THE WHITE HOUSE

WASHINGTON

February 22, 1984

MEMORANDUM FOR WENDELL W. GUNN

FROM: LEHMANN K. LI

SUBJECT: Status of National Productivity and Innovation Act

You asked for an update of the status of the National Productivity and Innovation Act. Following is a brief summary.

-- A coalition of industry associations and individual companies led by the National Association of Manufacturers (NAM) had developed in January a consensus proposal focusing on amending the antitrust laws for joint R&D ventures.

-- There was an article in the Bureau of National Affairs Reporter which portrayed NAM as the leader of the proposal.

-- On seeing the article, Senator Thurmond became wary of supporting the industry coalition bill because he did not want to perceived as carrying the industry's water. There is not much likelihood that the industry coalition bill will pass.

-- Senator Thurmond is waiting to see how the House Judiciary Committee is progressing on the bill. He will probably wind up moving title II of the Administration's bill.

-- Congressman Rodino is circulating a draft of his own bill among members of the House Judiciary Committee. Basically, it is very similar to Title II of the Administration's bill. The House bill should move along fairly smoothly.

THE WHITE HOUSE

WASHINGTON

December 30, 1983

MEMORANDUM FOR WENDELL GUNN
SPECIAL ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT

FROM: FRED F. FIELDING
COUNSEL TO THE ~~PRESIDENT~~

SUBJECT: New York County Lawyers' Association, Committee on Federal Legislation Report on "National Productivity and Innovation Act of 1983"

Attached for your information is a report forwarded to the President by the Committee on Federal Legislation of the New York County Lawyers' Association on S. 1841, the "National Productivity and Innovation Act of 1983." We have thanked the Chairman of the Committee, Richard A. Givens, for providing us with this report.

37
F. Fielding

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 VESEY STREET
NEW YORK, N. Y. 10007
(212) 267-6646

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December 9, 1983

Hon. Ronald Reagan
The President
The White House
Washington, D.C. 20500

My dear Mr. President:

Enclosed please find copy of report adopted by the Committee on Federal Legislation of the New York County Lawyers' Association on S. 1841.

Very truly yours,

RICHARD A. GIVENS

Chair

Botein, Hays, Sklar & Herzberg
200 Park Avenue
New York, NY 10017

December, 1983 Report No. F-2 S.1841

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street - New York 10007

COMMITTEE ON FEDERAL LEGISLATION

Report on "National Productivity and Innovation Act of 1983"

S. 1841, 98th Cong., 1st Sess. (1983) is the Reagan Administration's proposal to reform Federal antitrust and intellectual property laws applicable to research and development joint ventures. Its purpose is to encourage innovation and stimulate trade.

The proposed legislation entitled the "National Productivity and Innovation Act of 1983" is divided into four substantive titles. Title I simply names the bill.

Title II

Title II attempts to encourage joint research and development programs by preventing the courts from defining such ventures to be per se illegal under the antitrust laws. In addition, parties to a joint research and development program which has been fully disclosed to the proper authorities would be immune from treble damage liability in a private antitrust suit. Government antitrust actions and private suits seeking single damages or injunctive relief would remain unaffected.

In defining "joint research and development program," the bill does not specifically exclude actual full-scale commercial development, marketing and promotion. We believe that the line between joint research and development and joint production must be drawn as carefully as possible so as to avoid extending an antitrust exemption to subsequent full scale commercial production. Otherwise, joint research could lead to joint activity in all phases of subsequent conduct of a line of business in a way detrimental to competition.

No pure research and development joint venture to date has been declared unlawful, let alone per se illegal, by a court of law.[1] However, to the extent antitrust fears may deter useful joint research and development, such a prohibition on per se illegality could prove beneficial.

Considering the remote exposure to antitrust liability for a true joint research and development program, antitrust concerns, in our view, do not pose the most serious obstacles to future research and development projects.

---

[1]See generally, U.S. Department of Justice, Antitrust Division Antitrust Guide Concerning Joint Research Ventures (1980), reproduced in BNA ATRR No. 992 (Spec. Supp. 12/4/80).

In many instances, it is the desire to get there first that induces firms to pursue such projects independently. And most often, competition is more effective in stimulative innovation than the combined efforts of competition.

Yet, in a small but important number of situations, joint research may be the only practicable alternative. In order to encourage joint undertakings for such projects, it might prove effective to offer more than a mere exemption from treble damage liability. If a proposed joint research and development project is in the national interest, but too expensive or risky to be undertaken without collaboration then (a) an absolute exemption should be granted, and (b) all government agencies, to the extent appropriate, also ought to assist the project in the furtherence of its objectives by means within their existing powers.

The decision as to which joint research and development projects merit such assistance could be left to the President or a designated governmental agency. From time to time, the President or the agency involved could designate technologies, the development of which would be vital to the national interest by reason of their economic, strategic, environmental or other importance. All such designations and any modifications or withdrawals would be published in the Federal Register.

In making these designations, the President could obtain and consider the views of governmental agencies such as the National Science Foundation, the Defense Department and the Environmental Protection Agency, as well as private industry, academic institutions, the scientific community, labor and the public.

