

106TH CONGRESS  
1ST SESSION

# H. R. 850

To amend title 18, United States Code, to affirm the rights of United States persons to use and sell encryption and to relax export controls on encryption.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 1999

Mr. GOODLATTE (for himself, Ms. LOFGREN, Mr. ARMEY, Mr. DELAY, Mr. WATTS of Oklahoma, Mr. DAVIS of Virginia, Mr. COX, Ms. PRYCE of Ohio, Mr. BLUNT, Mr. GEPHARDT, Mr. BONIOR, Mr. FROST, Ms. DELAURO, Mr. LEWIS of Georgia, Mr. GEJDENSON, Mr. SENSENBRENNER, Mr. GEKAS, Mr. COBLE, Mr. SMITH of Texas, Mr. GALLEGLY, Mr. BRYANT, Mr. CHABOT, Mr. BARR of Georgia, Mr. HUTCHINSON, Mr. PEASE, Mr. CANNON, Mr. ROGAN, Mrs. BONO, Mr. BACHUS, Mr. CONYERS, Mr. FRANK of Massachusetts, Mr. BOUCHER, Mr. NADLER, Ms. JACKSON-LEE of Texas, Ms. WATERS, Mr. MEEHAN, Mr. DELAHUNT, Mr. WEXLER, Mr. ACKERMAN, Mr. ANDREWS, Mr. ARCHER, Mr. BALLENGER, Mr. BARCIA, Mr. BARRETT of Nebraska, Mr. BARRETT of Wisconsin, Mr. BARTON of Texas, Mr. BILBRAY, Mr. BLUMENAUER, Mr. BOEHNER, Mr. BRADY of Texas, Mr. BRADY of Pennsylvania, Ms. BROWN of Florida, Mr. BROWN of California, Mr. BURR of North Carolina, Mr. BURTON of Indiana, Mr. CAMP, Mr. CAMPBELL, Mrs. CAPPS, Mr. CHAMBLISS, Mrs. CHENOWETH, Mrs. CHRISTIAN-CHRISTENSEN, Mrs. CLAYTON, Mr. CLEMENT, Mr. CLYBURN, Mr. COLLINS, Mr. COOK, Mr. COOKSEY, Mrs. CUBIN, Mr. CUMMINGS, Mr. CUNNINGHAM, Mr. DAVIS of Illinois, Mr. DEAL of Georgia, Mr. DEFazio, Mr. DEUTSCH, Mr. DICKEY, Mr. DOOLEY of California, Mr. DOOLITTLE, Mr. DOYLE, Mr. DREIER, Mr. DUNCAN, Ms. DUNN, Mr. EHLERS, Mrs. EMERSON, Mr. ENGLISH, Ms. ESHOO, Mr. EWING, Mr. FARR of California, Mr. FILNER, Mr. FORD, Mr. FOSSELLA, Mr. FRANKS of New Jersey, Mr. GILLMOR, Mr. GOODE, Mr. GOODLING, Mr. GORDON, Mr. GREEN of Texas, Mr. GUTKNECHT, Mr. HALL of Texas, Mr. HASTINGS of Washington, Mr. HERGER, Mr. HILL of Montana, Mr. HOBSON, Mr. HOEKSTRA, Mr. HOLDEN, Ms. HOOLEY of Oregon, Mr. HORN, Mr. HOUGHTON, Mr. INSLEE, Mr. ISTOOK, Mr. JACKSON of Illinois, Mr. JEFFERSON, Ms. EDDIE BERNICE JOHNSON of Texas, Mrs. JOHNSON of Connecticut, Mr. KANJORSKI, Mr. KASICH, Mrs. KELLY, Ms. KIKPATRICK, Mr. KIND, Mr. KINGSTON, Mr. KNOLLENBERG, Mr. KOLBE, Mr. LAMPSON, Mr. LARGENT, Mr. LATHAM, Ms. LEE, Mr. LEWIS of Kentucky, Mr. LINDER,

