and that is the end of it. We agree at the working technical level and this moves on. What you read about are the small fraction that we do not agree on, that work their way up through the dispute settlement process, but which as I said have always gotten resolved at the assistant secretary level and have not yet had to go higher, though the means exists to do that.

As I mentioned in the beginning, we have not done one, only one end-use visit in China, we have done 60. We have more scheduled. The agreement we have with the Chinese is classified confidential. We gave it to the Cox Committee. We gave it to our authorizing

committees. We are happy to give it to the Governmental Affairs Committee. We are happy to give it to you, Mr. Chairman, and have you look at it. I could not tell you that we are entirely pleased with it. In fact, my Assistant Secretary is in China as we speak negotiating with the Chinese to try to strengthen it. And I hope that she will come back at the end of the week with some improvements, because I think we can do more. But I think 60 is a big improvement. I also say that that does not count the other some 200 end-use visits that we have to conduct, because we are required by law to visit all computers shipped, not just to China but to 50 countries. And the Congress has not seen fit to give us additional resources to do that, so we have been able to do 60 in China, we have been able to do some 200 in the other 49 countries, some of which I can enumerate if you wanted me to. But the other big ones are India, Pakistan, Russia and Israel. Those along with China comprise about 85 percent of that particular group in the marketplace.

I think in terms of facts, Mr. Chairman, I'll just stop there and respond as you wish to anything else.

The CHAIRMAN. Thank you. Mr. Holum, do you have anything to add?

Mr. HOLUM. No.

The CHAIRMAN. Mr. Bodner?

Mr. BODNER. No, sir.

The CHAIRMAN. I guess the concern is about the small number of those that resulted in the legal sale by American companies of biological materials to Iraq during the 1980's, providing the basis for that country's biological weapons program: the acquisition by Iraq of glass fiber technology used to improve weapons systems, including guided missile components; the sale to the former Soviet Union of the common river truck plant, the product of which was used extensively during the invasion of Afghanistan; the sale to China of machine tools used in the manufacture of advanced fighter jets; and numerous transactions involving the sale to China of computers and other technologies to institutes with integral ties to the People's Liberation Army.

All those, I am sure, are some of the few that slipped by during previous administrations, when the previous Export Administration Act had not expired. Is it true, Mr. Reinsch, that Department of Commerce under this proposed legislation would decide whether referrals were made to DOD and State?

Mr. REINSCH. Of export license applications no, Mr. Chairman. It would largely repeat the structure which we have now, in which the other agencies would indicate to us what they wish to see. And they tend to do it through what might best be called a negative option. That is, we assume they want everything; they delegate back to us authority not to send them certain things, and as I have said, what that has resulted in is we refer 85 to 90 percent of all our licenses. If anybody wants to see all of them, we are happy to do that. This bill would not change that process.

The CHAIRMAN. I would like to give you a chance to respond. On "60 Minutes" there was, a report on dual-use technologies which referenced a factory in China to which military sensitive U.S. machine tools were sent. This factory was known to produce Silkworm

missiles. In response you noted the factory also produces bicycles. Would you care to respond to that?

Mr. REINSCH. I remember that program, Mr. Chairman. That was one of the more interesting events of my tenure.

The CHAIRMAN. I do have some sympathy for you.

Mr. REINSCH. What I learned, as perhaps you observed, too, Mr. Chairman, from that is the bigger the program, the more furniture they move when they interview you. It took them an hour and a half to set up and an hour to shut down for what you saw, which was a very brief interview. There is no question in this case, Mr. Chairman, that there was a diversion. That is also under investigation, and as you may be aware, last October 19th, criminal indictments were issued against McDonnell Douglas Corporation and a Chinese corporation and certain individuals for their alleged involvement in that case. That will be working its way through the criminal justice system.

What is often forgotten in that particular case is that of the 30-plus machine tools that were involved in this larger shipment, six were—five or six were actually diverted to the Nanchang plant which is the one you were referring to.

What most people fail to mention is two things. First of all, we got them all back before they had been used. All but one of them had not even been taken out of its crate, and the company was able to visit them to verify that. We were able to ascertain and demonstrate that they had not been used. These are not machines you simply plug in and run. The one that was uncrated was a hydraulic stretch press that needed water, connections, and a lot of other things. We were confident they were not used. They were all returned to another facility where they are under American control. They continue to be visited, and we are confident that they were not used.

The irony, I would say, Mr. Chairman, is that what that report on "60 Minutes" also did not comment on is after that stretch press was sent back, was recovered and sent back into American control, the Chinese bought a brand-new one from Europe to replace it.

The CHAIRMAN. I hate to do this to you, but I do have some questions——

Mr. REINSCH. Fire away.

The CHAIRMAN. —that I would like to submit to you all that I would like responses for the record. I know how busy you are, and I will try to keep those questions at a minimum.

But let me just ask the three of you to address concerns that have been raised by the Inspectors General of each of your departments that you represent. And that is this whole issue which really focuses a lot of the concerns that Members have and Americans have about dual-use technologies and especially dual-use technology that is exported to China, given the indivisible relationship between the Chinese Army and their commercial enterprises.

That is, that is the great cause for concern. I think amongst most of the Members of this Committee and other Members of the Senate. Would you—would you discuss those concerns specifically, beginning with you, Mr. Bodner.

Mr. BODNER. I do think it is possible to square this circle in terms of the challenges posed by the fact that technology is advanc-

ing at a very rapid pace, and it is spreading and it is becoming ubiquitous in the industrial environment, the business environment and, of course, the military environment, and that is where the rub comes because of the overlap there.

What we need to do is to make sure we have processes in which in each case an appropriate balance can be struck and judged. And I do think that it has been stated here when the Department of Commerce determines that a license is required, I do think the interagency process works. And we are satisfied generally with that. Similarly, with regard to the question of the formulation of a list, as it exists now, and as it exists under the proposed legislation, particularly as it came with changes in the manager's amendment as it now stands.

There obviously are cases in which it is a little more difficult to make determinations. I would note that in a parallel process at the State Department runs for Munitions List items under the Arms Export Control Act, there is a very transparent system there that we are very pleased with in terms of determinations made by State that a license is required. We have adequate insight into how that works, and we think that system works well. We also have adequate insight into the State Department system for deciding whether a license is required, the so-called commodity jurisdiction process, and we think that works well.

I will tell you that within the Department of Defense one of the things we have done to improve our system is we have gathered the three military departments together, and we have had them identified together which of them has the best practice for each of the different elements of their export license review process, and then we encourage them to adopt the best practice, even though for a particular department they may be borrowing a practice from another. And I think in this case we may have a similar situation.

We think the commodity jurisdiction process works quite well. It is transparent and open, and we are pleased with our colleagues in the State Department that we have insight into how they make a judgment as to whether a license is required or not, and we think that is a best practice. And as a principle in life, I would say that we should all be looking to adopt best practices.

The CHAIRMAN. Mr. Holum.

Mr. HOLUM. Going specifically to the question of whether it is possible to export a dual-use commodity to an entity in China and not have it end up in the service of the military, the PLA, it seems to me that it is possible in two ways. One is the technology may not lend itself to a particular military use or might not be useful. It may be embedded technology where having access to what's really valuable to the commodity might result in destruction of the product, which would leave them with nothing. And another way is through the end-use process that Under Secretary Reinsch described, and I think it does serve our interests, if we have confidence that we are protecting U.S. technology from diversion, to, for example, provide computing capability to weather predicting operations in China. That can serve international air traffic safety, for example, and weather prediction.

I think we have a broader set of interests here. Both the commercial transaction and other national interests can be served, so

I do not regard everything that goes to China as inherently going to the PLA. I do not think that is the appropriate standard for review of dual-use items, but I do think we need to be careful to protect the technologies from diversion and strongly enforce against the exporter and entities in China when there are diversions.

The CHAIRMAN. Mr. Reinsch.

Mr. REINSCH. I thank you.

I think, Mr. Chairman, I would draw a distinction between information technologies and other technologies, particularly production technologies. If you look at our record overall on machine tools or semiconductor manufacturing equipment or production equipment—things that are used to make other things—with respect to China, it has been quite tight. In fact, I am quite confident if you were to have a machine tool industry witness on your next panel, he would give you nothing but a series of complaints, which the three of us have gotten over the last several years about this administration's failure to do what that industry would like. I am going down to their annual meeting tomorrow, and I expect to hear those complaints. We have got similar complaints, incidentally, from the semiconductor manufacturing equipment organization.

IT, information technologies, is in a little bit different category because of its ubiquity, because of the pace at which it moves, because the real issue here as far as computers are concerned is not so much the box, but the chips. The chips are made all over the world. Intel will tell you they have 50,000 authorized dealers, and those are not the people who sell clones. Those are the people that sell, you know, the real thing. It is very difficult in those situations to box up that technology and keep it out of individual hands.

In the case of China, some 60, 65 percent of computers that have gone there have gone to banks, phone companies, weather prediction organizations, and I think railroads. Now, we believe that those are essentially benign institutions. We have visited many of them. Of all the visits we have done in China, we have not found any problems. Every computer that was shipped was where it was supposed to be, doing, as far as we can tell, what it was supposed to do. We think that in the computer IT area there are limits to what we can accomplish. Beyond that I would agree with Mr. Holum. And that is an area where you can draw the distinction. Elsewhere, I think we have been quite tight.

The CHAIRMAN. Well, I guess you say 65 percent went to those, and that gives rise to the question, where did the other 35 percent go?

Mr. REINSCH. Radio and television stations. Actually, I can submit that for the record.* We have got a complete accounting.

The Chairman: I would appreciate that.

Mr. REINSCH. Research institutions. It raises an interesting question, Mr. Chairman. For example, if you want to make an analogy, if you want to make an American analogy, we might send one to the Johns Hopkins University. Well, that sounds good, but the Johns Hopkins University owns and operates the Applied Physics Laboratory which, as you probably, engages in a great deal of classified research for the Department of Defense and others. Does that

*The information referred to was not available at the time this hearing went to press.

mean we should not give a computer to the university? I mean, these are the kind of problems we face in China.

The CHAIRMAN. Johns Hopkins is not owned by the United States Army. There is a little less than subtle difference.

Mr. REINSCH. These are the Chinese institutions that I am talking about. They are not owned by the Army, but they have relationships with the Army. There is no question about that. But, you know, the other reality is in any country in the world, if we ship something overseas, you know, we lose a modicum of control over it. I mean, if you are going to tell me the PLA can march into the Guangjou Telephone Company and rip their computer out of its flooring and take it somewhere, the answer to that is probably yes, but that can happen in most any country in the world if that is what the military wants to do.

What we have tried to do in that technology is parse what we are doing in relation to the widespread availability of the technology, and their own ability to make these products themselves.