A joint research and development project undertaken to develop a designated technology would be exempt from action under the antitrust laws provided certain limited disclosures were made to the Attorney General and the Federal Trade Commission. Such projects would also be entitled to whatever necessary assistance other governmental agencies could reasonably, lawfully and appropriately provide.

Any project filed with the Attorney General or the FTC could be subject to review for a limited time at the outset before the exemption became effective to make sure it would not defeat the purpose of the exemption, and the right to exclusive ownership of patented discoveries resulting from such efforts would be conditioned upon exploitation by one or more of the joint venturers.

A further approach might be to create a National Technology Development Bank along the lines of S.3111 of 1976 proposed by Senators Javits, Humphrey and Mathias, as recommended by this

Committee at that time. A corporation could be established to assist in funding high risk technological and scientific research which would help to meet vital national needs in conjunction with financing by the private sector.[2]

The purpose of the corporation would not be to provide federal loans or subsidies for ongoing commercial businesses, but rather to encourage innovation through research and development. "In pursuit of this objective, even conservative economists have little trouble justifying government intervention. It is generally agreed that the innovations resulting from R & D provide social returns--in improved quality of life, jobs, and expansion of knowledge--that far exceed the private investor's return on his outlay."[3]

Titles III and IV

Title III would prohibit the courts from condemning agreements concerning intellectual property as illegal per se under the antitrust laws. It would also eliminate the potential for treble damage liability in connection with intellectual property licensing. Title IV would effectively eliminate the doctrines of patent and copyright misuse.

With the exception of price fixing, very little conduct is considered by the courts today to be per se illegal under the antitrust laws to the extent that no justifications are considered. It is a rare judge who will not admit evidence proffered by an antitrust defendant concerning the economic justification for, or the procompetitive effects of, the conduct being challenged, if such can reasonably be claimed to exist.

Without evidence that the antitrust laws are actually stifling desirable licencing arrangements, we would oppose any extension of the rights to exclude competition already accorded holders of patents and copyrights. The objective of promoting innovation may not necessarily be furthered effectively by disrupting the delicate balance achieved by our patent and copyright laws between rewarding innovation and promoting competition.

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[2]A copy of the Committee report filed in March, 1976, providing more details is attached.

[3]Cover Story, Business Week, July 4, 1983 at page 62.

Title V

Title V would extend the exclusive rights of the holder of a process patent to products made by the patented process. It would also create a rebuttable presumption that a product that could have been made by use of a patented process was, in fact, so made, thereby shifting the burden of proof to the defendant in such an infringement suit.

This proposal would inhibit United States importers from importing goods manufactured abroad by a process currently patented in the United States, unless authorized by the patent holder. Because importers would bear the burden of ascertaining production methods, they would be reluctant to import without obtaining full production process information, which their foreign suppliers might often be unwilling to furnish for fear of revealing trade secrets.

The existing Tariff Act already appears to provide sufficient protection for patent holders. In 1940, Congress amended the Tariff Act, giving the importation of products produced by a patented process the same status as the importation of patented products, 19 U.S.C. §1337a.

Repeated prior legislative efforts to restrict the right to import further have been defeated, because no need for restriction could be demonstrated.[4] Before extending the rights granted patentees further, there should be compelling evidence that the benefits of such a step would outweigh the harm to competition.

CONCLUSION

We commend the Administration for its effort to promote joint research and development programs and reduce the risks of antitrust anxiety among potential joint venturers. We urge that any antitrust exemption be carefully limited to pure research and development programs so as to exclude subsequent full scale commercial production and marketing.

For those willing to undertake research and development projects deemed vital to our national interest, we also advocate greater assistance. We think it critical that all agencies, to the extent appropriate, use their existing powers to assist such projects in furthering their objectives.

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[4] See General Revision of the Patent Laws, 1968, Hearing on S. 2, S. 1042, S. 1377, S. 1691, S. 2164, S. 2597 before the U.S. Senate Subcommittee on Patents, Trademarks, and Copyright, 90th Cong., 2d Sess. 731 (1968); General Revision of the Patent Laws, 1967, Hearings on H.R. 5924, H.R. 13951 before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 90th Cong. 1st Sess., 146 (1967).

We oppose the proposed amendments to the intellectual property laws as unnecessary and likely to inhibit healthy competition. We believe deletion of these titles would simplify the legislation without impairing its objectives. The purpose of the proposed legislation are vital to the nation. We believe it can be further improved by the changes recommended here.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION

Richard A. Givens, Chair*

Wendell B. Alcorn, Jr.
Thomas Charles Bivona
Judith K. Braun
Robert Stephen Clemente
William Francis Connell
William Stephen DeCarlo
Nanette Dembitz
Carolruth Feinman
Howard Brett Felcher
John W. Finley, Jr.
Jack Harold Halperin
George Joseph Koelzer
Robert Elihu Kushner
George William Leopold, Jr.
Rory Michael McLaughlin
Virginia Hudson Phifer
James W. Rayhill
David A. Schmudde
Milton Sherman
Harrison J. Snell
Brian Weiss

Denis McInerney, Ex-Officio
M. Robert Goldstein, Ex-Officio

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*Abstaining as to Title V.

