STATEMENT OF

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Dr. Baruch has described for you the proposed Government Patent Policy Act that the Administration has drafted for consideration by the Congress. The National Science Foundation has been actively involved -- along with the Department of Commerce, the Justice Department, and many other agencies -- in developing and drafting that proposal. The Foundation actively supports it, for three principal reasons:

First, the Foundation is a research-support agency, with most of the research we support performed by universities and small businesses. The NSF therefore shares with other research-support agencies a concern for the effect of Government patent policy on research performers and has a special concern for its effect on universities and small businesses. The President's proposal would be a major plus for them.

Second, the Foundation has a special interest, reflecting the President's personal interest, in drafting legislation and regulations so that they are as clear and comprehensible as the subject and the substance permit. In drafting the President's proposal the Administration has tried very hard

to develop a logical and comprehensible structure and to use plain English. We believe the resulting difference is more than cosmetic.

Third, and most important, the Foundation is the agency within the Government whose special responsibility is for science and the dissemination and use of science for the benefit of the public. The President's proposal would do much to spur innovation and bring the fruits of Government-supported science to the public.

I expanded on each of these three points in testimony two weeks ago before the two Senate Committees interested in this issue. Rather than repeat myself on all of them here, I should like to submit a copy of my statement there for inclusion in this record.

Today I would like to stress three additional points:

(1) The President's proposal has the same primary objective and embodies almost the same approach to that objective as other proposals pending before the Congress.

(2) The emergence of that much consensus, and indeed the achievement of an Administration consensus on a bill with that primary objective and that basic approach, offers the best opportunity ever for enactment of high-quality comprehensive legislation on Government patent policy.

(3) The President's proposal has several valuable features that deserve your special attention as we work toward such a bill.

Common Objective and Approach of Pending Proposals

As you know the President's bill comes to a Congress that already has before it other bills on Government patent policy. There are some differences among these bills, but most striking is what they have in common.

They all have the same primary objective: to stimulate commercial development and public benefit of inventions that result from research sponsored or supported by the Government. They all preserve for such inventions the exclusivity provided by the U.S. patent system for inventions generally. They all do so for the same reason: to give incentive and investment protection to those who will bear the costs and risks of development, production, and marketing that someone must bear if inventions are to become useful innovations.

Moreover, they all employ the same basic approach: allocation of principal rights to the contractor. The President's proposal differs from the other pending bills only in preserving a licensing role for the Government in markets (or, in the jargon of the patent business, fields of use) where the contractor has no deep or immediate interest.

The Opportunity to Break Through

This commonality of objective and approach seem to me a remarkable development.

Government patent policy is a topsy-turvy world where what seems most plausible, or even obvious, to a fair-minded citizen who comes new to the subject turns out after deeper consideration and experience to be least workable and least effective. As you know better than I, it is not easy to work such an issue through a diffuse political system where many of those who have important roles have little time to examine any but the most major issues in depth. Thus, such an issue -- this issue in particular -- tests our ability to govern effectively in a complex system of representative democracy such as we have in the United States and value so highly.

In this context the success the Carter Administration has had, after many previous efforts had failed, in producing a bill representing a consensus on the primary objective and the basic approach I have described, is a very encouraging development. It certainly should be seen as such by all those who understand the value and importance of that objective and that approach.

Now, with consensus hopefully emerging in the Congress as well on this long-debated issue, the opportunity for enactment of high-quality, comprehensive Government-patent-policy legislation is the best we have ever had. To achieve that long-sought and important end, we must reason together toward legislation that embodies the best thinking of all involved, and that can be passed. For our part, the Administration has no intention of being stubborn or prideful about our particular product.

Special Virtues of the President's Bill

Still, it took a long and painstaking effort to produce that product, in the course of which many points of view were heard and taken into account. The resulting product has, we think, distinctive virtues that deserve serious consideration by others as we proceed in the political process. Let me call out four that seem particularly important.

