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U.S. GOVERNMENT
INFORMATION
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107TH CONGRESS
2nd Session

HOUSE OF REPRESENTATIVES

REPT. 107–297
Part 2

EXPORT ADMINISTRATION ACT OF 2001

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ON

H.R. 2581

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]

MARCH 8, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
99–006 WASHINGTON : 2002

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107TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPT. 107–297 Part 2

EXPORT ADMINISTRATION ACT OF 2001

MARCH 8, 2002.—Committed to Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STUMP, from the Committee on Armed Services, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2581]

[Including cost estimate of the Congressional Budget Office]

The Committee on Armed Services, to whom was referred the bill (H.R. 2581) to provide authority to control exports, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers to the committee print document containing the text of the amendment as reported by the Committee on International Relations) are as follows:

Page 5, strike lines 7 and 8 and insert the following:

> (iii) the release of an item to a foreign national within or outside of the United States;

Page 6, strike line 22 and all that follows through page 7, line 2, and insert the following:

> (ii) TECHNOLOGY.—The term "technology" means specific information, communicated by any means tangible or intangible, that is necessary for the design, development, production, or use of an item, including taking the form of technical data or technical assistance.

Page 13, lines 4 and 5, strike "by the business community on the export control advisory committees" and insert "on the export con-

trol advisory committees by nonproliferation and national security experts, and by the business community".

Page 16, lines 10 and 11, strike "in consultation with the Secretary of Defense, the Secretary of State," and insert "with the concurrence of the Secretary of Defense and in consultation with the Secretary of State,".

Page 16, line 16, strike "would" and insert "could".

Page 17, strike line 17 and insert the following:

> (3) To restrict the export of items that could contribute to acts of international terrorism so as to prove detrimental to the national security of the United States, its allies, or countries sharing common strategic objectives with the United States.

Page 21, lines 13, 17, and 23, strike "would" and insert "could".

Page 22, line 1, strike "would" and insert "could".

Page 24, insert the following after line 2:

> (4) MILITARILY CRITICAL TECHNOLOGIES LIST.—
>
> (A) ESTABLISHMENT.—The Secretary of Defense shall establish and maintain a Militarily Critical Technologies List, which shall be part of the National Security Control List.
>
> (B) CONTENTS.—The Militarily Critical Technologies List shall be composed of a list of items that are, or could be, critical to the United States military maintaining or advancing its qualitative advantage and superiority relative to other countries or potential adversaries.
>
> (C) AUTHORITY OF THE SECRETARY OF DEFENSE.—Notwithstanding any other provision of this Act, other than section 201(d)(2), the Secretary of Defense shall have sole authority for adding any item to or removing any item from the Militarily Critical Technologies List, regardless of whether that item is otherwise on the Control List or otherwise controlled for export under this Act.
>
> (D) LICENSING OF MILITARILY CRITICAL TECHNOLOGIES LIST ITEMS.—Items listed on the Militarily Critical Technologies List shall not be approved for export without the express consent of the Secretary of Defense, unless the President determines otherwise pursuant to section 402(b).
>
> (E) ANNUAL REPORT.—The Secretary of Defense shall report annually to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate on actions taken to carry out this paragraph.

Page 24, line 5, insert "as set forth in paragraphs (1), (2), and (3) of subsection (a)" after "Control List".

Page 27, insert the following after line 11:

> (4) NONDELEGATION.—The President may not delegate the authorities he has under subsection (a) and this subsection.

Page 31, insert the following after line 10:

SEC. 206. CONGRESSIONAL REVIEW AND REPORT.

(a) NOTIFICATION.—The Secretary shall inform the appropriate committees of Congress at least 30 days before any change to the export status of an item on the National Security Control List (other than the Military Critical Technologies List) is made.

(b) REPORT.—Upon the request of either the chairman or ranking member of any of the committees of Congress notified of a proposed change under subsection (a), the Secretary shall promptly provide to that committee a report that contains a clearly stated description of the proposed change, and the reasons why the change is justified and necessary. The report shall include in its entirety the assessment of the Secretary of Defense under subsection (c). The report may be provided on a classified basis if the Secretary considers it necessary.

(c) ASSESSMENT.—The Secretary of Defense, in consultation with the Secretary of State and the Director of Central Intelligence, shall submit to the Secretary an assessment of the following with respect to a proposed change on which a report is requested under subsection (b):

(1) The impact that the proposed change will have on the national security of the United States with respect to the purposes of export controls set forth in section 201(b).

(2) The impact the proposed change will have on the United States Armed Forces and the intelligence community.

(3) The cumulative effects that the proposed change could have on the national security of the United States, as well as the military potential, proliferation activities, and support for international terrorism by countries that may receive the exported items with respect to which the proposed change would apply.

(d) APPROPRIATE COMMITTEES.—For purposes of this section, the appropriate committees of Congress are the Committee on Armed Services and the Committee on International Relations of the House of Representatives, and the Committee on Foreign Relations, the Committee on Armed Services, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

Page 31, line 21, strike "and determine".

Page 32, lines 2 and 3, strike "and making a determination with respect to".

Page 32, line 9, insert ", with the concurrence of the Secretary of Defense and the Secretary of State," after "Secretary".

Page 32, line 10, insert "in accordance with subsection (c)" after "determine".

Page 32, lines 14 and 15, strike

(c) RESULT OF DETERMINATION.—In any case in which the Secretary determines,

and insert

(c) DETERMINATION.—In any case in which the Secretary, with the concurrence of the Secretary of Defense and the Secretary of State, determines,

Page 33, strike lines 7 through 23 and insert the following:

(1) FOREIGN AVAILABILITY STATUS.—An item has foreign availability status under this subtitle only if the item—

(A) is available to controlled countries without restriction from sources outside the United States, more than one of which are countries that participate with the United States in multilateral export control regimes as members; and

(B) is available in significant quantity and comparable quality to the item produced in the United States so that the requirement of a license or other authorization with respect to the export of the item is or would be ineffective.

Page 33, strike line 24 and all that follows through page 34, line 25, and insert the following:

(2) MASS-MARKET STATUS.—An item has mass-market status under this subtitle only if the following criteria are met:

(A) The item is produced in a large volume and is available for sale to multiple potential purchasers.

(B) The item is widely distributed through normal commercial channels, such as retail stores, direct marketing catalogues, electronic commerce, and other channels.

(C) The item is conducive to shipment and delivery by generally accepted commercial means of transport.

(D) The item can be used for its normal intended purpose without substantial and specialized service provided by the manufacturer, distributor, or other third party.

Page 35, strike lines 1 through 21.

Page 44, insert the following after line 14:

Subtitle C—High Performance Computers

SEC. 221. EXPORTS OF HIGH PERFORMANCE COMPUTING TECHNOLOGY.

(a) JOINT PROCESS.—The Secretary, the Secretary of State, the Secretary of Defense, and the Secretary of Energy shall jointly develop and implement a process that would permit the United States to monitor effectively the export of high performance computing technology to countries of proliferation concern. Such a process shall include, at a minimum, the following:

(1) A definition of high performance computing technology and any associated performance metrics.

(2) The ability to assess the proposed export of high performance computing technology prior to its export and possibly require a license for such export to end users or end uses of concern.

(3) The use of post-shipment verifications and other procedures to monitor end uses and end users in order to ensure that exports of high performance computing technology are not being used by countries of proliferation concern in a manner detrimental to the national security of the United States.

(b) REPORT TO CONGRESS.—The President shall submit to the Congress, not later than 180 days after the date of the enactment of this Act, a report describing the process developed under subsection (a).

(c) IMPLEMENTATION.—The process developed under subsection (a) shall first become effective 60 days after the end of the 180-day period described in subsection (b).

