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Memorandum

Subject: Presidential Message and Address	Date: August 15, 1983

To: Lehmann K. Li
Office of Policy Development
The White House

From: Charles F. Rule
Special Assistant
Antitrust Division, DOJ

Attached are redrafts of the proposed address and the Presidential Statement. We felt it would be easier to redraft the two documents than to try to send you edits.

The redrafts reflect the most recent revisions of the National Productivity and Innovation Act. In addition, the redrafts tend to emphasize the joint R&D title (Title II) less than the original drafts. The other titles should be stressed because (1) they are at least as important substantively as the joint R&D provision, (2) some of the other titles are politically more attractive than the joint R&D title, and (3) the "packaging" makes this bill stand out from the other joint R&D bills that already have been introduced. However, the effect of dealing with those other titles in the address has been to lengthen it. The redrafted statement is somewhat shorter and reflects some of the editing with which we could be comfortable.

Before finalizing the address and message, we need to agree on our political strategy. In their present form, the two documents maximize the political credit that the Administration can take from the bill; however, there is a downside in terms of the bill's viability on the Hill. First, the support of some Republican Senators and Congressmen may be less enthusiastic if they appear merely to be the President's messengers than if they are given some credit for shaping the bill. Second, the more partisan is our presentation of the bill, the more likely it is that Rep. Rodino will let the bill die in his committee. Further discussion of these problems would be useful.

I look forward to your comments and to working further with you on this and other projects. We are delighted to have such a talented and sympathetic advocate in the White House.

cc: Wendell W. Gunn

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Geothermal

RADIO ADDRESS

A great deal of concern has been expressed in recent years about this country's productivity and competitiveness. During the 1970s, productivity in the U.S. grew more slowly than we had come to expect. During the same period, American firms faced increasingly stiff foreign competition. This competition appeared not only in traditional industries such as steel but also in "high technology" industries such as semiconductors.

Although a number of factors have contributed to these difficulties, this country's ability to reinvigorate industrial competitiveness will depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. Over the last eighty years, the development of new technologies has accounted for almost half of the growth in our real per capita income.

What does technology mean to our daily lives? It means exports and jobs. Our ability to create and develop new ideas provides us with an advantage in international markets. Since the 1960s, this country has been a net exporter of "high-technology" goods. As a result, the computer industry, for example, has provided employment for 350,000 people.

Technology means a better quality of life. Today, we travel farther and faster because of aero-space technology. New medical technologies are constantly increasing our life span and reducing the pain and suffering of mankind.

Technology also means enhanced national security. Sophisticated defense-technology enables us to keep the peace and to maintain our freedom. The improvement of technology, then, is something in which all Americans have an interest.

Although new technologies are sometimes created by serendipity, generally a great deal of time, money and effort is required to discover and develop new technologies. The public sector must provide some of the funding for R&D, particularly in areas involving very basic, scientific research. With this in mind, I have proposed in my 1984 budget to increase federal funding of R&D by 17 percent to $47 billion.

However, while this public sector funding of R&D is necessary, the private sector, responding to the discipline of the marketplace, is often a more efficient creator and developer of new technologies. It thus is important to assure that the economic climate, as well as the legal climate, does not unnecessarily impede private sector R&D.

We have already done a number of things to improve the economic climate. For example, lower inflation and interest rates brought about by our economic program have reduced substantially the cost of conducting research. In addition, the Economic Recovery Act of 1981 provides a 25 percent tax credit to encourage firms to invest in additional R&D.

We also have been examining ways to improve the legal climate. The antitrust and intellectual property laws have perhaps the most profound effect on private investment in R&D. The antitrust laws are designed to protect consumers from truly anticompetitive conduct. While the economy generally is best served by vigorous competition among independent businesses, the antitrust laws recognize that some cooperation, even among competitors, may be necessary to maximize the well-being of consumers. The creation and development of new technology is one area where such cooperation is frequently beneficial.

The intellectual property laws, such as those dealing with patents, also serve to promote the interests of consumers. The promise of the financial reward provided by exclusive rights to intellectual property induces individuals to compete to create and develop new and useful technologies.

After reviewing the effect of the antitrust and intellectual property laws on the creation and development of new technologies, I have concluded that a few, relatively minor modifications could significantly stimulate private sector R&D. Hence, I am proposing legislation entitled the National Productivity and Innovation Act of 1983 to effect these changes.

First, the Act would alleviate any adverse deterrent effect the antitrust laws may have on procompetitive joint R&D ventures. Because of the high cost and risk associated with sophisticated, large-scale R&D, it is sometimes necessary for several firms to work together on R&D projects. Such joint ventures that lower the costs of R&D are consistent with the principles underlying the antitrust laws, so long as these ventures do not provide an opportunity for fixing prices and do not diminish the incentive to innovate.

Nevertheless, there is still a risk that some judges may ignore the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that a successful antitrust claimant is automatically entitled to three times the damages actually suffered. The threat of being forced to pay triple damages likely deters some procompetitive joint ventures.

My proposed bill would address this problem by clarifying that the courts may not condemn a joint R&D venture under the antitrust laws without first considering its procompetitive benefits, and by providing that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage caused by its conduct. The bill thus would eliminate the deterrent effect that the antitrust laws may have on procompetitive joint R&D ventures, while still retaining an adequate legal remedy for those injured by anticompetitive joint ventures.

