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United States Senate
COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

February 20, 1980

Hon. Birch Bayh
Russell Senate Office Building
Suite 363
Washington, D. C. 20510

Dear Birch:

The Senate will soon resume consideration of S. 414, the University and Small Business Patent Procedures Act. While Chairman of the Senate Small Business Committee's Monopoly Subcommittee, I spent many years studying this subject. From the prospective of this extensive experience, I am convinced that this bill is one of the most radical and far-reaching giveaways I have seen in the many years I have served in the United States Senate.

S. 414 would allow a single company to monopolize a product invented with public funds. I adamantly oppose this concept and am convinced that the American public shares my belief that title to publicly-financed inventions should belong to the public. The entire legislative history of congressional action on the subject of monopoly rights to publicly-financed inventions has been a consistent policy of protecting the public's rights. S. 414 is an unprecedented reversal of a long history of congressional action and should not be undertaken lightly or without full Senate debate.

Extensive hearings held by the Monopoly Subcommittee of the Senate Small Business Committee inevitably lead to the conclusion that the comtemplated proposal is deleterious to the public interest. Witnesses at these hearings, which started as far back as December, 1959, included distinguished economists, a Deputy Attorney General of the United States, and Assistant Attorney General in charge of the Antitrust Division of the Justice Department, two Chairmen of the Federal Trade Commission, and former staff members of the Council of Economic Advisors.

Without any exception these witnesses testified that when a private company finances its own research and development, it takes a risk and deserves exclusive right to the fruits of that risk. Government research and development contracts, however, are generally cost-plus with an assured market--the U.S. Government. There is, thus, absolutely no reason why the taxpayer should be forced to subsidize a private monopoly and have to pay twice: first for the research and development and then through monopoly prices. When a contractor hires an employee or an agent to do research for him, the standard common law rule is that the contractor gets the invention. Surely the government should have no less a right!

In addition to the problem of equity, economic growth and increased productivity require the most rapid dissemination of scientific and technical knowledge. Allowing private firms to file private patents would do just the opposite. Filing for a patent application is a secret matter; and technical information connected with the patent is not disclosed until the patent is granted, which takes an average of 3½ years. In other words, instead of rapid disclosure, information is really bottled up for that length of time.

In testimony presented by Dr. Lee Preston, former Staff Economist of the Council of Economic Advisors, greater economic efficiency and increased growth rate would result from a policy of allowing technological advances to be available to all.

Nobel prize winner Dr. Wassily Leontief, the developer of the input-output techniques and analysis, testified in 1963 that a government-wide policy whereby the results of research financed by the public would be freely available to all would increase the productivity of labor and capital, and estimated that the difference between restrictive (allowing the contractor to retain title) and open patent policies should account for one half of one percent in a 4-to-5 percent growth rate of the average productivity of labor. "I have no doubt," he stated, "that an open door policy in respect to inventions resulting from work done under governmental contract would speed our technological progress considerably."

John H. Shenefield, Assistant Attorney General, Antitrust Division, Department of Justice, and Michael Pertschuk, Chairman of the Federal Trade Commission, categorically told the Senate Small Business Committee in December, 1977, that there is no factual basis for the claims that giving away title to private contractors promotes commercialization of government-financed inventions and that the available evidence shows just the opposite. They also stated that even if an exceptional circumstance arises--and no specific example could be found--that would justify a waiver of the government's rights, it should never be done unless the invention has been identified and a study made of the impact of the waiver on the public interest. In addition, such proposals as "march-in rights" would be ineffective and valueless to protect the public against patent misuse. Neither the Department of Justice nor the Federal Trade Commission, the major antitrust arms of the federal government, were called to testify during hearings on S. 414.

The effect on small business could be particularly unfavorable. Allowing a small business firm to retain a patent of exclusive license to the results of publicly-financed research could well be an incentive to its acquisition by a large firm with an already extensive patent portfolio. Besides, a patent seldom protects a small firm against market incursions of a large firm. Because litigation is so expensive, large firms have infringed with impunity patents held by small firms.

Government patent policy is not a patent problem at all; it is not concerned with the mechanics of securing a patent or the administration of the Patent Office. It involves simply the disposition of public property rights arising out of the huge expenditures of public funds--about thirty billion dollars at present--and it is dismaying to find that the same old claims--discredited years ago--to justify the giveaway of government's rights are still being made today as in Senator Birch Bayh's bill S. 414.

S. 414 would wipe out every law on the books which reserves for the public the paid results of the research. Even the small business window dressing of the bill cannot hide the fact that S. 414 would, if enacted, constitute a blatant and colossal giveaway of the government's rights.

I am enclosing a summary of the statement of Admiral Hyman G. Rickover, Father of the Nuclear Navy, detailing his opposition to S. 414. Admiral Rickover is one of the nation's most experienced and most successful government officials. He is an unbiased, recognized expert with over thirty years of government experience managing major defense programs encompassing hundreds of contractors, both large and small. The universal recognition of the successful development of the modern nuclear Navy, under Admiral Rickover's guidance, gives his views special importance in this area.

I hope you will join me in opposing this legislation.

Sincerely yours,

Russell Long

Enclosure

Synopsis of
Admiral Rickover's views
on Government Patent Policy

1. In recent years, Members of Congress have introduced various bills which, contrary to the thrust of existing statutes, would give contractors the exclusive rights to inventions arising under their contracts with the U.S. Government. In support of these bills, the patent lobby contends that unless the Government grants its contractors such rights, companies will not have sufficient financial incentive to develop and market the ideas that grow out of Government-funded research.

2. Admiral Rickover has had more than a half century's experience in engineering, technology and contracting. For many years he has strongly opposed bills which would give contractors exclusive rights to inventions developed at Government expense. He believes that each citizen should have equal rights to use these inventions and that the monopoly rights conveyed by a patent should be reserved for those who develop inventions at private expense.

3. In support of his views, Admiral Rickover makes these points:

a. In the vast majority of cases, patent considerations neither attract companies to Government work nor repel them from it. Contractors seek Government work because it generates profit; it helps support their scientific and engineering staffs; and they obtain valuable know-how from performing the work. The idea that the Government cannot attract good companies without giving away patent rights is simply rhetoric by the patent lobby.

b. The technology growing out of most Government R&D efforts is not reflected by the patents generated, but is in the form of data, know-how, concepts, and design features which, although of great technical importance, generally are not patentable.

c. Truly good ideas arising under Government contracts tend to be adopted and used elsewhere without having to grant someone monopoly patent rights. Nuclear technology in this country has flourished under a policy in which Government contractors have not been given exclusive rights to inventions developed at public expense.

d. By generally claiming the rights to inventions their employees develop on the job, industry endorses a principle that patent rights should belong to the employer. But when the Government is the employer, and the contractor the employee, the patent lobby wants to reverse this principle.

e. Large corporations would benefit most from a give-away Government patent policy because the vast majority of Government research and development funds is spent in contracts with large corporations.

f. It would be wrong to give a company a 17-year monopoly to some technological breakthrough, in the energy area for example, that was paid for with public funds.

4. Based on this first-hand experience encompassing many years, Admiral Rickover contends that the dissemination of technology and the public good are both best served when the Government retains title to inventions developed at public expense and the public retains the unrestricted right to use them. Because of a proliferation of sometimes conflicting statutes dealing with patent matters, he recommends that Congress enact legislation which would ensure that each citizen has equal rights to use inventions developed at Government expense.