The CHAIRMAN. But again, I do not mean to be argumentative, but there are different levels of concern, and our concern I think is driven by the actions of those particular countries. And obviously if it went to England, then we might have a different level of concern than if it went to China or Iraq or Libya or Iran so—and again with all due respect, you are saying well, any country in the world. I think there are different levels of concern about what exports go to which country, and I am also aware that those countries can serve as middlemen and all of that. But I guess the concern that many of us have is when we see what apparently is a very significant investment in military capability on the part of China, which was not true some years ago, that it makes us even more cognizant of this particular aspect of our export of high technology which can be used again, which is dual-use.

Mr. REINSCH. We share that concern, Mr. Chairman. I think there is no question about that, and there—probably the two countries that as an interagency group we spend the most time talking about for precisely that reason is China and India because of recent events there, and they both pose some very complicated policy dilemmas. I think we would concur completely with the concern you are expressing or attempting to work our way through it one by one, which is what we do in the licensing business as best we can.

The CHAIRMAN. I thank you all. I thank you for taking time this afternoon to be here, and I think it has helped a great deal as we examine this very important piece of legislation. I thank the panel.

The next panel is Mr. John Douglass and Dr. William Schneider.

Welcome back, Mr. Douglass.

Mr. DOUGLASS. Thank you, Mr. Chairman.

The CHAIRMAN. Please begin, and how are you, Mr. Schneider?

Dr. SCHNEIDER. Very good, sir.

The CHAIRMAN. You have not aged a bit since you and I have first encountered each other in the middle 70's. Now you are in your middle 70's, are you not? That is not a kind remark. I apologize for that, Bill.

Dr. SCHNEIDER. I worked for the State Department, I am well insulated from assaults of that sort.

The CHAIRMAN. Thank you.

Dr. SCHNEIDER. Thank you, Mr. Chairman.
The CHAIRMAN. John.

STATEMENT OF JOHN W. DOUGLASS, PRESIDENT AND CEO, AEROSPACE INDUSTRIES ASSOCIATION

Mr. DOUGLASS. Thank you, Mr. Chairman. I want to begin by thanking you for holding this hearing and giving me an opportunity to testify, sir. As you know, sir, we worked together before, I remember, and I especially remember your attempts to work with Senator Nunn on things that were in the Defense bill that should not have been in the Defense bill and, sir, I have always enjoyed that and greatly respect you for your valiant efforts there.

The CHAIRMAN. Thank you.

Mr. DOUGLASS. I would like to just take what time we have left today to go over, provide a little information to the Committee, sir, about the system and about where our products are and then comment briefly on the bill and then turn it over to Bill.

First point that I would like to make, sir, is that there are two systems, and the two systems have their roots in two basic laws. The Arms Export Control Act is administered by the Department of State, and that covers Defense articles and services which are clearly military items. And one aspect of the debate that I have heard often over and over in the past oh, 60 to 90 days—I have testified three times on this bill—is that examples of things that are military tend to get into the debate when talking about dual-use items. There is considerable amount of confusion there.

The bill that we are talking about, of course, is trying to get a new Export Administration Act. As previous witnesses have pointed out, we have not had one since 1994, so it has been 6 years now. And these are essentially for commercial items, which might have some use by some potential enemy as a military product, and this is a very difficult judgment to make, sir. I could hold up a cell phone, and you and I could make the obvious discussion about how it could be used by a soldier. In fact, during our military operation down in the Dominican Republic a few years ago in the islands one of the soldiers called in on a cell phone in order to locate his unit. That whole system is administered by the Department of Commerce.

But there is one interesting thing, sir, that has not been brought out in the debate. None of the previous witnesses mentioned it, and that is if there is an item that is being administered by the Department of Commerce and the Department of State feels that it is—belongs on the munition list, the Secretary of State has the unilateral authority to, you know, exercise jurisdiction over it. So things can be moved internally as it exists today without the intervention of the Congress.

And finally, sir, I thought I would just mention, I mentioned it in my written statement, which I would like to submit for the record——

The CHAIRMAN. Without objection. Both statements.

Mr. DOUGLASS. —is that the confusion about these two laws exists not only in the mind of the public and in the minds of people up here on the Hill, but it exists in the minds of business people, and indeed it exists in the minds of people in the government.

After Secretary Holum testified recently, somebody in the State Department put up a summary of his testimony on their website and they had it all backward. They had the military things being controlled by Commerce and vice versa. You can imagine the impact that this would have on a small business somewhere out in the Midwest who might be bidding on a contract in England or France and trying to understand this. It is terribly confusing.

[Chart.]

Mr. DOUGLASS. Next chart, please.

As a result of the fact that we have two bills and as a result of the length of time that has gone by since these bills were put through our legislative system, a lot of things have changed. In the old days during the Cold War when the current bills were drafted, the distinctions were more clear than they are today. Indeed, the classic case that we have often discussed here is the commercial communications satellites. Is a communications satellite really a weapon or is it a dual-use item and where does it belong? I'll comment on the sales of those in a few minutes.

We used to—generally speaking, sir, we used to do the R&D in the military side. This is where you and Senator Nunn worked together to try to keep the pork out, and then that military technology would be spun off into the commercial market. That paradigm existed for many years. But now there is much more investment over on the commercial side than there is on the military side. DOD R&D spending for the aerospace industry has declined by over 70 percent in the last 10 years, and there is all kinds of research going on in the commercial side for this industry to survive.

I would also mention to you, sir, that there is a lot of confusion about the difference between classified information and information that just might be sensitive or helpful to someone. And generally speaking, when you get to the bottom of a lot of these discussions, we find that people are not talking about compromise of classified information. We are talking about how to do it or, you know, trade secrets or things of that nature which are certainly not classified.

But there is an important point to be made here about what you asked one of the previous witnesses and that is when it comes to China, sir, it is interesting to note that we have here in the United States today in our graduate schools about 45,000 graduate students from the PRC. Now, they are working in college laboratories and all over the United States. They are working on technologies that might become classified 5 or 6 years from now when the military finds out about it. That is where a lot of the razor's edge of technology is getting spread all over the world because we educate a lot of scientists and engineers for tomorrow's projects right here in the United States, and none of that, sir, is controlled. It does not get controlled until later on in the process.

And then finally, we used to do things on paper. Today, it is all done electronically, and if there is to be sharing of information or compromises of information, it is much more difficult to track. It is much easier to spread it around on the Internet and so on. I am sure from your duties here in the Congress, you have seen some of these awful things that get on the Internet about how to build

bombs and so on, and so it is much more difficult today than it used to be.

[Chart.]

Mr. DOUGLASS. Next please.

Here is just a little bit of sales information. I thought you would find this interesting for the aerospace industry. If you were to go back to 1989, which most people consider to be the last year of the cold war, DOD is about 50 percent of the aerospace business in this country. And if you went back a little further, between DOD and NASA, they were 70 percent of our business base.

Today, you can look at the chart on the right, and you can see that exports are over 40 percent of our business base. Our single biggest customer today is the global economy, and these are all overwhelmingly commercial products. I did dot in a little part there to show you the military products that go overseas. It is about 8 percent of our total production, but it is almost ⅓, sir, of our fighter aircraft production that is sent outside the United States, but to our allies. We are not selling these things to people that we do not trust.

[Chart.]

Mr. DOUGLASS. Next chart, please. I want to show how aerospace exports affect our country in an economic sense because as we all know, military security is one thing, but if you do not have economic security, the recent story in the Soviet Union and what happened to it is a good example. It does no good to have a big military without the economic security to go with it. These statistics on this chart are from 1997. And in that year, as can you see, aerospace was the largest earner of export credits for our country. That represents a $34 billion surplus on about $50 billion of sales that year.

And what's interesting is look at 1998, the next year after this. This is when the Asian recession began to set in. Almost all the blues went away, and we increased our surplus to $42 billion on over about $60 billion of sales. And again reflecting on the comment that you made earlier, sir, the overwhelming amount of these sales are to America's closest allies; the biggest single chunk of that export surplus is with the United Kingdom.

There are only two countries in the world we have an aerospace trade deficit with. One is Canada, in which we have no export licensing restrictions because of long-standing agreement. The other one is France, and that is primarily due to the production of the Airbus in France.

There is some troubling postscript to this information that I am showing you, though, sir. In 1999, this export surplus has declined by over 10 percent. Our latest projections are that it is going to decline from the 42 billion down to around 37 billion. Exports are down. Imports are up, and in some sectors there has been a very dramatic decline. Since the satellites were moved from the Commerce Department jurisdiction back into State, satellite sales have dropped about 40 percent. My organization has tracked it to be about 40 percent, but there are others I have seen that are reporting it higher. So there is some real concern that we are going over the top of a cycle here and that it is going to have a pretty serious and profound effect on our economy if we are not able to get this export licensing system straightened out.

If you just go back to the first chart one more time, I just want to mention to you a little conversation I had with Senator Thompson before the hearing. Before you came into the hearing, he and I were discussing the issue that you have mentioned and he has mentioned, and that is the need for balance in this. And balance, as we all know, is tied very closely to people's perception. He asked me what recommendation I would make for the long term, and in the short term clearly our industry wants to see this Export Administration Act put in place because we need a bill now.

But for the longer term we have called for a Presidential commission. We have asked both Presidential candidates that are still in the race to promise us a Presidential commission, a bipartisan commission with members of labor, business, our best people from our universities and colleges, from the Wall Street community to see how—why can't we make this one single system. Both of these bills rely on the advice of the Department of Defense that witnesses on the previous panel were explaining to you how they all go back to DOD to ask what should they do. We think for the long term you could have a much better system that would combine the two and give us the economic security we need along with our national, addressing our national security concerns.

But for the short term, we think this bill needs to be enacted. It has been too long, sir, since we have been working on an Executive Order. Thank you.

The Chairman: I thank you very much. Bill.

[The prepared statement and charts of Mr. Douglass follows:]

PREPARED STATEMENT OF JOHN W. DOUGLASS, PRESIDENT AND CEO, AEROSPACE INDUSTRIES ASSOCIATION

Mr. Chairman:

I am John Douglass, President and CEO of the Aerospace Industries Association. We are pleased to have this opportunity to explain the impact of export controls on our industry (and our nation), with particular reference to S.1712, the Export Administration Act (EAA) of 1999. AIA is the trade association that represents the major manufacturers of commercial and military aircraft, helicopters, missiles, satellites, engines, and related aerospace subsystems. Our industry produced $155 billion of aerospace products last year, and currently employs over 800,000 Americans (in high-tech, well-paying positions).

We welcome the opportunity to discuss our export control system with you this afternoon. The EAA, and its companion legislation, the Arms Export Control Act, form the legislative foundation for today's export controls systems. These laws were both passed in the mid-seventies, at the height of the Cold War. As I will note later in my testimony, much has changed in the political, technological, and business world since then. However, the laws have not been modified to reflect those changes.