(d) REPEAL OF CERTAIN EXPORT CONTROLS.—Subtitle B of title XII of division A of the National Defense Authorization Act for Fiscal Year 1998 (50 U.S.C. App. 2404 note) is repealed, effective 60 days after the end of the 180-day period described in subsection (b).

(e) INCLUSION OF ITEMS IN DEFINITION.—The definition of "high performance computing technology" under subsection (a)(1) shall include computer hardware, software, technical data, and source codes.

(f) END USE REVIEW.—

(1) NOTIFICATION.—Any United States person that exports a computer with a dollar value of more than $250,000, or any equivalent metric developed pursuant to subsection (a), shall, not less than 10 days before the item is exported, provide to the Secretary a 1-page notification described in paragraph (2) with respect to the export.

(2) CONTENT.—A notification under paragraph (1) with respect to a proposed export shall include the following:

(A) A detailed description of the item to be exported.

(B) Performance measures of the item to be exported.

(C) The quantity and dollar value of the item to be exported.

(D) The name, address, and telephone number of the end user of the exported item.

(E) The end uses of the exported item.

(3) INTERAGENCY REVIEW.—Within 24 hours after receiving a notification under paragraph (1), the Secretary shall refer the notification to the Director of Central Intelligence (in this subsection referred to as the "Director") and the Secretary of Defense. The Director and the Secretary of Defense shall review the notification to determine whether the end user or any end use of the item to be exported—

(A) could threaten the national security of the United States;

(B) could contribute to the proliferation of weapons of mass destruction or the means to deliver them; or

(C) could assist foreign terrorist organizations in performing acts of international terrorism.

(4) DETERMINATION.—Within 7 calendar days after receiving a notification under paragraph (3), the Director and the Secretary of Defense shall inform the Secretary of any determinations they made under paragraph (3) with the respect to the notification. If the Director or the Secretary of Defense determines that a proposed export meets any of the criteria set forth in subparagraphs (A), (B), and (C) of paragraph (3), the Secretary shall immediately so notify the United States person exporting the item.

(5) REPORT.—The Secretary, with the concurrence of the Secretary of Defense and the Director, shall report annually to the Congress on the implementation of this subsection. The report shall contain the number and type of determinations made by the Director and the Secretary of Defense under paragraph (3).

(6) EFFECTIVE DATE.—This subsection shall take effect 90 days after the date of the enactment of this Act.

Page 57, lines 15 and 16, strike "and except as provided in section 304, the President may" and insert ", the President shall".

Page 58, line 7, strike "that".

Page 58, line 8, insert "that" after "(1)".

Page 58, line 11, insert "in consultation with the Secretary of Defense, that" after "(2)".

Page 84, line 22, strike "chairperson" and insert "committee".

Page 85, line 2, strike the period and insert the following: ", except that any decision of the committee is not valid unless it is unanimous. If such a unanimous decision is not reached, the license at issue shall be denied, unless the matter is appealed under paragraph (3).".

Page 85, strike lines 7 through 13 and insert the following:

(3) FURTHER RESOLUTION.—The President shall establish additional levels for review or appeal of any matter that cannot be resolved pursuant to the process described in paragraph (1). Each such review shall—

(A) provide for decision-making based on the concurrence of the participating departments and agencies;

(B) provide that a department or agency that fails to take a timely position, citing the specific statutory and regulatory bases for a position, shall be deemed to have no objection to the pending decision;

(C) provide that any decision of an interagency committee established under paragraph (1) or interagency dispute resolution process established

under this paragraph may be escalated to the next higher level of review at the request of an official appointed by the President, by and with the advice of the Senate, or an officer properly acting in such capacity, of a department or agency that participated in the interagency committee or dispute resolution process that made the decision; and

(D) ensure that matters are resolved or referred to the President not later than 90 days after the date the completed license application is referred by the Secretary.

If concurrence of the participating departments and agencies is not reached at a level of review established under this paragraph, the license at issue shall be denied unless the matter is escalated to the next higher level of review or the President determines otherwise.

Page 145, line 4, strike "repeatedly".

Strike title VII.

Strike section 807(k).

Redesignate title VIII as title VII and redesignate the sections therein accordingly.

Amend the table of contents accordingly.

PURPOSE AND BACKGROUND

The purpose of H.R. 2581, the Export Administration Act (EAA) of 2001, as amended, is to establish a modern, comprehensive framework for the control of U.S. exports of dual-use items (those goods, technologies, and services with both military and commercial application) that protects and advances U.S. national security without unnecessarily restricting free trade and international commerce.

The last comprehensive legislative effort to fashion a dual-use export control system was the Export Administration Act of 1979 (Public Law 96–72), which expired in 1994. Since then, and with the exception of brief reauthorizations, the export control process has been implemented through emergency executive order. As such, the committee recognizes the need not only to pass a new EAA, but to update current law where appropriate so U.S. export controls address the new national security needs of the United States, the economic realities of globalization, and the changed international security environment of the 21st Century, for the next several years.

The committee considered H.R. 2581, as reported by the Committee on International Relations; this bill is the House alternative to S. 149, which passed the Senate on September 6, 2001. In the course of this consideration, the committee held a two-panel hearing that included witnesses from the Departments of Defense, Commerce, and State, and from industry, the national security community, and the General Accounting Office (GAO). This hearing highlighted significant problems with H.R. 2581 as reported, particularly regarding the role of the Secretary of Defense in the export control process, the shortcomings of national security safeguards within the proposed system, and the inadequacies of executive

branch implementation of current law and Congressional intent, among other things.

Based on that hearing, the committee decided to consider and amend H.R. 2581 as reported. The bill as amended includes provisions to restore and strengthen the role of the Secretary of Defense in the export control process and to impose additional safeguards to ensure that sensitive dual-use items are not transferred to potential adversaries, proliferators of weapons of mass destruction, or terrorists, where they could prove detrimental to U.S. national security. The amended bill also reestablishes important elements of the EAA of 1979 that were not included in either S. 149 and H.R. 2581 as reported. Incorporation of these provisions is designed to ensure the proper involvement of the Secretary of Defense, commensurate with his duties and responsibilities, in the export licensing process.

The committee amendment would strengthen the role of the Secretary of Defense in several key ways. First, it would reestablish the Militarily Critical Technologies List (MCTL)—a list of technologies most critical to the maintenance and advancement of the U.S. military's qualitative superiority over other countries and potential adversaries. The Secretary of Defense would have sole authority over the creation and maintenance of this list, and would have veto authority over any licenses involving an item on this list. Only the President, by using the dispute resolution process specified in Section 402 of the bill, could overrule the Secretary of Defense's decisions with regard to the MCTL.

Second, the committee amendment would not allow the Secretary of Commerce to make export control decisions that impact U.S. national security, unless he has the concurrence of the Secretary of Defense. The basic statement of authority for the Secretary of Commerce would be altered to require the Secretary of Defense's, as well as the Secretary of State's, concurrence with regard to the regulation of national security export controls. Further, the committee amendment would require unanimity in the dispute resolution process among participating departments and agencies before a license could be approved. This change would preserve the Secretary of Defense's authority to object to a license on national security grounds, and is consistent with the bill's underlying presumption of denial.

Third, the committee amendment would require the Secretary of Commerce to seek the concurrence of the Secretaries of Defense and State when making foreign availability and mass market determinations as the basis for decontrol of dual-use items. In addition, with regard to "foreign availability," the bill would restore the standards codified in the 1979 EAA, which are well-understood by the implementing bureaucracy and have served the nation's security well over the last twenty plus years. These standards would improve the definition of foreign availability contained in S. 149 and HR 2581, which could otherwise lead to the decontrol of scores of items based on a relaxed standard of foreign availability, quantity, and quality. The committee amendment would also require that strict criteria be met (rather than merely considered as under the base bill) before a determination of foreign availability or mass market status is made.