Mr. LUCAS of Oklahoma, Mr. LUTHER, Ms. MCCARTHY of Missouri, Mr. McDERMOTT, Mr. MCGOVERN, Mr. MCINTOSH, Mr. MALONEY of Connecticut, Mr. MANZULLO, Mr. MARKEY, Mr. MARTINEZ, Mr. MATSUI, Mrs. MEEK of Florida, Mr. METCALF, Mr. MICA, Ms. MILLENDER-McDONALD, Mr. GEORGE MILLER of California, Mr. MOAKLEY, Mr. MORAN of Virginia, Mrs. MORELLA, Mrs. MYRICK, Mrs. NAPOLITANO, Mr. NEAL of Massachusetts, Mr. NETHERCUTT, Mr. NORWOOD, Mr. NUSSLE, Mr. OLVER, Mr. PACKARD, Mr. PALLONE, Mr. PASTOR, Mr. PETERSON of Minnesota, Mr. PICKERING, Mr. POMBO, Mr. POMEROY, Mr. PRICE of North Carolina, Mr. QUINN, Mr. RADANOVICH, Mr. RAHALL, Mr. RANGEL, Mr. REYNOLDS, Ms. RIVERS, Mr. ROHRABACHER, Ms. ROS-LEHTINEN, Mr. RUSH, Mr. SALMON, Ms. SANCHEZ, Mr. SANDERS, Mr. SANFORD, Mr. SCARBOROUGH, Mr. SCHAFER, Mr. SESSIONS, Mr. SHAYS, Mr. SHERMAN, Mr. SHIMKUS, Mr. SMITH of Washington, Mr. SMITH of New Jersey, Mr. SOUDER, Ms. STABENOW, Mr. STARK, Mr. SUNUNU, Mr. TANNER, Mrs. TAUSCHER, Mr. TAUZIN, Mr. TAYLOR of North Carolina, Mr. THOMAS, Mr. THOMPSON of Mississippi, Mr. THUNE, Mr. TIAHRT, Mr. TIERNEY, Mr. UPTON, Mr. VENTO, Mr. WALSH, Mr. WAMP, Mr. WATKINS, Mr. WELLER, Mr. WHITFIELD, Mr. WICKER, Ms. WOOLSEY, and Mr. WU) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on International Relations, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend title 18, United States Code, to affirm the rights of United States persons to use and sell encryption and to relax export controls on encryption.

1       *Be it enacted by the Senate and House of Representa-*  
 2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Security And Freedom  
 5       through Encryption (SAFE) Act”.

1 **SEC. 2. SALE AND USE OF ENCRYPTION.**

2 (a) IN GENERAL.—Part I of title 18, United States  
3 Code, is amended by inserting after chapter 123 the fol-  
4 lowing new chapter:

5 **“CHAPTER 125—ENCRYPTED WIRE AND**  
6 **ELECTRONIC INFORMATION**

“2801. Definitions.

“2802. Freedom to use encryption.

“2803. Freedom to sell encryption.

“2804. Prohibition on mandatory key escrow.

“2805. Unlawful use of encryption in furtherance of a criminal act.

7 **“§ 2801. Definitions**

8 “As used in this chapter—

9 “(1) the terms ‘person’, ‘State’, ‘wire commu-  
10 nication’, ‘electronic communication’, ‘investigative  
11 or law enforcement officer’, and ‘judge of competent  
12 jurisdiction’ have the meanings given those terms in  
13 section 2510 of this title;

14 “(2) the term ‘decrypt’ means to retransform or  
15 unscramble encrypted data, including communica-  
16 tions, to its readable form;

17 “(3) the terms ‘encrypt’, ‘encrypted’, and  
18 ‘encryption’ mean the scrambling of wire commu-  
19 nications, electronic communications, or electroni-  
20 cally stored information, using mathematical for-  
21 mulas or algorithms in order to preserve the con-  
22 fidentiality, integrity, or authenticity of, and prevent

