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98TH CONGRESS
2d Session

SENATE

REPORT
98-427

# THE NATIONAL PRODUCTIVITY AND INNOVATION ACT

## REPORT

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ON

## S. 1841

together with

## ADDITIONAL VIEWS

MAY 3 (legislative day, APRIL 30), 1984.—Ordered to be printed

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# THE NATIONAL PRODUCTIVITY AND INNOVATION ACT

MAY 3 (legislative day, APRIL 30), 1984.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 1841]

The Committee on the Judiciary, to which was referred the bill (S. 1841) to modify the operation of Federal and State Antitrust laws with respect to joint research and development activity, and for other purposes, having considered the same, reports favorably thereon with an amendment, and recommends that the bill do pass.

### I. BACKGROUND AND NEED FOR LEGISLATION

The international competitiveness of U.S. firms in both mature and emerging industries depends on their ability to remain at the frontiers of technological development. Equally important, the security of the United States vitally depends on the ability of U.S. firms to maintain their technological edge. Research and development is critical to the success of these efforts.

In many industries, however, the research and development necessary to remain competitive has become increasingly costly and risky—indeed, often prohibitively so. In addition, limits on the available pool of skilled scientific and technical personnel may preclude any single company from gathering the talent needed to make an R&D project successful.

In recent years, many of our trading partners have recognized the need for collaborative R&D efforts. Having seen the potential

for tremendous economies that could be achieved through such efforts, firms in other countries have formed numerous joint R&D projects, often with government encouragement.

Many U.S. firms have also recognized the potential value of joint R&D efforts. These firms recognize that joint R&D holds the promise of a more efficient use of both scarce R&D capital and human resources. In light of the increasing competitiveness of the world economy, joint R&D efforts also represent a necessary step to continued prominence of U.S. firms. Furthermore, stepped-up joint R&D activity, and the innovation that it will make possible, promises to increase productivity and employment, and to permit continued American leadership in important fields of research.

The relative infrequency of joint R&D activity has been the subject of broad concern. Mr. William C. Norris, Chairman of the Control Data Corporation, summarized one public policy concern in testimony before the Committee:

> [T]he U.S. is suffering from a wasteful duplication of research and development efforts. * * * This is especially valid in light of our critical shortage of competent scientific and engineering talent.

Although some duplication of effort in a market economy is desirable and essential to competition, unnecessary and wasteful duplication of research can hinder our ability to remain competitive in the world economy.

Another and more serious problem is that much important research may never be done if firms are not able or willing to undertake such research on their own. Mr. Charles H. Herz, General Counsel of the National Science Foundation, addressed the problem of foregone collaborative research before the Committee:

> [I]n an era of accelerating technology, development, increasingly complex and costly R&D, and heightened international competition, the United States and specific U.S. industries need to be concerned about research and development that a typical corporation cannot take on alone.

In sum, these and other problems have created an environment in which firms place undue emphasis on short-term research results. Mr. Peter F. McClosky, President of the Electronics Industries Association, described this effect to the Committee while at the same time extolling the virtues of combined research efforts:

> [T]oo much of the industrial research performed focuses only on shorter-term applied research driven by industry's need for immediate return on investment. By pooling resources, companies can afford longer-term research—the fruits of which will be employed to assure our industrial competitiveness worldwide.

Many reasons have been cited for the absence of substantial joint research activity in the United States. Although there have been relatively few actual antitrust challenges to joint R&D activity, the prospect of such a challenge has been frequently cited by industry to explain the reluctance to undertake such activity. Mr. Steven Olson, Associate General Counsel of the Control Data Corporation,

provided a representative summary of the antitrust concerns faced by firms that consider participation in R&D joint ventures:

> I think it fair to say that even among those who believe that our antitrust laws do not—or at least under reasonable application should not—inhibit cooperation in R&D, there is general agreement that many business executives perceive such laws as significant barriers to joint research. They thus shy away from such activities—and, over the long haul, our country is the loser.

The Assistant Attorney General of the Antitrust Division of the Department of Justice, The Honorable J. Paul McGrath, noted this same perception in testimony before the Committee.

> The antitrust problem in the area of joint R&D is this perception—I should say misperception—that the antitrust laws constitute a barrier to joint R&D. The perception translates into a business risk—the risk that after substantial investments are made in joint R&D, the venture participants may be threatened by unfounded antitrust challenges * * *. And this risk increases as the joint venture becomes more and more successful.

Mr. McGrath's predecessor, The Honorable William F. Baxter, explained in an earlier hearing the underlying rationale of the application of the antitrust laws to joint R&D activity:

> Cooperation among competitors, however, does not always violate the antitrust laws. While the antitrust laws are premised on the notion that a free economy is best served by vigorous competition, those laws are sensitive to the fact that, in some areas, cooperation among independent entities, even among competitors, may be fully consistent with competition and in fact necessary to maximize the well-being of consumers. The creation and development of technology is one very important area in which such cooperation frequently may be beneficial.

The Committee notes, in fact, that the Justice Department has never challenged a pure research and development joint venture without ancillary restraints. However, firms that contemplate entry into such ventures must weigh not only the possibility of government challenge, but also the potential for private antitrust litigation. Indeed, the uncertain legal status of joint R&D efforts may have caused many firms to abandon their plans for such efforts at the drawing board, even when the activities under consideration posed little or no actual threat to competition. The result is that much potentially valuable R&D has gone undone, or has been done incompletely or inefficiently.

To rectify this perception problem, this bill provides explicit congressional recognition of the fact that joint R&D activity will generally encourage competition, and that such competition should not be inhibited by unclear antitrust standards.

The bill recognizes, however, that in specific instances a joint R&D venture or its conduct may, on balance, be anticompetitive, and provides safeguards against this potential. First, the bill limits

its benefits to "joint R&D programs"—a carefully defined term designed to reflect the special concern with innovative joint efforts necessary to help U.S. firms to compete internationally, and to eliminate several types of potentially anticompetitive conduct from coverage under the bill. Second, the bill provides that any such joint R&D program will be analyzed under the antitrust "rule of reason"—that is, a program will be judged based on its actual effects on competition. If a joint R&D program in fact violates the antitrust laws, law enforcement agencies and victims may sue to obtain appropriate relief.

The fact that this bill focuses on a particular type of joint R&D activity—statutorily defined "joint R&D programs"—does not mean that other types of joint R&D activity are necessarily anticompetitive. The bill is not intended to change current law with respect to any such activity.

The Committee concludes that valuable joint R&D activity has been discouraged by the paucity of clear legal guidelines about the application of the antitrust laws to this type of activity. The perception by many firms of exaggerated antitrust risks will continue to deter desirable joint activity unless Congress acts to clarify the essential difference between beneficial joint activities and the kind of collusive conduct that is properly condemned by the antitrust laws. The Committee intends by adoption of this bill to eliminate, or at a minimum lessen, any perception that the antitrust laws deter competitive joint R&D activity, activity which adds vitality and diversity not only to our domestic economy but also to our position in world markets.

## II. Text of Senate Bill S. 1841

A BILL To promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate amendments to the antitrust, patent, and copyright 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 Productivity and Innovation 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 persons: *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 section 4 of the Clayton Act (15 U.S.C. 15), any person entitled to recovery in an action under said section 4 based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to section 204 shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such 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 the cost of suit, including a reasonable attorney's fee.

(b) Notwithstanding the provisions of section 4C of the Clayton Act (15 U.S.C. 15c), any State entitled to monetary relief in an action under said section 4C based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to section 204 shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said section 4C, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such 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 the cost of suit, including a reasonable attorney's fee.

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

(b)(1) Except as provided in subsection (d), within thirty days of the filing of any notification pursuant to this section, the Commission shall cause to be published in the Federal Register notice of such notification, describing in general terms the participants, the program, and its objectives.

(2) Except as provided in subsections (c) and (d), all information and documentary material submitted as part of a notification filed pursuant to this section shall be available to the public upon request within thirty days after their submission to the Attorney General and the Commission.

