

**Testimony of
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Before
The Senate Committee on Commerce, Science, and Transportation
on the Reauthorization of the Export Administration Act**

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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.