1 unauthorized recipients from accessing or altering,  
2 such communications or information;

3 “(4) the term ‘key’ means the variable informa-  
4 tion used in a mathematical formula, code, or algo-  
5 rithm, or any component thereof, used to decrypt  
6 wire communications, electronic communications, or  
7 electronically stored information, that has been  
8 encrypted; and

9 “(5) the term ‘key recovery information’ means  
10 information that would enable obtaining the key of  
11 a user of encryption;

12 “(6) the term ‘plaintext access capability’  
13 means any method or mechanism which would pro-  
14 vide information in readable form prior to its being  
15 encrypted or after it has been decrypted;

16 “(7) the term ‘United States person’ means—

17 “(A) any United States citizen;

18 “(B) any other person organized under the  
19 laws of any State, the District of Columbia, or  
20 any commonwealth, territory, or possession of  
21 the United States; and

22 “(C) any person organized under the laws  
23 of any foreign country who is owned or con-  
24 trolled by individuals or persons described in  
25 subparagraphs (A) and (B).

1 **“§ 2802. Freedom to use encryption**

2 “Subject to section 2805, it shall be lawful for any  
3 person within any State, and for any United States person  
4 in a foreign country, to use any encryption, regardless of  
5 the encryption algorithm selected, encryption key length  
6 chosen, or implementation technique or medium used.

7 **“§ 2803. Freedom to sell encryption**

8 “Subject to section 2805, it shall be lawful for any  
9 person within any State to sell in interstate commerce any  
10 encryption, regardless of the encryption algorithm se-  
11 lected, encryption key length chosen, or implementation  
12 technique or medium used.

13 **“§ 2804. Prohibition on mandatory key escrow**

14 “(a) GENERAL PROHIBITION.—Neither the Federal  
15 Government nor a State may require that, or condition  
16 any approval on a requirement that, a key, access to a  
17 key, key recovery information, or any other plaintext ac-  
18 cess capability be—

19 “(1) built into computer hardware or software  
20 for any purpose;

21 “(2) given to any other person, including a  
22 Federal Government agency or an entity in the pri-  
23 vate sector that may be certified or approved by the  
24 Federal Government or a State to receive it; or

25 “(3) retained by the owner or user of an  
26 encryption key or any other person, other than for

1 encryption products for use by the Federal Govern-  
2 ment or a State.

3 “(b) PROHIBITION ON LINKAGE OF DIFFERENT  
4 USES OF ENCRYPTION.—Neither the Federal Government  
5 nor a State may—

6 “(1) require the use of encryption products,  
7 standards, or services used for confidentiality pur-  
8 poses, as a condition of the use of such products,  
9 standards, or services for authenticity or integrity  
10 purposes; or

11 “(2) require the use of encryption products,  
12 standards, or services used for authenticity or integ-  
13 rity purposes, as a condition of the use of such prod-  
14 ucts, standards, or services for confidentiality pur-  
15 poses.

16 “(c) EXCEPTION FOR ACCESS FOR LAW ENFORCE-  
17 MENT PURPOSES.—Subsection (a) shall not affect the au-  
18 thority of any investigative or law enforcement officer, or  
19 any member of the intelligence community as defined in  
20 section 3 of the National Security Act of 1947 (50 U.S.C.  
21 401a), acting under any law in effect on the effective date  
22 of this chapter, to gain access to encrypted communica-  
23 tions or information.

1 **“§ 2805. Unlawful use of encryption in furtherance of**  
2 **a criminal act**

3 “(a) ENCRYPTION OF INCRIMINATING COMMUNICA-  
4 TIONS OR INFORMATION UNLAWFUL.—Any person who,  
5 in the commission of a felony under a criminal statute of  
6 the United States, knowingly and willfully encrypts in-  
7 criminating communications or information relating to  
8 that felony with the intent to conceal such communications  
9 or information for the purpose of avoiding detection by  
10 law enforcement agencies or prosecution—

11 “(1) in the case of a first offense under this  
12 section, shall be imprisoned for not more than 5  
13 years, or fined in the amount set forth in this title,  
14 or both; and

15 “(2) in the case of a second or subsequent of-  
16 fense under this section, shall be imprisoned for not  
17 more than 10 years, or fined in the amount set forth  
18 in this title, or both.

