August 24, 1987

Memorandum for: Mike Farren
Mike Kirk
Catherine Miller
Ray Kammer

From: Barbara Powell
FOR Steve Needle

DKP.

Subject: Superconductivity Competitiveness Act of 1987

We have just received a revised draft of the Justice Department's legislative proposal, which the Administration intends to implement the President's initiative on Superconductivity.

Any comments which you may wish to make should be addressed to me by 3:00 P.M. today, due to the very short response time required by OMB.

You may wish to know that Norm Laeker's comments on the first draft of this legislation were not accepted with respect to this bill, but those comments will be addressed in a forthcoming Executive Order. This recirculation should be viewed as another opportuntiy for your to comment on this important issue.

cc: Steve Needle
Michael Levitt
Barry Bird

TO THE CONGRESS OF THE UNITED STATES:

I am pleased to transmit today for your immediate consideration and enactment the "Superconductivity Competitiveness Act of 1987" (the Act). This legislation is needed to help translate U.S. leadership in science into U.S. leadership in commerce.

Scientific advances in superconductivity have occurred at remarkable pace recently: in the estimation of one noted physicist, we have made two hundred years of progress in the last eight months. If additional breakthroughs are forthcoming, the effects on our standard of living, indeed our way of life, could be unprecedented, in fields as diverse as transportation, energy, health care, computers, and communication.

The Federal Government has played a key role in the scientific breakthroughs by funding basic research. The Federal Government is currently spending approximately $55 million in superconductivity research, with nearly half of that reallocated within the last six months. Ultimately, however, our success in superconductivity will depend on the private sector, which will make the critical decisions on how much capital, time and effort to invest in commercializing superconductivity.

On July 28, 1987 I announced an eleven point Superconductivity Initiative designed to help the private sector in its efforts to commercialize superconductivity. This initiative has three objectives:

1. Promoting greater cooperation among the Federal Government, academia, and U.S. industry in the basic and enabling research that is necessary to continue the scientific breakthroughs ~~necessary for the commercialization of~~ in superconductivity;

2. Enabling private sector to more rapidly ~~exploit high temperature superconductivity, and other~~ scientific advances into new and improved products and processes ~~in the marketplace~~; and

3. Better protecting the intellectual property rights of scientists, engineers and business men working in superconductivity, ~~and the potential commercial value of related Government owned scientific and technical information.~~

The Superconductivity Competitiveness Act of 1987 is a key part of the Initiative. It will help ensure U.S. readiness in commercializing technologies resulting from recent and anticipated scientific breakthroughs.

Title II of the Act amends the National Cooperative Research Act to cover joint production ventures. This is a particularly important step towards allowing U.S. firms to become more competitive with firms overseas in moving important research in superconductivity and other fast moving high technology areas from the laboratory to the marketplace. ~~In particular, the NCRA is intended to ease the adversity that U.S. firms have to participating in potentially procompetitive business arrangements because of the perceived risk of costly antitrust liability.~~

Title II recognizes that unless U.S. firms are allowed to organize their R&D investment and resources in the most efficient manner possible, they cannot compete with firms overseas, some of which operate in countries where the governments subsidize the costs of advanced research.

~~because the essence of the NCRA is not to provide firms with immunity from anticompetitive behavior, but instead~~ The purpose of the NCRA is to allow ~~them~~ firms to prenotify the Government of their activity in ~~areas covered under the NCRA~~ certain areas, U.S. antitrust statutes will continue to protect consumers and firms from unfair trading practices where they occur. It is not intended to provide an immunity from anti-competitive behavior

Title III of the Act increases the protection of U.S. patent laws for holders of U.S. process patents. Currently, there is no remedy for "infringement" when a product made overseas, using a process that is patented in the U.S., is imported into the United States. Title III would provide such a remedy and permit U.S. manufacturing process patent holders to sue for injunctive relief and monetary damages. This relief is already available to process patent holders when products are made in the U.S. using processes patented in the United States.

Title III will not extend the territoriality of U.S. laws. Foreign manufacturers will not be prevented by Title III from using processes overseas that are patented in the United States as long as they do not import those items to the United States where Title II will be effective.

Title IV of the Act will provide protection to commercially valuable scientific and technical information owned by the Federal Government, ~~that~~ which is similar to recognizing it as "proprietary" ~~so that it will have~~ as having value in the marketplace, ~~providing U.S. firms with an incentive to commercialize it.~~ It will ~~also~~ discourage foreign firms and countries from exploiting

wholesale through the Freedom of Information Act the U.S. science and technology enterprise, while failing perhaps to invest sufficiently in their own national R&D. Under Title IV, U.S. scientific and technical information that is owned by the Federal Government and has commercial value will not be prevented from disclosure altogether, rather it will be prevented from unconditional widespread dissemination that fails to account for the considerable investment that made the information possible. This title is not intended to cease the U.S. tradition of permitting others to benefit form U.S. excellence in science and technology, it simply infers that the Freedom of Information Act is not the appropriate avenue to do so.

My Administration is currently developing a uniform policy to permit Federal contractors to own the rights to technical information developed for the Government. We intend this action to provide Federal contractors with rights equal to those of private contractors who submit confidential, commercial information to the Government, for purposes of the Freedom of Information Act. Once this uniform policy is in place, then, the Administration will ensure through administrative policies of Federal agencies that both Federal contractors and private submitters of confidential, commercial information have a process for objecting to the release of that commercially valuable information to third parties who request it wholesale under the Freedom of Information Act on the basis that disclosure would cause harm to the firm's economic competitiveness. Because of this pending protection, Title IV is not intended to apply at

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this time to Government generated, contractor owned scientific and technical information.