The committee amendment would make two major changes to strengthen national security export controls. First, it would broaden the number of items available for control to encompass those that "could" contribute to the military capabilities, proliferation activities, or terrorism potential of a country, thus giving the Secretary of Defense more say over items for control. Second, the committee amendment would close a loophole in the base text by requiring the President to impose controls, regardless of a foreign availability or mass market finding, if the item in question is controlled by a multilateral export control regime or international agreement to which the United States is a party. This change would help ensure that the United States maintains its international responsibilities and that sensitive dual-use items remains controlled.

The committee amendment would also change the underlying bill with regard to two particular commodities. In terms of satellite exports, the amendment strikes Title VII of the bill as reported by the International Relations Committee. That version would have overturned provisions of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105–261) which moved satellite exports from the primary jurisdiction of the Commerce Department to the State Department. The committee amendment would retain the State Department's authority over satellite exports, as the committee feels this is the most appropriate process to ensure the national security implications of these items are fully considered in decisions to export.

On the subject of high-performance computer exports, the committee was concerned about the action taken in the underlying bill to strike provisions of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105–85). That Act requires notification of departments involved in the licensing process before computers above a certain performance threshold could be exported to nations of proliferation concern. The Act also includes provisions allowing the President to adjust that performance threshold following Congressional notification, and requires the Secretary of Commerce to conduct post-shipment verification of high-performance computer exports.

The committee amendment would require the Secretaries of Commerce, Defense, State, and Energy to jointly develop and implement a process for monitoring high-performance computer exports, including a new definition and metric(s) for high-performance computers; an ability to assess proposed exports of such items in advance; and post-shipment verification procedures to ensure that high-performance computing technology is not diverted to an improper end-use or end-user. Sixty days after the President submits a report to Congress on this new process, the provisions of the 1998 defense act would be repealed.

Finally, the committee amendment would require exporters to provide a one-page notification to the Department of Commerce 10 days prior to exporting any computer with a dollar value greater than $250,000. The Secretary of Commerce would then refer this notification to the Secretary of Defense and the Director of Central Intelligence, who would then determine whether the end use or end user of the item could threaten U.S. national security, contribute to the proliferation of weapons of mass destruction, or assist for-

eign terrorist organizations. If a positive determination is made, the exporter would be immediately notified, prior to shipment, by the Secretary of Commerce.

LEGISLATIVE HISTORY

H.R. 2581 was introduced on July 20, 2001 and was referred to the Committee on International Relations and the Committee on Rules. The bill was reported (amended) November 16, 2001 by the Committee on International Relations (H. Rept. 107–297, Part I). The bill was also referred jointly and sequentially to the Committee on Agriculture, the Committee on Armed Services, the Committee on Energy and Commerce, the Committee on the Judiciary, the Committee on Ways and Means, and the Committee on Intelligence (Permanent Select) on November 16, 2001.

On March 6, 2002 the Committee on Armed Services held a mark-up session to consider H.R. 2581 as amended by the Committee on International Relations. The committee adopted the amended bill with an amendment and reported the same favorably by a rollcall vote. The record vote can be found at the end of this report.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of those sections of H.R. 2581 amended by the Armed Services Committee.

SECTION 2—DEFINITIONS

Changes made to this section of the underlying bill would strengthen the definitions of "technology" and "export." The amended definition of "technology" would broaden the term to cover both tangible and intangible transfers of information, including but not limited to, information communicated by word of mouth; by fax, e-mail, or other electronic means; through sketches, letters, and memos; or made available for visual inspection.

The amended definition of "export" would better encompass two areas to strengthen the control and enforcement of "deemed exports." First, the release of technology to a foreign national in the United States would include the release of any "item"—a broader term that includes the previously-covered technology, as well as goods and services—to a foreign national in the United States. Second, the release of items to foreign nationals would be expanded to include the release to a foreign national "within or outside of" the United States. According to a senior Department of Commerce official during testimony before the committee, this was a definitional shortcoming requiring correction to prevent the release of sensitive dual-use items outside of the United States.

SECTION 105—EXPORT CONTROL ADVISORY COMMITTEES

Changes made to this section of the underlying bill would permit the participation of nonproliferation and national security experts in any export control advisory committees established by the Secretary of Commerce pursuant to this section. The underlying bill made no allowances for these types of experts, but permitted the widest possible participation by the business community. By including nonproliferation and national security experts on the Sec-

retary's advisory committees, the committee intends that he receive more balanced information and advice when faced with weighing U.S. national security and economic interests regarding export controls.

SECTION 201—AUTHORITY FOR NATIONAL SECURITY EXPORT CONTROLS

The committee amendment includes several changes to this section. First, the amendment would modify the overall authority for imposing national security export controls. The Secretary of Commerce's authority would no longer be exercised "in consultation with" the Secretary of Defense; the revised provision would now require the Secretary of Defense's concurrence. This change is one of several made by the committee to address significant concerns that the Secretary of Defense have a prominent enough role in the export control process to adequately safeguard national security.

Second, the committee amendment would also change the standard for the first purpose of national security controls which relates to the impact of a proposed export on the military potential of countries so as to prove detrimental to the national security of the United States, its allies, or countries sharing common strategic objectives with the United States.

While both "could" and "would" are subjective standards, the committee's intent is to safeguard U.S. national security by anticipating unforeseeable threats and uses of dual-use items. To accomplish this, the standard would be raised from one where a direct, causal link to a threat is probable, to one where such a link is possible. The committee intends that this change require those implementing the export control system to at least consider a broader category of items for control. It is not intended to have the effect that all licenses considered under this standard would necessarily be denied; rather the goal would be to ensure closer scrutiny of the impact of potential end-uses, and the possible intentions of their end-users, on U.S. national security.

Third, the committee amendment would clarify a provision from the underlying bill. As reported by the International Relations Committee, H.R. 2581 expressed the third purpose of national security export controls as "to deter acts of international terrorism." Because the deterrence of terrorism is also a purpose of foreign policy controls in Title III of both versions of the bill, the committee intended to clarify the difference between the two definitions. Foreign policy controls could be imposed on items to deter or punish a country or entity for committing or preparing to commit terrorist acts. National security controls, under this new definition, would "restrict the export of items that could contribute to acts of terrorism so as to prove detrimental to the national security of the United States, its allies, or countries sharing common strategic objectives with the United States." The use of the term "could" is intended to capture a broader range of items in the same way as its use was explained in the preceding paragraph.

Finally, a similar change was made to the underlying bill to change "would" to "could" for the risk factors listed in paragraph (e) of this section—presumption of denial of certain licenses.

SECTION 202—NATIONAL SECURITY CONTROL LIST

The committee amendment would change this section to include the requirement to preserve the current Military Critical Technologies List (MCTL), created under the Export Administration Act of 1979, but as a subset of the broader National Security Control List (NSCL). Neither the underlying bill nor S. 149 included such a provision. Items listed on the MCTL would not be able to be licensed for export without the approval of the Secretary of Defense, and only the Secretary of Defense would be authorized to add or remove items from the MCTL. The President, however—using the authority given him in the dispute resolution process of section 402(b)—would retain the ability to overrule a decision of the Secretary of Defense. The provision would also require an annual report by the Secretary of Defense to the Committees on Armed Services of the Senate and the House of Representations on implementation of this provision. Finally, the committee amendment would clarify that the risk assessment required in subsection (b) would only apply to the NSCL, not the MCTL.

With this modification, the committee intends to further strengthen the role of the Secretary of Defense. The provision would give the Secretary of Defense sole authority to establish and maintain a list of dual-use technologies that he determines are critical to the United States maintaining its military superiority and qualitative advantage relative to other countries or potential adversaries. Examples of critical items the committee expects the Secretary of Defense would place on the Military Critical Technologies List include, but are not limited to, stealth technology and jet engine "hot section" technologies.