Indeed, it is noteworthy that it is now a decade since the Berlin Wall came down and the Cold War over. For over half that period, the EAA has been officially lapsed, as the executive branch and Congress have been unable to reach a consensus as to how to adapt that law to reflect current conditions. It is particularly embarrassing for the U.S. to preach the merits of a strong export control system to countries such as Russia and China, when our own law lapsed in 1994 and still refers to such Cold War fixtures as the Soviet Bloc and the Coordinating Committee on Multilateral Export Controls, or COCOM.

To the credit of the Senate Banking Committee, it made a bipartisan effort to redraft the EAA to bring it into conformity with today's world. Yet it's efforts have been met with considerable second guessing from a number of critics, both from within and without the Senate. Partly this is because the legal and bureaucratic structure in not easy to understand. This was brought home to me last week, when following the testimony of Under Secretary of State John Holum before the House International Relations Committee, the State Department posted a report on the testimony on its web page. Let me quote one paragraph:

> Much of the regulation of arms for commercial export was transferred by Congress from the Commerce Department to the State Department in the spring of 1999. In addition to conventional arms, the system also covers satellites, computers and other technology with a dual use that could fall into the wrong hands and jeopardize the security of the United States.

Almost everything in that paragraph is incorrect. The Commerce Department has never had responsibility for licensing commercial sales of arms. The sale of computers and other dual use items was not transferred to State. Only commercial communications satellites, not all satellites, were transferred from State to Commerce and then back again.

I am not trying to criticize a reporter for being confused, or even the State Department for posting a piece on such a subject without having a quality control system. What I am saying is that our current legal and bureaucratic export control system is confusing, and that it is high time the Congress to come up with an EAA that meets the security, foreign policy, and commercial needs of today, not yesterday.

This hearing will hopefully help us all get on with that job. This afternoon I would like to briefly comment on how times have changed, and address how S.1712 addresses those changes. I would also like to make a plea that even if the Congress passes some form of S.1712, the next President and Congress should still take a hard look at what kind of export control system would make sense in the 21st century, and work to devise such a system. Let me now briefly review the changed world for which we need to adapt our current export control system, and the degree to which S.1712 attempts to do so.

Background

During the Cold War, the U.S. was willing to sacrifice economic interests for the sake of limiting the ability of the Soviet Union and its allies to improve their military capabilities and to discourage other countries from joining the Soviet Bloc (or punishing those that did). This was also true of other industrial democracies who recognized the Soviet threat and the importance of the U.S. nuclear umbrella. We were able to obtain relative consensus on the importance of keeping a variety of technologies from the Soviet Bloc that would directly help those countries build their weapons systems, or improve their economies to support larger military establishments.

It was also true that new advanced technologies generally originated from government supported military research first applied to military projects. These included such technologies as radar, nuclear energy, computers, lasers, sensors, satellites, and advanced materials. These technologies gradually migrated to the civilian sector. Technology and plans for hardware were generally recorded and transferred on paper.

The Soviet Union has now collapsed. There is greater awareness that both the economic welfare and security of countries in the future will increasingly depend on their ability to compete in the global marketplace. There is far less consensus among our fellow industrial democracies as to how to deal with countries such as Russia and China; those countries themselves have become both purchasers and suppliers of advanced technology. In particular, China has become an important market for many countries, and is regarded as one that will steadily expand. The tradeoff between security and economic benefits has become more complex.

At the same time, the distinction between military and commercial products has become less clear. The military is expanding the share of its budget that goes into such activities as communications, data processing, imaging, and simulation—all areas of accelerated commercial activity. Furthermore, in order to hold costs down, the military must turn to standard, or near standard commercial products to meet many of these needs. But lower costs and rapid technological innovation in the commercial sector are only possible for companies producing for a global marketplace, with the flexibility to rapidly penetrate new markets and to take on foreign partners.

These changes are reflected in the aerospace industry. Ten years ago, more than 50 percent of our business was with the Department of Defense. The U.S. government, as a whole, accounted for three-fifths of our sales. Today the government accounts for about 35 percent of our sales, and of the remainder, foreign sales account for two thirds. Commercial space activity is our fastest growing sector, with sales having jumped form 1 to 5 percent of sales in the past decade.

Increasingly, the Department of Defense looks to commercial research, development, and products to meet its needs, and to our foreign sales of military equipment to keep crucial defense lines open and to reduce unit costs to the U.S. military. Ten years ago we exported only 7 percent of our military aerospace output; last year we

exported nearly one-third. More importantly, many of the concepts for future warfare, often called the revolution in military affairs, will depend on technologies originating in the commercial sector, and on coalitions with other countries. The recent rather well publicized disputes between the Departments of State and DOD over export controls stem in large part from DOD recognizing that the old paradigm of security and foreign policy interests as having to be weighed against economic interests is increasingly obsolete. Instead security from DOD's perspective relates to the ability of the U.S. and its allies to maintain a lead in advanced technology. That in turn depends on the economic vitality of the industries that produce that technology. The vitality depends on exports.

This view is not only shared within our industry. In December, the Defense Science Board Task Force on Globalization and Security issued its final report. This report, written by an independent, bipartisan panel of national security authorities at the behest of the Department of Defense, makes many of the points I would like to bring to the Committee's attention. While I would like to submit the report in its entirety for the record, I would like to quote two paragraphs:

> The reality is that the United States' capability to effectively deny its competitors access to militarily useful technology will likely decrease substantially over the long term. Export controls on U.S. technologies, products and services with defense/dual-use applications will continue to play a role in the pursuit of U.S. foreign policy objectives. However, the utility of export controls as a tool for maintaining the United States' global military advantage is diminishing as the number of U.S.-controllable militarily useful technologies shrinks. A failure by U.S. leadership to recognize this fundamental shift—particularly if masked by unwarranted confidence in broad or even country-specific export controls—could foster a false sense of security as potential adversaries arm themselves with available technology functionally equivalent to or better than our own.
>
> Clinging to a failing policy of export controls has undesirable consequences beyond self-delusion. It can limit the special influence the U.S. might otherwise accrue as a global provider and supporter of military equipment and services. This obviously includes useful knowledge of, and access to, competitor military systems that only the supplier would have, and the ability to withhold training, spares and support. Equally obvious, shutting U.S. companies out of markets served instead by foreign firms will weaken the U.S. commercial advanced technology and defense sectors upon which U.S. economic security and military-technical advantage depend.

Finally, the pace of high technology business has increased enormously. Designers work on common electronic bases in real time, often in several companies and several countries. Improved production techniques have reduced the time needed from order to delivery—in the case of commercial aircraft from three years to eighteen months—with a current target of nine months. Commercial companies, and increasingly the military, expect contractors to hold inventories and deliver parts anywhere in the world within 48 hours. Information is no longer transmitted on paper but through nearly instantaneous electric communications.

The philosophical underpinnings, legal structure, and administrative framework for U.S. export controls, which are intended to deal with such technology, have not changed at a comparable pace. As a result, there are too many export licenses required and too many agencies involved in the review and administration of such licenses, and the process takes far too long.

S.1712

I believe there are short-term and long-term fixes we can make. One short-term fix is to move forward on S.1712, The Export Administration Act of 1999. That bill provides several features of importance to industry. I will highlight the most significant, and also explain why I would not want to see certain alterations that have been suggested by some in the Senate.

Title II has several provisions of importance to industry. Section 204 assures that controls will not be imposed on an end item because it contains components that are controlled, nor that the U.S. will attempt to impose third country controls on end items produced in other countries just because they contain some U.S. content. That was the case some years ago for civil aircraft, which were controlled if they contained certain avionics. The notion that a country would spend several tens of millions of dollars to obtain a part that cost a few tens of thousands never made much sense, but it certainly didn't help the image of the U.S. as a dependable or rational supplier.

Title II also limits the President's ability to impose national security controls on products that are available from foreign sources or are mass marketed. This makes eminent sense. After all, the idea of national security export controls is to deny a purchaser a capability, not to deny U.S. exporters a market. If the target country is able to obtain a technology from other sources, then it makes no sense to strengthen U.S. competitors that do not cooperate with the U.S. in imposing export controls, while we weaken U.S. industry.

If anything, this section should be strengthened to allow for some proactive rather than reactive findings of foreign availability. In our industry an opportunity to sell a specific product to a given country may only arise once every decade or two, given our long product cycles. It makes no sense to lose such opportunities in order to establish foreign availability beyond a shadow of a doubt. For most industries, including our own, capabilities that are about to come on stream are well known to anyone who reads the right trade press. The Export Advisory Committees could certainly help the Office of Technology Evaluation with information on what products will be entering the marketplace.

In this context I note that some have supported the idea of "carving out" certain technologies and products that would be subject to export controls irrespective of foreign availability. We would object to any provision that would carve out products prior to a study as to whether there was foreign availability. Once such information is in hand, we would agree that the President should still have the authority to impose controls if he believes there is a security reason for doing so. But such a decision should be made with the best possible information, and hence after the foreign availability review called for in S.1712, not before. After all, the whole point of the foreign availability and mass marketing provision is to determine whether a policy of controlling a particular technology has a chance of succeeding, or is simply wishful thinking. Acting without information is unlikely to improve the odds of the decision being a correct one.

Title III involves foreign policy controls, which most of us in industry believe are almost invariably ineffective at accomplishing their objectives of punishing foreign countries or convincing them to change their behavior. We certainly support the inclusion of a contract sanctity provision, as any time a U.S. company is forced to default on a contract it casts doubt on U.S. companies as reliable suppliers. The provision in section 304(b)(7) that requires the President to estimate the economic impact of a foreign policy export control on the U.S. economy is also important. One of the attractions of foreign policy export controls is they seem to be cost free—unlike the use of inducements such as foreign aid or threats of military action. But export controls are not cost free. The burdens fall on specific American workers and companies. A report at least forces the government to recognize and evaluate those costs, to be certain that we are not punishing Americans more than the intended target.

We also support Section 307, which is admittedly a weak sunset provision. It automatically terminates foreign policy controls after a 2-year period unless the President can provide a persuasive argument to continue them. Hopefully the report required of the President if he is to renew a control will force a more honest appraisal than the current annual renewal exercise.

Title IV of the bill provides that foreign policy export controls shall not apply to agricultural commodities, medicine, and medical supplies. We would strongly urge that a similar exclusion be included for components and technical data required to maintain the safety of commercial passenger aircraft. Humanitarian, political, and commercial considerations militate against the U.S. putting civilian lives in the air and on the ground at risk as part of a sanctions exercise.