The antitrust and intellectual property laws also should help investors to enjoy fully the fruits of their ingenuity. Very frequently, intellectual property owners cannot obtain their legitimate reward from R&D unless they license their technology to others. Such licensing can enable intellectual property owners to employ the superior ability of other enterprises to market technology more quickly and at lower cost. Thus, licensing can be particularly important for small businesses that do not have the ability to develop all possible applications of new technologies by themselves.

In the past, however, judicial interpretation of the antitrust and intellectual property laws often has been unjustifiably hostile toward intellectual property licensing. The adverse effect on the development of technology is aggravated by the fact that this hostility may lead courts to impose triple damages under the antitrust laws or to refuse completely to enforce valid patents and copyrights.

My bill would correct these unnecessary impediments to technology licensing in three ways. First, judges could no longer condemn intellectual property licensing under the antitrust laws without considering its competitive benefits. Second, such licensing would no longer be subject to triple damage liability; rather, an injured party could sue only for actual damages. Third, the bill would prohibit judges from refusing to enforce copyrights or patents on the basis of an aspect of a licensing arrangement, unless that aspect violates the antitrust laws.

Finally, the legislation I am proposing would close a technical loophole in the patent laws. Currently, if someone practices a process patent outside the country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Our bill would close this loophole so that owners of process patents can earn their rightful reward by preventing what amounts to overseas theft of their technologies.

The net effect of this proposed legislation would be to stimulate the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. At the same time, the antitrust laws would remain an effective guardian against anticompetitive activities which harm consumers. I strongly urge Congress to enact this proposed legislation as a means of encouraging innovation, and hence of increasing the employment opportunities and standard of living for all Americans.

Until next week, thank you and God bless you.

Draft Presidential Message on the
National Productivity and Innovation Act of 1983

Today I am proposing legislation entitled the National Productivity and Innovation Act of 1983. The bill would modify antitrust, patent and copyright laws in a way that should greatly enhance this country's productivity and the ability of industry to compete in international markets.

The ability of the United States to improve industrial productivity and competitiveness will depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. Over the last eighty years, the development of new technologies has accounted for almost half of the growth in our real per capita income. New technology creates new jobs and gives this country an advantage in world markets. The computer industry, for example, has provided employment for 350,000 people.

Although new technologies are sometimes created by serendipity, generally either the public or private sector must spend a great deal of time, money and effort to discover and develop new technologies. With this in mind, I have proposed in my 1984 budget to increase federal funding of R&D by 17 percent to $47 billion.

However, while this public sector funding of R&D is necessary, the private sector, responding to the discipline of the marketplace, is often a more efficient creator and developer of new technologies. It thus is important to assure that the economic climate, as well as the legal climate, does not unnecessarily impede private sector R&D.

We have already done a number of things to improve the economic climate. For example, lower inflation and interest rates brought about by our economic program have reduced substantially the cost of conducting research. In addition, the Economic Recovery Act of 1981 provides a 25 percent tax credit to encourage firms to invest in additional R&D.

When enacted, the National Productivity and Innovation Act will improve the legal climate by modifying the federal antitrust and intellectual property laws. Those laws have a profound effect on private investment in R&D. The antitrust laws are designed to protect consumers from truly anticompetitive conduct. While the economy generally is best served by vigorous competition among independent businesses, the antitrust laws recognize that in some areas, such as the creation and development of technology, cooperation at times may be necessary to maximize the well-being of consumers. Similarly, the intellectual property laws, such as those dealing with patents, encourage competition in the creation and development of new and useful technologies, by providing individuals with exclusive rights to their technology.

My proposed legislation would assure that the antitrust and intellectual property laws are fully compatible with the efficient creation and development of technology. The legislation will have the following provisions.

Title II of the bill would insure that the antitrust laws do not unnecessarily inhibit the formation of joint R&D ventures. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as the venture does not threaten to facilitate price fixing or to reduce innovation, such ventures do not violate the antitrust laws. Nevertheless, the risk remains that some judges may ignore the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that a successful antitrust claimant is automatically entitled to three times the damages actually suffered.

Title II would alleviate the adverse deterrent effect that this risk may have on procompetitive joint R&D ventures. That title provides that the courts may not condemn a joint R&D venture under the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage caused by its conduct.

Title III would assure that the antitrust laws encourage procompetitive intellectual property licensing, which greatly enhances our economy's ability to create and develop of technology. Very frequently, intellectual property owners cannot obtain their legitimate reward from R&D unless they license their technology to others. Such licensing can enable intellectual property owners to employ the superior ability of other enterprises to market technology more quickly and at lower cost.

Recognizing the importance of licensing, we have designed Title III to assist intellectual property owners to enjoy fully the fruits of their ingenuity. First, this title will prohibit courts from condemning an intellectual property licensing arrangement without first considering its procompetitive benefits. Second, the title would eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing could still sue for their actual damages plus prejudgment interest, Title III would minimize the deterrence that the antitrust laws currently may have on potentially beneficial licensing.

Similarly, Title IV would preclude the courts from unreasonably condemning the procompetitive use of intellectual property under the doctrine of patent or copyright misuse. Courts could not refuse to enforce a valid patent or copyright on the ground that the conduct somehow suppressed competition, unless after meaningful analysis they found that the conduct constituted an antitrust violation.