An important distinction to be made between S.149 and the underlying House bill on the one hand, and the 1979 EAA on the other, is that the National Security Control List established by the Senate version would focus controls primarily on the current threats to U.S. national security, such as the proliferation of weapons of mass destruction and terrorism. Only the provision contained in the committee amendment would provide an explicit provision focusing controls on preserving and advancing U.S. military capabilities as intended by the establishment of the Militarily Critical Technologies List.

SECTION 203—COUNTRY TIERS

Under this section, as amended, the President would not be able to delegate his authority to establish and maintain a country tiering and assignment system. The assessments to be used by the President in assigning countries to tiers would all relate to the potential risks such countries may pose to U.S. national security. The committee is concerned that, if the President can delegate this authority, he may do so to an agency without particular national security expertise. The provision to prevent that delegation aims to ensure that national security concerns remain primary in the tiering system.

SECTION 206—CONGRESSIONAL REVIEW AND REPORT

The committee amendment would establish a new provision to address what the General Accounting Office (GAO) has described

as a longstanding problem: executive branch failure to implement policies and procedures in the export control process as Congress intended. To respond to this concern, the provision would require the Secretary of Commerce to notify the Congress at least thirty days prior to a change being made to the export status of an item on the National Security Control List. The provision would also require the Secretary of Defense, in consultation with the Secretary of State and the Director of Central Intelligence, to conduct an assessment of the national security impact of making such a change to the control list.

Under this provision, the chairman or ranking member of the House Armed Services Committee (and other committees) would have the right to require a detailed report by the Secretary of Commerce on the proposed change and the justifications for it, along with the Secretary of Defense's national security assessment, before the change is implemented.

In addition to mandating a notification and report requirement for the Congress, the committee intends this provision to require the executive branch to do its homework and have a full understanding of the national security impact of changes in the export status of the item before it is decontrolled, and to be able to justify this decision to the Congress. Given reports by the GAO and other national security experts that past decontrol decisions had limited analytical bases, the committee fully expects that the national security impact assessments required under this provision be comprehensive, rigorous, and analytically based, and that the scope and methodology employed be scientifically sound.

SECTION 211—DETERMINATION OF FOREIGN AVAILABILITY AND MASS MARKET STATUS

The committee amendment would make several changes to this section. First, it would clarify that while the Secretary of Commerce would be responsible for reviewing the foreign availability and mass market status of controlled items, determinations made under this section would require the concurrence of the Secretaries of Defense and State.

Second, the amendment would restore the definition of foreign availability from the 1979 EAA which provides for decontrol if an item of comparable quality is available in sufficient quantities to controlled countries without restriction from foreign suppliers. However, the amended provision would make two changes to the 1979 standard—that of "significant" rather than "sufficient" quantity and the requirement that at least one of the foreign suppliers be participants with the United States in a multilateral control regime. This change was made due to the committee's concern that the definition contained in S. 149 and H.R. 2581 had been dramatically altered to allow for the possible decontrol of scores of items based on a relaxed standard of foreign availability, quantity, and quality. The committee believes that if items of comparable quality to controlled U.S. items are available without restriction in significant quantities from sources outside of the United States, then the U.S.-origin items should be strong candidates for decontrol under the "foreign availability" provision.

Finally, the provision would require that the criteria for foreign availability or mass market status be met before decontrol; S. 149

and H.R. 2581 as reported by the International Relations Committee would have allowed for decontrol after only considering such criteria.

The committee intends the change requiring Secretary of Defense concurrence to address a key finding of the GAO—namely that in the past, the Department of Commerce had unilaterally decontrolled items under the "foreign availability" exemption category based on little or no analysis. It is the intent of the committee that the Secretary of Defense and Secretary of State have an equal voice and role in making these determinations given the serious national security implications, and the expectation of the committee that "foreign availability" and "mass market" assessments will be comprehensive, rigorous, and scientifically sound.

An exemption for "mass marketed" items is a new concept introduced by the authors of the Senate bill; it is the "domestic" counterpart to foreign availability. In S. 149 and H.R. 2581, the Secretary of Commerce can make a "mass market" determination—which would result in the automatic decontrol of the item—after considering a set of general criteria. This approach raised concern that U.S. companies could simply mass produce and mass market their controlled items off of the Commerce Control List, even when there was no evidence that these sensitive items were acquired by countries of concern. Given the lack of strict standards, the unusual amount of discretion given to the Secretary, and the serious national security implications of decontrol decisions, the committee decided that it was in the best interests of the nation to transform these "considerations" into requirements.

SECTION 221—EXPORTS OF HIGH PERFORMANCE COMPUTING TECHNOLOGY

The committee amendment would add a new section specifically addressing high-performance computing technology. This provision would require the Secretaries of Commerce, Defense, State, and Energy, within 180 days of the enactment of this Act, to jointly develop and implement a process that would permit the United States to effectively monitor the export of this technology. At a minimum, the process would have to include a definition of high performance computing technology and any associated performance metric(s); an ability to assess proposed exports in advance and possibly require a license for them for end uses or to end users of concern; and the use of post-shipment verifications and other procedures to monitor end uses and end users. Sixty days after the President reports to Congress on this new process, provisions of the 1998 National Defense Authorization Act requiring notification of computers exports above a certain performance threshold to countries of proliferation concern, reporting to Congress before adjustments to that threshold are made, and post-shipment verifications would be repealed.

In addition, the committee amendment would provide a mechanism for exporters to determine whether an end use or end user of a proposed export is of national security concern. Not less than 10 days before a proposed shipment of a computer with a dollar value of $250,000—and regardless of whether the computer is subject to a license—a U.S. exporter would have to provide the Secretary of Commerce with a one-page notification regarding the

technology, end use, and end user of the item. In turn, the Secretary of Commerce would notify the Secretary of Defense and the Director of Central Intelligence (DCI) of the proposed export. Within seven days, the Secretary of Defense and DCI would then determine and notify the Secretary of Commerce as to whether the end use or end user could threaten U.S. national security, contribute to the proliferation of weapons of mass destruction, or assist foreign terrorist organizations in undertaking terrorist acts. If such a determination were made, the Secretary of Commerce would immediately notify the exporter in question. Finally, the provision would require the Secretary of Commerce, with the concurrence of the Secretary of Defense and the Director of Central Intelligence, to report annually to Congress on determinations made under this section.

The committee intends these provisions to respond to the concerns of the Administration and industry while protecting U.S. national security. It recognizes the limited utility of the existing computing performance measure, millions of theoretical operations per second (MTOPS), and responds to Administration and industry complaints about its use. It also responds to the view of industry raised during a hearing on this subject that exporters are willing to self-police their exports if they can obtain better information about end uses and end users of concern.

Yet, the committee also intends these provisions to address the view of a senior Defense Department official that the government should not "decontrol high-end computers, either from a hardware perspective or a software perspective." The committee seeks to give the Administration the flexibility it has sought in establishing a new definition and process for controlling high-performance computing technology. It also addresses the real problem raised by the GAO in its testimony before the committee, that there is a need for continued Congressional oversight in this area, given the outdated MTOPS metric and the lack of adequate national security analyses in decisions about high-performance computing.

SECTION 309—COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

The committee amendment would make two changes to this section. First, it would exempt controls imposed to comply with a multilateral export control regime or with an international obligation from the reporting requirements of section 304. Second, it would close a loophole in the underlying bill by requiring the President to impose controls, regardless of a foreign availability or mass market finding, if the item in question is controlled by a multilateral export control regime or international agreement to which the United States is a party. This change would help ensure that the United States maintains its international responsibilities and that sensitive dual-use items remain controlled. The committee believes that, with regard to controlling dual-use exports for national security purposes, the United States must play a leadership role internationally by maintaining high standards and opposing the decontrol of sensitive items covered by international agreement due to pressure from exporters.