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street - New York 10007

COMMITTEE ON FEDERAL LEGISLATION

Report on S. 3111, to create a national research and technology corporation

RECOMMENDATION: APPROVAL

S. 3111, 94th Cong., 1st Sess. (1975) introduced by Senators Javits and Humphrey would establish a corporation for the purpose of assisting in funding high-risk technological and scientific research which would help to meet vital national needs, in conjunction with financing by the private sector.

The bill would establish a National Technology Development Corporation which would function along the lines of the Export-Import Bank. The Corporation would assist research in specified areas including energy and materials resources, pollution and waste-disposal and resource recovery, and other critical environmental problems as well as to provide the basis for avoiding future resource crises.

The Board of Directors would consist of seven members with staggered 3-year terms and ex-officio members from specified agencies. A technical advisory panel would define categories within which assistance could be granted, subject to disapproval by either House of Congress. The panel would consist of 15 members including representatives from science and environment-oriented Federal agencies.

Assistance would be granted in the form of loans and guarantees of loans. In return for the high-risk financing to be given, the Corporation would be authorized to receive a share in the equity or royalties of the applicant. The Corporation would also be empowered to waive any liability of a parent of an applicant if necessary to secure participation needed for research to be undertaken.

An initial capital of up to $5 billion is authorized to be appropriated, additional power to issue obligations guaranteed by the Treasury is granted, and the Treasury is authorized to buy Corporation obligations subject to Congressional disapproval of the amounts of proposed Treasury financings.

The bill follows in many respects recommendations made by this Committee in its report No. F-5 of June, 1972, as well as those of the Special Committee on Consumer Affairs of The Association of the Bar of the City of New York in its report "A National Energy or Technology Development Bank," 29 Record of The Ass'n of the Bar of the City of New York 718 (December 1974).

The use of specialized financial institutions by Congress to permit long-term funding on an investment basis of wholly or partially self-liquidating projects for national purposes is not new.[1] Recent examples include the Export-Import Bank among others. The advantages include the following:

(a) Establishment of a revolving fund permitting additional investments without additional expenditures from outside the fund.

(b) Ability to make long-term commitments vital to scientific research, which often requires planning ahead for more than one year if it is to be effective.[2]

(c) Treatment of investments as investments rather than current expenditures.

(d) Ability to utilize private-sector investments together with investments by the institution, thereby conserving the funds of the latter.

(e) Ability to utilize scientific advisory boards to assist in long-term planning.

The need for priority attention to research and development today is clear and contested by few. Recent reports indicate that the technological position of the United States is weakening[3] despite increased challenges which require more, rather than less research and development. These challenges include:

(1) The beginning of exhaustion of scarce resources, requiring both development of substitutes and development of technologies using less of the scarce resources (including energy).

(2) The continuing urgent need to develop technologies which are environmentally sound. This is needed both to protect the environment and to protect the jobs and economic activity supported by former methods which have been found to create environmental hazards.

(3) The need to raise productivity to combat cost-push inflation which produces both higher living costs and unemployment.

(4) The need for independence from cutoffs of essential resources by foreign cartels acting for political reasons or to obtain higher prices.

(5) The specific urgent need for environmentally sound new energy sources.

(6) The need to develop safer consumer products, such as to give one example, flame retardent sleepwear.[4]

Statistics show that the percentage of national income devoted to research and development has actually fallen in recent years despite increased needs in these areas.[5] S. 3111 will help to overcome this critical problem.

Support for the approach taken by the bill has been expressed by diverse sources ranging from former Treasury Secretary John Connally,[6] and America magazine[7] and Representative Thomas Downey who has offered a related House bill, H.R. 10259, 94th Cong., 1st Sess. (1975), which we also approve.

The bills provide for publication of categories in which loans and guarantees might be made and for congressional and public participation in decision-making. Congress may disapprove such categories by vote of either House.

Creation of such an institution would not duplicate the functions of any existing agencies, such as the National Science Foundation or the Energy Research & Development Administration, which are funded on an annual basis and do not have a revolving fund capable of investments in consortiums with private capital in high-risk ventures. The existing agencies would be able to provide advice to the proposed corporation, and also to draw upon it as a funding source for critical projects requiring research which neither these agencies nor the private sector alone could sustain.[8] Examples of the types of high-risk efforts which such a corporation might support might include accelerated controlled nuclear fusion research (to be contrasted with existing fission technologies which yield radioactive byproducts)[9] and collection of solar energy in space,[10] as well as other long-term new energy source research.[11]

S. 3111 is a logical extension of the technology assessment movement, which is designed to lead to better decisions as to what technologies are desirable.[12] The negative phase of the movement, concerned with stopping harmful technologies,[13] needs to be complemented by a positive aspect, permitting affirmative development of technologies needed by society. New technologies which could encourage new industries could also help to create new competition and thereby promote the objectives of the antitrust laws.[14]

From a larger perspective, S. 3111 would help to place our decision-making processes more closely in tune with the needs of the last quarter of the twentieth century. No longer are stop-gap measures sufficient. Long-term thinking and long-term financing of research to meet critical needs are now essential.