Title V of the Act would increase federal protection for process patents. Currently, if someone practices a process patent outside the country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Our bill would close this loophole so that owners of process patents can earn their rightful reward by preventing what amounts to overseas theft of their technologies.

The net effect of this proposed legislation would be to stimulate the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. I strongly urge Congress to enact this proposed legislation as a means of encouraging innovation, and hence of increasing the employment opportunities and standard of living for all Americans.

THE WHITE HOUSE

WASHINGTON

July 11, 1983

MEMORANDUM FOR MEMBERS OF THE CABINET COUNCIL ON COMMERCE AND TRADE

FROM: WENDELL W. GUNN
Executive Secretary

WW Gunn

SUBJECT: Papers for the July 12 Meeting

Attached are two documents for the July 12 meeting of the Cabinet Council on Commerce and Trade. The first, a memorandum from the Attorney General, is an explanation of the Joint R&D draft legislation which Secretary Baldrige described in his testimony on June 29 to the Senate Judiciary Committee. The second is a study paper, prepared by Commerce, for discussion at the meeting, entitled "Increasing the Efficiency of U.S. Industries to Enhance Their Competitiveness in World Markets."

Attachments

Office of the Attorney General
Washington, D.C. 20530

July 11, 1983

MEMORANDUM TO: The Cabinet Council on Commerce and Trade

FROM: William French Smith WFS
Attorney General

SUBJECT: Antitrust and Intellectual Property Improvements to Enhance International Trade Opportunities

I. Discussion

The recent emergence of strong foreign competitors makes it imperative that United States regulatory policies do not unnecessarily limit the flexibility of American business to respond to challenges and opportunities both here and abroad. The Department of Justice examined the antitrust and intellectual property laws from this perspective, and last March proposed a four-part legislative package to improve the international competitiveness of American industry, to maintain United States leadership in research, innovation, and high technology, and to respond to economic policies of other nations without compromising our strong commitment to free international trade. The President approved this package at a March 24, 1983 Cabinet meeting, and it was circulated informally to the Congress.

Discussions between the Administration and Congress revealed that congressional support for the package would be strengthened by the addition of a fifth provision, dealing specifically with the antitrust status of joint research and development (R&D) ventures. The Commerce and Justice Departments jointly agreed on the appropriate formulation of such a provision. They testified in favor of it on June 29 before the Senate Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks, and on June 30 before the House Science and Technology Committee's Subcommittees on Investigations and Oversight and Science, Research, and Technology. In the course of their testimony, Justice and Commerce Department spokesmen also officially unveiled the four legislative provisions that have been formally endorsed by the Administration.

II. Legislative Proposals

The Administration's original four-part legislative reform program together with the more recent Commerce-Justice Department joint R&D proposal have been reformulated as a five-part legislative package entitled the National Innovation and Productivity Act of 1983 ("1983 Act"). The joint R&D proposal is embodied in Title II of the 1983 Act, and the four previously approved proposals comprise Titles III-VI of the 1983 Act (Title I of the 1983 Act sets forth its name). These Titles provide as follows:

1. Title II amends sections 4 and 16 of the Clayton Act to provide that no joint R&D ventures may be treated as per se illegal, and to immunize joint R&D ventures that have been fully disclosed to the Justice Department and the Federal Trade Commission from private antitrust suits and from government antitrust suits for damages.

There is a misperception that the antitrust laws discourage joint R&D effort, regardless of its benefits. Although the courts and the Justice Department now are sensitive to these concerns, American industry has indicated that because of uncertainty as to future legal interpretations, the antitrust laws serve as a serious obstacle to procompetitive R&D ventures. The risk of costly antitrust damage suits may sufficiently reduce the expected returns from innovative joint R&D to discourage certain socially desirable ventures from being formed. Adoption of the proposed statutory amendments would completely eliminate the antitrust disincentive for joint venturers who disclose their activities to the government, and shield other joint venturers from the inappropriate application of the harsh *per se* rule, which condemns specified conduct out of hand without regard to its competitive effect. At the same time, these amendments would provide a safeguard against socially undesirable behavior by preserving the government's right to seek injunctions against anticompetitive joint ventures.

2. Title III amends section 4 of the Clayton Act to provide for actual damages, rather than punitive treble damages, with regard to potentially procompetitive activity analyzed under the rule of reason, such as intellectual property licensing.

Mandatory trebling of antitrust damages (the long standing rule) may usefully deter *per se* antitrust violations -- categories of conduct deemed so likely to injure competition that they merit being deemed illegal without inquiry into competitive effect in every case (for example, price-fixing among direct competitors).

However, the threat of mandatory trebling for non-*per se* violations discourages conduct that would improve productivity and benefit consumers, such as intellectual property licensing, because of uncertainties in antitrust law. Business planners cannot rely with certainty on government enforcement policies to avoid the threat of treble damages, since public enforcement authorities have no control over ill-advised private antitrust litigation. Moreover, because of the evolving and often uncertain character of antitrust law it is fundamentally unfair to impose mandatory treble damages in all cases. This undesirable result could be precluded by the proposed statutory change.