SECTION 310—DESIGNATION OF COUNTRIES SUPPORTING TERRORISM

The committee amendment would modify this section to require the Secretary of State to consult with the Secretary of Defense when determining whether a license is required for items being exported to a country that has repeatedly provided support for acts of international terrorism. The role of the Secretary of Defense would be to offer his assessment as to whether the item could make a significant contribution to the military potential of such country, including its ability to support acts of international terrorism. This change would address a weakness in the corresponding section of the underlying bill that was highlighted by the GAO. The GAO testified before the committee that "without the Department of Defense's input into these important military assessments, Congress might receive notifications that do not fully reflect the potential military impact of these exports."

SECTION 402—INTERAGENCY DISPUTE RESOLUTION PROCESS

The committee amendment would modify this section to require unanimity among participating departments and agencies at the first level of dispute resolution before a license could be approved, thus preserving the Secretary of Defense's ability to object to a license on national security grounds. Additionally, failure to reach concurrence would result in license denial, which is consistent with the presumption of denial that is the foundation of H.R. 2581, as reported by the International Relations Committee. The amended section would also restore key elements of S. 149 regarding further resolution of conflicts if the initial interagency committee cannot reach a unanimous decision, thus streamlining the decision-making process so as to allow for timely determinations of export decisions. At each level, however, failure to reach concurrence would result in license denial, unless appealed to the next higher level or the President determines otherwise.

The committee believes the interagency dispute resolution process proposed under both S. 149 and H.R. 2581 would give too much authority to the Secretary of Commerce, would skew decisions toward the interests of the business community, and would fail to give the Secretary of Defense a role in the process commensurate with his duties, responsibilities, and expertise. For example, under S. 149 and H.R. 2581, license disputes would be resolved at the first level through the unilateral decision of a chairperson selected by the Secretary of Commerce. Appeals would be allowed under these bills, but the process for decision-making at these higher levels of appeal, at least in S. 149, would be based on majority vote. The committee is concerned that the Secretary of Defense could easily be outvoted during a license dispute—and the license approved—even though the Secretary of Defense has unique expertise and insight with regard to national security, and the item in question had clear national security implications.

SECTION 506—ENFORCEMENT

The committee amendment would modify this section to require the Secretary of Commerce, if a country has obstructed or denied post-shipment verifications (PSVs), to deny a license for the export of those items (or any substantially identical or directly competitive

items or class of items) to all end users in that country until such post-shipment verification is allowed. The standard used in the underlying bill would have only required the Secretary of Commerce to take such action if a country had repeatedly obstructed or denied post-shipment verification.

Given that the GAO raised the issue of post-shipment verification enforcement as a major weakness in the U.S. export control system, and cited the fact that the People's Republic of China has obstructed U.S. post-shipment verification efforts for years the committee believes that requiring license denial for repeated obstruction is too subjective (if not too lenient) a standard. As amended, the Secretary would be required to deny licenses under this section if a country obstructs any U.S. enforcement efforts.

TITLE VII—EXPORT OF SATELLITES

The committee amendment would modify the bill to retain the current law provisions on satellite exports of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105–261).

H.R. 2581 as reported by the International Relations Committee would have overturned these provisions and returned jurisdiction for most satellite and related exports to the Department of Commerce from the Department of State. The committee did not find sufficient evidence of problems with this arrangement to justify changing the prevailing law. In testimony before the committee, the Department of Defense noted its support on this issue by endorsing S. 149, which retained existing law. In addition, significant concerns remain about the national security implications of satellite exports. For these reasons, the committee recommends retaining the State Department's authority over these items.

SECTION 807—TECHNICAL AND CONFORMING AMENDMENTS

The committee amendment would strike subsection (k) of this section which would repeal provisions of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105–85) regarding high performance computing technology. As explained in the new section 221, such repeal would be conditional upon required Administration actions and reports.

COMMITTEE POSITION

On March 6, 2002, the Committee on Armed Services ordered H.R. 2581, as amended, reported to the House with a favorable recommendation by a vote of 44–6, a quorum being present.

FISCAL DATA

Pursuant to clause 3(d)(2)(A) of rule XIII of the Rules of the House of Representatives, the committee attempted to ascertain annual outlays resulting from the bill during fiscal year 2003 and the four following fiscal years. The results of such efforts are reflected in the cost estimate prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which is included in this report pursuant to clause 3(c)(3) of rule XIII of the Rules of the House.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402(a) of the Congressional Budget Act of 1974 is as follows:

MARCH 8, 2002.

Hon. BOB STUMP,
Chairman, Committee on Armed Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2581, the Export Administration Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs), Angela Seitz (for the state and local impact), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Export Administration Act of 2001

H.R. 2581 would replace the expired Export Administration Act of 1979 (EAA) and would update the system of export controls and penalties for national security and foreign policy purposes. Since the expiration of the EAA in August 2001, the President has extended export controls pursuant to his authority under the International Emergency Economic Powers Act. The Bureau of Export Administration (BXA) in the Department of Commerce administers export controls. This bill would authorize such activities through 2005.

CBO estimates that implementing H.R. 2581 would cost about $310 million over the 2002–2007 period, assuming appropriation of the necessary funds. Because the bill would increase criminal and civil penalties for violations of export controls, CBO estimates governmental receipts would increase by $3 million in 2005 and $7 million a year thereafter. The increase in criminal penalties would cause direct spending from the Crime Victims Fund to rise by about $1 million in 2006 and $3 million in subsequent years. Because the bill would affect direct spending and receipts, pay-as-you-go procedures would apply.

H.R. 2581 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

The bill would impose private-sector mandates as defined by UMRA on certain exporters. CBO estimates that the total direct cost of those mandates would fall below the annual threshold established by UMRA for private-sector mandates ($115 million in 2002, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of the bill is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 050 (national defense), and 150 (international affairs).

	By fiscal year, in millions of dollars—					
	2002	2003	2004	2005	2006	2007
CHANGES IN REVENUES AND DIRECT SPENDING						
Estimated Revenues	0	0	0	3	7	7
Estimated Budget Authority	0	0	0	0	1	3
Estimated Outlays	0	0	0	0	1	3
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
EAA Spending by the Bureau of Export Administration:						
Estimated Authorization Level	39	86	87	90	0	0
Estimated Outlays	11	98	85	90	13	5
EAA Spending by the Departments of State and Defense:						
Estimated Authorization Level	2	2	2	2	0	0
Estimated Outlays	1	3	2	2	0	0
Total Proposed Changes:						
Estimated Authorization Level	41	88	89	92	0	0
Estimated Outlays	12	101	87	92	13	5

Basis of estimate: H.R. 2581 would authorize the BXA to control the export of certain items from the United States for national security or foreign policy purposes. Generally, export controls would not apply to products that are widely distributed through normal commercial channels. For this estimate, CBO assumes that H.R. 2581 will be enacted in the spring of 2002. When fully phased in, CBO estimates that provisions of the Export Administration Act of 2001 would increase revenues by about $7 million a year beginning in fiscal year 2006 and direct spending by about $3 million a year beginning in 2007. In addition, we estimate that implementing the bill would cost $310 million over the 2002–2007 period, assuming appropriation of the necessary amounts.

Revenues

Since the expiration of the Export Administration Act of 1979 in August 2001, criminal and civil penalties for violating export control laws have been collected under the International Economic Emergency Powers Act. H.R. 2581 would significantly raise the maximum criminal fines that could be imposed for violations of export controls. The bill would set the maximum criminal fines at 10 times the value of the exports involved, or $5 million for corporations and $1 million for individuals, whichever is greater. Under the bill, civil penalties of up to $500,000 could also be imposed for violations of the law. On average, about three years elapse between the initial investigation of violations of export control law and the collection of a penalty. Because the amount of a fine is based on the law in force at the start of an investigation, CBO does not expect penalties under the new law to be collected until fiscal year 2005. Based on information from the Department of Commerce, CBO estimates that enacting the bill would increase receipts from civil penalties by about $4 million a year and receipts from criminal penalties by about $3 million a year beginning in 2006.