Technology has been criticized for leading to many of the evils we now confront. The criticism should be directed at lack of long-term thinking in the use of technology and in decisions as to what technologies are needed, rather than at technology itself. S. 3111 would go far in providing a legal structure for meeting this challenge, and we recommend its approval.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION

Vincent L. Broderick, Chairman

Edward Arkin	William J. Isaacson
Albert Xavier Bader	Eric M. Javits
Charles F. Brennan, Jr.	Jack Kaplan
Edward Brodsky	Herbert Lebovici
Arthur Brooks	Eileen Lerman
John Henry Doyle, III	Robinson Markel
Stephen V. Dubin	Gary P. Naftalis
Arnold L. Fein(Hon.)	Peter Repetti
Richard A. Givens	John A. Ronayne
Edward J. Guardaro	Lea S. Singer
Stephen David Hoffman	Anita Streep

John Joseph Tigue, Jr.

FOOTNOTES

1. E.g., First National Bank of the United States (1 Stat. 191 (1791)) Second Bank of the United States (3 Stat. 266 (1816)); National Bank Act of 1864 (13 Stat. 99 (1864)); Federal Farm Loan Act (39 Stat. 360 (1916)); Federal Home Loan Bank Act (47 Stat. 725 (July 22, 1932)); Home Owners Loan Act of 1933 (48 Stat. 128 (1933)); Federal Farm Mortgage Corporation Act (48 Stat. 344 (1934)); Export Import Bank Act of 1945 (59 Stat. 526 (1945)); for origin of the Reconstruction Finance Corporation see 47 Stat. 5 (January 22, 1932) for use of the Corporation in connection with aid at the end of World War II, see 61 Stat. 105 (1947); 61 Stat. 134 (1947); concerning creation of new communities, see Housing & Urban Development Act of 1970, Public Law 91-609, 84 Stat. 1793. (12/31/70); see also National Housing Goals, Hearings before the Subcommittee on Housing, House Committee on Banking & Currency, 91st Cong., 1st Sess. 595-598 (1969); Staff Report, New York Regional Office, FTC, Inquiry into the Challenge of Expansion of the Building and Construction Industry (placed on public record by the Federal Trade Commission in May 1973). Methods of funding used in the past have included permitting obligations of an institution to be used in making payments due to the United States, First Bank of the United States, Section 10, 1 Stat. 191 (1791); National Bank Act of 1864, Section 23 (except duties on imports), 13 Stat. 99 (1864). Another method has been authorizing bonds issued by institutions to be guaranteed by the United States. Reconstruction Finance Corporation Act, 47 Stat. 5 (1932); Federal Farm Mortgage Corporation Act, 48 Stat. 344 (1934). Such obligations can be non-interest bearing. Reconstruction Finance Corporation Act, Section 9, 47 Stat. 5 (1932). Another financing method is to provide that the Secretary of the Treasury purchase the obligations of the institution. RFC Act, Section 9, supra; Federal Home Loan Bank Act, Section 6(f), 47 Stat. 725 (1932); Home Owners Loan Act of 1933, Section 4, 48 Stat. 128 (1933); Export-Import Bank Act, Section 6, 59 Stat. 526 (1945). Congressional power appears to be plenary in regard to the types of financing it may choose to employ. See Norman v. B. & O. R.R. Co., 294 U.S. 240, 303 (1935); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Veazie Bank v. Fenno, 75 U.S. 533 (1869); compare Guaranty Trust Co. v. Henwood, 307 U.S. 247 (1939); McCulloch v. Maryland, 17 U.S. (Wheat.) 316 (1819); and see Thayer, "Legal Tender," 1 Harv. L. Rev. 73 (1887).

2. Federal Incentives for Innovation, Hearings before the Special Subcommittee on Science, Technology and Commerce, Senate Committee on Commerce, 93d Cong., 1st Sess. (1973) Serial 93-57 at 47; National Science Policy, Hearings before the Subcommittee on Science, Research & Development of the House Committee on Science & Astronautics, 91st Cong., 2d Sess. 20 (1970).

3. See Boffey, "Science Indicators: New Report Finds U.S. Performance Weakening," Science, 3/12/76, p. 1031.

4. See Luncheon Address by Richard A. Abbott, Vice-President, Montgomery Ward, February 21, 1974, before the American Apparel Manufacturers Association.

5. National Science Foundation, "National Patterns of R&D Resources, Funds & Manpower in the United States, 1953-1975," (NSF 75-307).

6. See Safire, "...And I Will Be Heard.," N.Y. Times 5/22/75, p. 39.

7. Current Comment, America, 8/30/75, Vol. 133, No. 5, p. 84-85.

8. Compare Jesse Jones, Fifty Billion Dollars: Story of the RFC (1951).

9. See Post & Ribe, "Fusion Reactors as Future Energy Sources," 186 Science 397 (11/1/74).

10. See O'Neill, "Space: A Place in the Sun," N.Y. Times, 6/12/75, p. 37; O'Neill, "Colonies in Orbit," N.Y. Times Magazine, 1/18/76, p. 10.