(c) Any person filing a notification pursuant to this section may request that information or documentary material submitted as part of such notification 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 to the public is considered necessary, and justify the request for nondisclosure to the public 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 to the public has been shown. Any information or documentary material that is withheld from disclosure to the public pursuant to this subsection shall be exempt from disclosure under section 552 of title 5, United States Code.

(d) Any person who has filed a notification pursuant to this section may withdraw such notification prior to the time at which notice of such notification is published in the Federal Register and information and documentary material submitted as part of such notification is made publicly available pursuant to subsection (b). Any notification so withdrawn shall have no force or effect, notice of such notification shall not be published in the Federal Register, and no information or documentary material submitted as part of such notification shall be made publicly available.

(e) Actions taken or not taken by the Attorney General or Commission in response to or with respect to notifications filed pursuant to this section, including without limitation determinations regarding the content of notices published or to be published in the Federal Register pursuant to subsection (b), the withholding from public disclosure of information or documentary material pursuant to subsection (c), and whether to institute antitrust or other investigations or enforcement actions shall not be subject to judicial review.

## TITLE III—INTELLECTUAL PROPERTY LICENSING UNDER THE ANTITRUST LAWS

SEC. 301. 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. (a) 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 illegal per se in actions under the antitrust laws.

"(b)(i) Notwithstanding the provisions of section 4 of this Act, any person entitled to recovery in an action under said section 4 based on an agreement described in subsection (a) of this section shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such 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 the cost of suit, including a reasonable attorney's fee.

"(ii) Notwithstanding the provisions of section 4C of this Act, any State entitled to monetary relief in an action under said section 4C based on an agreement described in subsection (a) of this section shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said section 4C, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such 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 the cost of suit, including a reasonable attorney's fee.".

## TITLE IV—PATENT AND COPYRIGHT MISUSE

SEC. 401. 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 by the patented process, (3) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or that 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 a 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. 402. 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 that 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 V—PROCESS PATENTS

SEC. 501. 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. 502. 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. 503. 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.".

## III. COMMITTEE ACTION

The Committee conducted three days of hearings on S. 1841 and similar joint research and development venture legislation: June 29 and October 26, 1983, and March 12, 1984. On March 15, 1984, S. 1841 was reported out of the Committee, subject to agreement. The Committee agreed to the following amendment:

On page 1, beginning with line 6, strike out all through the end of the bill and insert in lieu thereof the following:

## 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 persons, including, but not limited to, 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, and the granting of licenses; *Provided,* That the term "joint research and development program" shall be construed to exclude—

(i) joint production or marketing of any product or service, other than patents, know-how, or other proprietary information developed through such program;

(ii) the exchange of information among competitors relating to costs, sales, profitability, or prices that is not reasonably required to conduct the research and development that is the object of such program; or

(iii) any restriction on other research and development activities, or on the sale, licensing or sharing of inventions or developments not developed through such program, that is not reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of 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 also includes 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 "person" has the meaning given it in section 1 of the Clayton Act (15 U.S.C. 12);

(4) the term "State" has the meaning given it in section 4G (2) of the Clayton Act (15 U.S.C. 15g (2));

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

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

SEC. 202. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development program shall not be deemed illegal per se but shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to,

effects on competition in properly defined relevant research and development markets, and effects in promoting competition through innovation or enhancement of efficiency.

SEC. 203. (a) Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15), any person who is entitled to recovery in an action under such section shall recover the actual damages sustained by him, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws, or beginning on the date the injury was sustained if such date can be established, and ending on the date of judgment (unless the court finds that the award of all or part of such interest is unjust in the circumstances); and the cost of suit, including a reasonable attorney's fee—

(1) if such action is based on conduct that is within the scope of a research and development program for which notification has been filed pursuant to section 204, and

(2) if such action is filed after notification has been filed pursuant to section 204.

(b) Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c), any State which is entitled to monetary relief in an action under such section shall recover the total damages sustained as described in subsection (a)(1) of such section, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such total damages for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws, or beginning on the date the injury was sustained if such date can be established, and ending on the date of judgment (unless the court finds that the award of all or part of such interest is unjust in the circumstances) and the cost of suit, including a reasonable attorney's fee—

(1) if such action is based on conduct that is within the scope of a research and development program for which notification has been filed pursuant to section 204, and

(2) if such action is filed after notification has been filed pursuant to section 204.

(c) Notwithstanding any applicable provision of any State law providing a damage remedy for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recovery in an action under such provision shall not recover in excess of the actual damages sustained by him, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under such provision, or beginning on the date the injury was sustained if such date can be established, and ending on the date of judgment (unless the court finds that the award of all or

part of such interest is unjust in the circumstances), and the cost of suit, including a reasonable attorney's fee—

(1) if such action is based on conduct that is within the scope of a research and development program for which notification has been filed pursuant to section 204, and

(2) if such action is filed after notification has been filed pursuant to section 204.

SEC. 204. (a) Any person who is a party to a joint research and development program may, within 90 days after the formation of such program, or within 90 days after the effective date of the National Productivity and Innovation Act, whichever is later, file simultaneously with the Attorney General and the Commission a written notification disclosing—

(1) the identities of the parties to such program, and

(2) the nature and objectives of such program.

Any person who is a party to a joint research and development program may file additional disclosure notifications pursuant to this section as are appropriate.

(b) Except as provided in subsection (d), not later than sixty days after receiving a notification filed under subsection (a), the Commission shall cause to be published in the Federal Register a notice of such joint research and development program which identifies the parties to such program and which describes such program in general terms but which excludes trade secrets and commercial or financial information that is privileged or confidential. Prior to its publication, the contents of the notice shall be made available to the parties to such program.

(c) Except as to the information published in the Federal Register pursuant to subsection (b), all information and documentary material submitted as part of a notification filed pursuant to this section and all other information obtained by the Attorney General or the Commission in the course of any investigation or enforcement action shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not be made available except in a judicial or administrative proceeding, subject to appropriate protective orders.

(d) Any person who has filed a notification pursuant to this section may withdraw such notification prior to the time at which notice of such research and development program is published in the Federal Register. Any notification so withdrawn shall not be subject to subsection (b) and shall have no force or effect; no information or documentary material submitted as part of such notification shall be made publicly available.

(e) Any action taken or not taken by the Attorney General or the Commission with respect to any notification filed pursuant to this section shall not be subject to judicial review.

## IV. Section-by-Section Analysis of Reported Bill

### TITLE I—SHORT TITLE

Title I provides that the Act may be cited as the "National Productivity and Innovation Act."

### TITLE II—JOINT RESEARCH AND DEVELOPMENT VENTURES

Title II would promote research and development by clarifying the antitrust rules that apply to joint R&D ventures, and by giving participants in joint R&D programs the option of filing a notification disclosing their conduct with the Attorney General and the Federal Trade Commission, thereby limiting their exposure to possible liability for antitrust damages to actual, rather than treble, damages.

Section 201 defines key terms. A "joint research and development program" is defined to mean theoretical analysis, exploration or experimentation, or the extension of basic scientific knowledge into practical application, including prototype development. Such programs may include, for example, the establishment of research facilities, the collection and exchange of research information, the conduct of research on a proprietary basis, the prosecution of patent applications, and the granting of licenses. Only research and development programs carried out jointly—"by two or more independent persons"—are covered by the title. "Independent persons" refers to separate firms, and not to subsidiaries of the same corporate family or natural persons associated with the same firm.

Three types of activities are explicitly excluded from the definition of a joint R&D program: (i) joint production or marketing of any product or service, other than patents, know-how, or other proprietary information developed through such program; (ii) the exchange of information among competitors relating to costs, sales, profitability, or prices that is not reasonably required to conduct the research and development that is the object of such program; and (iii) any restriction on other research and development activities, or on the sale, licensing or sharing of inventions or developments not developed through such program, that is not reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of such program. Activities falling outside the definition of a "joint R&D program," whether or not within the excluded activities, are to be analyzed and judged under existing antitrust principles. The fact that the rule of reason applies to joint R&D programs does not suggest that some other standard must be applied to conduct falling outside such definition.