19 “(b) USE OF ENCRYPTION NOT A BASIS FOR PROB-  
20 ABLE CAUSE.—The use of encryption by any person shall  
21 not be the sole basis for establishing probable cause with  
22 respect to a criminal offense or a search warrant.”.

23 (b) CONFORMING AMENDMENT.—The table of chap-  
24 ters for part I of title 18, United States Code, is amended

1 by inserting after the item relating to chapter 123 the fol-  
 2 lowing new item:

“125. **Encrypted wire and electronic information** ..... **2801**”.

3 **SEC. 3. EXPORTS OF ENCRYPTION.**

4 (a) AMENDMENT TO EXPORT ADMINISTRATION ACT  
 5 OF 1979.—Section 17 of the Export Administration Act  
 6 of 1979 (50 U.S.C. App. 2416) is amended by adding at  
 7 the end thereof the following new subsection:

8 “(g) CERTAIN CONSUMER PRODUCTS, COMPUTERS,  
 9 AND RELATED EQUIPMENT.—

10 “(1) GENERAL RULE.—Subject to paragraphs  
 11 (2) and (3), the Secretary shall have exclusive au-  
 12 thority to control exports of all computer hardware,  
 13 software, computing devices, customer premises  
 14 equipment, communications network equipment, and  
 15 technology for information security (including  
 16 encryption), except that which is specifically de-  
 17 signed or modified for military use, including com-  
 18 mand, control, and intelligence applications.

19 “(2) ITEMS NOT REQUIRING LICENSES.—After  
 20 a one-time, 15-day technical review by the Secretary,  
 21 no export license may be required, except pursuant  
 22 to the Trading with the enemy Act or the Inter-  
 23 national Emergency Economic Powers Act (but only  
 24 to the extent that the authority of such Act is not

exercised to extend controls imposed under this Act),  
for the export or reexport of—

“(A) any computer hardware or software  
or computing device, including computer hardware or software or computing devices with encryption capabilities—

“(i) that is generally available;

“(ii) that is in the public domain for which copyright or other protection is not available under title 17, United States Code, or that is available to the public because it is generally accessible to the interested public in any form; or

“(iii) that is used in a commercial, off-the-shelf, consumer product or any component or subassembly designed for use in such a consumer product available within the United States or abroad which—

“(I) includes encryption capabilities which are inaccessible to the end user; and

“(II) is not designed for military or intelligence end use;

1           “(B) any computing device solely because  
2 it incorporates or employs in any form—

3           “(i) computer hardware or software  
4           (including computer hardware or software  
5           with encryption capabilities) that is ex-  
6           empted from any requirement for a license  
7           under subparagraph (A); or

8           “(ii) computer hardware or software  
9           that is no more technically complex in its  
10          encryption capabilities than computer  
11          hardware or software that is exempted  
12          from any requirement for a license under  
13          subparagraph (A) but is not designed for  
14          installation by the purchaser;

15          “(C) any computer hardware or software  
16          or computing device solely on the basis that it  
17          incorporates or employs in any form interface  
18          mechanisms for interaction with other computer  
19          hardware or software or computing devices, in-  
20          cluding computer hardware and software and  
21          computing devices with encryption capabilities;

22          “(D) any computing or telecommunication  
23          device which incorporates or employs in any  
24          form computer hardware or software encryption  
25          capabilities which—

1 “(i) are not directly available to the  
2 end user; or

3 “(ii) limit the encryption to be point-  
4 to-point from the user to a central commu-  
5 nications point or link and does not enable  
6 end-to-end user encryption;

7 “(E) technical assistance and technical  
8 data used for the installation or maintenance of  
9 computer hardware or software or computing  
10 devices with encryption capabilities covered  
11 under this subsection; or

12 “(F) any encryption hardware or software  
13 or computing device not used for confidentiality  
14 purposes, such as authentication, integrity, elec-  
15 tronic signatures, nonrepudiation, or copy pro-  
16 tection.