First, the President's bill makes a new and unique effort to address what has been the weakness of the basic approach that gives principal rights to the contractor. The contractor often has no deep interest, or no interest at all, in developing or licensing an invention outside its regular markets. The invention might nonetheless have substantial potential application in other markets if someone would be its champion there. Unless the contractor declares its willingness to

make a serious licensing effort in such other markets or fields of use, therefore, this bill would give the Government sufficient rights and authority to let it be the champion there. Even if the Government only modestly succeeds in stimulating development of innovation where none would otherwise have occurred, the sum of what it achieves and what the contractor achieves will be more than either would have achieved alone.

Second, the President's bill takes particular care to respond to a historic concern about the basic approach that gives principal rights to the contractor: possible harm to competition. The bill's "second look" section and its "march-in" sections include provisions that specifically invoke the antitrust laws. I will not say more about that, because you will be hearing from the antitrust experts.

Third, the President's bill establishes what seems to me just the right degree of flexibility within a coherent, consistently administered policy. The "second look" provision in section 203 and the deviation and waiver provisions in section 207 are the keys here. Comprehensive standard Government patent-policy legislation would take us out of an era when virtually every department and agency has, in practical effect, its own patent policy. (Indeed, some have multiple policies, because they are subject to

more than one statutory provision.) The flexibility allowed by the President's bill would not change that result. All that we in the agencies really need to achieve consistency is a clear policy decision that makes sense and freedom from the twenty-odd different statutes that now lead us in twenty-odd different directions. What we do not need is a strait-jacket that would require us to subordinate agency missions and program objectives to rigid "uniformity" in this derivative aspect of our business or to ignore the special circumstances of particular cases.

We understand the concern of those who have been struggling with the present system -- with the vagaries of agency policies that respond to shifting political signals in an area where there has been no political consensus. But this bill or another comprehensive bill along the same lines would establish a political consensus, backed by extensive legislative history, and give clear guidance to the agencies. We believe the agencies will respond responsibly. If experience should later demonstrate, as I think it will not, that more rigidity is necessary or desirable, it could be provided by regulations, by Executive Order, or by legislation. In the meantime, agencies, programs, and constituencies will have time to adjust to the new circumstances, and any problems with agency discretion will emerge with specificity and clarity.

Fourth and finally, the President's bill employs plain English within a clear and logical structure.

I do not mean to claim that the Act will be easy reading for someone new to the subject. This is, after all, a complex and technical area; patent law is almost a profession in itself. We cannot avoid using its specialized terms -- "exclusive license", "field of use", "author's certificate", and so on. Nor can we avoid complex and technical provisions. Too many considerations must be accomodated within the rules established to permit simple solutions.

We can, however, avoid the whereases, thereupons, convoluted constructions, and half-page uninterrupted sentences that still unfortunately abound in Federal statutes and regulations. We can also structure the statute to make it as easy as possible to follow and understand and to highlight its principal provisions. Those things the Administration has tried to do in drafting this legislation. I do not argue that we have succeeded completely, but I think we have succeeded substantially.

In our view, this is not a minor virtue, having to do only with the surface of things.

Not far from the surface, of course, "plain English" drafting reduces the length of the legislation and makes it easier to understand. All those who have to work with the legislation -- especially laymen and those new to the subject, but experienced practitioners too -- will therefore be saved both effort and frustration.

A deeper contribution of "plain English" drafting is to the substantive formulation and subsequent operation of the statute. By making what is said plainer, it ensures that those who are to implement or comply can easily understand what is expected of them. It also minimizes the unintended ambiguities that create disputes in the administration of the statute. It thus enhances the effectiveness of the law and the respect paid to both spirit and letter.

Most deeply, "plain English" highlights remaining flaws and issues that unfamiliar legalisms and convoluted structure would obscure. This is a vital, substantive service for drafters, legislators, and the public.

To us, indeed, eliminating obscurity would be one of the great virtues not only of the style in which the legislation is drafted, but of the legislation itself. Whether this bill, or another bill like it, can ultimately resolve

all the issues in Government patent policy remains to be seen. But speedy enactment of such legislation will remove the thicket of laws, Executive issuances, and regulations that now obscures this area. It will highlight the issues and allow us to move on to refinement of a coherent, comprehensive policy. It will also allow us to move on to related, probably more important, issues from which the tedious and seemingly endless debate on Government patent policy has been keeping us.

We hope such legislation will be enacted in this Congress. We are anxious to work with you toward that end.