Statement of Daniel B. Poneman
Before the Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
U.S. Senate
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Dear Mr. Chairman and members of the Subcommittee: I am honored to appear before you to testify on reforming the export licensing agencies to advance national security and economic interests. The subject is timely, as reform of US export controls is long overdue, and the prospect of a new presidential administration creates a rare opportunity to put our house in order.

My experience in this area is rooted in the six years I spent at the National Security Council, where my responsibilities included interagency coordination regarding US export controls.

I will be blunt. The US export control system is broken. It was designed for a world that no longer exists. When the last major rewrite of the Export Administration Act (EAA) entered into force, the hammer and sickle still flew above the Kremlin, the Berlin Wall stood tall, the strategy of containment of Soviet Communism unified the policies and practices of the United States and its allies, the United States had unique and unchallenged technological superiority across the spectrum of military technologies, the United States also had the ability, through the Coordinating Committee on East-West Trade (or CoCom), to veto technology exports from any and all of its Western allies to our Communist adversaries, and Pentagon procurements comprised the principal engine for military innovation.

The US system of export controls was based on two statutes. The Arms Export Control Act governed munitions exports and the EAA governed dual-use exports. The EAA, in turn, was divided into sections providing for "national security controls" (supporting US participation in CoCom) and "foreign policy controls" (which category ended up including all non-CoCom controls, ranging from restraints on implements that could be used for torture to the full array of nonproliferation controls). The agencies responsible for implementing these controls counted on the expertise of officials who could at least secure the advice of procurement officials who understood the nature of the technology to be controlled.

All that has changed. The Cold War has ended. The Berlin Wall has fallen and Germany has been reunified. CoCom has been dissolved. CoCom's successor, the Wassenaar Arrangements, do not allow one government to veto a proposed export of another. Globalization has led to the proliferation of technology to individuals and officials around the world, undermining the possibility that a "Fortress America" approach to export controls could succeed in preventing advanced military technologies. The source of our military strength now results from the innovation that gives us a technological edge over our adversaries, and that innovation often comes from the private sector (*e.g.*, information technology) rather than from the government.

Meanwhile, the Federal Government has been unable to update its structures to adapt to this new reality. Advancing technology has blurred the lines between munitions and dual-use items. The increasingly anachronistic and arbitrary division of dual-use export controls into "national security" controls and "foreign policy" controls, with two very different sets of rules and procedures, persists. Moreover, the bureaucratic tangle that has long plagued the interagency administration of US export controls also continues. Indeed, that internal division and stress characterizes relations both within and between the Legislative and Executive branches, to the point where it has been impossible to enact an updated version of the Export Administration Act.

Thus, we are left with the embarrassing fact that year after year our whole system of export controls rests on the power of the president to invoke the International Economic Emergency Powers Act.

What is to be done? For years we have witnessed a variety of attempts either to rewrite or revise the system of US export controls. All have failed.

We need to go to first principles. Why do we have export controls? Three objectives dominate:

1. To protect US and allied military advantage over our adversaries;
2. To send a political signal to -- or impose a cost upon -- another government;
3. To avoid US involvement in actions contrary to US values.

The first objective is fundamental to our national security. But to design an export control system to protect our military advantage we need to understand the source of that advantage. As noted above, increasingly the source of our military advantage is our technical superiority over our adversaries. That technical superiority increasingly relies on investment in new technologies in the commercial sector. That investment, in turn, depends on companies' success in generating sufficient revenues to underwrite research and development. Thus, to the extent that export controls place an undue burden on US companies and their competitiveness in an increasingly global marketplace, those controls actually become counterproductive and hurt US security.

Of course, many export controls do not pose "undue" burdens, for example, those that ensure that gap-closing technologies not widely available do not fall into the wrong hands. An "undue" burden implies either that the technology is so widely available that US controls cannot be effective, or that the controls themselves are so onerous that the benefit in averting diversion of the technology in question is outweighed by the burden on the technological advance of the US exporter.

The second objective of an export control is to impose a commercial burden on a trading partner in order to show political disapproval or, conversely, to remove an existing control to reward positive actions by another government. Here, too, before imposing such a control, the US Government should weigh the benefit of that political message against the burden that would fall disproportionately on the US exporter of the controlled item (as opposed to being evenly borne by all citizens), both as a matter of fairness and of undermining our technological edge.