17 “(3) COMPUTER HARDWARE OR SOFTWARE OR  
18 COMPUTING DEVICES WITH ENCRYPTION CAPABILI-  
19 TIES.—After a one-time, 15-day technical review by  
20 the Secretary, the Secretary shall authorize the ex-  
21 port or reexport of computer hardware or software  
22 or computing devices with encryption capabilities for  
23 nonmilitary end uses in any country—

24 “(A) to which exports of computer hard-  
25 ware or software or computing devices of com-

1           parable strength are permitted for use by finan-  
2           cial institutions not controlled in fact by United  
3           States persons, unless there is substantial evi-  
4           dence that such computer hardware or software  
5           or computing devices will be—

6                   “(i) diverted to a military end use or  
7                   an end use supporting international terror-  
8                   ism;

9                   “(ii) modified for military or terrorist  
10                  end use; or

11                  “(iii) reexported without any author-  
12                  ization by the United States that may be  
13                  required under this Act; or

14                  “(B) if the Secretary determines that a  
15                  computer hardware or software or computing  
16                  device offering comparable security is commer-  
17                  cially available outside the United States from  
18                  a foreign supplier, without effective restrictions.

19           “(4)   DEFINITIONS.—As   used   in   this  
20   subsection—

21                   “(A)(i) the term ‘encryption’ means the  
22                   scrambling of wire communications, electronic  
23                   communications, or electronically stored infor-  
24                   mation, using mathematical formulas or algo-  
25                   rithms in order to preserve the confidentiality,

1 integrity, or authenticity of, and prevent unau-  
2 thorized recipients from accessing or altering,  
3 such communications or information;

4 “(ii) the terms ‘wire communication’ and  
5 ‘electronic communication’ have the meanings  
6 given those terms in section 2510 of title 18,  
7 United States Code;

8 “(B) the term ‘generally available’ means,  
9 in the case of computer hardware or computer  
10 software (including computer hardware or com-  
11 puter software with encryption capabilities)—

12 “(i) computer hardware or computer  
13 software that is—

14 “(I) distributed through the  
15 Internet;

16 “(II) offered for sale, license, or  
17 transfer to any person without restric-  
18 tion, whether or not for consideration,  
19 including, but not limited to, over-the-  
20 counter retail sales, mail order trans-  
21 actions, phone order transactions,  
22 electronic distribution, or sale on ap-  
23 proval;

24 “(III) preloaded on computer  
25 hardware or computing devices that

1 are widely available for sale to the  
2 public; or

3 “(IV) assembled from computer  
4 hardware or computer software com-  
5 ponents that are widely available for  
6 sale to the public;

7 “(ii) not designed, developed, or tai-  
8 lored by the manufacturer for specific pur-  
9 chasers or users, except that any such pur-  
10 chaser or user may—

11 “(I) supply certain installation  
12 parameters needed by the computer  
13 hardware or software to function  
14 properly with the computer system of  
15 the user or purchaser; or

16 “(II) select from among options  
17 contained in the computer hardware  
18 or computer software; and

19 “(iii) with respect to which the manu-  
20 facturer of that computer hardware or  
21 computer software—

22 “(I) intended for the user or pur-  
23 chaser, including any licensee or  
24 transferee, to install the computer  
25 hardware or software and has sup-

1           plied the necessary instructions to do  
2           so, except that the manufacturer of  
3           the computer hardware or software, or  
4           any agent of such manufacturer, may  
5           also provide telephone or electronic  
6           mail help line services for installation,  
7           electronic transmission, or basic oper-  
8           ations; and