3. Title IV amends the Clayton Act to require the courts to scrutinize intellectual property licensing agreements under the rule of reason in antitrust cases.

The ability to license intellectual property encourages innovation, by permitting the intellectual property holder to match his own knowledge and other advantages with those of his licensees, and by allowing the intellectual property holder to utilize his property in the way he deems most effective. Despite these efficiencies, courts have sometimes condemned licensing practices under the antitrust laws without consideration of their basic procompetitive nature and purpose. Our legislative proposals would rectify this situation, by requiring the courts to weigh the pro-competitive purposes of such agreements rather than applying rules of *per se* illegality.

4. Title V amends the patent and copyright laws to require the courts to find actual harm to competition before denying enforcement of exclusive rights granted under the patent and copyright laws.

In circumstances where a patentee's or copyright holder's behavior is said to be a "misuse" of the patent or copyright, courts have refused to enforce the inventor's exclusive rights, thus allowing free use of the invention and destroying the value of the intellectual property. The misuse doctrine, which is based on the erroneous premise that certain practices invariably are anticompetitive, can seriously retard innovation and efficiency. Accordingly, existing patent and copyright law should be amended to assure that the competitive effects of potentially beneficial practices are judged on a case-by-case basis.

5. Title VI amends the patent law to give process patent holders the same ability to protect their domestic markets from off-shore infringement as the owners of product patents.

Under current law, a firm cannot avoid infringement of a product patent by manufacturing the product overseas and then importing it into the United States, because the use or sale of the product in the United States would infringe the patent. In contrast, there is no law that the holder of a process patent can use to stop a firm from practicing the process patent overseas, and then selling the product made by that process in the United States. This inequitable disparity of treatment discourages innovation in the process patent area. It follows that patent law should be amended to accord the same protection to process patent holders as is currently enjoyed by product patent holders.

III. Recommendation

The Administration has already endorsed for submission to Congress four of the five substantive provisions in the 1983 Act. The Administration should now endorse the fifth provision, dealing with joint R&D ventures, in order to ensure prompt congressional consideration of this important legislative package.

Increasing the Efficiency of U.S. Industries to Enhance Their Competitiveness in World Markets

Background

At our meeting of December 17, 1982, we addressed the need to clarify and modify the antitrust laws to promote the competitiveness of U.S. goods and services in world markets. At that time, the decision was made that:

> An Interagency Task Force, chaired by the Department of Justice, (would) identify antitrust barriers to the competitiveness of U.S. businesses in world markets and recommend policy changes as appropriate. Areas of examination...include joint research and development by private concerns, application of U.S. antitrust law to subsidiaries of U.S. firms operating in foreign countries, and the definition of an international competitive market.

In the last several weeks, the efforts of that Task Force have resulted in a major advance in the area of the antitrust policy on joint research and development ventures.

In testimony before the Senate Judiciary Committee on June 29, Secretary Baldrige and Assistant Attorney General Baxter announced our agreement on the antitrust reform package currently under review within the Administration. A major provision of this package would exempt joint R&D from all private antitrust actions and all government actions for damages under the antitrust laws based on conduct that is part of a research and development program that has been disclosed to the government. The government could, however, seek an injunction to halt any actions by the joint venture thought to be harmful to competition. In addition to the new R&D Section, the proposal under review contains four additional reforms in the antitrust laws which are of equal importance. These additional reforms are: a section which would eliminate treble damages for non per se antitrust violations; a section assuring that Intellectual Property licensing under the antitrust laws is a non per se offense; a section dealing with patent and copyright misuse; and a section dealing with process patents.

The reform package will have an important effect upon the competitiveness of U.S. firms in domestic and world markets. Congressional support is strong, as evidenced by Senator Dole's introduction of S. 1561, entitled the "National Joint Research and Development Policy Act of 1983." Dole's legislation would implement the joint R&D provisions of the reform package with the sole difference that it would provide for private suits for actual damages only. Thus prospects seem bright for the enactment of the joint research and development provisions of the reform package.

The United States in a World Market

At the same time that we recognize the success of our efforts in the area of joint research and development, we should not lose sight of other antitrust policies that affect the competitiveness of U.S. firms. In particular, I am concerned that U.S. firms may not have enough flexibility under the U.S. antitrust laws to conduct mergers that allow them to respond to increased foreign competition and the changing structure of the world economy.

The prosperity of the American people, and of American business, today depends more than ever before upon the ability of U.S. firms to compete successfully in world markets. Particularly during the past decade our prosperity has become significantly dependent on the global economy. Following World War II, the productive capacity of the United States relative to the rest of the industrial world gave this country the ability to compete successfully in almost every market and in almost any product area.

Over time, however, the industrial economies of Europe and Japan have rebuilt, recovered, and significantly increased their market share relative to the United States in virtually every product category and geographic market. The U.S. economy has grown at a lower rate than most large industrial nations. This is due in part to the relatively slower growth in U.S. productivity. In addition, the developing countries have built up their industrial sectors to the point where they now challenge us in a number of product areas.

The international situation provides a serious challenge to our own economic objectives. The United States is facing and will continue to face intense competition for markets. The health of our economy and our ability to create new jobs for an expanding work force depends in large part on our ability as a nation to compete successfully in world markets.