The specific inclusions and exclusions in the definition of a joint R&D program give the bill a sound basic balance that allows joint R&D to be structured in effective, efficient ways, and at the same time more clearly lays out the intended scope of title II.

Section 201 also defines the "antitrust laws" to match the definition of those laws in the Clayton Act (primarily the Sherman and Clayton Acts), and adds to that definition section 5 of the FTC Act insofar as it applies to unfair methods of competition. Definitions of the terms "person" (to match the definition of that term in the

Clayton Act), "State" (to match the definition of that term in the parens patriae section of the Clayton Act), "Attorney General," and "Commission" (the Federal Trade Commission) are also contained in section 201.

Section 202 as amended states clearly and unequivocally that conduct in making or performing a contract to carry out a joint research and development program is not to be considered illegal "per se" under the antitrust laws. Section 202 assures consideration of the actual competitive effects of such programs under the antitrust "rule of reason." Under this standard courts must realistically analyze the competitive effects of any challenged joint R&D programs.

Section 202 provides courts with valuable direction on the application of the rule of reason to joint R&D programs. Such a program is to be judged on the basis of its reasonableness, "taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined relevant research and development markets, and effects in promoting competition through innovation or enhancement of efficiency." Thus, section 202 directs the courts to consider the possible competitive effects of joint R&D—positive and negative—in the R&D arena, together with any other relevant competitive factors. Specifically, courts are to consider the procompetitive effects on innovation and enhancement of efficiency that may result from joint R&D. Under this analysis, of course, positive competitive effects become relevant only when anticompetitive effects have already been demonstrated.

Section 202 clarifies existing legal standards applicable to joint R&D programs and so eliminates any misconception that present law automatically condemns R&D programs conducted jointly by competitors. The rule of reason analysis prescribed in section 202 does not affect or alter antitrust analysis of agreements not within the scope of this Act.

Section 203 modifies current Federal law that requires the trebling of antitrust damage awards by limiting possible liability in any Federal antitrust damage case based on conduct that is within the scope of a joint R&D program to actual damages and attorney's fees (plus interest on actual damages in order to provide a more fully compensatory remedy), as long as the notification requirements of section 204 are met. Section 203 protects joint R&D conduct challenged in antitrust actions "filed after notification has been filed pursuant to section 204." Under this formulation, parties may be assured that preliminary planning of joint R&D prior to notification will not be an independent source of treble damage liability.

Section 203 provides for the award of prejudgment interest on actual damages in antitrust cases challenging joint R&D "beginning on the date of service of [the plaintiff's] pleading setting forth a claim under the antitrust laws, or beginning on the date the injury was sustained if such date can be established." In such cases, a plaintiff may recover interest from the earliest point in time (within the statute of limitations) at which injury can be established. The alternative "date of injury" formulation is intended to provide a more fully compensatory actual damage remedy, but recognizes that it may be hard to put precise dates on the sort of

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"lost profits" injuries that might be claimed in litigation over joint R&D.

Prejudgment interest is not to be awarded if it is unjust in the circumstances. For example, where actual damages awarded on lost profits include compensation for the loss of use of such profits, prejudgment interest on such use should not be awarded lest the plaintiff recover what in effect would be double interest. Dilatory conduct by the plaintiff might also affect whether prejudgment interest is "unjust in the circumstances."

Subsection (c) of section 203 limits damage recoveries in cases brought against joint R&D under State antitrust laws to actual damages, interest, and attorney's fees, in the manner of and under the same conditions applicable to the limitations placed on damage recoveries under Federal law by subsections (a) and (b). The protections afforded by title II to joint R&D programs from treble damages under Federal law would be largely vitiated by continuing treble damage exposure under State law.

Section 204 as amended sets out the manner in which participants in a joint R&D effort may file a written notification with the antitrust enforcement agencies and thereby avoid treble damages. Such a notification must identify the parties to the program and describe its nature and objectives. Section 204 requires notification of a joint R&D program to be filed within 90 days of the formation of such program or within 90 days after the effective date of the National Productivity and Innovation Act, whichever is later, ensuring that joint R&D participants who wish to take advantage of title II's protection will provide the agencies with prompt notice of their activities. Parties may file such additional notifications as are appropriate.

Subsection 204(b) directs the FTC to publish in the Federal Register within 60 days a general notice of any joint R&D program that has been disclosed to the enforcement agencies. This notice is to exclude trade secrets and commercial or financial information that is privileged or confidential, and is to be available to the parties to the program prior to its publication.

Subsection 204(c) provides that, except as to information that is published in the Federal Register, information submitted to the antitrust enforcement agencies, as well as any other information they obtain in the course of any investigation of a joint R&D program, shall be exempt from disclosure under the Freedom of Information Act, and shall not be made available except in a judicial or administrative proceeding. Section 204 recognizes the competitively sensitive nature of R&D by establishing a general rule of confidentiality.

Subsection 204(d) allows any person who has filed a notification disclosing a research and development program to withdraw that notification prior to the time at which notice is published in the Federal Register. The practical effect of this subsection is to give a person who has filed a notification the opportunity to withdraw it if no agreement can be reached regarding the content of the notice that is to be published. Withdrawing the notification forfeits any treble-damage protection that it otherwise would have afforded, and will not preclude or otherwise affect further investigation or enforcement action by the agencies.

Subsection 204(e) as amended continues to assure that title II will not be misconstrued as any sort of Federal regulation of joint R&D, or become the basis for extensive litigation, particularly that which might be employed as a tactic to force the disclosure of details of competitively sensitive American joint R&D. The purpose of sections 203 and 204 is simple and limited: to remove the possibility that a penalty in the form of the trebling of antitrust damages might be assessed against the participants in joint R&D, in return for notification to the enforcement agencies of the program. No one is required by title II to disclose R&D activities; joint R&D, which carries in any event little antitrust risk, can be conducted freely without filing a notification and obtaining the protection of section 203, at the option of the participants. Failure to file does not affect the substantive application of the antitrust laws to a party's conduct. Title II does not contemplate government approval or disapproval of joint R&D programs or notifications; the investigatory and enforcement powers and responsibilities of the Attorney General and the Commission with respect to disclosed programs continue to rest on the Sherman Act, the Federal Trade Commission Act, and other laws.

## V. Discussion of Key Provisions of S. 1841 as Reported

### 1. SECTION 201: DEFINITION OF "JOINT RESEARCH AND DEVELOPMENT VENTURES"

The key term "joint research and development program" is defined as theoretical analysis, exploration or experimentation, or the extension of basic scientific knowledge into practical application "including the experimental production and testing of models, devices, equipment, materials, and processes." Further explicit examples of activities that might be part of a joint R&D program are "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, and the granting of licenses." The joint granting of licenses or the refusal to grant licenses by participants in a joint R&D program is within the scope of the Act—as are restrictions on such licenses reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of the program. However, other restrictions shall continue to be governed by existing legal standards as to liability and damages. This list of activities is not intended to be exclusive: other specific activities may be parts of a properly constructed joint R&D program if they fall within the scope of the definitions contained in section 201(1) (A) or (B).

Certain activities are explicitly excluded from the term "joint research and development program" for purposes of this Act. The first of these is the "joint production or marketing of any product or service, other than patents, know-how, or other proprietary information developed through such program." Joint ventures in production and marketing are not, of course, necessarily anticompetitive; indeed, they may have significant procompetitive aspects. But this legislation is not directed to these joint ventures. However, the

sale or licensing of patents, know-how, or other proprietary information that are developed through a joint R&D program may constitute part of the program. Obviously, marketing this intellectual property may be the ultimate goal and a key financial aspect of a joint R&D program and is rightfully viewed as an integral part of it. Indeed, the dissemination of new technology through licensing of the results of the joint program can have important procompetitive benefits.