Direct spending

Collections of criminal fines are recorded in the budget as governmental receipts (i.e., revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. CBO estimates that the additional direct spending resulting from the increase in criminal penalties would be about $3 million a year beginning in

2007, because spending from this fund generally lags behind the collection of criminal fines by about a year.

Spending subject to appropriation

H.R. 2581 would authorize the appropriation of between $72 million and $76 million a year for the BXA to implement the provisions of the bill during the 2002–2005 period. Also, the bill would authorize additional appropriations of at least $3.5 million annually to hire 20 employees to establish a best practices program for exporters, at least $4.5 million annually to hire 10 overseas investigators, $5 million to enhance the BXA's program to verify the end use of controlled exports, at least $5 million to procure a computer system for export licensing and enforcement, and $4 million annually to hire and train additional license review officers.

CBO estimates that the BXA has already received an appropriation of $55 million for fiscal year 2002 to implement the Export Administration Act. The bill would authorize a total of $72 million for this year. This estimate assumes the additional $17 million would be provided in a supplemental appropriation this spring. Also, CBO estimates that implementing a best practices program for exporters would cost about $4 million a year, stationing overseas investigators would cost about $5 million a year, and procuring the computer system would cost about $2 million in 2002 and $3 million in 2003. Any such spending would be subject to appropriation of the necessary amounts. Based on BXA's historical spending patterns, CBO estimates that implementing the bill would cost the agency about $302 million over the 2002–2007 period. This estimate assumes that funds are appropriated for the BXA through 2005, as provided in section 506 of the bill.

H.R. 2581 also would require the Departments of State and Defense to review the classification of exports under the new rules established by the bill, and to make any recommendations concerning these rules to the Department of Commerce. Based on information from the Departments of State and Defense, CBO assumes that those two agencies would need to hire additional staff to conduct these reviews. CBO estimates that implementing these provisions would cost about $1 million in 2002 and $8 million over the 2002–2005 period.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act establishes pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects through 2006 are counted.

	By fiscal year, in millions of dollars—										
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Changes in outlays	0	0	0	0	1	3	3	3	3	3	3
Changes in receipts	0	0	0	3	7	7	7	7	7	7	7

Estimated impact on state, local, and tribal governments: H.R. 2581 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: The bill would require pharmaceutical companies that apply for licenses to export certain test articles, including drugs, medical devices, biological products, and additives, to undertake new procedures. Such firms would have to identify each clinical investigation concerning those articles involving human subjects and submit proof that the protocols for each investigation have been examined by an institutional review board. Based on information from the Pharmaceutical Research and Manufacturers of America and the Food and Drug Administration, CBO estimates that the cost to identify and submit proof of review would be small and that few test articles would be subject to the new procedures.

The bill would prohibit implements of torture from being exported to certain countries. According to the Bureau of Export Administration, the number of prohibited instruments would be minimal. Historically, the value of such exports has been small.

H.R. 2581 also would require exporters not currently filing their applications through the Automated Export System (AES) to do so. Based on information from the Bureau of Export Administration, the number of additional exporters that would now be required to file through the AES would be minimal.

Previous CBO estimate: On September 21, 2001, CBO transmitted an estimate for H.R. 2581, as ordered reported by the House Committee on International Relations on August 1, 2001. Previously, on April 2, 2001, CBO completed an estimate of S. 149, the Export Administration Act of 2001, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on March 22, 2001.

Both these prior estimates contained CBO's estimates for increases in revenues and direct spending resulting from higher civil and criminal penalties. Based on new information from the BXA, CBO now estimates that enacting either H.R. 2581 or S. 149 would increase penalty collections by $7 million a year and direct spending by $3 million a year when fully phased in.

CBO estimates that implementing H.R. 2581, as ordered reported by either the House Committee on International Relations or the House Committee on Armed Services, would increase the discretionary costs of the Departments of State and Defense by a total of $8 million during the 2002–2005 period. CBO did not anticipate any such increases in cost for these departments as a result of S. 149.

On November 9, 2001, CBO transmitted a private-sector mandate statement for H.R. 2581, as ordered reported by the House Committee on International Relations on August 1, 2001. Both versions of H.R. 2581 contain the same private-sector mandates. CBO determined that S. 149 contained no private-sector mandates as defined by UMRA.

Estimate prepared by: Federal Costs: Ken Johnson; Federal Receipts: Erin Whitaker; Impact on State, Local, and Tribal Governments: Angela Seitz; and Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis and G. Thomas Woodward, Assistant Director for Tax Analysis.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d) of rule XIII of the Rules of the House of Representatives, the committee generally concurs with the estimate contained in the report of the Congressional Budget Office.

OVERSIGHT FINDINGS

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, this legislation results from hearings and other oversight activities conducted by the committee pursuant to clause 2(b)(1) of rule X.

With respect to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974, this legislation does not include any new spending or credit authority, nor does it provide for any increase or decrease in tax revenues or expenditures. The fiscal features of this legislation are addressed in the estimate prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the committee has not received a report from the Committee on Government Reform and Oversight pertaining to the subject matter of H.R. 2581.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8 of the United States Constitution.

STATEMENT OF FEDERAL MANDATES

Pursuant to section 423 of Public Law 104–4, this legislation contains no federal mandates with respect to state, local, and tribal governments, nor with respect to the private sector. Similarly, the bill provides no unfunded federal intergovernmental mandates.

RECORD VOTE

In accordance with clause 3(b) of rule XIII of the Rules of the House of Representatives, a record vote was taken with respect to the committee's consideration of H.R. 2581, as amended. The record of this vote can be found on the following page.

The Committee on Armed Services ordered H.R. 2581, as amended, reported to the House with a favorable recommendation by a vote of 44–6, a quorum being present.

COMMITTEE ON ARMED SERVICES
107TH CONGRESS
ROLL CALL

Final Passage of H.R. 2581 **Date: 3/6/02**
as Amended

Voice Vote **Ayes** **Nays**

Rep.	Aye	Nay	Present	Rep.	Aye	Nay	Present
Mr. Stump	X			Mr. Skelton	X		
Mr. Hunter	X			Mr. Spratt	X		
Mr. Hansen	X			Mr. Ortiz	X		
Mr. Weldon	X			Mr. Evans	X		
Mr. Hefley	X			Mr. Taylor		X	
Mr. Saxton	X			Mr. Abercrombie	X		
Mr. McHugh	X			Mr. Meehan	X		
Mr. Everett	X			Mr. Underwood	X		
Mr. Bartlett	X			Mr. Blagojevich			
Mr. McKeon	X			Mr. Reyes	X		
Mr. Watts	X			Mr. Allen	X		
Mr. Thornberry				Mr. Snyder		X	
Mr. Hostettler	X			Mr. Turner	X		
Mr. Chambliss	X			Mr. Smith		X	
Mr. Hilleary	X			Ms. Sanchez			
Mr. Jones	X			Mr. Maloney	X		
Mr. Graham	X			Mr. McIntyre	X		
Mr. Ryun	X			Mr. Rodriguez	X		
Mr. Riley				Ms. McKinney			
Mr. Gibbons	X			Ms. Tauscher		X	
Mr. Hayes				Mr. Brady			
Mrs. Wilson				Mr. Andrews	X		
Mr. Calvert				Mr. Hill		X	
Mr. Simmons	X			Mr. Thompson	X		
Mr. Crenshaw				Mr. Larson (CT)	X		
Mr. Kirk	X			Mrs. Davis (CA)	X		
Mrs. Davis (VA)	X			Mr. Langevin	X		
Mr. Schrock	X			Mr. Larsen (WA)		X	
Mr. Akin	X						
Mr. Forbes	X						
Mr. Miller	X						
Mr. Wilson (SC)	X						

Roll Call Vote Total

44 Aye **6 Nay** **Present**

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported by the Committee on International Relations, are shown in Report 107–297 part I, filed on November 16, 2001.