11. Compare "Energy Research Policy Alternatives," Hearing before Senate Committee on Interior & Insular Affairs Pursuant to S. Res. 45, 92d Cong., 2d Sess. (1972).

12. See Technology Assessment Act of 1972, 86 Stat. 797 (1972), 2 U.S.C. 471 (1962).

13. Compare Alvin Toffler, Future Shock (1970).

14. See Worsinger, "New Technologies and Antitrust," 47 N.Y. State B.J. 651 (Dec. 1975).

THE WHITE HOUSE

WASHINGTON

October 17, 1983

MEMORANDUM FOR ROGER B. PORTER
WENDELL W. GUNN
MARY JO JACOBI

FROM: LEHMANN K. LI

SUBJECT: Innovation Legislation Status

The status of the Administration's proposed innovation legislation is as follows.

We held a briefing in EOB 194 on October 13th for the major industry associations, both high tech and traditional ones. Bill Baxter and Jerry Mossinghoff presented the Administration bill.

This week, Mary Jo, Rick Rule, and I have met or will meet with representatives from the three industry groups that are probably most important: Control Data Corporation, Semiconductor Industry Association, and Electronic Industries Association.

There are primarily two issues that have emerged from the discussions. First, William Norris (Control Data) and Bobby Inman (MCC) have strongly argued for eliminating uncertainty by establishing standards that joint R&D ventures can meet to gain immunity from antitrust suits. Justice argues that we can live with standards that maintain sufficient flexibility to differentiate procompetitive from anticompetitive joint R&D ventures and to accomodate changing technology. However, Justice has not yet seen and frankly doubts that anyone can come up with such standards.

Second, Norris and Inman have been pressing for mandatory licensing of new technology after three years of discovery. They apparently are pressing this issue because: a) they think it is necessary to promote sufficient dissemination of technology; and b) they perceive it as a price for gaining standards for antitrust immunity. Justice argues that we should not force joint ventures to license their technology. We are arguing against mandatory licensing in international fora, for example, Law of the Sea. Moreover, it does not look as though there will be adequate standards developed. Hence, mandatory licensing will not have to be a quid for standards.

Mary Jo, Rick, and I have tentatively concluded that it is unlikely that the Administration and Messrs. Norris and Inman will find common ground on the above two issues. It appears that there is little support from most industry groups for mandatory licensing. In addition, Congressman Rodino is not particularly enthusiastic about mandatory licensing.

Roger and Bill Baxter should go ahead soon with their meeting with Norris and Inman in any case so that no one can accuse the Administration of not keeping an open mind on this issue.

I have drafted a letter from Jack Svahn and Faith Whittlesey to send to various interested companies and associations. Sherrie Cooksey is currently reviewing the letter to ensure that it is not inconsistent with anti-lobbying restrictions.

On the legislative front, the Senate Judiciary Committee is holding hearings on the Administration bill on September 26th. Messrs. Baldrige, Mossinghoff, Baxter, and Herz (NSF General Counsel) are scheduled to testify. The Committee is holding a separate hearing on November 9th for other interested parties.

In the House, the House Science and Technology Committee is marking up on October 26th the Fuqua bill, H.R. 4043, which summarized a number of different approaches on joint R&D ventures antitrust reform.

The House Judiciary Subcommittee on Monopolies and Commercial Law, chaired by Rodino, will decide this week whether it wants to go ahead and mark up a joint R&D venture bill or hold more hearings. Rodino will probably develop a new bill that combines the Administration's and Congressman Fish's approaches, which would be fine with us.

At this point, it looks like the House Judiciary Committee will report in either this session or early next session a bill which addresses only the relationship between the antitrust laws and joint R&D ventures. While not necessarily opposed to Titles III-V of the Administration bill, Rodino probably does not want a complicated bill. The Senate Judiciary Committee will probably report the entire Administration bill in either this session or early next session. If both Houses pass their respective bills, two possibilities would exist:

1. Not wanting to deal with Titles III-V because House hearings were not held on them, the House conferees force those provisions off the final bill. We then wind up with a joint R&D venture bill, which would be all right with us.

2. Because the House Judiciary subcommittee dealing with patents manages to hold hearings on Titles III-V of the Administration bill, the House conferees feel comfortable accepting those provisions in the final bill. We then wind up with basically the Administration's original proposal.

To

Date 7-27 Time 930

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THE WHITE HOUSE

WASHINGTON

July 16, 1983

Bill Maxwell
Jim Murr
of OMB
Dick Rule

MEMORANDUM FOR EDWIN L. HARPER
ROGER B. PORTER
WENDELL W. GUNN
MICHAEL M. UHLMANN

FROM: LEHMANN K. LI

SUBJECT: Presidential Radio Address on Innovation

Attached is a proposed draft of a radio address the President might want to make proposing the National Innovation and Productivity Act of 1983. The draft covers innovation issues in general, and focuses on the joint R&D provision in particular. It does not include specific mention of the detrebling or intellectual property changes because they would require a great deal of time to explain, considering the radio address would only be for 6 to 7 minutes. But if you think they are important to address, we can include a more elaborate discussion of them.