The second specific exclusion from the definition of a joint R&D program covers "the exchange of information among competitors relating to costs, sales, profitability, or prices that is not reasonably required to conduct the research and development that is the object of such program." This exclusion recognizes that the exchange of such competitively sensitive information may raise serious competitive concerns, and seeks to guard against the unnecessary appending of such an information exchange to a joint R&D program. However, the exchange of certain information of this type may be reasonably required for the planning or success of a joint R&D program, and when such is the case the information exchange should and would be included within the definition of the joint R&D program in question. The "resasonably required" formulation will enable courts to consider not only the type of information that is being exchanged but also the manner in which it is exchanged. In some cases, where the data to be exchanged is particularly competitively sensitive, the participants in joint R&D might make efforts to limit the extent of their information exchange, perhaps by using data aggregation techniques, or independent third parties as a screen. As used here, the term "reasonably required" denotes an objective standard and thus does not refer to the subjective opinion of the participants, but rather to whether the particular circumstances at issue establish the need to exchange the type of information in question and to do so in the planned manner. For example, under this standard any exchange of information that results in an agreement or that represents concerted action toward an agreement to fix prices for goods or services would never be reasonably required by a joint R&D program.

Finally, a joint R&D program is defined to exclude "any restriction on other research and development activities, or on the sale, licensing or sharing of inventions or developments not developed through such program, that is not reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of such program." As the purpose of this Act is to promote research and development, restrictions on other R&D activity by the participants in a joint R&D program should be disfavored, unless such restrictions are reasonably required to guard against the misappropriation by some joint R&D participants of proprietary information they have acquired through the joint program. Few firms will make significant contributions to joint R&D programs if they cannot be assured that monetary support or technical know-how that they contribute to the program will not be appropriated by others and used outside the joint program against them. For example, one participant in a joint R&D venture might convert what is essentially the product of the joint R&D program to his own exclusive use. Accordingly, the exclusion

makes proper allowance for covenants in joint R&D programs that are reasonably required to protect the participants' investments.

The explicit inclusions and exclusions in the definition of a joint R&D program give the bill a sound basic balance. They insure the ability of joint venturers to structure R&D programs in effective, efficient ways and at the same time limit the scope of the bill to that intended by Congress.

### 2. SECTION 202: APPLICATION OF THE RULE OF REASON TO JOINT RESEARCH AND DEVELOPMENT PROGRAMS

Section 202 states clearly and unequivocally that the conduct of any person making or performing a contract to carry out a joint R&D program shall not be deemed illegal per se, but rather shall be judged on the basis of its reasonableness. It thus assures consideration of the actual competitive effects of such conduct and the joint R&D program of which it is a part under the antitrust "rule of reason." Section 202 clarifies existing legal standards solely with respect to joint R&D programs, and so eliminates any misconception that present law automatically condemns R&D conducted jointly among competitors.

Under the rule of reason standard, courts must realistically analyze the competitive effects of any challenged joint R&D program. If a joint R&D program has no anticompetitive effects, or if any such effects are outweighed by its procompetitive effects, then it should not be deemed to violate the antitrust laws. Section 202 identifies "effects on competition in properly defined relevant research and development markets" as an important, but not exclusive, focus of this analysis. Competition is as important in R&D as it is in any other commercial endeavor. Indeed, in many industries, particularly those that are based on rapidly evolving technology, competition in R&D may be crucial to success. Motivated by the benefits of getting ahead of one's competitors as well as the threat of falling behind, firms in such industries have strong incentives to be the first to develop new processes and products. Thus, under the rule of reason courts will consider whether any challenged joint R&D program presents a significant probability of reducing R&D competition, and thus of deterring innovation.

The first step in considering effects on competition in R&D is to determine the area of effective R&D competition—that is, the "relevant R&D market." To be included in the relevant R&D market, firms must have the ability and incentive, either individually or in collaboration with one another, to undertake R&D comparable to that of the joint program in question. In this context, "incentive" is measured by an objective standard. Firms need not currently compete with one another at the production or marketing stage. Market shares in current markets or in projected future markets will not be determinative of a firm's ability and incentive to compete in a relevant R&D market. Rather, what is crucial to evaluating R&D competitiveness are the facilities, technologies, and other assets to which firms have access.

The unique nature of knowledge—the basic product of R&D—is important in defining relevant R&D markets. Knowledge is highly mobile—it does not face significant transportation costs, or, in gen-

eral, any other legal or economic barriers to worldwide dissemination. Even though particular goods or services may face legal or economic barriers that impede their importation into this country, the knowledge that makes those goods or services possible generally can be "imported," and the goods or services made here. Thus, overseas R&D competitors usually will be significant factors in properly defined R&D markets, and in those instances courts must take this international dimension into account.

After a relevant R&D market is determined, the effect on competition in that market of the joint R&D program in question must be evaluated. The greatest potential for harm to R&D competition exists when a joint R&D program is overly inclusive—that is, when the program is more inclusive than it should be under the circumstances. Overinclusiveness is the major concern because it reduces the number of competing R&D efforts. In general, reducing the number of separate R&D efforts may increase the costs to society of mistakes in R&D strategy, because there will be fewer other decisionmakers pursuing different and potentially successful R&D paths. Moreover, as the number of its competitors with which a joint program participant is required to share the benefits (or losses) of R&D increases, incentives to innovate may be decreased because the benefits of winning in R&D competition and the costs of losing may be reduced.

Whether a given joint R&D program is overly inclusive will depend on a variety of factors, including the relative capability and incentive of the firms that are in and out of the venture. No arbitrary rule is appropriate as to the minimum number of entities necessary to ensure adequate R&D competition. But when there are several other—perhaps four—comparable R&D efforts underway or successfully completed, or the substantial potential for such efforts by firms or groups of firms that are included in the market, anticompetitive effects are unlikely. However, the mere fact that there are fewer entities in the R&D market does not necessarily mean that a joint R&D program has an anticompetitive effect, or that any such effect is not outweighed by the procompetitive benefits of the program.

Because it generally is the existence of competing R&D efforts that spurs desirable innovation, decisions not to include every applicant in joint R&D programs generally will not have adverse competitive effects on R&D. Indeed, forcing a joint R&D program to accept all comers could forestall the development of competing R&D efforts. However, a joint R&D program that includes a large proportion of the competitors in an R&D market, even all the competitors in certain instances, might be permissible when only a program of that size can efficiently pursue the research objectives. In such a case antitrust concerns may be raised by the exclusion of competitors from the program.

*Another possible anticompetitive risk of a joint research and development program would be that the participants would in some manner agree to slow the pace of innovation, or the exploitation of the fruits of the program. Any agreement relating to the commercialization of the fruits of the program should not unreasonably discourage the participants from making full and prompt use of those fruits.*

Although joint R&D programs will generally be procompetitive, to the extent that such programs create an anticompetitive risk, that risk is most likely to arise from their effects on competition in properly defined R&D markets. However, other competitive effects also must be considered. Section 202 makes this clear by requiring the courts to take into account "all relevant factors affecting competition." For example, joint R&D that includes a large proportion of the competitors in properly defined relevant markets for goods or services that are currently being produced might in some circumstances have anticompetitive "spillover" effects, such as collusion among those competitors with respect to current price and output, or other strategic business decisions. If appropriate safeguards are built into a program, any likelihood that these effects will occur will be minimized. Courts should also consider how closely related the research and development being carried out is to the production and marketing of the product or service in question. The risk of collusion is least significant when the R&D program involves basic research, far removed from current price and output decisions.

The rule of reason condemns only joint R&D programs that on balance are anticompetitive. If no anticompetitive effects are established, a program does not violate the antitrust laws, regardless of whether it creates any demonstrable efficiencies.