The third objective is the least complicated. The United States, for example, would never permit the export of implements of torture. It would not matter if such implements were easily obtained elsewhere, or whether no other nation on earth restricted such exports, since the export of such items is abhorrent to the values embraced by all Americans.

From those principles flow certain implications about how to structure the US export control system. Before trimming our sails to acknowledge the political difficulties of far-reaching reform, let me sketch out an ideal for purposes of discussion:

- First, the Export Administration Act should be rewritten, starting with a set of objectives of the US export control system, which then drive the structure of our statutory controls. The anachronistic division of the law into national security and foreign policy controls would be removed. Instead, the law would be divided into sections on multilateral and unilateral controls. Unilateral controls should only be authorized to the degree that

rigorous cost-benefit analyses established that they were on balance beneficial to the United States. The President would sign the revised EAA into law.

- Second, under this new law all US export controls would be implemented pursuant to generally-accepted standards of good government. Specifically --

    - License applications would be addressed in a timely manner according to fixed deadlines, agencies would have full transparency into license applications but would have an affirmative obligation to object. In other words, silence on an application would be deemed to constitute consent to the granting of the license. Thus, the process would default to a decision, not default to inaction or paralysis.

    - An agency objecting to the granting of a license could appeal a decision to approve the license, only in such case as the higher-level interagency representative – such as a Senate-confirmed presidential appointee – "pulled up" the application from below. This would encourage officials to take responsibility for making decisions, rather than simply "passing the buck" to a higher level.

    - The head of the export processing function would be accountable both to the President and to the Congress, reporting periodically on the implementation of US export controls, with explanations for failure to comply fully with the deadlines or other requirements of the system.

    - Instead of the current system of parallel processes for munitions and dual-use items, a single system would be applied to both commodity jurisdiction and licensing determinations. Executive Order 12981, of December 5, 1995, would provide a good starting point for a system that would allow every agency transparency into – and a say in – all classification or licensing decisions, while imposing the procedural disciplines necessary for US export controls to comply with traditional standards of good government. This would ensure procedural fairness among the agencies, and prevent "forum shopping" by exporters looking for the "easiest" approval.

    - In order to protect the ability of the US Government to exercise critical discretion to slow or stop any particular export that presented a threat to US national security, the export control system would need a "national security kick-out" provision that would permit the President to suspend the procedural disciplines in any given case, provided that the President justified that action in a letter to the Congressional leadership.

    - At the outset of this new system, the Executive Branch would review all existing controls with a view to eliminating all unilateral controls that could not be justified under the newly-enacted standards. It would also consider adoption of mechanisms to "right-size" the license application pool to the resources dedicated by the US Government to administer controls. For example, pre-approval of qualified companies to export (subject to federal audit), block approval of a series of licenses all linked to the same system, etc., could be used to prevent the system from becoming overloaded to the point of producing inevitable processing errors and delays. This list review should produce "higher fences around fewer items".

- Once the initial list review is complete, the US Government would abandon large-scale list reviews, in which federal employees would seek to establish clear and detailed definitions of which goods, services, and technologies fell into which categories. This has always been a cumbersome process, and often takes longer to conduct than the technology generations to which it relates. Rather, the license application review process itself would define which items required different levels of control. In essence, our commodity jurisdiction and classifications would be implemented more under a "common law" than a "civil code" approach.

- Third, the US Government would seek to hire qualified personnel to implement this export control system, and would provide opportunities for advancement and other benefits consistent with establishing a career path able to attract people qualified to perform this critical task well.

I do not suggest that this is the only approach to reforming US export controls. I recognize that starting from scratch and going back to first principles could generate fierce debate, and may fail in the end. But I also believe that tinkering around the edges of our current export control system may offer a palliative but no lasting solution to a problem that has dogged the US Government at least since the end of the Cold War. Now, as we face the prospect of a new Administration in less than a year, is precisely the right time to go back to first principles and seek to design an export control system that is most likely to advance US national security for the years ahead, by blocking the transfer of sensitive items that could hurt US and allied interests, while protecting the investment and innovation that nourish the roots of our military superiority. Only a system based on first principles can re-establish the broad consensus, across party lines and between the branches of government, necessary to restore US export controls to the level of effectiveness and efficiency that every American has a right to expect.