Also attached is a proposed Presidential Statement proposing the legislation. The Statement goes into greater detail about the legislation, describing briefly each of the titles. This 4 page Statement was condensed from a 16 page version Justice sent.

In terms of timing, as I understand it, OMB should be finished clearing the bill within the next few days. We should have the rest of the package done or close to being done. Assuming all goes on track, the President could make the radio address this coming Saturday, July 23rd.

I would strongly urge that the President personally announce this proposed legislation. It really represents one of the President's strongest efforts to enhance innovation and hence U.S. industrial competitiveness. Particularly given all the recent discussion of an "industrial policy" for the United States, a Presidential announcement would show how the Administration can improve U.S. industrial competitiveness without industrial targeting.

Attachments

PRESIDENTIAL RADIO TALK: INNOVATION LEGISLATION
SATURDAY, JULY 23, 1983

My fellow Americans:

You have heard a great deal of discussion in recent years about the issue of U.S. industrial competitiveness. Foreign competitors have provided tough competition for many of our industries, ranging from traditional industries like steel to "high technology" industries like semiconductors. There are many factors which account for the difficulties that many of our industries are facing, including a strong dollar, high labor costs, and insufficient capital formation.

Perhaps one of the most important factors determining the ability of U.S. industry to restore and enhance its competitiveness is its ability to create and develop new technologies. Technology provides the economy with the ability to produce new or improved goods and services and to produce more efficiently those products already out on the market.

What does technology mean in terms of affecting our daily lives? It means jobs. The development of the computer, for example, has created employment for about 350,000 people in the computer industry. It means a higher standard of living. We can travel farther and faster because of developments in aeronautics. We can live longer and better because of new medical technologies. Technology also means more competitive U.S. industries. America's great competitive edge lies not in our having lower labor costs than other countries, but in our

inventing and developing new ideas.

New technologies sometimes come from serendipidity. But they usually come from systematic research undertaken in both the private and public sectors. We have taken many steps to increase research and development in the public sector and encourage R&D in the private sector. I proposed in my fiscal year 1984 budget an increase in federal R&D funds of 17 percent to $47 billion.

To encourage the approximately $44 billion in R&D conducted by the private sector each year, we have done a number of things. The lower inflation and interest rates resulting from our economic program have reduced substantially the cost of conducting research for companies. The Economic Recovery Tax Act included a provision for a 25 percent tax credit on the additional amount of R&D conducted by companies.

Two major areas of legislation affecting innovation are the antitrust and intellectual property laws. The antitrust laws are based on the notion that our economy is best served by vigorous competition among independent commercial entities. Nevertheless, those laws are sensitive to the fact that in some areas, like the creation and development of technology, cooperation among those entities may be necessary to maximize the well-being of consumers. The intellectual property laws benefit the economy by providing inventors and innovators exclusive rights to the products of their creative genius. However, the intellectual property laws, as currently interpreted, often discourage innovation.

After reviewing the effect of the antitrust and intellectual

property laws on innovation, I have concluded that a few, relatively minor modifications could greatly enhance the ability of the private sector to create and develop technology. Hence, I am proposing legislation entitled the National Innovation and Productivity Act of 1983.

Perhaps the most important aspect of the bill is the revised treatment of joint R&D ventures under the antitrust laws. The increasing complexity of research and development of technology has increased the benefits of large scale R&D efforts. These large scale projects are often beyond the scope of any individual company's ability to undertake. Particularly given the R&D efforts of foreign competitors, it may very well be the case that allowing cooperation among U.S. companies to conduct joint R&D can enhance competition.

Nevertheless, there is a widespread perception in American industry that the antitrust laws discourage joint R&D efforts. The threat of competitors not participating in the joint R&D project suing the project's members discourages companies from cooperating in such activities. Hence, my proposed bill would address this problem first, by clarifying that joint R&D ventures may not be deemed illegal per se: and second, for those joint R&D ventures that have been fully disclosed to the Justice Department and the Federal Trade Commission, by providing immunity from any antitrust suit brought by private parties and from damage suits brought by the government. If the joint R&D venture is still anticompetitive, the government could still challenge it. Hence, the proposed bill would eliminate the deterrent that legal

uncertainty has on joint R&D efforts, while still retaining adequate safeguards against anticompetitive activities.

The rest of the proposed legislation includes other provisions amending the antitrust, patent, and copyright laws. The net effect of these changes would be to encourage the creation and development of new technologies. For too long, government has hindered the ability of U.S. industry to compete effectively in international markets. I strongly urge the Congress to pass this proposed legislation as a means of encouraging innovation, and hence increasing employment opportunities and standard of living for all Americans.

Thank you and God bless you.

DRAFT PRESIDENTIAL STATEMENT ON THE NATIONAL INNOVATION AND PRODUCTIVITY ACT OF 1983

Today I am proposing the National Innovation and Productivity Act of 1983. This Act represents my Administration's efforts to promote technological progress by amending the federal antitrust and intellectual property laws.