On the other hand, merely because a joint R&D program has some anticompetitive effect, it is not automatically illegal. Courts should determine whether any aspect of a program that has an anticompetitive effect is justified by its procompetitive benefits. Joint R&D programs can capture significant economies and can be procompetitive. For example, the unit cost of operating very sophisticated scientific machinery used in experiments generally decreases as the frequency of use increases. Also, combining the complementary abilities of different competitors may yield synergies that further reduce the cost of R&D. If anticompetitive effects are established, the court must weigh any demonstrated promotion of competition through innovation or enhancement of efficiency against those effects, and courts are reminded of this fact by explicit language in section 202.

## VI. Regulatory Impact Statement

Pursuant to paragraph 11(b), Rule XXVI, of the Standing Rules of the Senate, the Committee has concluded that the Act will have no direct regulatory impact.

## VII. Cost of Legislation

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, D.C., April 6, 1984.*

Hon. STROM THURMOND,
*Chairman, Committee on the Judiciary,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1841, the National Productivity and Innovation Act, as ordered reported by the Senate Committee on the Judiciary, March 22, 1984. We estimate that enactment of this bill would result in no significant cost to Federal, State, or local governments.

S. 1841 establishes legal procedures with respect to joint research and development ventures entered into by corporations, associations, or groups of individuals. The bill provides that parties engaging in the venture may voluntarily disclose the identities of the parties, the nature, and the objectives of the venture to the Attorney General and the Federal Trade Commission (FTC). The FTC is to publish this information in the Federal Register within 60 days of the disclosure. The bill limits the liability for damages for parties that voluntarily disclose their projects in this way.

The only area where costs may occur is in the publishing of program disclosures. CBO does not expect these costs to be significant.

On March 30, 1984, the Congressional Budget Office prepared a cost estimate for H.R. 5041, the Joint Research and Development Act of 1984, as ordered reported by the House Committee on the Judiciary, March 20, 1984. That bill is very similar to S. 1841, and CBO estimated that no significant costs would occur from its enactment.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER.

## ADDITIONAL VIEWS OF SENATOR MATHIAS

On December 18, 1982, along with Senator Hart, I introduced S. 3116, a bill aimed at encouraging firms to engage in beneficial, procompetitive joint research and development ventures. On March 9, 1983, joined by Senators Specter and Baucus of this Committee and by Senators Hart and Chafee, I introduced S. 737, a revised version of S. 3116. The Judiciary Committee held a hearing on June 29, 1983 on S. 737 and two related bills. In response to the testimony at that hearing, the administration developed a new bill on this topic, S. 1841, which Senator Thurmond introduced by request on September 14, 1983. The present bill represents a substantial revision of the original text of S. 1841, arrived at through cooperative discussions among many members of the Committee. I am pleased that the Committee is today favorably reporting a bill that adopts much of the substance of my bill, S. 737.

Joint research and development can be a tremendous force for competition and efficiency. Yet to date only a handful of firms have been willing to enter into such ventures. While there are several possible reasons why so few such ventures have been initiated, many firms appear to have been deterred from joint research activity by antitrust fears. It is difficult to say whether or not such fears are "realistic," since there has been so little statutory or case law about the antitrust implications of joint R&D activity. But realistic or not, those fears have held back U.S. firms from the sort of joint activity that could help keep America a world leader in new technology.

In my view, what those considering joint R&D activity need most is clear standards. I have long urged Congress to enact statutory rules that would tell firms specifically how they can assure themselves that their joint R&D activities will not run afoul of the antitrust laws. I note, with great satisfaction, that the bill we report today goes a long way toward providing the clarity that firms considering joint R&D need.

The current bill incorporates two amendments of particular significance. The first—now section 201(B)(i)-(iii)—clarifies what activities a joint R&D program may not engage in and still enjoy the protections of this bill. The second—now section 202—elaborates upon the application of the antitrust "rule of reason" to joint R&D programs. The text of the Committee report on these sections provides further important guidance about their application. Taken together, these two improvements and the related report language come close to incorporating the clear statutory guidelines that I proposed in S. 737, and, indeed, parallel the standards included in that bill.

Nevertheless, our job is not yet done. For reasons similar to those ably advanced by Senator Hatch in his additional views, I believe that we should offer some relief to participants in joint R&D

programs that suffer the often enormous expense of defending unwarranted antitrust litigation. Indeed, my bill, S. 737, which contained a somewhat different package of provisions, called for participants in certain joint R&D ventures to be awarded attorney's fees if they successfully defended an antitrust suit challenging the joint venture.

We must use great care, however, in devising a standard for when an unsuccessful plaintiff must pay the litigation expenses of his or her adversary. In setting that standard, we must reconcile two opposite goals: first, to discourage frivolous litigation; and second, to avoid intimidating plaintiffs from pursuing meritorious claims.

In devising an attorney's fee provision, it is important to keep in mind that other provisions of the bill before us are themselves designed to discourage meritless litigation against joint R&D programs. First, the clarity that the bill will bring to the antitrust analysis of joint R&D programs will greatly discourage "strike suits" against such programs. The bill will firmly establish that most such programs are not only consistent with the antitrust laws, but will actually enhance competition. By making this unmistakably clear, the bill will make it easier to throw litigants out of court when they bring groundless antitrust suits against joint R&D programs. Second, the elimination of treble damages in suits based on activities within the scope of a joint R&D program will remove much of the incentive to engage in nuisance litigation. It is in the context of these changes that we should evaluate a statutory provision for the award of attorney's fees to successful defendants.

Whatever Congress provide in this legislation, the common law already permits defendants to recover attorney's fees in certain instances. The Supreme Court has repeatedly affirmed that when a plaintiff brings a suit in bad faith, the victimized defendant will be entitled to recover his or her attorney's fees. See, e.g., *Hall* v. *Cole,* 412 U.S. 1, 5 (1973). "Bad faith" can be difficult to prove, however, and several recent statutes have set less stringent standards for the recovey of attorney's fees by defendants. Both Congress and the courts, however, have recognized that it is necessary to be cautious in awarding attorney's fees to successful defendants.

Perhaps the best discussion of this issue is the Supreme Court's unanimous opinion in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 417 (1978). In that case, the Court was interpreting Title VII of the Civil Rights Act of 1964, which provides that a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." The Court concluded, however, that "strong equitable considerations" counsel that differing standards be applied in awarding attorney's fees to prevailing defendants that in doing so to prevailing plaintiffs. First, the Court noted that plaintiffs are "the chosen instrument of Congress" to vindicate federal statutory policy. 434 U.S. at 418. Second, the Court pointed out that when a court awards attorney's fees to a prevailing plaintiff, "it is awarding them against a violator of federal law." Id. Third, the Court concluded that too-ready an assessment of attorney's fees against unsuccessful plaintiffs might discourage victims from bringing meritorious claims. Id. at 421–22. In light of these factors, the Court held that prevailing defendants should recover fees in Title VII

suits only if the plaintiff's action was "frivolous, unreasonable, or without foundation." Id. at 421.

In many instances, Congress has been so concerned about the possibility of chilling meritorious litigation that it has provided for attorney's fees only for prevailing plaintiffs. But in some contexts, Congress has fashioned a standard similar to that stated by the Supreme Court in *Christiansburg Garment.* For example, the Natural Gas Pipeline Safety Act of 1976, 49 U.S.C. 1686(e) authorizes an award of attorney's fees to a prevailing defendant "whenever (the) action is unreasonable, frivolous, or meritless." Similarly, the Jury System Improvements Act of 1978, 28 U.S.C. 1875(d)(2), permits a defendant to recover his or her attorney's fees if the court "determines that the action is frivolous, vexatious, or brought in bad faith." And the Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3608(D), provides that a defendant may recover legal fees if the action was "frivolous, malicious, or lacking in substantial merit."