Changes to existing law made by section 221(d) of the bill, as reported by the Committee on Armed Services, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, and existing law in which no change is proposed is shown in roman):

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1998

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DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

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TITLE XII—MATTERS RELATING TO OTHER NATIONS

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[Subtitle B—Export Controls on High Performance Computers

[SEC. 1211. EXPORT APPROVALS FOR HIGH PERFORMANCE COMPUTERS.

[(a) PRIOR APPROVAL OF EXPORTS AND REEXPORTS.—The President shall require that no digital computer with a composite theoretical performance level of more than 2,000 millions of theoretical operations per second (MTOPS) or with such other composite theoretical performance level as may be established subsequently by the President under subsection (d), may be exported or reexported without a license to a country specified in subsection (b) if the Secretary of Commerce, the Secretary of Defense, the Secretary of Energy, the Secretary of State, or the Director of the Arms Control and Disarmament Agency objects, in writing, to such export or reexport. Any person proposing to export or reexport such a digital computer shall so notify the Secretary of Commerce, who, within 24 hours after receiving the notification, shall transmit the notification to the Secretary of Defense, the Secretary of Energy, the Secretary of State, and the Director of the Arms Control and Disarmament Agency.

[(b) COVERED COUNTRIES.—For purposes of subsection (a), the countries specified in this subsection are the countries listed as "Computer Tier 3" eligible countries in section 740.7(d) of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997, subject to modification by the President under subsection (e).

[(c) TIME LIMIT.—Written objections under subsection (a) to an export or reexport shall be raised within 10 days after the notification is received under subsection (a). If such a written objection to the export or reexport of a computer is raised, the computer may

be exported or reexported only pursuant to a license issued by the Secretary of Commerce under the Export Administration Regulations of the Department of Commerce, without regard to the licensing exceptions otherwise authorized under section 740.7 of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997. If no objection is raised within the 10-day period, the export or reexport is authorized.

[(d) ADJUSTMENT OF COMPOSITE THEORETICAL PERFORMANCE.—The President, in consultation with the Secretary of Commerce, the Secretary of Defense, the Secretary of Energy, the Secretary of State, and the Director of the Arms Control and Disarmament Agency, may establish a new composite theoretical performance level for purposes of subsection (a). Such new level shall not take effect until 60 days after the President submits to the congressional committees designated in section 1215 a report setting forth the new composite theoretical performance level and the justification for such new level. Each report shall, at a minimum—

[(1) address the extent to which high performance computers of a composite theoretical level between the level established in subsection (a) or such level as has been previously adjusted pursuant to this section and the new level, are available from other countries;

[(2) address all potential uses of military significance to which high performance computers at the new level could be applied; and

[(3) assess the impact of such uses on the national security interests of the United States.

[(e) ADJUSTMENT OF COVERED COUNTRIES.—

[(1) IN GENERAL.—The President, in consultation with the Secretary of Commerce, the Secretary of Defense, the Secretary of Energy, the Secretary of State, and the Director of the Arms Control and Disarmament Agency, may add a country to or remove a country from the list of covered countries in subsection (b), except that a country may be removed from the list only in accordance with paragraph (2).

[(2) DELETIONS FROM LIST OF COVERED COUNTRIES.—The removal of a country from the list of covered countries under subsection (b) shall not take effect until 120 days after the President submits to the congressional committees designated in section 1215 a report setting forth the justification for the deletion.

[(3) EXCLUDED COUNTRIES.—A country may not be removed from the list of covered countries under subsection (b) if—

[(A) the country is a "nuclear-weapon state" (as defined by Article IX of the Treaty on the Non-Proliferation of Nuclear Weapons) and the country is not a member of the North Atlantic Treaty Organization; or

[(B) the country is not a signatory of the Treaty on the Non-Proliferation of Nuclear Weapons and the country is listed on Annex 2 to the Comprehensive Nuclear Test-Ban Treaty.

[(f) CLASSIFICATION.—Each report under subsections (d) and (e) shall be submitted in an unclassified form and may, if necessary, have a classified supplement.

[(g) DELEGATION OF OBJECTION AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE.—For the purposes of the Department of Defense, the authority to issue an objection referred to in subsection (a) shall be executed for the Secretary of Defense by an official at the Assistant Secretary level within the office of the Under Secretary of Defense for Policy. In implementing subsection (a), the Secretary of Defense shall ensure that Department of Defense procedures maximize the ability of the Department of Defense to be able to issue an objection within the 10-day period specified in subsection (c).

[(h) CALCULATION OF 60-DAY PERIOD.—The 60-day period referred to in subsection (d) shall be calculated by excluding the days on which either House of Congress is not in session because of an adjournment of the Congress sine die.

[SEC. 1212. REPORT ON EXPORTS OF HIGH PERFORMANCE COMPUTERS.

[(a) REPORT.—Not later than 60 days after the date of the enactment of this Act, the President shall provide to the congressional committees specified in section 1215 a report identifying all exports of digital computers with a composite theoretical performance of more than 2,000 millions of theoretical operations per second (MTOPS) to all countries since January 25, 1996. For each export, the report shall identify—

[(1) whether an export license was applied for and whether one was granted;

[(2) the date of the transfer of the computer;

[(3) the United States manufacturer and exporter of the computer;

[(4) the MTOPS level of the computer; and

[(5) the recipient country and end user.

[(b) ADDITIONAL INFORMATION ON EXPORTS TO CERTAIN COUNTRIES.—In the case of exports to countries specified in subsection (c), the report under subsection (a) shall identify the intended end use for the exported computer and the assessment by the executive branch of whether the end user is a military end user or an end user involved in activities relating to nuclear, chemical, or biological weapons or missile technology. Information provided under this subsection may be submitted in classified form if necessary.

[(c) COVERED COUNTRIES.—For purposes of subsection (b), the countries specified in this subsection are—

[(1) the countries listed as "Computer Tier 3" eligible countries in section 740.7(d) of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997; and

[(2) the countries listed in section 740.7(e) of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997.

[SEC. 1213. POST-SHIPMENT VERIFICATION OF EXPORT OF HIGH PERFORMANCE COMPUTERS.

[(a) REQUIRED POST-SHIPMENT VERIFICATION.—The Secretary of Commerce shall conduct post-shipment verification of each digital computer with a composite theoretical performance of more than 2,000 millions of theoretical operations per second (MTOPS) that is exported from the United States, on or after the date of the enactment of this Act, to a country specified in subsection (b).

[(b) COVERED COUNTRIES.—For purposes of subsection (a), the countries specified in this subsection are the countries listed as

"Computer Tier 3" eligible countries in section 740.7 of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997, subject to modification by the President under section 1211(e).

[(c) ANNUAL REPORT.—The Secretary of Commerce shall submit to the congressional committees specified in section 1215 an annual report on the results of post-shipment verifications conducted under this section during the preceding year. Each such report shall include a list of all such items exported from the United States to such countries during the previous year and, with respect to each such export, the following:

[(1) The destination country.

[(2) The date of export.

[(3) The intended end use and intended end user.

[(4) The results of the post-shipment verification.

[(d) EXPLANATION WHEN VERIFICATION NOT CONDUCTED.—If a post-shipment verification has not been conducted in accordance with subsection (a) with respect to any such export during the period covered by a report, the Secretary shall include in the report for that period a detailed explanation of the reasons why such a post-shipment verification was not conducted.

[(e) ADJUSTMENT OF PERFORMANCE LEVELS.—Whenever a new composite theoretical performance level is established under section 1211(d), that level shall apply for purposes of subsection (a) of this section in lieu of the level set forth in subsection (a).

[SEC. 1214. GAO STUDY ON CERTAIN COMPUTERS; END USER INFORMATION ASSISTANCE.