Title V deals with the administration of export controls. We support the notion of providing time deadlines for decisions. In today's fast paced commercial world a delayed decision may well mean denial, as customers simply go elsewhere. It does a company no good to improve its cycle time from order to production to delivery if it cannot predict with some certainty how long a license will take.

The title also provides an appropriate appeals process that allows an agency, if it desires, to force a decision to a higher level. That is appropriate. What is not appropriate is requiring consensus at each level. An agency should have the ability go on record as disagreeing with a decision, without having to force an appeals process unless it feels the issue is important enough to do so.

While on the subject of the administration of export controls, I would urge the Committee, whether in this title or elsewhere, to consider language that would require the executive branch to move forward with an electronic data system that would link the Department of Commerce, State, Defense, Customs and industry. While this lack is a particular problem with the Department of State's management of the export control system as mandated by the Arms Export Controls Act, it is absurd that at the beginning of the 21st century the agencies that are responsible

for controlling the export of advanced technology have not themselves been able to establish a functioning communications system among themselves.

Finally, Title VI deals with multilateral arrangements. Certainly industry agrees that unilateral export controls rarely do anything other than punish U.S. workers and businesses rather than the intended target country. The emphasis in this title on multilateral agreements is appropriate.

Section 605 (h) of the bill, the so-called Patriot Provision, is intended to give monetary incentives for an employee of a company to report violations of the Export Administration Act as a further enforcement mechanism. Unfortunately, while well intentioned, the provision undercuts the goal of stopping of prohibited transfers of technology. The subsection as written gives employees every incentive to sit on information of potential Export Administration Act violations until after they have occurred, thereby increasing the employee's chance of monetary recovery. This section should be amended to require that an employee report any potential violations immediately through the internal corporate control process before being eligible for an award of compensation.

As I mentioned at the beginning of my statement, AIA strongly supports the approach and recommendations of the recent Defense Science Board Task Force report on Globalization and Security. The report makes several key recommendations that this Committee should consider in formulating any future legislation concerning controls. The more pertinent recommendations include:

- *DOD needs to change substantially its approach to technology security*

  DOD should focus export controls on those technologies that are exclusively available from the United States. In other words, there should be higher export control walls around fewer items.

- *DOD must realize fully the potential of commercial sector to meet its needs*

  DOD cannot just purchase available commercial products and adopt commercial business practices. DOD must pro-actively engage with commercial industry in developing new products and services to better meet its needs.

- *DOD should take the lead in establishing and maintaining a real-time, interagency database of globally available, militarily relevant technologies and capabilities*

  Such a database would prove to be invaluable to export controllers in their decision making process. Furthermore, such a database would provide guidance to both government and industry in identifying potential foreign sources and partners.

- *DOD should facilitate transnational defense industrial cooperation and integration*

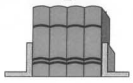
While it is agreed that there are many potential benefits to greater transnational (particularly transatlantic) defense industrial integration, there are currently obstacles in place which prevent this. DOD should clarify its policy on cross-border defense industrial mergers and acquisitions. Additionally, DOD and other relevant agencies should also address the overly burdensome regulatory environment affecting both foreign direct investment in the U.S. defense sector and the transfer of U.S. defense technology, products and services.

On balance, the Aerospace Industries Association believes that S. 1712 is a step forward in bringing the EAA up to date, and we would support it as voted out of the Senate Banking Committee.

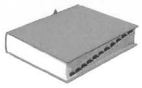
However, this support does not mean AIA would be content with the passage of EAA if this would undermine the fundamental examination and reform of our current export control process. We feel that it is imperative that the next President and the next Congress conduct a thorough review of the entire legislative and administrative approach to export controls as a prelude to a total overhaul. As a representative of industry, I would like to emphasize my desire to work with both Congress and the Administration to help do just that.

The Law

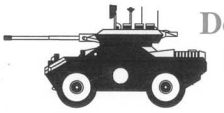
Arms Export Control



Export Administration



What is Controlled



Defense Articles and Services

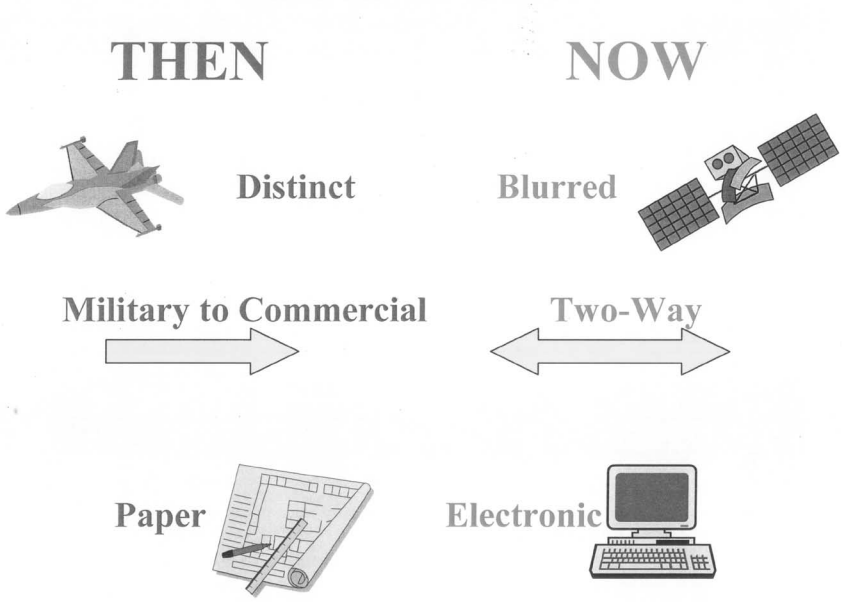
Dual Use Products

Jurisdiction

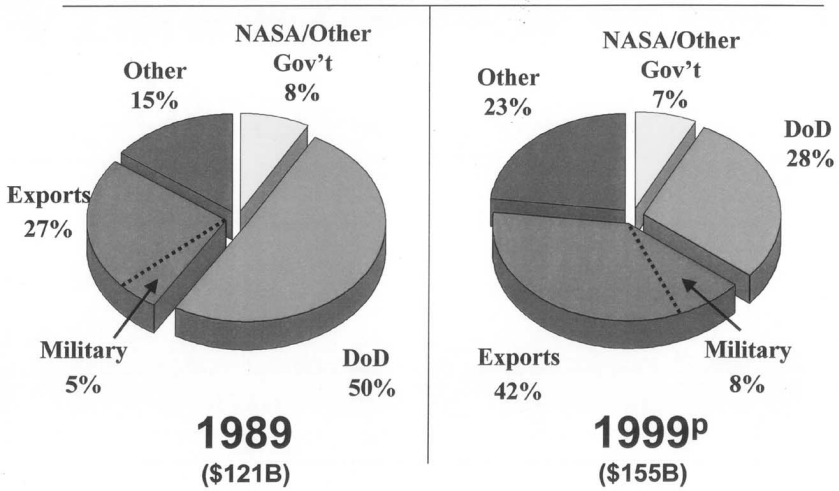
Department of State

Department of Commerce

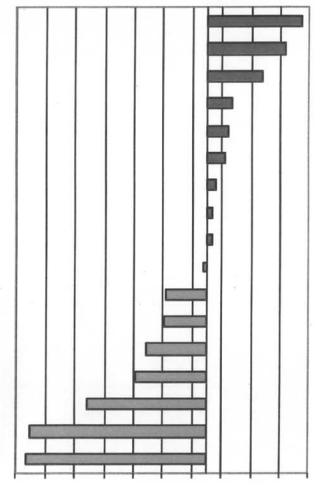
TECHNOLOGY


THEN
NOW
Distinct
Blurred
Military to Commercial
Two-Way
Paper
Electronic

U.S. Aerospace Industry Sales

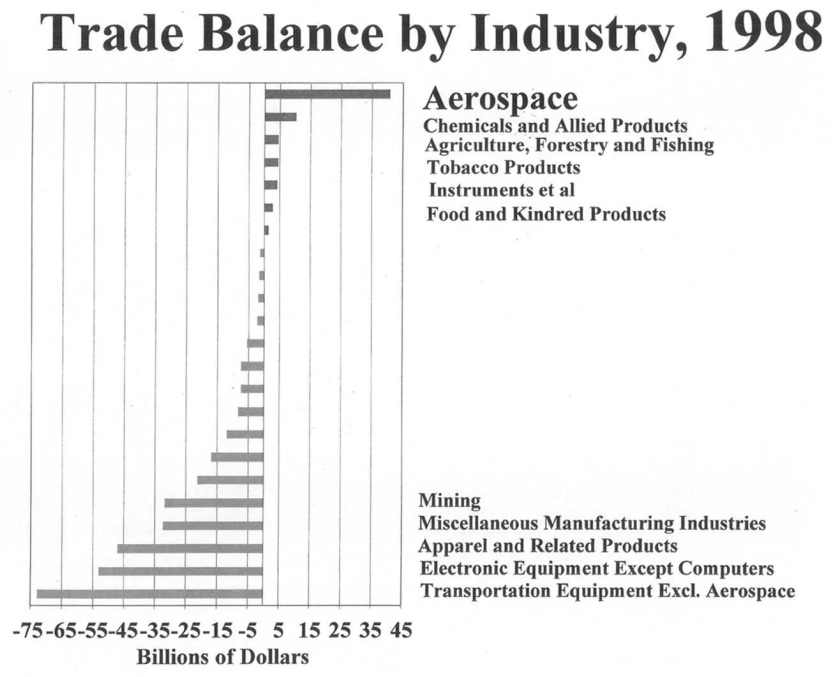


Trade Balance by Industry, 1997



Aerospace
Agricultural Products, Food & Tobacco
Chemicals and Allied Products
Construction, Mining & Materials Handling Machinery
Engines & Turbines, Parts & Accessories
Surgical, Medical & Dental Instruments & Supplies
Bituminous Coal & Lignite

Electrical & Electronic Machinery, Equip. & Supplies
Primary Metal Products
Office, Computing, Accounting Machinery, Equip. & Supplies
Miscellaneous Manufactured Commodities
Apparel and Related Products
Motor Vehicles & Vehicle Equipment & Parts
Crude Petroleum and Natural Gas



The CHAIRMAN. Thank you very much. Bill.

STATEMENT OF WILLIAM SCHNEIDER, JR., ADJUNCT FELLOW, HUDSON INSTITUTE

Dr. SCHNEIDER. Thank you, Mr. Chairman, and I appreciate the opportunity and privilege to appear before you, and I particularly appreciate your energy and insights in working on modernizing the export control system. Because I know the hour is late I'll just compress my remarks into a few points.