In litigation between private parties and the government, Congress has also sought to find a fair middle ground in the award of attorney's fees. For example, the Equal Access to Justice Act provides that certain private litigants are entitled to an award of attorney's fees when they win their cases against the federal government, unless the government's position was "substantially justified" or "special circumstances make an award unjust." See 5 U.S.C. 504(a)(1); 28 U.S.C. 2412(d)(1)(A). Similarly, in 1982 Congress provided that victorious private parties in federal tax cases shall be awarded attorney's fees if "the position of the United States . . . was unreasonable." See 26 U.S.C. 7430(c)(2)(A)(i). And the Clean Air Act, 42 U.S.C. 7413(b), provides that a prevailing defendant may be awarded legal fees in a suit brought by the Environmental Protection Agency if "the court finds that (the) action was unreasonable."

In view of the generally beneficial character of joint R&D programs, some similar intermediate standard is appropriate in the context of this bill. Such a standard would, quite properly, hold plaintiffs who bring meritless cases against joint R&D programs accountable for the attorney's fees that they force the participants to incur. At the same time, it would ensure that plaintiffs who bring lawsuits in good faith, based on an objectively reasonable evaluation of the law and the facts, will not be saddled with staggering bills for their adversaries' legal fees after losing a close case. There has been little debate thus far about how best to set such a standard, but I welcome further discussion of this issue.

One option that has been proposed would be to provide that attorney's fees "shall be awarded" to a successful defendant, but that the award could be "reduced or withheld in the interests of justice." I am concerned, however, that such a standard might create too strong a presumption in favor of the award of attorney's fees to defendants—even when the plaintiff's suit had a reasonable basis. Indeed, the Supreme Court declined to adopt a similar standard in the *Christiansburg Garment* case. See 434 U.S. at 418. However, I believe that further exploration of this issue will be needed before we can determine whether this or some other standard is most appropriate.

Experience under the Equal Access to Justice Act suggests that an intermediate standard will in fact enable courts to determine fairly when an award of attorney's fees is appropriate. A recent study by the Small Business Administration of the operation of that Act indicates that many applicants have succeeded in obtaining fees under the Act. See U.S. Small Business Administration, Office of Advocacy, "Small Business Attorneys' Fees Recovery: Report on the Equal Access to Justice Act" (1984). This experience suggests that courts applying an intermediate standard will in fact award attorney's fees in cases in which the losing position was frivolous, while not penalizing litigants who have failed in a close case.

I am also sympathetic with concerns raised by Senator Leahy in his additional views. The notification provisions in the current bill have been revised substantially to try to avoid making notification a treacherous obstacle course for firms embarking on joint R&D. But those changes may not go far enough, and I welcome Senator Leahy's thoughtful contribution to the debate on this issue.

CHARLES McC. MATHIAS, Jr.

## ADDITIONAL VIEWS OF SENATORS HATCH, LAXALT, SIMPSON, EAST, AND DENTON

In reporting this legislation, the Committee found it necessary to defer decision on some provisions of merit. One such provision deals with the question of the award of litigation costs to successful defendants in antitrust cases involving claims against joint R&D programs. The absence of such a provision is unfortunate and should be corrected.

As a general matter, the American legal system strives to be neutral, favoring neither plaintiffs nor defendants. Each side is responsible for paying its own litigation costs, win or lose. Generally, no more than actual damages are awarded to an injured party.

Antitrust cases are treated as an exception to this principle of neutrality. Price-fixing, bid-rigging, and the like are reprehensible activities. The law properly provides incentives to ferret out those who engate in such conduct: It awards treble damages and the payment of litigation costs to the victorious plaintiff. This bias in favor of litigation may be entirely justified as an antitrust norm, but it has no place in the present context.

In this legislation we have recognized that joint R&D activity is a procompetitive economic necesssity. An increase in such activity is necessary for the health of both our domestic economy and our international trade. Those who engage in joint R&D activity are serving the Nation's best interests. Thus, we feel it is incongruous to maintain a bias in favor of litigation against such beneficial activity. Yet the reported bill does just that.

While the bill reduce treble damage liability to actual damages with interest, it nonetheless leaves in place legislated incentives—namely, the payment of the costs of litigation to successful plaintiffs, including a reasonable attorney's fee—designed to encourage antitrust litigation, including litigation against joint R&D programs. This bill limits its focus to beneficial activity, excluding, by definition, antitrust violations such as price-fixing, and the like. Moreover, it additionally excludes unreasonable restraints that may be collateral to joint R&D activity. Yet, despite this limited scope, the bill inconsistently fails to eliminate a bias against the beneficial activity that it hopes to promote.

We believe that this bias should be eliminated by treating the award of litigation costs, including reasonable attorney's fees, to the prevailing party in an equitable and even-handed manner. Since prevailing plaintiffs are presently awarded such litigation costs, the practical way to eliminate the bias is to also permit the award of such costs to prevailing defendants and grant the courts discretion to reduce such an award, if necessary, in the interest of justice. While other formulas may be appropriate, our basic purpose is to eliminate the bias in favor of litigation against activity it is our policy to encourage. If we are committed to promote and in-

crease joint R&D activity, we believe it is only reasonable that the judicial system treat legislatively promoted activity in a neutral manner.

ORRIN G. HATCH.
PAUL LAXALT.
ALAN K. SIMPSON.
JOHN P. EAST.
JEREMIAH DENTON.

## ADDITIONAL VIEWS OF SENATOR ROBERT DOLE

The bill reported by the Committee will go a long way toward addressing business uncertainties about the application of antitrust law to joint research and development ventures. Amidst the continuing debate about the need to establish a new "industrial policy," S. 1841 represents yet another of the specific, concrete proposals being acted upon by this Committee which will have an immediate and real impact on the private sector's ability to find and develop new technologies to strengthen America's international competitive position.

The basic approach contained in the reported bill is the same as the approach I proposed last summer when I introduced S. 1561, the "National Joint Research and Development Policy Act." This approach recognizes that antitrust disincentives to engage in joint research and development projects stem not only from confusion and misconceptions about the legality of such ventures, but also from the fact that the risk of an antitrust challenge is compounded by the current bias in favor of litigation caused by the availability of treble damages. Consistent with the need for vigorous antitrust enforcement, this "stacked deck" afforded antitrust plaintiffs, may be appropriate in most instances. However, in the context of joint research and development ventures which, by definition, pose little anticompetitive risk and can produce enormous procompetitive benefits, a treble damage remedy has no sound policy basis.

The reported bill addresses both problems without imposing burdensome regulatory requirements or increasing governmental interference in the marketplace. The bill simply clarifies that joint research and development ventures are not unlawful, per se, under the antitrust laws, but rather the "rule of reason" applies whereby the courts must examine the venture's actual economic effects. The bill provides guidance to the courts with regard to the factors to consider in applying the rule of reason, but avoids the imposition of rigid statutory criteria. To address the current system's litigation bias, the bill would permit joint research and development ventures to shield themselves from treble damage awards by merely filing a simple disclosure statement with the Department of Justice.

With regard to the question of attorney's fees, I had included an attorney's fees provision in my bill and agree with Senator Hatch's views on this question. Even with protections against treble damages, there may remain substantial concerns among many firms about the danger of excluded competitors bringing costly, unfounded litigation against joint R&D programs—a danger which becomes more acute the more successful the venture. This danger is reduced if, in order to being such suits, plaintiffs must assume the risk of paying defendants' legal costs. If defendants continue to be responsible for these costs, however, some businesses may remain reluc-

tant to undertake joint research and development programs or, alternatively, may be tempted to try to avoid antitrust challenges by simply giving all competitors access to the program. Either result is incompatible with a national policy which should encourage the formation of procompetitive joint research and development ventures.

ROBERT DOLE.

## ADDITIONAL VIEWS OF SENATOR BIDEN

I strongly support the Committee reported bill and the bipartisan effort that went into its formulation. I add these views to express further encouragement and support for the concept we have developed.