[(a) IN GENERAL.—The Comptroller General of the United States shall submit to the congressional committees specified in section 1215 a study of the national security risks relating to the sale of computers with a composite theoretical performance of between 2,000 and 7,000 millions of theoretical operations per second (MTOPS) to end users in countries specified in subsection (c). The study shall also analyze any foreign availability of computers described in the preceding sentence and the impact of such sales on United States exporters.

[(b) END USER INFORMATION ASSISTANCE TO EXPORTERS.—The Secretary of Commerce shall establish a procedure by which exporters may seek information on questionable end users in countries specified in subsection (c) who are seeking to obtain computers described in subsection (a).

[(c) COVERED COUNTRIES.—For purposes of subsections (a) and (b), the countries specified in this subsection are the countries listed as "Computer Tier 3" eligible countries in section 740.7(d) of title 15 of the Code of Federal Regulations, as in effect on June 10, 1997.

[SEC. 1215. CONGRESSIONAL COMMITTEES.

[For purposes of sections 1211(d), 1212(a), 1213(c), and 1214(a) the congressional committees specified in those sections are the following:

[(1) The Committee on Banking, Housing, and Urban Affairs and the Committee on Armed Services of the Senate.

[(2) The Committee on International Relations and the Committee on Armed Services of the House of Representatives.]

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CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, March 8, 2002.

Mr. Chairman, due to the enhanced security measures around the Capitol, I was unable to return to the committee hearing room until just after the vote had concluded on the Manager's Amendment to H.R. 3581, the Export Administration Act of 2001. Please let the record reflect that had I been present on Wednesday, March 2, 2002, I would have voted yea, in favor of the Manager's Amendment to H.R. 2581.

Thank you,

ROBIN HAYES.

DISSENTING VIEWS OF HON. GENE TAYLOR

Mr. Chairman, I voted not to favorably report H.R. 2581 to the House because I believe that enactment of this legislation will make it easier to export technology that may ultimately be used by those who seek to threaten or bring harm upon the national security interests of the United States.

I applaud the efforts of Chairman Stump in offering his "manager's amendment" to H.R. 2581 which addressed the obvious flaws of the underlying bill. Unfortunately, I believe that this measure may contain other provisions that, if enacted, unintentionally weaken existing national security safeguards that protect the flow of sensitive dual-use technology to the global marketplace.

I regret that H.R. 2581 was sent to this committee under sequential referral and that such a small period of time was allotted to us to ensure that the bill was properly considered. The subject of export control of dual-use technology is a grave matter. It demands the full attention of this committee without unrealistic time constraints being attached to it. Legislation that makes far-reaching changes to such a complex area of national security policy should never be considered in haste.

Therefore, I could not in good conscience consent to this committee's action to positively report H.R. 2581 to the House.

GENE TAYLOR.

DISSENTING VIEWS OF REPRESENTATIVES ADAM SMITH, ELLEN TAUSCHER, AND RICK LARSEN

We are writing to express serious reservations with H.R. 2581 as amended and passed by the House Armed Services Committee. The underlying version of the Export Administration Authorization (EAA) that we considered—reported by the House International Relations Committee—had fundamental flaws. Instead of making progress toward improving this legislation, we believe the amendments adopted by our committee moved H.R. 2581 further in the wrong direction. As such, we voted against this measure and would like to outline some of the flaws that we believe undermine efforts to develop and implement a new effective system of national security export controls.

1. The export of high performance computing technology amendment will tie the President's hands by ordering him to develop a product-specific export monitoring and control system. H.R. 2581 does not dictate to the President how he should control any other specific class of products and technology. It doesn't tell the President how, for example, to control products and technology used to produce chemical and biological weapons. The President, drawing on the expertise of the Departments of Defense, Commerce, State and Energy, is capable of deciding how high performance computing technology should be controlled for national security purposes. The Administration is already considering a range of options for improved computer export controls. This amendment is counterproductive since it prejudges those deliberations.

2. The deemed export provision will also tie the President's hands and complicate valuable science exchanges between American companies and our allies. The Administration has already recognized the need to improve the export control system for deemed exports. Rather than forcing a particular system on the President, this Committee should provide him the flexibility to draw on the expertise in the Departments of Defense, Commerce, State and Energy to develop and implement the best possible system.

3. By substituting "could" for "would", the presumption of denial and the license review process create such a vague statutory standard that the authority to administer export controls in a manner that effectively advances U.S. national security will be compromised. In practice, such a vague standard will frustrate the effective administration of export controls by misdirecting focus and resources away from exports that are most relevant to U.S. national security interests.

4. The foreign availability and mass market amendment is another example of a proposal that is problematic. If a product is either available from foreign sources or available in such mass quantities as to be impossible to control, then a related multilateral export control regime is flawed since it makes no sense to use scarce

resources to control products that are not susceptible to being controlled.

5. The interagency dispute resolution process is a problem. It will force the President to become an export licensing officer since the requirement of unanimous concurrence at the interagency level will clearly force the President to become involved.

6. The export of commercial communications satellites to NATO allies and other friendly countries will continue to be a problem for US manufacturers by dropping Title VII of the HIRC-reported bill. The HIRC amendment had retained all the national security provisions written into law by this Committee in 1998 and 1999 and also maintained all current legislative and administrative bars to launching in China. The deletion of this provision will simply make it easier for foreign competitors of this important industry to undermine our US companies.

We believe that speedy passage of effective EAA legislation is critical to heightening our national security and strengthening our nation's economy. Unfortunately, as adopted by our committee, this legislation falls short on both of these goals. In addition, we are attaching a letter sent by House Democratic Leader Gephardt to Speaker Hastert—we believe this letter clearly outlines why passage of EAA is so crucial and we echo his calls for swift movement on this legislation.

We look forward to continuing our work on this important measure as it moves through the legislative process and to the Floor of the House.

ADAM SMITH.
ELLEN TAUSCHER.
RICK LARSEN.

RICHARD A. GEPHARDT
MISSOURI
DEMOCRATIC LEADER

H-204 U.S. CAPITOL
202-225-0100

Congress of the United States
House of Representatives
Office of the Democratic Leader
Washington, DC 20515–6537

February 26, 2002

The Honorable J. Dennis Hastert
House of Representatives
H 232 U.S. Capitol
Washington, DC 20515

Dear Mr. Speaker:

I am writing to urge you to schedule the Export Administration Act (EAA) for House floor consideration this year at the earliest possible time.

As you know, several House committees of jurisdiction have had the opportunity to consider this legislation for several months. Resulting delays in bringing the legislation before the full House of Representatives have prevented America's export control regime from being updated to reflect current technological reality. Further delays will only exacerbate this situation. Last year, the Senate passed an EAA bill acceptable to the Bush Administration and many in Congress by a 85 to 14 margin, clearly demonstrating that export control reform is a bipartisan issue with broad support.

It is disappointing that Congress has not passed a new EAA since 1990. We live in an era of rapid and accelerating technological change, and U.S. companies are at a competitive disadvantage due to our outdated export control regime. Export markets for U.S. technology companies plummeted in 2001 because of the weak global economy. The passage of EAA reform can enhance the economic recovery of our technology companies by helping to increase their exports.

In the aftermath of September 11, Members are right to be concerned about the export of technologically advanced products to rogue nations. Proliferation of technology that undermines our national security is unacceptable. However, the Senate was able to craft a bill that contains adequate safeguards to block exports of critical technologies. In addition, the President continues to have the maximum discretion to prohibit high-technology exports even further in situations that threaten national security.

The Honorable J. Dennis Hastert
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I look forward to hearing from you regarding the prompt scheduling of the EAA for floor consideration. I pledge to work with you to build a bipartisan coalition to pass an EAA bill that can emerge from a conference with the Senate in an expeditious manner.

Sincerely,

Richard A. Gephardt

Richard A. Gephardt
House Democratic Leader

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