The reason to modernize the export control system relates to two issues. The first is the change in the strategic situation that reflects the collapse of the former Soviet Union and its associated bloc. Second, but equally important, has been the change in the source of enabling technology that produces advanced military capabilities. These enabling capabilities in the past have been developed in the Defense sector were generally not only developed there, but were also manufactured in the Defense sector and integrated into weapons systems that provided our forces with the military capabilities they needed to maintain military superiority. What has changed since then has been that the source of these enabling technologies is now largely in the commercial sector, and this—the importance of the commercial sector as a source of military power is likely to grow in the years ahead, and our export control system needs to reflect that.

I had substantial direct personal experience during my service in the Department of State in managing both the Department of State's munitions licensing system and serving as the Chairman of an interagency activity involved in coordinating this. And it is clear

an interagency activity involved in coordinating this. And it is clear that the circumstances require a refocusing of the export control system so as to limit the possibilities that these enabling technologies will get to bad end users but to do so in a way that does not cripple our ability to maintain the benefits of a vibrant export sector in our high technology area.

I call attention to three concerns I have—relating to the national security aspects of the pending legislation, S. 1712. The first one I would like to call attention to is the end use verification and post-delivery system. My reading of the legislation and the hearings surrounded it cause concern about the difficulties of taking national security considerations into account in a decision to continue controlled exports to end users that refuse end user verification. This is likely to be a problem, and I think it is—as the enabling technologies become more pervasive as having arisen from the commercial sector, the need to do effective post-delivery verification is going to become more and more important. And when dealing with high-performance computers, especially to the Tier III countries that have a very high propensity to engage in proliferation-related activities, it is a particular source of concern. The commission that was set up by the Congress to investigate the organization of the U.S. Government to deal with the proliferation problem affirmed the need of the Bureau of Export Administration to conduct effective post-shipment verifications.

The second point I would like to raise is the concern about the differential PRC Hong Kong export control standards. It has certainly been our hope that the PRC would be able to maintain the autonomy of Hong Kong. But from an export control perspective, there are some reasons to be concerned, and I believe it would be constructive for the export control legislation to provide opportunities for U.S. national security concerns to be asserted in that area.

The final point raised is the issue of foreign availability and mass market determinations. The U.S. Government does not maintain a foreign availability data base, and this is a limitation on the ability of the government to really maintain an effective, fully up-to-date, and comprehensive data base on foreign availability so these kind of determinations can be made. Absent such a data base, the authority given in the statute to the Secretary of Commerce makes the process unduly a prisoner of assertions by the applicant of foreign availability.

And the importance of this point I think is sufficient to justify finding out some way to deal in a more effective way in this matter. It was a recommendation in the Defense Science Board globalization study to tend to the matter of developing a government data base for this purpose because foreign availability is also on issue in munitions licensing.

I'll conclude my remarks at this point, Mr. Chairman, and be glad to take any questions you may have.

[The prepared statement of Mr. Schneider follows:]

PREPARED STATEMENT OF WILLIAM SCHNEIDER, JR., ADJUNCT FELLOW, HUDSON INSTITUTE

Mr. Chairman and Members of the Committee:

It is a privilege to appear before this Committee to discuss the national security aspects of S.1712, the pending bill to renew the Export Administration Act. Exports are a matter of great importance to the vitality of the American economy, and are responsible in no small measure for its sustained high level of performance.

My remarks are focused on narrow dimension surrounding this important legislative initiative—its national security implications. My testimony today derives from my experience in the Federal government where I served as Under Secretary of State for Security Assistance, Science and Technology. In that post, I had both interagency export control policy responsibilities as well as management of the Department of State's role in export controls, both for dual use and U.S. Munitions List items. In addition, I have served as a Member of two Congressional Commissions that have addressed the export control issue in the context of the proliferation of weapons of mass destruction (WMD) and the means of delivering them. Two years ago, I served as a Member of the *Commission to Assess the Ballistic Missile Threat to the United States* led by former Secretary of Defense, Don Rumsfeld. More recently, I served as a Member of the *Commission to Assess the Organization of the Federal Government to combat the Proliferation of Weapons of Mass Destruction.* The former Director of Central Intelligence, Dr. John Deutch, chaired this Commission. The Vice-Chairman was Senator Arlen Specter. This Commission addressed the question of the export control function and its role in U.S. policy to combat the proliferation of weapons of mass destruction. The Commission delivered its final report to the Congress in July 1999.

The Post-Cold War Role of Export Controls

The role of export controls in U.S. national security policy has changed fundamentally subsequent to the demise of the former Soviet Union in 1991. During the Cold War period, export controls were an important instrument to limit the access of the Soviet bloc to technology that could facilitate the modernization of their armed forces. The export control system was a multilateral one operated through an informal, but effective non-treaty based entity, the Coordinating Committee on Multilateral Export Controls (COCOM) based on U.S. diplomatic property in Paris. The U.S. participation in COCOM was supported by an aggressive diplomatic effort reinforced by a large-scale Intelligence Community collection, processing, and dissemination effort. The COCOM controls were effective, and forced the former Soviet Union and its allies to depend largely on indigenous technology for its defense modernization. The technology developed indigenously in the Soviet bloc proved inadequate to support its foreign policy aims. Its inability to modernize its scientific and industrial base was a contributing factor to the collapse of Soviet military power in the latter stages of the Cold War.

The diminished contemporary role of export controls is reflected in aggregate statistics of licensure. In the mid-1980s when I had interagency coordination responsibilities for export controls as an official of the Department of State, the Department of Commerce issued nearly 150,000 validated dual-use export licenses per year. In FY 98, the number of export licenses issued by the Department of Commerce declined to less than 12,000. This order-of-magnitude decline understates the scope and magnitude of the sweeping liberalization of export controls since the volume of high-tech trade has increased several-fold over the same period.

The decline in the relative importance of export controls in U.S. national security policy reflects the change in the nature of post-Cold War security concerns. The massive edifice of Soviet military power and ambition has collapsed. Twenty-first century security concerns are now focused on a more amorphous amalgam of threats including state-sponsored terrorism and the proliferation of weapons of mass destruction and the means of delivering them. A monolithic adversary has been replaced by several regional powers whose military power is more narrowly focused, but yield little to the former Soviet Union in their hostility to the United States and its allies. It is the change in the nature of U.S. post-Cold War security concerns and the changing sources of technology that animates that threats forcing a re-examination of the role export controls might play. This change will be the subject of my comments on S.1712.

The post-Cold War Proliferation of WMD and Their Means of Delivery

Since the 1980s, a fundamental change has taken place in the nature of the problem of proliferation—a change with profound implications for U.S. export control requirements, and indeed, the role of export controls in U.S. foreign policy. The worldwide trend toward democratic order, economic liberalism, and deregulation of advanced technology commerce has spurred a widely distributed boom in international trade. The broadening of the scope of international markets has in turn stimulated the globalization of manufacturing and service sectors to serve the global market. These developments have overwhelmingly served the interests of the United States in both economic and security terms.

These developments have also had a negative dimension to which public policy must respond. The globalization of advanced technology science and industry converged with the deregulation of international trade to diminish the obstacles posed to nations hostile to the U.S. seeking to develop WMD and the means to deliver them.

The very technology that has contributed so much to American prosperity and security has paradoxically stimulated and facilitated WMD and missile proliferation. The fruits of the American command of the application of advanced civil sector technology for military applications became apparent during *Operation Desert Storm* in the Gulf War in 1991, and more so during *Operation Allied Force*—the seventy-eight day air campaign in Kosovo in 1999. Previous calculations of conventional military power were swept away by the efficacy of the military applications advanced sensors, signal processing, materials, telecommunications, and precision geo-spatial location technologies. The ironic effect of the eclipse of conventional "analog" military power has been to stimulate the development of weapons of mass destruction and the means to deliver them by a number of states hostile to the United States.

Frustrated at their inability to achieve their regional ambitions, Iran and North Korea for example, have turned to the development of WMD and long-range missiles to offset their inability to use conventional military power to deter American (and allied) involvement in regional disputes. Their ability to do so has been abetted by the liberalized policy and regulatory environment of the post-Cold War period. The U.S. Department of Energy has declassified obsolete (but functional) information about nuclear weapons design, manufacturing, and testing as part of its contribution to post-Cold War openness. This "obsolete" (to the U.S.) information is now widely available, and has made the U.S. the leading provider of scientific and industrial information on the military applications of atomic energy. Iran and North Korea are able to bypass the arduous process of nuclear weapons design and development permitting them to focus their attention on gaining access to fissile material.

Similarly, information made widely available relating to the production and weaponization of chemical and biological agents has produced a surge in development activities despite powerful international norms arrayed against such programs. Indeed, among nations hostile to the United States, international norms against WMD and long-range missile development have been honored more in their breach than in their observance.

Liberalization in access to aerospace-related technologies, abetted by a breakdown in the portions of the U.S. export control system still in place after the Cold War, has permitted the accelerated development of long-range ballistic and cruise missiles as well by nations hostile to the U.S. So rapid have been these developments that the Rumsfeld Commission was forced to conclude in 1998 that:

> *The warning times the U.S. can expect of new, threatening ballistic missile deployments are being reduced. Under some plausible scenarios—including re-basing or transfer of operational missiles, sea and air-launched options, shortened development programs that might include testing in a third country, or some combination of these—the U.S. might well have little or no warning before operational deployment.*

Today, nations among the poorest on earth have or are well on the road to the development and deployment of WMD and the means to deliver them. The changing nature of the post-Cold War security environment has created a community of interests among nations seeking WMD and the means to deliver them, despite widely divergent political and strategic interests. Close collaboration between Iran, North Korea, and Pakistan, for example, is serving to accelerate WMD and delivery system development, and is contributing to the creation of a WMD and missile-manufacturing infrastructure that may be the source of subsequent proliferation in the decades ahead.

Changes in the Sources of Technology for Military Application

The rapid advances being made in virtually every scientific and industrial discipline is a phenomena that is being diffused to virtually every corner of the globe as a consequence of the process of globalization. The availability of advanced technology and its extraordinarily rapid development cycle has changed the source of advanced military capabilities. In the past, the defense sector produced advanced technology for military applications. In areas such as aviation, microelectronics, telecommunications, materials, etc., these developments eventually "trickled down" to the civil sector. Over the past decade or two, these circumstances are being reversed. The specialized defense sector now creates advanced military capabilities from technologies primarily developed for civil applications.

The defense sector is now a minor participant in the market for advanced civil sector technology products, and for the most part, must draw from what it can find in the civil sector to meet military requirements. In many cases, civil sector requirements are more demanding than military requirements. Civil sector product development cycles are measured in months rather than years or decades, as is the case with major defense platforms. The defense sector is increasingly becoming an industry whose primary function is to transform and integrate widely available technology into advanced military capabilities that can assure the U.S. of military superiority.