Innovative and creative thinking has been, and will remain, in my view, the hallmark of the American way of life and the stimulus for American economic strength. But we can not rest on our laurels. We can not only emphasize short-term profits and accomplishments. We must keep at the task of basic research and development efforts, the fruits of which will pay off ten and fifteen years from now.

The United States remains a world leader in scientific and technical achievements across many fields—medicine, electronics and agriculture—to name a few. Yet the increasingly competitive world market for goods and services has challenged our historical position of worldwide preeminence in many fields as well as in our own domestic markets. The past decade has taught us, and reinforced what the business and scientific communities have been telling us, that we ignore the encouragement of adequate research and development activity to our peril.

As we begin to adjust to what is a fundamentally altered world of competition, clarity of antitrust enforcement with regard to research and development joint ventures may be only the first of many questions that we will need to address as a country and as a Congress—but it is, I believe, an important first step. We also need to examine whether we are spending sufficient federal dollars, and in the right areas. Furthermore, we need to examine how to get our outstanding educational institutions to turn-out the skilled technical and innovative thinkers who will staff our great research and development laboratories in the decades to come.

But in the mean time, we need to assure that our deficiencies in these areas do not irreparably damage our competitive position in the world. I believe Admiral B.R. Inman USN Ret.), chairman of the newly formed Microelectronics and Computer Technology Corporation research and development joint venture, may have best summarized our problem in testimony before the Committee on this issue:

> [Research] [c]apital is important, but talent is even more important. What we are facing at this point, and we need to clearly recognize it, is that we as a country have invested insufficiently in producing the graduate scientists and the graduate engineers, beginning in the late '60's, to take advantage of the opportunities that lie out ahead.
>
> More than that, we have an insufficient number to deal with the competition that is abroad, even ignoring the op-

portunity for great economic growth. Even if we address those education problems and begin producing a very substantial additional number of graduate engineers, graduate computer scientists, graduate physicist and graduate mathematicians, it is going to be ten years before that is available to us.

We have a problem to deal with now, and the real problem is making sure that we do not waste the talent we are producing by having them recreate the same basic technology across a large number of industries.

The prospect of significantly increased joint research and development activity represents one alternative for firms in an environment where successful research requires substantial investment of human talent and monetary capital. Yet, the complaint has often been made that joint efforts are discouraged or deterred by the antitrust laws and the uncertainty that surrounds antitrust enforcement in this area.

Edmund Burke was the great proponent of a notion that is at once popular and conservative. "Produce nothing wholly new," he wrote, "and retain nothing wholly obsolete." We would do well at this moment in our economic history to keep that thought before us in charting a course for the future. Given the strengths and the resources of our economic system, we can find solutions to some of the competitive challenges we face—and we can do it without emasculating the antitrust laws.

The antitrust laws, which represent the cornerstone of our free market economy, have served us well for over seventy years. Fundamentally, they do not need change. But like most laws, they need the benefit of some creative fine tuning from time to time. The Committee has reported a bill that, in my view, adequately accomplishes that goal.

There may be Senators who will argue that this bill does not go far enough and that additional provision should be made for relief from antitrust enforcement or the threat of antitrust enforcement. There may also be Senators who will argue that this bill goes too far and that we have now opened the door to widespread abuses by firms who may be competitors today.

To each of these views, I would argue that our action should be kept in the proper perspective. The area of joint research is largely an area where combined activity is today already legal. In fact, from the time when we began consideration of this legislation, I have wondered whether the need for this legislation has been more about changing the mind-set of our corporate leaders and board members, to think about the long term research needed to assure competitive potential, and less about a specific alteration of the antitrust laws.

Despite this thought, however, I think the risk of inaction is too great. Competition will not be served if our domestic markets become dominated by foreign competitors who have aggressively entered into joint research activity, often with the aid and encouragement of their governments. Competition will also not be fostered if the innovative thinking and creative potential in many firms is only brought together by mergers.

The thrust of this bill is to do what we often do in Congress and that is, send the proper signal—a positive signal—to the businesses that are prepared to invest in joint research. The bill also adds clarity to laws that are currently causing confusion and sluggish investment in important research efforts. To this end, the committee has reported a bill with provisions that are tightly drawn.

The bill, in Burkean fashion, preserves what is essential in the antitrust laws—a competitive environment—but at the same time dispenses with the obsolete notion that any combination of firms doing research should draw fire under the antitrust laws. Futhermore, because the bill asserts a clarity of antitrust enforcement, it mitigates more broad based—and unfounded—efforts to alter the fundamental basis of our antitrust laws.

Research and development is the key to America's competitive potential in the decades ahead. It is the engine that will drive our prosperity and stature in a world economy undergoing fundamental change. This legislation fosters a climate and develops momentum for a committment to excellence that must be brought to fruition in industry. It is time to get on with the task.

JOSEPH P. BIDEN, Jr.

## ADDITIONAL VIEWS OF MR. METZENBAUM

I support legislation which would encourage procompetitive joint ventures without harming competition or the antitrust laws. Section 202 of this bill, which clarifies existing antitrust law in this area and provides further guidance to courts and the business community, serves such a goal. However, the record established before the committee does not support an award of attorneys fees to a prevailing defendant, as some have advocated. Moreover, the proponents of this legislation have not made the case to support the elimination of our 94-year tradition of treble damages for proven violations of the antitrust laws.

Our hearings elicited testimony from representatives of high-technology industries that the antitrust laws currently may have some deterrent effect on important cooperative ventures in the research and development area. The principal cause of this deterrence, we have been told, is the risk that many years down the road a venture will find itself subject to antitrust liability based on uncertain principles. Although, frankly, the evidence in support of this claim is not overwhelming, I believe that legislation which provides guidance as to the potential antitrust liability of firms engaging in joint research and development may have some beneficial effect and will not harm competition.

However, the case for the award of attorneys fees to defendants or the elimination of treble damages to plaintiffs has not been made. I see great potential for harm, both in suggestions made by a minority of my colleagues to include an attorney free provision, and in section 203 of S. 1841.

As the committee report notes, S. 1841 recognizes that some joint R&D programs may be anticompetitive, and section 202 provides safeguards against this potential. This section adopts a rigorous rule of reason analysis for scrutinizing these joint ventures.

Most of the facts relevant to this analysis will be in the hands of the defendants. Plaintiffs must sustain significant costs to litigate and prevail in these cases. As section 202 makes clear, plaintiffs must marshal sophisticated economic data and analysis to prove that the venture harms competition. In this light, such an endeavor is inevitably fraught with risk. In order to ensure that victims and the state law enforcement agencies are willing to bring suits challenging anticompetitive ventures, this legislation properly omits any provision awarding attorneys fees to prevailing defendants. However, in reducing incentives for private antitrust enforcement by eliminating treble damages, the bill as reported goes to far, in my view.

Virtually no private antitrust actions will be brought if plaintiffs face the potentially enormous liability for the legal fees of multiple defendants. Indeed, shifting the cost of defendant's attorneys fees to plaintiffs may have precisely the opposite effect intended by its

proponents. The threat of fee liability could encourage a firm to wait until a R&D program becomes successful, and until the firm suffers significant damages, before assuming the risk of paying significant attorneys fees to defendants. In these cases, such a plaintiff could have brought an action for injunctive relief at the outset of the venture, and thus assured that the venture was structured to comply with our antitrust laws at the onset. Thus, such fee shifting could actually have a damaging effect on joint R&D programs.

Some members of the committee argue that defendants should be reimbursed for their attorneys fees because joint research and development is a "beneficial activity". There are many beneficial activities that may be challenged under our antitrust laws without plaintiffs bearing the cost of defendants' attorneys fees should defendants prevail. Production joint ventures which can be "beneficial" may be challenged as anticompetitive without the threat of attorney fee reimbursement should the challenge fail. Similarly, employers who engage in beneficial activities do not receive attorneys fees whenever they prevail in civil rights action. To intimidate plaintiffs with the risks action. To intimidate plaintiffs with the risk of liability for defendants' attorneys fees would severely restrict enforcement of vital rights and public policies embodied in our laws. Vigorous antitrust enforcement is essential to maintaining a free market.