9                   “(II) the computer hardware or  
10           software is designed for such installa-  
11           tion by the user or purchaser without  
12           further substantial support by the  
13           manufacturer;

14                   “(C) the term ‘computing device’ means a  
15           device which incorporates one or more micro-  
16           processor-based central processing units that  
17           can accept, store, process, or provide output of  
18           data;

19                   “(D) the term ‘computer hardware’ in-  
20           cludes, but is not limited to, computer systems,  
21           equipment, application-specific assemblies,  
22           smart cards, modules, integrated circuits, and  
23           printed circuit board assemblies;

24                   “(E) the term ‘customer premises equip-  
25           ment’ means equipment employed on the prem-

1           ises of a person to originate, route, or terminate  
2           communications;

3                 “(F) the term ‘technical assistance’ in-  
4           cludes instruction, skills training, working  
5           knowledge, consulting services, and the transfer  
6           of technical data;

7                 “(G) the term ‘technical data’ includes  
8           blueprints, plans, diagrams, models, formulas,  
9           tables, engineering designs and specifications,  
10          and manuals and instructions written or re-  
11          corded on other media or devices such as disks,  
12          tapes, or read-only memories; and

13                 “(H) the term ‘technical review’ means a  
14          review by the Secretary of computer hardware  
15          or software or computing devices with  
16          encryption capabilities, based on information  
17          about the product’s encryption capabilities sup-  
18          plied by the manufacturer, that the computer  
19          hardware or software or computing device  
20          works as represented.”.

21          (b) NO REINSTATEMENT OF EXPORT CONTROLS ON  
22          PREVIOUSLY        DECONTROLLED        PRODUCTS.—Any  
23          encryption product not requiring an export license as of  
24          the date of enactment of this Act, as a result of adminis-

1 trative decision or rulemaking, shall not require an export  
2 license on or after such date of enactment.

3 (c) APPLICABILITY OF CERTAIN EXPORT CON-  
4 TROLS.—

5 (1) IN GENERAL.—Nothing in this Act shall  
6 limit the authority of the President under the Inter-  
7 national Emergency Economic Powers Act, the  
8 Trading with the enemy Act, or the Export Adminis-  
9 tration Act of 1979, to—

10 (A) prohibit the export of encryption prod-  
11 ucts to countries that have been determined to  
12 repeatedly provide support for acts of inter-  
13 national terrorism; or

14 (B) impose an embargo on exports to, and  
15 imports from, a specific country.

16 (2) SPECIFIC DENIALS.—The Secretary may  
17 prohibit the export of specific encryption products to  
18 an individual or organization in a specific foreign  
19 country identified by the Secretary, if the Secretary  
20 determines that there is substantial evidence that  
21 such encryption products will be used for military or  
22 terrorist end-use.

23 (3) DEFINITION.—As used in this subsection  
24 and subsection (b), the term “encryption” has the  
25 meaning given that term in section 17(g)(5)(A) of

1 the Export Administration Act of 1979, as added by  
2 subsection (a) of this section.

3 (d) CONTINUATION OF EXPORT ADMINISTRATION  
4 ACT.—For purposes of carrying out the amendment made  
5 by subsection (a), the Export Administration Act of 1979  
6 shall be deemed to be in effect.

7 **SEC. 4. EFFECT ON LAW ENFORCEMENT ACTIVITIES.**

8 (a) COLLECTION OF INFORMATION BY ATTORNEY  
9 GENERAL.—The Attorney General shall compile, and  
10 maintain in classified form, data on the instances in which  
11 encryption (as defined in section 2801 of title 18, United  
12 States Code) has interfered with, impeded, or obstructed  
13 the ability of the Department of Justice to enforce the  
14 criminal laws of the United States.

15 (b) AVAILABILITY OF INFORMATION TO THE CON-  
16 GRESS.—The information compiled under subsection (a),  
17 including an unclassified summary thereof, shall be made  
18 available, upon request, to any Member of Congress.

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