This development has important implications for national defense.[1] The United States will be able to develop very sophisticated military capabilities more rapidly and at much lower cost than would be the case if such technologies were developed by the defense sector. However, adversary states will enjoy access to the same technology base available to the United States. Differences in future military capabilities will depend less on access to military-unique technologies than on unique ways in which these technologies are transformed and integrated to produce advanced military capabilities.

These circumstances also create a new environment with important implications for U.S. export control policy. As enabling (civil sector) technology for military applications become ubiquitous, military capabilities rather than technologies relevant for military applications need to become the focus of export control activities. In a *de facto* manner, this is taking place. While dual-use export licenses issued by the Department of Commerce have declined by more than an order of magnitude in the past decade, munitions licenses issued by the Department of State have declined by only twenty percent over a similar period despite a fifty-percent decline in international arms transfers. If this characterization of current circumstances is accurate, do export controls on dual-use technologies have any role in supporting U.S. post-Cold War national security objectives, and what are its implications for S. 1712?

Can Export Controls Serve a Constructive Post-Cold War Public Policy Purpose?

The dynamics of the post-Cold War international economy and the evolution of the sources of military advantage have raised questions about the role and efficacy of export controls as an instrument to support U.S. foreign policy objectives. The U.S. has an enduring interest in preventing or slowing the spread of WMD and the means to deliver them. An interest in preventing or slowing adversary access to advanced conventional military capabilities has also emerged as a post-Cold War objective of public policy. Both the legislative and executive branches of government on numerous occasions have affirmed this interest in law, policy, and regulation.

Achieving these public policy purposes cannot be achieved through the instrumentality)—broad multilateral export controls—which were used to such good effect during the Cold War. If export controls are to achieve a public policy purpose worth the effort, such controls must be far more focused than was the case during the Cold War. The Deutch-Specter Commission summarized U.S. post-Cold War export control needs.

> *The export control system needs to adapt to these changes if it is to contribute to combating proliferation effectively. This can be accomplished by refocusing the export control system from broad-based technology-driven controls to limiting or denying access to proliferation-enabling technologies by*

[1] The Defense Science Board has undertaken a recent study of the phenomena. See Donald A. Hicks, Chairman, *Report of the Defense Science Board Task Force on Globalization and Security,* (Washington: Office of the Under Secretary of Defense for Acquisition and Technology, December 1999).

potential proliferators. Reinforced by the coordinated employment of other policy instruments available to the U.S. government, ranging from diplomacy to arms transfers, export controls can provide leverage to these initiatives to achieve U.S. goals in combating proliferation.

In affirming the utility of a modernized system of export controls for combating proliferation, the Deutch-Specter Commission cited three ways in which export controls contribute to the efficacy of U.S. policy to combat proliferation.

> *First, the very process of developing export controls within a nation or negotiating export controls multilaterally, educates government, officials and individual companies about technologies, materials, and equipment that could be diverted for proliferation-related purposes. Doing so facilitates the broad-based voluntary compliance by exporters without which no system could function effectively.*
>
> *Second, export controls and the enforcement apparatus that supports them can prevent dangerous goods from reaching their intended destinations. In this connection, the Commission acknowledges the determination and creativity in enforcing export controls by U.S. officials.*
>
> *Third, export controls provide a legal basis for punishing violators. For those exporters who fail to comply, violation of export controls may result in fines, denial of export privileges, or in extreme cases, prison sentences.*

If a modernized export control apparatus can serve the more specialized post-Cold War national security concerns of the United States, then the pertinent question is whether or not S.1712 contributes to the modernization of U.S. export controls.

National Security Aspects of S. 1712

My remarks will not address the legislative and statutory history of the Export Administration Act (EAA) and its relationship to the national security aspects of export controls. Comments will be limited to areas where S.1712 could be improved with respect to post-Cold War U.S. national security interests. The recent report of the Cox Committee[2] identified a number of areas where improvements in the U.S. export control system are needed. Some—especially increased penalties for non-compliance—are incorporated in S.1712. However, a number are not.

1. *End-use verification and post-delivery verification*: The provisions of S.1712 that provide for end-use verification are weakened by a failure to provide an institutional basis for taking national security considerations into account in a decision to continue controlled exports to end-users refusing end-use verification. Moreover, repeal of the provisions of the National Defense Authorization Act of Fiscal Year 1998 that require post delivery verification to Tier 3 countries of high performance computers (HPCs) is unhelpful in combating proliferation as these nations are among the most proliferation-sensitive destinations. The Deutch-Specter Commission strongly affirmed the need for post-shipment verification. Its recommendation **[5.19]** stated:

> *The Bureau of Export Administration should expand its post-shipment verification to encompass technologies of proliferation concern and Congress should ensure that the Bureau has the resources and the discretion it needs to implement an effective and aggressive post-shipment verification program.*

2. *Diminished impact of national security concerns in the National Security Controls List*: While S. 1712 provides for consultation with the Secretary of Defense on establishing the content of the national security control list, only the President can overrule decisions made by the Secretary of Commerce. Moreover, determinations of foreign availability (which the neither the Department of Commerce or Defense has a database to support) and mass-market decisions can be made without consultation with the Secretary of Defense.[3] This too requires presidential intervention to reverse. The institutional reality of Executive branch decision-making renders engaging interagency conflict infrequent and reversals a rare event. As a practical matter, the process established in S. 1712 will diminish the priority of national security concerns in export control decisions to sensitive destinations. A procedure as noted in

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[2] Hon. Christopher Cox, Chairman, *Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China,* (Washington: GPO, 1999).

[3] *The Report of the Defense Science Board, op cit.,* pp. 36–37 recommends that a foreign availability data base be established, but no initiative has yet been undertaken to do so, nor does S.1712 provide authorization or resources for such an effort.

(6) below to mandate incorporation national security expertise in such decisions could mitigate the problem.

3. *Ambiguity concerning "deemed export" provisions*: The growing importance of labor mobility in the international economy creates new opportunities for proliferation-sensitive data to be transferred to inappropriate end-users. An important way of dealing with this issue in current law and regulation requires employees who are non-U.S. persons to obtain an export license for them to gain access to export controlled information in the United States. While the legislation is ambiguous on this point, some readings of its provisions could lead one to conclude that current law and regulation in this respect is being weakened. Such an outcome would undermine the ability of the U.S. to promote such practices among U.S. allies who share similar export control issues arising for increased labor mobility in the high tech sector.

4. *Procedural impediments to the introduction of national security concerns into export licensing decisions*: The limitations of the interagency appeal process described in (2) above are retained in S. 1712, but rendered more difficult to introduce because of a series of procedural impediments. To the institutional impediments to appealing an export licensing decision to the President are added a set of process improvements intended to eliminate unneeded foreign policy controls and compress license processing time. The President has only thirty days to appeal a mass market decision of the Secretary of Commerce, while HPC export decisions are reduced from the present 180 days (in the FY 98 NDAA) to 60 days. The evidentiary and policy aspects of such decisions are often very difficult, and it is unlikely that complex issues could be fully resolved in this period. The cumulative impact of procedural and institutional characteristics make it unlikely that national security considerations will receive due consideration under the provisions now embedded in S. 1712.

5. *Differential PRC-Hong Kong export control standards*: The basis for maintaining differential export control standards between the PRC and Hong Kong is an expectation that the autonomy of Hong Kong's export control institutions can be preserved. While there is some evidence that this expectation is justified, there are also some ominous portents that place this expectation at risk. First, there have been numerous legal challenges to Hong Kong's autonomy within the PRC's legal and political system, though these challenges have not directly affected the export control function. Second, several countries of proliferation concern have stepped up their activity and presence in Hong Kong. For example, North Korea has recently established a diplomatic presence in Hong Kong. In light of reported PRC assistance to North Korea's ballistic missile program(s), the establishment of a diplomatic conduit for the diversion of controlled technologies, equipment, and technical data to North Korea from Hong Kong would be difficult for Hong Kong authorities to interdict, given their limited autonomy.

6. *Foreign availability and mass market determinations*: As noted previously, the Secretary of Commerce has the authority to make foreign availability and mass market determinations under the bill without consultation with the Secretary of Defense. Only a successful appeal to the President can reverse such a decision. There is no U.S. government database to support foreign availability decisions, nor does one appear to be contemplated.[4] The provisions of S.1712 that permit the Department of Commerce to make foreign availability decisions do not provide for the incorporation of appropriate USnG expertise. An alternative approach that would assure that appropriate inter-agency expertise was incorporated in the decision process would be to require the affirmative support of the three cabinet level officers of the national security agencies—the Secretaries of Defense and State, and the Director of Central Intelligence. Foreign availability and mass market determinations could not be made in the face of an objection from a Cabinet officer of the three national security officers unless reversed by the President.

Conclusion and recommendations

The export control system is in urgent need of modernization. The current system neither meets the needs of U.S. exporters, nor reflects a capacity to incorporate contemporary national security concerns. The need to do so has been affirmed by several Executive and Legislative branch studies, commissions, and reports. S.1712 is an appropriate vehicle to do so. However, in its present form, S.1712 fails to adequately provide for U.S. national security needs that address the proliferation issue.

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[4] This is also true in the Department of State in support of its responsibilities to manage exports of products and services on the U.S. Munitions List. Although President Clinton's 1995 *Conventional Arms Transfer Policy* declaration affirmed authority to use foreign availability considerations in USML licensing decisions, no resources have been provided to develop such a database.

To be sure, export controls cannot carry the entire burden of combating proliferation, or even a major part of it. Other measures must be employed in conjunction with export controls if overall national security objectives are to be achieved. Nevertheless, export controls can support other measures to combat proliferation. As a result, the opportunity to modernize and thereby strengthen the contribution of export controls should be taken by modification of S. 1712.

Mr. Chairman, this concludes my testimony. I am prepared to respond to questions raised by you and other Members of the Committee.

The CHAIRMAN. I thank you very much. Where do you differ with John Douglass?

Dr. SCHNEIDER. Well, a couple of points that he mentioned. First, I do not believe it is a practical aspiration to have an integrated control system for munitions and dual-use items. The underlying purpose of controlling Defense-related items for—to achieve foreign policy objectives is usefully set apart from the export control regulations that deal with the Department of Commerce. So that in any case, I think John would agree, is a somewhat utopian aspiration in this environment in any case, so I think it is better for us to look at process improvements, liberalization, and maintaining a clear understanding of what we need to do to modernize this system as conditions change. I don't disagree with any of his points about the need to keep the system up-to-date and responsive to the need of our exporters.

I think the strategic advantages we enjoy as a consequence of the collapse of the Soviet Union provide us with an ability to very sharply narrow the impact of export controls on U.S. exporters. The process improvements are en route. Even the much maligned State Department is about to make a number of very significant process improvements that I think will diminish many of the concerns that exporters had about protracted processing time and that sort of thing. So I think the interest of the Congress is starting to be reflected in the behavior of the bureaucracy, and I hope that continues.