In sum, the U.S. economy is no longer an island unto itself. Today our imports annually total about $250 billion. In 1970, our total trade--imports plus exports--equaled about 8 percent of the gross national product. By 1980, our total trade equaled about 18 percent of our GNP. In addition, between 1960 and 1980 our share of world exports of manufactured goods declined from 25 percent to only 18 percent.

How Mergers Improve Economic Efficiency and U.S. Firms' Competitiveness in World Markets

Efficiencies frequently occur as production increases, but the source of the improvement is often unclear. The causes of efficiencies brought about by merger may include the following:

- allowing the after-merger firm to operate plants more fully by combining production into a few plants while closing others;
- increasing the production runs of items whose average production costs fall as the cumulative total number of units produced in all periods increases;
- allowing the after-merger firm to operate more effectively by closing older plants and directing production to newer, more technically advanced plants;
- increasing the availability and reducing the cost of capital for the after-merger firms;
- centralizing firms' internal capital used to conduct research and development for new products, or used for productivity improvements in the manufacturing process;
- centralizing the skilled labor, or "human capital", required to manage the firm, or to conduct specialized research, or to achieve quality production; and finally,
- increasing the availability of efficiencies in transportation and marketing.

It would be consistent with the policy of this Administration to provide an economic climate that favors productivity improvement by authorizing mergers that increase efficiency. As we all know, industries facing decline in this country rarely die a quiet death. For some industries at least, mergers might be the means of avoiding demands in later years for government bailouts for failing firms, or for protectionism in the form of high tariffs. At the same time, however, we must remain vigilant to prevent mergers that create monopolies to the detriment of the U.S. consumer.

Monopoly Profits or Economies of Scale

The main reason for preventing efficiency-increasing mergers is that they increase concentration, thereby raising the probability of explicit or implicit collusion. The main reasons for allowing such mergers are that the increase in concentration can only be postponed not prevented, that the earlier society can enjoy the benefits of increased efficiency the better off it is, that delay may enable foreign firms to outcompete U.S. firms in world markets, and that in those few cases in which collusion would occur the antitrust laws can be used against the collusive practices.

Preventing efficiency-enhancing mergers may decrease concentration and the probability of collusion but may involve a cost to society. A correlation between profit rates and concentration ratios has been found by many economists. The issue, though, is whether the increased profits occur because of collusion or because of increased efficiency.

If firms in an industry collude, and there are no significant scale economies, then one would expect all firms in the industry to make about the same level of higher-than-average profits. Recent studies suggest, however, that efficiencies are present, since large firms in specific industries tend to make higher profits than smaller firms in the same industries.

Do U.S. Antitrust Laws Prevent Mergers?

The Sherman Act prevents mergers that result in an actual and adverse impact on the vitality of competition. The Clayton Act and the FTC Act were designed to reach threats to the vitality of competition in their incipiency. In bringing charges under these Acts the Government typically does not need to show an actual and adverse impact on the vitality of competition. Specific cases deal with trends and with changes in measures of concentration as indicators of the probability that a merger will have anticompetitive effects. There is no requirement that the probability of the anticompetitive effects of a merger should be higher when there are efficiencies available to the after merger firm and higher still when the merging firms are in competition with foreign firms that can exploit these efficiencies.

The objectives of the U.S. antitrust laws are as valid today as they were on the day they were enacted. However, the statutory framework enacted to meet those objectives has in some applications become obsolete, and now may have an anticompetitive effect in operation. Instead of fostering efficient, competitive industries in the United States the antitrust laws may weaken U.S. industries under attack from foreign competitors. The situation is made more serious since the firms of our major trading partners are free under their laws to conduct mergers barred to U.S. firms.

In the United States, the use of domestic market share or concentration ratios as the primary yardstick to measure the competitive impact of mergers and acquisitions has the effect of preventing such activities, even when mergers might enhance the competitiveness of U.S. firms over foreign firms in U.S. and other world markets. The Federal Trade Commission has included the presence of efficiencies in the charges it has brought seeking to prevent mergers. The Supreme Court has held that the presence of efficiencies can be a legitimate reason to prevent a merger.

Enforcement policies pertaining to Section 7 of the Clayton Act are described in the Merger Guidelines published by the Department of Justice. A decision on the legality of a merger normally depends upon the concentration of the market where the merger will take place, as measured by the market shares enjoyed by each firm in that market. The Guidelines, of course, are a statement of the Department of Justice's enforcement policies and do not bind the courts or preclude private suits. The Merger Guidelines employ the Herfindahl-Hirschman Index (the "HHI") to assess an industry's concentration by making calculations on the market shares of the various firms in the market. If a proposed merger makes the HHI rise significantly, then it will likely be challenged. These HHI scores are translated into enforcement policies in the Merger Guidelines.

The practical effect of Section 7 of the Clayton Act, and of the Merger Guidelines, can be better understood by looking at a specific industry. The steel industry has become a focus for many of the concerns raised here. An example of this is the recent statement of Mr. David M. Roderick, Chairman of the American Iron and Steel Institute, which was reported in the Washington Post, May 26, 1983. Mr. Roderick stated that, in order to create a more competitive steel industry capable of competing abroad, the antitrust laws governing mergers should be more liberally interpreted or, if that is not possible, be changed. In his view, had more liberal antitrust laws been in effect in 1974 the Nation might have been able to save some 200 domestic steel facilities that have now been closed permanently.