The competitiveness of United States industry will depend in large measure on its ability to create and develop new technologies. Technology provides the economy with the ability to produce new or improved goods and services and to produce more efficiently the goods and services that already exist. The development of the computer, for example, has not only created employment for about 350,000 people in the computer industry, it has dramatically improved the competitiveness of many basic and service industries as well.

New technologies occasionally come from serendipidity. But they usually come from systematic research undertaken in both the private and public sectors. I proposed in my fiscal year 1984 budget an increase in federal research and development funds of 17 percent to $47 billion. But much of the national R&D effort is done by the private sector as well. The National Science Foundation estimates that industry will invest $44 billion in R&D in 1983.

For U.S. industry to maintain its competitive edge, it will have to invest a greater proportion of its resources in R&D. The lower inflation and interest rates resulting from my economic program and certain provisions in the Economic Recovery Tax Act

have encouraged greater private sector investment in R&D. To stimulate such investment further, I am proposing legislation to amend the federal antitrust and intellectual property laws. The antitrust laws are based on the notion that our economy is best served by vigorous competition among independent commercial entities. Nevertheless, those laws are sensitive to the fact that in some areas, like the creation and development of technology, cooperation among those entities, even competitors, may be necessary to maximize the well-being of consumers. The intellectual property laws benefit the economy by providing inventors and innovators with exclusive rights to the products of their creative genius.

However, after a review of the effect of these laws on innovation, the Administration has concluded that a few, relatively minor modifications could greatly enhance the ability of those laws to foster increased growth in technology. The National Innovation and Productivity Act of 1983 embodies these modifications. This Act would have the following provisions.

Title II would modify the current treatment of joint R&D ventures under the antitrust laws. Currently, there is a widespread perception in U.S. industry that because of uncertainty as to future legal interpretations, the antitrust laws discourage procompetitive joint R&D ventures. Industry worries that after heavily investing in such ventures, it may be faced with the threat of a treble damage suit from a disgruntled competitor who has been excluded from the venture. Title II would address this problem first, by clarifying that joint R&D ventures may

not be deemed per se illegal; and second, for those joint R&D ventures that have been fully disclosed to the Justice Department and the Federal Trade Commission, by providing immunity from any antitrust suit brought by private parties and from damage suits brought by the government.

Title III would eliminate the potential of treble damage liability under the antitrust laws for all practices except for those that are plainly and inherently anticompetitive. By amending the law to include prejudgment interest for the first time, this provision would assure that those who suffer injury as a result of an antitrust violation will be made whole. At the same time, by eliminating treble damage liability for conduct that is not clearly wrong under the law, this provision minimizes the deterrence that the antitrust laws may have on potentially beneficial practices.

Title IV would encourage innovation by assuring that intellectual property licensing is treated reasonably under the antitrust laws. This provision would alleviate occasional judicial hostility shown toward intellectual property in antitrust suits by expressly prohibiting courts from condemning transactions involving intellectual property as per se illegal.

Title V would preclude courts from classifying conduct as patent or copyright misuse on the ground that the conduct somehow suppressed competition. Courts could classify such conduct as misuse only after determining by meaningful analysis that the conduct constituted a violation of the antitrust law.

Title VI would classify the sale in the U.S. of a product made by a process covered by a U.S. patent as an infringement of the process patent, regardless of where in the world the patent is practiced. This provision would have the effect of encouraging more R&D in new processes, as well as products, and discourage U.S. firms from moving production facilities abroad simply because of a loophole in the patent law.

In conclusion, the National Innovation and Productivity Act of 1983 would remove disincentives, and add incentives, for the creation and exploitation of new technology. Hence, not only would my proposal enhance the competitive position of U.S. firms in international markets, but it should also materially improve the quality of life for all Americans.

THE WHITE HOUSE

WASHINGTON

August 17, 1983

MEMORANDUM FOR ROGER B. PORTER

FROM: LEHMANN K. LI

SUBJECT: Innovation Legislation Status

Everything is on track for Justice's proposed legislation amending the antitrust and intellectual property laws:

o Bill. OMB has cleared the bill. Baxter is sending over to OMB 15 copies of the cleared bill.

o Transmittal letter. Baxter will send a transmittal letter by Thursday afternoon.

o Presidential Statement. Baxter has reviewed our draft Presidential Statement and incorporated the changes made at the last CCCT meeting. Wendell and I will be going over the draft.

o Fact Sheet. Baxter will send a draft by Thursday afternoon.

o President's Radio Address. Attached is a proposed radio address. It incorporates the changes made at the last CCCT meeting. Wendell okays the attached draft. Also attached is a memorandum from you to David Gergen, proposing that the President use the draft for his weekly radio address on Saturday, August 27. Can we shoot for August 27? _____.

o Introducing the Bill. Wendell will coordinate with Nancy Risque on how the Administration should have the bill introduced. Baxter has already consulted with Senator Thurmond and Representatives Rodino and Fish.

o Press Conference. If the President talks about the bill on Saturday, August 27, it might be useful to have a press briefing at the White House on the following Monday, August 29. Bill Baxter and Secretary Baldrige would be logical candidates to give the briefing. Who should represent the White House at the briefing? _____.