The CHAIRMAN. John.

Mr. DOUGLASS. Well, it may be a little utopian to try to get a single system. I sort of stayed away, or at least tried to stay away, other than just explaining that there was a different system for military products and some of the problems that we are having there.

The principal problem that I see is that occasionally a problem will come up with a single country; like, for example, we are all familiar with the highly worrisome situation that we see in China in certain aspects of it, and we pass a law and the same law applies to England, France, Germany, our NATO allies and so on. And so I found myself, for example,—as Assistant Secretary of the Navy dealing with our friends in England that share a nuclear technology with them, sharing submarine quieting technology, sharing all kinds of important and very serious classified information because we knew that they would always be with us in coalition warfare, and we were cooperating with them to make their systems compatible and as good as we could, and then a pump or a valve or something would be needed over there and some low-ranking bureaucrat in the State Department would say no, they can't have it because of some reason, or it would get lost in the system.

So I gradually felt that there needed to be a system which was a little less sensitive to the foreign policy rulings and political atmosphere that sometimes develops around some of these issues and was a little more tied to the mainstream of what was going on in the Department of Defense. And so I always thought an integrated system might work, but I certainly respect Bill's views. He served in a different part of the system than I did, and our short-term objective is the same as Bill's, and that is to take the system we have today which involves two laws, two systems, and improve it as best we can. And that is why we have been supporting the passage of S. 1712.

We have some problems with it. They are in my written statement, Senator, but we think Senator Enzi has really gone the extra mile to try to address people's concerns, and there are still a few amendments that are being talked about by the Armed Services Committees and Intelligence Committees, and so on.

One of them involves a so-called carve out, which Bill mentioned, for mass market determinations. The only difference we have with the way that amendment is being discussed is where do you do the carve out. We think before you unilaterally set aside an item which is probably available on the world market fairly readily, you ought to go out and look at the world market and do some studies and then bring the results of those studies to high-level decisionmakers rather than doing it at the beginning based on conjecture. So it is just where it is in the system.

The CHAIRMAN. I am sorry to tell you that we will probably have further conversations on this issue before it is finally resolved. I thank you both for being here, and I thank you both for your contribution to this very important issue. This Committee obviously has significant jurisdiction if a lot of this authority is going to be transferred to the Department of Commerce, and that is why I thought it was important for us to have it this hearing and get the input of yours, as well as the administration witnesses, and we'll be calling on you again in the future.

Dr. SCHNEIDER. Thank you, Mr. Chairman.

Mr. DOUGLASS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. This hearing is adjourned.

[Whereupon, at 4:20 p.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO WRITTEN QUESTIONS BY HON. JOHN MCCAIN TO JAMES M. BODNER, PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE (POLICY)

Question 1. How does S. 1712 address cumulative impacts of licensing decisions? Or the cumulative impact of categorization and delisting of items?

Answer. S. 1712 does not specifically address the cumulative impact of licensing and/or the delisting of items. S.1712 does, however, require Commerce to annually provide data necessary for such an analysis. For example, under S. 1712 Commerce must provide an annual report that includes a description of changes made to the control list and a statistical summary to include export license data by ID code and country code. This report supplements the requirement directed under the National Defense Authorization Act of FY2000 for the President to provide a cumulative analysis of export to key countries of concern for each year through 2007.

DOD supports the proposed floor manager's amendment (O:-CRA—CR00.262) for S. 1712 Section 202 (a)(3) requiring the concurrence of the Secretary of Defense to adjust the National Security Control List to add items that require control under this section and to remove items that no longer warrant control under this section. As drafted, S. 1712 requires DOD's concurrence on adding items to the list; the amendment adds the requirement for DOD's concurrence on the removal of items as well.

DOD supports the language of Section 201(d) "Enhanced Controls" as drafted in the floor manager's amendment (O:—CRA—CR00.262). DOD continues to believe that a mechanism must exist that exempts certain items (e.g. encryption and hot engine technology) from foreign availability and mass market provisions of the Act.

DOD believes the 18 month expiration date specified by Section 212, Presidential Set Asides, must be deleted. DOD believes that arbitrarily limiting the effective time of any Presidential determination can cause recalcitrant countries to delay negotiations on controlling technology until the 18 months have expired.

Question 2. The 1999 DOD IG report states that the DOD sometimes changes its denial of a license application during the appeal process to an approval with conditions. It is my understanding that these conditions often require end-use checks or other site monitoring to ensure that the export has gone where it was suppose to go and is being used for the purpose intended. How does DOD know whether those conditions have been met?

Answer. The Department of Commerce, Office of Export Enforcement is responsible for monitoring the implementation of and compliance with safeguards. If an end-use(r) check or site monitoring report is required, the Defense Department can review the information developed as a result of the check. Any non-compliance with the directed safeguards or licensing conditions could subject the company or the end-user to enforcement actions including criminal and civil penalties.

(a) What provisions are in S. 1712 to ensure that monitoring and enforcement of conditions is adequate?

Answer. Section 607 (a)(2)(c) authorizes officials designated by the Secretary of Commerce to conduct pre-license and post-shipment verifications (PSV) of controlled items. S.1712 also directs the Secretary to target PSVs to exports involving the greatest risk to national security, thereby focusing limited enforcement resources on exports that represent the greatest security risk.

There are authorities in S.1712 that allow the Secretary of Commerce to deny exports to an end-user that has refused a PSV. Additionally, the Secretary may deny all such items to all end-users in the country. By providing the authority to deny any future license, S.1712 provides an incentive to exporters to comply with PSVs and monitoring conditions. Additionally, by providing the Secretary with the authority to deny all exports, countries have an incentive to ensure that PSVs are conducted quickly and efficiently. Finally, S.1712 Section 607(j) requires the Secretary of Commerce to report annually on the effectiveness of the Commerce Department's end-use verification activities.

S.1712 also contains strong criminal and civil penalties for violations of the Act.

(b) Does S.1712 make post-shipment "end-checks" mandatory?

Answer. PSV's are not mandatory. DOD believes that S. 1712 provides appropriate flexibility to focus PSVs on exports representing the greatest risk to national security.

(c) What role does DOD play in making those "end-checks" under S. 1712?

Answer. When requested, DOD provides technical assistance to Commerce pre-license and post-shipment verification programs.

Question 3. Both the DOD and Commerce IGs note that questions were raised during their 1999 review of the dual-use export process about the appeal process. Specifically, there were concerns raised that the Chair of the Operating Committee, which provides the first level of appeal, can determine the outcome of the appeal regardless of the input from interested agencies. There were also allegations that in some instances, though limited, the Chair was directed by Commerce to rule in favor of the Department, requiring other agencies to appeal to the next level.

The DOD IG report states:

"(pg. D–36) Although the escalation process generally provided DOD with a meaningful opportunity for seeking review of disputed license applications, the outcome of the process often favored the Commerce position. In general, the OC Chair voted more often with Commerce than with DOD. In addition, the ACEP escalation process is predicated on the idea that an export will be allowed (typically a Commerce position) unless a Federal department or agency has concrete evidence that an end-user is a high-risk diversion. By more often favoring the Commerce position, the escalation process places a greater burden on DOD to substantiate concerns about exports such as potential diversions and possible links between known diversion risks and intermediary or end users."

How is the process for appeals established in S.1712 different from the current process?

Answer. Section 502 of S.1712 specifies that an interagency committee be established to provide a review of all licenses where there is not interagency agreement. S.1712 further provides the authority to the President to establish additional review levels necessary to resolve agency conflicts with the decision taken by the initial review committee. This is consistent with current practice under Executive Order 12981. Under those procedures, DOD or another agency can appeal an initial Operating Committee decision to the Assistant Secretary-level Advisory Committee on Export Policy (AC EP) and if it continues to oppose the export, DOD has the authority to escalate that decision to the Cabinet-level Export Administration Review Board (EARB) and to the President, if necessary.

(a) Does the Chair appointed by the Secretary of Commerce have discretion to rule in whatever way he or she determines?

Answer. The Department does not have visibility into the internal Commerce Department decision-making process.

(b) What checks and balances are provided in S.1712 to ensure that the decisions of the Chair of the appeal committee cannot be controlled by Commerce?

Answer. S. 1712 does not specifically address this issue, however, we anticipate that the Administration will continue the checks and balances established by Executive Order 12981 that provide for full rights of escalation by any participating agency, including DOD up to the President if necessary.

Question 4. In testimony to the Senate Committee on Armed Services on March 23 of this year, the IG for DOD provided several examples of incorrect commodity classification decisions made by Commerce without referral to DOD. He recommended that S.1712 be revised to require that referrals be made to DOD.

Answer. DOD also believes that there must be a statutory requirement for the review by DOD of commodity classification determinations by the Department of Commerce. DOD recommends that S.1712 Section 501(h) be amended (underlined portion) to read as:

> "In any case in which the Secretary receives a written request asking for the proper classification of an item on the Control List or the applicability of licensing requirements under this title, the Secretary shall promptly *refer such requests for review to* the Secretary of Defense and other departments or agencies the Secretary considers appropriate. *Reviewing departments and agencies shall notify the Secretary of any objection within 10 days of receiving the referred request. Any objections shall be subject to the interagency dispute resolution process in this Title*. If there are no objections, the Secretary shall inform the person making the request of the proper classification within 14 days of receiving the request."

Can you address why it is important for the Department of Defense to be referred commodity classification requests?

Answer. Commodity Classification decisions can result in an item being exported *without* a license review. In addition, decisions can result in advice that a product is controlled under the Commerce system, when it should be controlled as a munitions item under the State system. DOD believes that such decisions need to be shared interagency to ensure that such decisions benefit from DOD's technical and security expertise.

(a) Does S.1712 ensure that all appropriate referrals will be made to DOD?

Answer. S. 1712 section 501 (h)(1) contains a provision requiring the Secretary of Commerce to notif the Secretary of Defense. We believe that S.1712 should specifically provide the reviewing departments the authority to object to proposed Commerce classification decisions and to escalate those differences through the interagency dispute resolution process under section 502.

Question 5. We seem to be in the unique and troubling position of having the State Department stand alone as the last vestige of institutional concern for the national security ramifications of dual-use exports. Would you comment on efforts by the Commerce Department to assume greater control over not just dual-use items but those historically and logically included on the U.S. Munitions List? Could you describe instances where the Defense Department objected to the transfer of items from the USML to the CCL and was overridden?

Answer. By Executive Order, any transfer or removal of an item controlled under the USML must receive the concurrence of the Secretary of Defense. We are aware of no circumstances where such concurrence was not obtained.