Over 80 percent of all steel production in the U.S. is accounted for by the top 10 firms. Mergers among the atomistic remainder of the steel industry would likely not be challenged; however, this offers no help to the top ten firms in the steel industry, which represent the bulk of the nation's steel capacity.

The Interaction of Economic Analysis and Legal Analysis

Some U.S. industries are in secular decline. The problems of these industries are unusually severe because the economy as a whole has until recently been in cyclical decline, because the competition from foreign firms for U.S. markets has intensified, and because of structural changes occurring in the U.S. economy. Within this environment, demands for protection against foreign firms have increased.

U.S. high technology industries are experiencing increased foreign competition, in some cases because the U.S. technological advantage has been reduced or eliminated and in other cases because of targeting or other circumstances. Other countries form consortia of their domestic firms to compete against U.S. industries; in some cases the consortia involve firms from more than one country. In the U.S., antitrust authorities can prevent mergers on the basis of narrowly defined product lines, even though it may be too early to know what product lines might evolve in the affected industries, or on the basis of narrowly defined markets, even though it may be too early to know what markets might eventually be served by the industries.

This Administration is deeply committed to allowing free markets to function. But these markets operate within a legal framework, and the merger law component of this framework is preventing some industries from operating as efficiently as possible. This should be changed.

Declining industries that face foreign competition should be allowed to phase out their obsolete facilities and maintain their efficient facilities. High technology and new technology industries that face foreign competition should be allowed to participate in mergers that accelerate the emergence of their products and markets.

Allowing mergers that increase efficiency, will not solve all of the problems of declining industries. But, the Act will allow these industries to scale themselves down more efficiently. The Act will not solve all of the problems of high technology and new technology industries. But, it will allow them to merge more securely and more efficiently. In a case of actual and adverse monopolistic behavior, all firms will, and should, continue to be subject to all of the provisions of the Sherman Act.

The problems created by present US antitrust policy are, in part, real and, in part, a product of the perceptions of the business community. These perceptions, however, govern business behavior. They may best be dispelled by new legislation that comes out foursquare for increased efficiency.

Conclusion

There are two reasons why efficiency-enhancing mergers should be allowed even if the efficiency gains might eventually be realized by internal expansion. First, the earlier the efficiency gains are realized, the greater the benefit to society; delaying efficiency gains by insisting that they occur by internal expansions wastes resources. Second, if foreign firms are allowed to merge to increase efficiency and U.S. firms are prevented from doing so, then the relatively small firms that are driven out of business are most likely to be U.S.-based. In this case measures of concentration may fall initially as foreign firms enter the U.S. market. As smaller U.S. firms are driven out of business, however, measures of concentration rise. By preventing U.S. firms from merging, the increase in concentration is postponed and a share of the U.S. market is awarded to foreign firms.

The Cabinet Council on Commerce and Trade in conjunction with the Cabinet Council on Legal Policy should consider possible modifications to our antitrust laws to permit mergers which increase the efficiency and competitiveness of U.S. firms in world markets. The objective of such modifications would be to assure U.S. firms the same flexibility to conduct mergers which is now enjoyed by firms in Japan, West Germany and other countries. At the same time, any changes in the antitrust laws should protect the interests of U.S. consumers by assuring that mergers not result in the monopolization of any market.

DOCUMENT NO. 153483 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/21/83 ACTION/CONCURRENCE/COMMENT DUE BY: fyi

SUBJECT: PRESIDENTIAL RADIO ADDRESS ON INNOVATION

	ACTION	FYI
HARPER	☐	☐
PORTER	☐	☐
BARR	☐	☐
BLEDSOE	☐	☐
BOGGS	☐	☐
BRADLEY	☐	☐
CARLESON	☐	☐
DENEND	☐	☐
GALEBACH	☐	☐
GARFINKEL	☐	☐
GUNN	☐	X
B. LEONARD	☐	☐
LI	☐	X
McALLISTER	☐	☐
MONTOYA	☐	☐
ROPER	☐	☐
SMITH	☐	☐
SWEET	☐	☐
UHLMANN	☐	☐
ADMINISTRATION	☐	☐

	ACTION	FYI
DRUG POLICY	☐	☐
TURNER	☐	☐
D. LEONARD	☐	☐
OFFICE OF POLICY INFORMATION		
HOPKINS	☐	☐
PROPERTY REVIEW BOARD	☐	☐
OTHER		
______	☐	☐
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REMARKS: Radio addresses next two weeks are covered. Maybe this could be done at the Comm on Ind Competitiveness event. Pls check w/ Wendell Gunn.

Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

Action

THE WHITE HOUSE

WASHINGTON

July 16, 1983

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

FROM: LEHMANN K. LI

SUBJECT: [redacted]

Radio addresses are next two weeks this covered. Maybe this be done at the Gov. or Fed competitiveness event. Pls check w Wendell Gunn

Attached is a proposed draft of a radio address the President might want to make proposing the [redacted] 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.

[redacted] 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.

[redacted] 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 paying American workers less ~~having lower labor costs~~ than workers are paid in other countries, but in our inventing and developing new ideas.