The bill as reported strongly discourages plaintiffs from harassing defendants with meritless law suits. By adopting the rule of reason standard, the act imposes a significant burden of proof on plaintiffs that will discourage frivolous suits. In addition, as noted below, the law substantially reduces the incentive for plaintiffs to bring suits based on borderline claims by allowing plaintiffs to recover only actual damages. Imposing liability on plaintiffs for defendants' attorneys fees clearly is not needed to discourage meritless suits.

There is no hard evidence to support the claim that elimination of treble damages will encourage significantly more joint ventures. Faced with substantial risk that the R&D venture will not bear fruit for commercial reasons, and the more speculative possibility of antitrust liability include actual damages to those injured plus the full panoply of injunctive relief, common sense suggests that such a firm will not really base its decision on the treble damage question. Indeed, the principal administration official who has pushed this legislation, former Assistant Attorney General William F. Baxter, has publicly conceded that "the extent to which the antitrust laws interfere with research and development is vastly overrated." Moreover, the Office of Technology Assessment, in a 600 page report on international competitiveness in electronics, devoted only two paragraphs to antitrust. OTA concluded that some businessmen fear antitrust liability due to uncertainty. We have taken care of that problem in section 202, by providing clear guidance to courts and industry concerning the application of antitrust laws to joint research and development. OTA, significantly, does not mention treble damage liability as a source of underinvestment in joint R&D. Thus, it is unlikely that the elimination of treble damages will help create more procompetitive research and development.

What is more likely, however, is that injuries which might result from an anticompetitive venture will not be redressed because of the unavailability of treble damages. The author of the Sherman Act, Senator John Sherman of Ohio, proposed multiple damages not to deter or punish, but to ensure that injured comsumers would have a sufficient economic incentive to take on the powerful corporations who would be likely violators of the antitrust laws. In Sherman's view, "the damages should be commensurate with the difficulty of maintaining a private suit against a combination . . ." (21 Cong. Rec. 2457). Indeed, he viewed the original bill's award of double damages as too small. "Very few actions will probably be brought", he states, "but the cases that will be brought will be by men of spirit who will contest against these combinations." (ID. at 2470).

The current administration's lax enforcement of the antitrust laws demonstrates that now, more than ever, we need private antitrust enforcement. By eliminating the treble damages incentive in difficult antitrust litigation, we may be effectively immunizing such conduct. The elimination of treble damages will have a very adverse effect on the ability of those injured by violations committed by joint ventures—typically small business—to vindicate their claim.

I hope that the full Senate, after careful consideration, will reject any attempt to award attorneys fees to defendants and will delete section 203 from S. 1841.

HOWARD M. METZENBAUM.

## ADDITIONAL VIEWS OF SENATOR PATRICK LEAHY

I am very gratified that the Committee is acting expeditiously on legislation designed to allow joint research and development in the United States, because our economic future will depend on the quality of our inventive imagination, and it is a plain fact that no one company has a monopoly on that imagination, and no one company can do the job by itself.

The need for this legislation does not negate the need to be vigilant in preventing violations of our antitrust laws. But I strongly believe that we have put together legislation that will promote needed technological cooperation without risking harm to the competitive marketplace.

Though this bill has come a long way in achieving the balance that will permit our industries to benefit from joint research and development efforts, there are still some changes that may be necessary to ensure this result. In particular I am concerned about the provisions that require participants in a joint R&D venture to disclose their activities to the Justice Department in order to obtain the benefits of detrebilization.

First, I want to say that I think the original impetus for the notice provision as a condition to detrebilization reflected a sense of responsibility and history in its proponents. Treble damages have served an important purpose in a field where the detection of violations is difficult and where the penalties for violating the law are no deterrent if they amount to single damages.

But let us recall that the basic tenet of the antitrust laws is to prevent anticompetitive combinations. In a sense, the basic tenet of the present legislation is to promote combination where it is needed to produce a desirable economic and social result.

Our foreign competitors do not labor under antitrust restrictions. Their R&D muscle is unlimited, and research consortiums are formed on strictly pragmatic grounds: What is needed and what will work.

Much of our national inventive dynamism is located on our small enterprises—particularly in the field of high technology. If they can maintain their small-unit creativity and yet join with others for R&D when a project is too big or costly to do alone, the beneficiary will be the entire nation.

In short, I think it is inconsistent with the original theory underlying treble damages to impose them where the very reason for the bill is to permit needed combinations. And the temptation of some companies to exceed the bill's limited permission to combine is more than amply met by its carefully framed definitions.

There are practical objections to disclosure requirements as well. The most serious of these stems from the possibility that companies might be fearful that the detailed information provided t the Justice Department might get to competitors outside the joint R&D

program, and therefore, might not elect to disclose their joint R&D venture at all. To solve this problem, the bill creates an additional one—which is a nondisclosure section that is so broad that it even cuts off congressional access to any documents held by federal agencies concerning the joint R&D program.

Furthermore, in some industries, even the very general federal register announcement contemplated by the bill might provide enough information for industry insiders to be able to learn a great deal about the nature and purpose of the R&D.

The disclosure statement itself presents additional problems. If it is very detailed, the future research and development will be limited to the very project described in detail, and researchers will have to constantly question whether a new tack, or offshoot of research, has taken them outside the protection they had originally gained, and thus a new disclosure statement is required.

On the other hand, a statement that is considered too vague may be subject to the charge that the companies filing it wanted blanket protection and failed to disclose enough details to warrant protection. To add to the confusion, it is not at all clear whether a court would look to the Federal Register notice contemplated by the bill, or the more detailed filing submitted to the Justice Department to determine the scope of protection provided by the bill.

Like that fabulous giant of Greek Mythology, Procrustes, this approach would cut you feet off if you're too large to fit, and would stretch you out if you're too short.

Even if the ideal disclosure statement could be drafted and the filing companies were lucky enough to have their actual results track their intentions exactly, this is a provision that continues to contain uncertainty and is an ineffective means of encouraging compliance with the antitrust laws. And it adds a burden of paperwork on the private sector and on industry that runs counter to the apparent intent of the bill. Much of the paperwork will be necessarily general, and I wonder whether a future lawsuit may focus more on the adequacy of disclosure and less on the issue of whether two or more companies have used the excuse of R&D to violate our antitrust laws. That issue—and that issue alone—should concern us, and I don't believe that the notice provision will help lawyers or judges in the future. It may, however, deter joint R&D.

I am not suggesting that the need for research and development is so great in this country that we should put potential violators of our antitrust laws on an honor system. But I think that the protections against abuse of the present bill will come from clear definitions and its clear purposes. Companies that want to use this bill as a cover to conspire against the competition know that they risk not coming within its protection.

If there is any possibility of a venture existing whose members intend to abuse the limited permission this legislation grants, but which appears to meet the literal requirements of the bill's protections, the answer is not a cumbersome notification procedure, but perhaps the addition of a standard for such conduct, so that when it is demonstrated, treble damages can be revived.

With or without this refinement, the current bill is a considerable risk for those who are not serious about the bill's purposes—but it should not be a risk for the vast majority of the companies in

advanced industries who share with the United States Senate the conviction that our competitive future lies within our own control and is subject only to the limits of our own creative spirit.

In closing I want to stress that my skepticism about the notification requirement flows from the logic of this particular legislation. It would be unfair and unfortunate if those who wish to see treble damages ended in all rule-of-reason antitrust cases cited these views to support their goals. Treble damages have served the cause of antitrust enforcement well and should not be weakened. Joint research and development can serve the nation well, and detrebilization makes sense in the context of the bill's other protections against abuse. But I want to underscore the need to keep these goals in mind as separate and distinct and to avoid using the argument for needed new legislation as support to weaken needed old legislation.

PATRICK LEAHY.

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