Question 6. The June 1999 Department of Commerce IG report noted that the Department of Commerce was not screening license applications against the Treasury Enforcement Communication System database maintained by the U.S. Customs Service. What information would be gained through screening the applications through the Customs database?

Answer. The Treasury Enforcement Communication System (TECS) was created to provide multi-agency access to a common database of enforcement data supplied by the participating agencies, such as Customs, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, and Firearms. The system was developed to satisfy a recognized need to promote the sharing of sensitive information between federal law enforcement agencies.

RESPONSE TO WRITTEN QUESTIONS BY HON. JOHN MCCAIN TO JOHN D. HOLUM, SENIOR ADVISOR FOR ARMS CONTROL AND INTERNATIONAL SECURITY AFFAIRS, U.S. DEPARTMENT OF STATE

Question 1. The June 1999 Department of Commerce IG report noted that the Department of Commerce was not screening license applications against the Treasury Enforcement Communication System database maintained by the U.S. Customs Service. What information would be gained through screening the applications through the Customs database?

Answer. The U.S. Customs Service uses the Treasury Enforcement Communication System database in daily liaison with the Department of State in connection with a number of munitions export functions and issues. Since the question specifically refers to matters for which the Departments of Commerce and Treasury are responsible, however, it would be appropriate for those agencies to respond.

Question 2. What is the current process for an export applicant to appeal a denial of a license? What role do State and Defense play in such an appeal? What process is established in S.1712 for applicant appeals, and what role would State and Defense play?

Answer. I would defer to the Commerce Department for a full description of its current appeals process for Commerce-controlled items and the likely changes, if any, that would occur under the provisions of S.1712. Currently, the State Department has a voice in reviewing appealed denials through the interagency process coordinated by the Department of Commerce. Under the provisions of S.1712, the Department expects to play a similar role in the appeals process.

Question 3. As you know, S.1712 was passed by unanimous vote of the Senate Banking Committee. Yet, the chairmen of every national security committee and subcommittee jointly wrote to the Majority Leader expressing their very grave concern with that bill's consequences for U.S. national security. Can you discuss the

provisions in S.1712 which you believe ensure a proper balancing between free trade and national security?

Answer. The Administration agrees that commercial concerns must be balanced with national security. However, national security can not be compromised in the name of economic gain. We have worked with Senate staff to ensure that no provision of this bill will force any President or Administration to make decisions that jeopardize our national security.

Question 4. I am aware that the Arms Export Control Act mandates the President periodically review the U.S. Munitions List to determine what items could be moved to the less restrictive Commodity Control List. I am more than a little concerned, however, by reports I have heard that the export control structure that divides exports between dual-use Commodity Control List items from military-related U.S. Munitions List items is being deliberately eroded. Specifically, it is my understanding that efforts are being made to move increasing numbers of items from the USML to the CCL without regard for State Department considerations and despite your own statement before the Foreign Relations Committee that no such moves would occur for the duration of the current Administration tenure. Is it your opinion that activities have been consistent with the spirit of your statement?

Answer. The Executive Branch revised the entire ITAR in 1993 and an extensive review of the USML continued into 1996. The most recent USML revision became effective March 15, 1999, with the return of commercial satellites to State Department jurisdiction.

We believe the USML covers the commodities that warrant special controls as administered under the Arms Export Control Act and the International Traffic in Arms Regulations (ITAR).

So, while we do not anticipate removing any items from the USML during this administration, we are considering means by which the Department of Defense might advise State in a systematic fashion of those commodities that it does not believe merit its national security scrutiny When such advice would be received by DOD, State would decide upon the continued commodity coverage in terms of U.S. foreign policy considerations. As is our practice, the Congress would be consulted prior to any removal of any category of items from the USML.

Question 5. A principal outcome of over two dozen congressional hearings, including by this Committee, into the transfer of satellite and missile technology to China was the statutory reversal of the Administration's decision to transfer control over commercial communications satellites from the State Department to the Commerce Department. It is my understanding that the Administration has interpreted the language in the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 so as to exclude satellite and space-related items and to include ground stations and key components. Do you believe such a policy is consistent with both the letter and intent of the law?

Answer. The State Department regulations promulgated to implement the Strom Thurmond National Defense Authorization Act for FY1999 stated that all specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for communications satellites would be controlled on the U.S. Munitions List (USML). The Commerce Department's regulation specified that entries on the CCL containing items that are space qualified" would be reviewed within 30 days from the issuance of the regulation to determine the appropriate jurisdiction and that the review might result in a rule change. Unfortunately, other demands prevented the Departments of State and Commerce from resolving the issue of how to treat so-called "space qualified" items within the period specified in the regulations. The NSC directed the two Departments to launch a process to review space-qualified items to determine whether any met the definition established in the State Department regulation as being "specially designed or modified for use in space", and therefore subject to USML controls. To reduce confusion while this review is being carried out, it was agreed that industry should be notified that in the interim such items fall under Commerce control.

RESPONSE TO QUESTIONS WRITTEN BY HON. JOHN MCCAIN TO WILLIAM A. REINSCH

Question 1. S. 1712 provides in Section 202 that the Secretary of Commerce is to develop a National Security Control List (NSCL) as part of the Control List for dual-use commodity exports. The NSCL is to contain those items which are controlled for national security purposes. Section 202 also provides that items on the National Security Control List are to be determined with the "concurrence" of the Secretary

of Defense. Is it your interpretation of this provision that the Secretary of Defense has a veto over the listing, or delisting, of any items on the National Security Control List?

Sec. 211 permits the Secretary of Commerce to delist "any item" which is controlled by the act if the Secretary of Commerce determines that such item "has a foreign availability or mass market status." In making that determination, the Secretary is to "consult" with the Secretary of Defense. Can the Secretary of Commerce delist items from the National Security Control List based upon the mass market or foreign availability determination? If so, does this "consult" requirement with the Secretary of Defense give DOD the same veto as it has over the listing and delisting of items on the NSCL? If not, doesn't this section negate the intent of the NSCL and for the "concurrence" of the Secretary of Defense? In other words, doesn't this give the Secretary of Commerce total discretion over the NSCL?

Answer. Under Section 202 of S. 1712, the Secretary of Commerce must have the agreement of the Secretary of Defense to include items on, or remove items from, the NSCL. Under S. 1712, the NSCL would be a subset of the Commerce Control List. The Administration anticipates that all the items on the Commerce Control List currently controlled for national security and nonproliferation reasons, including all of the items controlled pursuant to the multilateral export control regimes, would be included on the NSCL. In addition, S. 1712 would not alter the process for adding items to, or removing items from, the Commerce Control List. Under the interagency regulations review process administered by the Office of Management and Budget, changes to the Commerce Control List are cleared by the Departments of Defense, State and Energy and, for encryption products, the Department of Justice (Federal Bureau of Investigation) as well.

Section 211 authorizes the Department of Defense and other departments to determine how the foreign availability and mass market process affects the NSCL. Section 211 requires the Secretary of Commerce to consult with the Secretary of Defense and other appropriate departments to determine whether an item subject to a foreign availability or mass-market petition has foreign availability or mass-market status. Even if an item is determined to have foreign availability or mass-market status, it will not be decontrolled if:

(1) the determination is set aside for national security reasons (Sec. 212—foreign availability determination may be set aside for up to 18 months if absence of controls would prove detrimental to U.S. national security and there is a high probability that negotiations will eliminate foreign availability and Sec. 213—mass market determination may be set aside indefinitely if decontrol would seriously threaten U.S. national security and continuing controls would diminish that threat);
(2) the item is subject to end use and end user based controls (Sec. 201(c)); or
(3) decontrol would be inconsistent with U.S. participation in the multilateral export control regimes (Sec. 309).

Thus, under Sec. 211 other departments have two opportunities to influence whether foreign availability or mass-market considerations change the NSCL. First, other departments can participate in determining whether an item has foreign availability or mass-market status. Second, even if an item is determined to have such status, there are three different criteria departments can invoke to prevent an item from being decontrolled. In the current Administration, these decisions would be the result of interagency consensus.

Question 2. The Department of Commerce IG expressed concern in June 1999 that the Department is not under current policy and regulations adequately controlling "deemed exports." In a follow-up report dated March, 2000, the IG noted that Commerce has done little since June 1999 to address this issue.

The IG states in the recent report that "(t)o help us determine whether U.S. high technology companies are generally complying with deemed export regulations, we sought to obtain a reasonable estimate of what the level of license applications might be with good compliance. BXA was unable to provide us with such an estimate. As one indication, we alternatively compared the number of deemed export license applications submitted to BXA in fiscal year 1999 (783) with the number of 'high technology' employment visas issued to foreign nationals during this same time period (115,000) . . . the tremendous gap between the two figure, at a minimum, raises questions about the extent of U.S. companies' knowledge of and compliance with the deemed export regulations . . ."

What provisions of S. 1712 address deemed exports and would result in more thorough control and review of them?

Answer. Neither the June 1999 nor the March 2000 Department of Commerce Inspector General reports identified any deficiencies or recommended any changes to the statutory authority for control of deemed exports. S. 1712 authorizes continuing control of deemed exports but does not, consistent with the Inspector General's reports, include new deemed export provisions. The Inspector General's June 1999 report recommended that the Department's Bureau of Export Administration (BXA) work with the National Security Council to ensure that the policy and regulations on deemed exports are clear and do not provide any avoidable loopholes. The June 1999 report also recommended that once the policy and regulations are clarified, BXA increase its efforts to inform U.S. industry of the requirements of the deemed export rule. The Inspector General's March 2000 report repeated these recommendations with a special focus on federal agencies and research facilities. None of these recommendations require additional statutory authority.

In response to these recommendations, BXA has been working with the National Security Council and other departments to clarify the Administration's policy on deemed exports. BXA is also developing additional detailed guidance for exporters regarding the application of the deemed export rule. Finally, BXA is working, within available resources, on expanding its outreach to industry and federal agencies to enhance their understanding of the scope and application of the deemed export rule.

Question 3. The June 1999 IG report noted that Commerce was not screening license applications against the Treasury Enforcement Communication System database maintained by the U.S. Customs Service. The March 2000 report concludes that such is still the case. Does S. 1712 require Commerce to do this?

Answer. S. 1712 does not, and should not, require Commerce to screen all license applications against the Treasury Enforcement Communication System (TECS) database maintained by the U.S. Customs Service. S. 1712 requires the Secretary of Commerce to refer all license applications to the Department of Defense and other appropriate departments and agencies, and it also explicitly authorizes the Secretary of Commerce to undertake enhanced cooperation with the United States Customs Service (Sec. 607(k)).

Since the March 2000 IG report, Commerce has begun screening export license applications against the Treasury Enforcement Communication System database maintained by the U.S. Customs Service.