New technologies sometimes come from serendipity. 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 must be ~~are~~ sensitive to the fact that in some special areas, like the creation and development of technology, cooperation among those entities may be necessary to maximize the well-being of
and to put American businesses & workers on The same footing as Their foreign competitors.
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 <u>enhance</u> 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 serendipity. 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.

98th CONGRESS
1st Session

A BILL

To promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate amendments to the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--SHORT TITLE

SEC. 101. This Act may be cited as the "National Innovation and Productivity Act of 1983".

TITLE II--JOINT RESEARCH AND DEVELOPMENT VENTURES

SEC. 201. For purposes of this Title--

(1) the term "joint research and development program" means

(A) theoretical analysis, exploration, or experimentation, or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application, including the experimental production and testing of models, devices, equipment, materials, and processes;

to be carried out by two or more independent entities: provided, that for purposes of this Title, such a program may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of licenses, and any other conduct reasonably necessary and appropriate to such program;

(2) the term "antitrust laws" has the meaning given it in Section 1 of the Clayton Act (15 U.S.C. § 12), except that the term shall also include Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to the extent that said Section 5 applies to unfair methods of competition;

(3) the term "Attorney General" means the Attorney General of the United States; and

(4) the term "Commission" means the Federal Trade Commission.

SEC. 202. No joint research and development program shall be deemed illegal per se in any action under the antitrust laws.

SEC. 203. (a) Notwithstanding the provisions of Sections 4, 4A, 4C , and 16 of the Clayton Act (15 U.S.C. §§ 15, 15a, 15c, 26), no action for injunctive relief may be brought under the antitrust laws by any person except the Attorney General or the Commission, and no action for damages may be brought under the antitrust laws, based on conduct that is part of a research and development program and that is engaged in after the disclosure of such conduct to the Attorney General and the Commission pursuant to Section 204.

(b) Nothing in this Title shall affect the ability of the Attorney General or the Commission to obtain all necessary or appropriate relief in any action to enforce the antitrust laws, other than damages under Section 4A of the Clayton Act (15 U.S.C. § 15a).

SEC. 204. (a) Any person participating in a joint research and development program may disclose such program to the Attorney General and the Commission. Such disclosure shall specify the identity of the parties participating in the program, its nature, scope and duration, and any and all ancillary agreements or understandings. Only conduct specified in a disclosure pursuant to this Section shall be entitled to the protections of Section 203.

(b) Within 30 days of any disclosure of a research and development program made pursuant to this Section, the Commission shall cause to be published in the Federal Register notice of such disclosure, describing in general terms the participants, the program, and its objectives.

(c)(1) Except as provided in paragraph (2), all information and documentary materials submitted as part of the disclosure of a research and development program pursuant to this Section shall be available to the public upon request within 30 days after its submission to the Attorney General and the Commission.

(2) Any person disclosing a research and development program pursuant to this Section may request that information or documentary material submitted as part of such disclosure not be made public. Any such request shall specify precisely what information or documentary material should not be made public, state the minimum period of time during which nondisclosure is considered necessary, and justify the request for nondisclosure both as to content and time. The Attorney General and the Commission shall consult with one another with respect to any such request, and each in its sole discretion shall make a final determination as to whether good cause for nondisclosure has been shown. Any information or documentary material which is withheld from disclosure pursuant to this paragraph shall be exempt from disclosure under Section 552 of Title 5, United States Code.

(d) No action by the Attorney General or the Commission under this Title shall be subject to judicial review.

TITLE III--TREBLE DAMAGES IN ANTITRUST CASES

SEC. 301. Section 4 of the Clayton Act, as amended (15 U.S.C. § 15), is amended--

(a) by striking "threefold the" and inserting in lieu thereof "actual";

(b) by inserting after "sustained," the words "interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances,"; and

(c) by striking all that follows "fee" and inserting in lieu thereof "; provided, that damages attributable to agreements or practices the nature or necessary effect of which is so plainly anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use shall be trebled.".

SEC. 302. Section 4A of the Clayton Act, as amended (15 U.S.C. § 15a), is amended--

(a) by inserting after "sustained" the first time it appears the words ", interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances,"; and

(b) by striking all that follows "suit.".

SEC. 303. Paragraph (2) of subsection (a) of section 4C of the Clayton Act, as amended (15 U.S.C. § 15c(a)(2)), is amended--

(a) by striking "threefold";

(b) by inserting after "subsection," the words "interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on the total damage for the period beginning on the date of service of such state's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances,"; and

(c) by striking all that follows "fee" and inserting in lieu thereof ": provided, that damages attributable to agreements or practices the nature or necessary effect of which is so plainly anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use shall be trebled.".

TITLE IV--INTELLECTUAL PROPERTY LICENSING UNDER THE ANTITRUST LAWS

SEC. 401. The Clayton Act, as amended (15 U.S.C. § 12 et seq.), is amended by renumbering section 27 as section 28 and by adding the following new section 27:

"Sec. 27. Agreements to convey rights to use, practice, or sublicense patented inventions, copyrights, trade secrets, trademarks, know-how, or other intellectual property shall not be deemed unlawful per se in actions under the antitrust laws.".