o Name Change. Baxter entitled the bill, "The National Innovation and Productivity Act of 1983." Every title in the bill addresses innovation more directly than productivity (joint R&D, detrebling for intellectual property, copyright misuse, and process patents). For that reason, I would recommend that the name of the bill be changed to "The National Innovation Act of 1983." Moreover, it is simpler and easier to remember. Do you agree? Yes ___ No ___.

cc: /Wendell W. Gunn

Attachments

PRESIDENTIAL RADIO TALK: INNOVATION LEGISLATION
SATURDAY, AUGUST 27, 1983

My fellow Americans:

You have heard a great deal of discussion in recent years about the issue of our country's industrial competitiveness. We have faced some tough competition from abroad in industries ranging from traditional ones like steel to high technology ones like semiconductors. There are many factors making competition tough for a lot of our industries, including insufficient capital formation, a strong dollar, and difficult labor-management relations.

One of the most important factors affecting our industrial competitiveness is our ability to create and develop new technologies. Advances in technology allow our economy to develop new or improved products and to produce more cheaply those products already out on the market.

What does technology mean in our daily lives? It means jobs, a better quality of life, and stronger national security. The development of the computer, for example, has created jobs for about 350,000 people in the computer industry. We can live longer and healthier lives because of new medical technologies. We can travel farther and faster because of developments in aeronautics. Advanced defense technology enables us to keep the peace and to maintain our freedom.

Technology also means more competitive U.S. industries. While some other countries' competitive edge may lie in lower

labor costs, one of America's strongest competitive edges is our ability to invent and develop new ideas.

New technologies sometimes come from luck. But they usually come from systematic research conducted in both the private and public sectors. We are doing more to improve public sector investment in research and development. For example, I proposed in my 1984 budget to increase federal funding of R&D by 17 percent to $47 billion.

To encourage the private sector to expand its investment in R&D, we have done a number of things. The 1981 Economic Recovery Tax Act provides a 25 percent tax credit to encourage firms to invest in additional R&D. Also, the lower inflation and interest rates resulting from our economic program have reduced substantially the cost of conducting research.

We have also been looking at two major areas of legislation affecting innovation -- the antitrust and intellectual property laws. The antitrust laws are designed to protect consumers from anticompetitive behavior. While the economy generally benefits most from vigorous competition among independent businesses, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation among producers, even competitors, can actually serve to maximize the benefits to consumers.

The intellectual property laws promote the interests of consumers by encouraging more innovation. When the rights of inventors and innovators to reap the rewards of their efforts are protected, they are more likely to take the risks to develop new

technologies. However, the intellectual property laws, as currently interpreted, often discourage innovation.

After reviewing the effect of the antitrust and intellectual property laws on innovation and consulting with key members in the House and the Senate, I have concluded that a few, relatively minor modifications could greatly enhance the ability of the private sector to create and develop technology. Hence, I am proposing legislation entitled the National Innovation and Productivity Act of 1983.

An important aspect of the bill is the treatment of procompetitive joint R&D ventures under the antitrust laws. The increasing complexity of research and development often makes it necessary to have large scale R&D efforts. These large scale projects are often beyond the scope of any individual company's ability to undertake. Especially in light of the R&D efforts of foreign competitors, it may very well be that allowing cooperation among U.S. companies to conduct joint R&D can enhance competition.

Nevertheless, there is a widespread perception in American industry that the antitrust laws discourage procompetitive joint R&D efforts. The risk of paying three times the amount of actual damages discourages some companies from forming procompetitive joint ventures.

My proposed bill would address this problem by first clarifying that the courts may not condemn a joint R&D venture under the antitrust laws without first considering its benefits of enhancing competition. Second, it would provide that a joint

R&D venture that has been fully disclosed to the Justice Department and the Federal Trade Commission may be sued only for the actual damage caused by its conduct. Hence, the bill would eliminate the deterrent that antitrust laws may have on procompetitive joint R&D ventures, while still providing adequate legal remedy to those injured by anticompetitive joint ventures.

The proposed legislation also includes provisions amending the antitrust, patent, and copyright laws. The net effect of this entire set of changes would be to enhance considerably the ability of the private sector to create and develop new technologies. This legislation would improve the ability of U.S. industry to compete in world markets. I strongly urge the Congress to pass this proposed legislation as a means of encouraging innovation, increasing opportunities for American workers, widening consumer choice, and improving the quality of life for all Americans.

Until next week, thank you and God bless you.

THE WHITE HOUSE

WASHINGTON

August 18, 1983

MEMORANDUM FOR DAVID R. GERGEN

FROM: ROGER B. PORTER

SUBJECT: Proposed Radio Address

I would like to propose that the President talk about innovation legislation in his weekly radio address on August 27. A suggested draft address is attached.

The Administration's proposed legislation amending the antitrust and intellectual property laws represents one of the most significant efforts to improve the climate for innovation in the U.S. The President can claim much credit for proposing legislation which should stimulate technology considerably.

Attachment