There is a growing realization that although the United States is a leader in laboratory breakthroughs, it has ~~repeatedly~~ occasionally failed to promptly convert those breakthroughs into commercial applications. ~~Our leadership in science must translate into leadership in commerce.~~ This Act, in conjunction with the other components of our superconductivity initiative, can facilitate and speed the process ~~by which that translation is made~~ of commercialization. There is no time to waste in this effort. I urge the Congress to act upon this legislation most expeditiously.

THE WHITE HOUSE

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"In actions alleging infringement of a process patent based on use, sale, or importation 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 made a reasonable effort 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 patented process shall be on the party asserting that it was not so produced.".

(2) The table of sections for chapter 29 of title 35, United States Code, is amended by adding after the item relating to section 294 the following:

"295. Presumption: Product produced by patented process.".

SEC. 302. This title shall take effect on the date of enactment; provided, that section 301 shall not apply to any product imported into or made in the United States before the date of enactment.

TITLE IV - SCIENTIFIC AND TECHNICAL INFORMATION PROTECTION

SEC. 401. Upon receipt of a Freedom of Information Act request under section 552 of Title V, U.S. Code, for scientific

or technical information, the head of each Federal agency or his or her designee shall determine whether:

(1) the information was generated in a laboratory or similar facility that was owned and operated, in whole or in part, by the Federal Government; and

(2) the information has commercial value, ~~and~~

~~(3) disclosure of the information would be reasonably expected to cause harm to the economic competitiveness of the United States.~~

SEC. 402. An agency may withhold information described in section 401 [redacted] from disclosure, under section 552 of Title V, U.S. Code.

SEC. 403. This title shall take effect on the date of enactment.

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condition will depend on the circumstances. A patentee's burden would be less than that of proving at trial that a product in question was in fact made by the patented process but would be more than showing a slight possibility that the product was so made. Second, the patentee must show that he has made a reasonable effort to determine what process was used in the manufacture of the product in question and was unable to do so. The reasonableness of the effort will depend on the circumstances. These initial, good-faith efforts would include the use of discovery procedures under the Federal Rules of Civil Procedure or other good-faith methods, such as requesting the information from a manufacturer who may not be subject to U.S. jurisdiction. These limitations on the availability of the presumption should adequately safeguard the rights of competitors while permitting suit by patent holders who might otherwise be left with no remedy against an infringer.

TITLE IV - SCIENTIFIC AND TECHNICAL INFORMATION PROTECTION

Title IV is designed to establish protection for certain commercially valuable scientific and technical information that is currently at risk of being subject to mandatory public disclosure to any requester through the Freedom of Information Act. Indiscriminate disclosure of such information could seriously harm the United States' economic competitiveness. Title IV is intended to promote United States competitiveness

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in superconductivity and other commercial technologies resulting from recent scientific advances by enabling agencies to withhold commercially valuable information when disclosure could adversely affect United States economic competitiveness.

Section 401 sets forth the conditions that must be met in order for an agency to withhold scientific or technical information from a FOIA requester. First, the agency head or his or her designee must determine that the requested information was generated in a wholly or partly owned and operated government laboratory or similar facility.

Second, a determination must be made that the information has commercial value. Laboratory research that has potential for commercial application clearly has commercial value.

Finally, a determination must be made that disclosure of this information could be reasonably expected to cause harm to the economic competitiveness of the United States. Because it would be unrealistic to expect such a determination to be made with absolute certainty, the proposed statute only requires that a determination be made that disclosure "could be reasonably expected" to cause harm. This determination will be made by the agency in possession of the information. The proposed statute's purpose--preventing disclosure of

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~~"information that could harm the "economic competitiveness" of the United States--is the result of a growing realization that although the United States is a leader in laboratory breakthroughs, it has repeatedly failed to promptly convert those breakthroughs into practical commercial applications. Title IV will aid in assuring that U.S. leadership in science translates into leadership in commerce.~~

Section 402 ~~specifically~~ states that information falling within the purview of section 401 ~~shall not~~ may be withheld from disclosure ~~disclosed and should be exempt from disclosure~~ under the Freedom of Information Act. Title IV would largely remove ~~entirely~~ any risk that federal agencies would be required to publicly disclose sensitive ~~scientific or technical~~ information described in section 401 under the Freedom of Information Act.

Section 403 provides that Title IV shall be effective on the date of enactment.

Disclosure of such information would be discretionary with the agency involved, [redacted] although it is expected that non-disclosure would normally constitute standard practice. Of special importance in making any determination with respect to disclosure of covered information would be an agency's findings regarding the likely impact of disclosure on the economic competititveness of the United States. If non-disclosur could reasonably be expected to promote U.S. competitive interests, the information should not be disclosed. If, however, disclosure would significant ~~likely have no~~ impact on the Nation's economic competitiveness, it should be made available. The purpose of title IV -- to prevent the disclosure of information that could harm the economic competitiveness of the United States -- is the result of a growing realization that the United States, although a leader in laboratory breakthroughs, has not been able to capitalize fully on ~~repeatedly failed to convert~~ these breakthroughs by prompt conversion into practical commercial applications. This title will help in assuring that U.S. leadership in science translates into leadership in commerce.

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