TITLE V--PATENT AND COPYRIGHT MISUSE

SEC. 501. Section 271 of Title 35, United States Code, is amended--

(a) by redesignating subsection (c) as paragraph (c)(1);

(b) by redesignating subsection (d) as paragraph (c)(2); and

(c) by adding the following new subsection (d):

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made under a patented process, (3) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or are allegedly excessive, (4) obligated a licensee of the patent to pay royalties in amounts not related to the licensee's sales of the patented product or the product made by the patented process, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition.".

SEC. 502. Subsection (a) of section 501 of Title 17, United States Code, is amended by adding at the end thereof the following:

"No copyright owner otherwise entitled to relief for infringement of a copyright under this title shall be denied relief or deemed guilty of misuse or illegal extension of the copyright by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the copyright under terms that affect commerce outside the scope of the copyright, (2) restricted a licensee of the copyright in the sale of the copyrighted work, (3) obligated a licensee of the copyright to pay royalties that differ from those paid by another licensee or are allegedly excessive, (4) obligated a licensee of the copyright to pay royalties in amounts not related to the licensee's sales or use of the copyrighted work, (5) refused to license the copyright to any person, or (6) otherwise used the copyright allegedly to suppress competition.".

TITLE VI--PROCESS PATENTS

SEC. 601. Section 154 of Title 35, United States Code, is amended by inserting after "invention" the second time it appears the words ", and if the invention is a process of the right to exclude others from using or selling products produced thereby,".

SEC. 602. Section 271 of Title 35, United States Code, is amended--

(a) by redesignating subsection (a) as paragraph (a)(1); and

(b) by inserting the following new paragraph (a)(2):

"(a)(2) If the patented invention is a process, whoever without authority uses or sells in the United States during the term of the patent therefor a product produced by such process infringes the patent.".

SEC. 603. Title 35, United States Code, is amended by adding the following new section 295:

"§ 295. Presumption: Product Produced by Patented Process.

In actions alleging infringement of a process patent based on use or sale of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has exhausted all reasonably available means through discovery or otherwise to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the process shall be on the party asserting that it was not so produced.".

THE WHITE HOUSE

WASHINGTON

November 18, 1983

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

FROM: LEHMANN K. LI

SUBJECT: Innovation Legislation Status

Rick Rule and Mike Dolan, Deputy Assistant Attorney General for Legislative Affairs, met with Chairman Rodino's staff members to discuss joint R&D legislation. They will be preparing an options paper for Rodino, outlining the important issues that will affect any final joint R&D bill. Rodino will be addressing this legislation sometime during the recess.

Rodino's staffers think that the hearings held by the House Judiciary Committee in September could possibly constitute a final set of hearings and thus allow the Committee to markup a bill. They continue to believe that there will be some joint R&D bill passed next session. The questions will probably be over the form of the bill and how close it is to Title II of the Administration's proposed bill.

They have not detected any interest in the Committee for examining Titles III-V of the Administration bill. The likelihood of Rodino attaching those titles to the joint R&D bill appear slim at this point.

Bob McConnell, Assistant Attorney General for Legislative Affairs, seems to think that while we should lay the groundwork for the bill during the recess and in the first few months of the next session, we should not expect any actual progress until after the bankruptcy issue is dealt with in late March. I believe that waiting until then entails the significantly high risk that the bill will not pass in the next session.

THE WHITE HOUSE

WASHINGTON

October 26, 1983

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

FROM: LEHMANN K. LI

SUBJECT: Senate Judiciary Committee Hearing on Administration Innovation Legislation

The Senate Judiciary Committee held this morning a hearing on the Administration's National Productivity and Innovation Act of 1983. It was one of the shortest Committee hearings I have ever seen, lasting only about one half hour. Senator Thurmond was the only member present and had to leave for a meeting at the White House. Given the brevity of the hearing, I am not optimistic about the press coverage.

There were four Administration witnesses who testified (Bill Niskanen could not testify because the hearing ended early). Secretary Baldrige expressed support for all four substantive titles. Senator Thurmond asked Baldrige how many more joint R&D ventures the Administration expects will be formed as a result of the legislation and which industries would benefit most from it. Baldrige replied that it is difficult to pin down a precise number but that the legislation would make a significant difference. He also stated that the legislation would help the computer and telecommunications industries and small business, in general.

Bill Baxter focused on the differences between the Administration's and other proposed legislation. He noted that other bills addressed only joint R&D. The Administration bill also encouraged innovation by individual companies through amending the intellectual property laws. The Administration bill also:

o Avoids Justice Department certification of joint R&D ventures because it would add unnecessary regulatory functions for the Antitrust Division and increase reporting costs for business.

o Avoids establishing inefficient standards for joint R&D ventures. Most of the proposed standards are too sweeping and restrictive. In particular, one bill would establish standards that are appropriate for one venture in one industry (MCC), but would be inappropriate for other ventures and other industries.

o Avoids mandatory licensing which would discourage businesses from forming joint R&D ventures because of the reduction in return on investment.

Jerry Mossinghoff expressed particularly strong support for Titles III to V, which focus on the intellectual property laws. In particular, he mentioned that he strongly supports Title V, which strengthens process patents. He cited the need for the United States to make our process patent protection laws more consistent with other countries.

Chuck Herz, General Counsel of the National Science Foundation, also testified in support of the bill.

On November 9th, there will be another hearing on the Administration's proposed legislation at which the public will be invited to testify.