

On December 12, 1980, President Carter signed into law a piece of legislation which most of us refer to as the University and Small Business Patent Act of 1980.

News of this event reached me in Detroit within an hour of its occurrence. And suddenly, it was all over. A victory which at one time had seemed hopelessly beyond our grasp, which had eluded our most determined efforts for years, had now become an incredible reality. It was a time for celebration, and also for reflection. Were we together then, we would have recounted, laughingly, the hours of our despair, while toasting the heroes and roasting the villains of a truly epic struggle.

I am sure there were parties somewhere, in Washington perhaps, where a few of our number could add the warmth of comradeship to the joy of victory. Yet most of us, being removed from one another by a considerable distance, were obliged to rejoice in solitude, if not also in silence.

Today, for the first time since that happy event, we have an opportunity to rejoice together. I have not come here today to explore with you the problems which lie ahead, nor to discuss the proper distribution among ourselves of specific assignments. I have come, rather, to celebrate what has already been accomplished. It is time to luxuriate in the knowledge not merely that we have won, but that, by all that is holy, we deserved to win.

What was the darkest hour of the campaign? It was not, as some might conjecture, when we were farthest from victory. Indeed, our progress was remarkably steady, albeit agonizingly slow, so that we inched closer to victory each day. The darkest hour was marked instead by the severity of our casualties. The nadir was reached on December 12, 1978, exactly two years prior to the date of enactment. If only we had known!

It is a tradition among employes everywhere, and among federal employes especially, for a departing worker to be escorted to lunch on his final day by a coterie of his friends and office mates. Such occasions can range from the simply bittersweet to the hilarious. And sometimes, very rarely, they can be poignant beyond description. Norm Latker had been fired by Joe Califano and December 12, 1978 was his last day on the job. After 22 plus years of federal service he was being terminated without separation pay for alleged departures from official DHEW policy. I was working at Argonne Laboratories during this period but arranged to be in Washington on that <sup>final</sup> day. There were just three of us for lunch. Norm, myself, and Dave Eden, my former special assistant at Commerce who <sup>was then</sup> with the Department of Energy. Our purpose, Dave's and mine, was to assure Norm of our continuing commitment to the joint undertaking, and more especially to one another. It was not a sad meeting, though the situation itself was grim. We were sustained by the conviction that the Civil Service Commission would ultimately set aside Norm's dismissal as illegal, restoring him to his post with full back pay. This eventually transpired, except that Norm got no back pay since his income as a private patent attorney during the layoff period far exceeded what he would have earned as a civil servant.

It would have helped had we known then that Califano himself would soon be dismissed by the President and that the President would prove willing to sign into law a policy which Califano had dismissed Norm Latker for espousing.

Califano was indeed the arch villain of the entire affair, yet his excesses helped our cause tremendously, turning otherwise *neutral* parties to our side. Yet, he was not around at the beginning.

The very first battle took place in late 1974, immediately prior to the establishment of the Energy Research and Development Administration (ERDA). At issue was the patent policy which would guide the contract and grant activities of this new agency. President Ford was anxious to get started with his energy initiatives of which ERDA was to be the cornerstone. His eagerness, however, / left him vulnerable to a handful in Congress who saw an opportunity to impose rigid patent policies upon the fledgling organization. We fought this opposition to a standstill, then turned the tide so that, in the end, ERDA's patent policy was a lot better than that found in many federal programs. We were aided in this endeavor by an extraordinary communication from the Executive to the Legislature. It may well be without parallel in our history. It said, in effect, that the administration had carved out a compromise with Senator Hart, the leader of the opposition, and that the President would veto any bill which departed from the text of that compromise in the slightest particular. The battle ended with a minor victory for our side: we had averted disaster and had actually gained a little ground,

We were beginning to recognize our friends and win new ones. These included Congressmen Craig Hosner, Don Fuqua, Mike McCormack, and Barry Goldwater, Jr. On the other side were the rest of the House and the whole of the Senate, or so it appeared. Our leading foes were Kastenmeier, Seiberling and Udall in the House, and Hart and Long in the Senate. We should also remember Bernie Nash, Senator Hart's aide, who was both tenacious and indefatigable in his opposition. He was a worthy adversary and fully deserving of our respect, and perhaps even some grudging admiration. Unlike Joe Califano, Bernie Nash made few mistakes and he pushed no one into our camp.

And what about the good guys. The inner circle consisted of about six members of the Executive Subcommittee of the Committee on Government Patent Policy. These six were charged with the task of organizing an active constituency from among those who shared our philosophy. Their efforts produced strong support and write-in campaigns from the American Bar Association, the National Small Business Association, the National Patent Council, the Chamber of Commerce, the National Association of Manufacturers, Aerospace Industries Association, and like groups. Norm Latker was chairman of a subcommittee dealing with university patent policy. It was his job to organize the university sector and he did so magnificently, extracting immediate pronouncements of support from the American Council on Education, and NACUBO (National Association of College and University Business Officers), from which organization your own has sprung. SUPA came later, but we soon found ourselves with a team of dedicated supporters at the cutting edge of technological advancement. There is always a first, even among equals, and the first one on my list must be Howard Bremer of

the Wisconsin Alumni Research Foundation. With him were:

Neils Reimers of Stanford

Larry Gilbert then of MIT, now of Boston University

Ray Woodrow of Princeton and later the first President of SUPA

Ray Snyder of Missouri

Al Gold then of Rockefeller University and more recently of NY Polytech

Bob Johnson of the University of Florida

Earl Freise then of Northwestern and now of N. Dakota

Clark McCartney of the University of Southern Cal

Tom Martin of Utah

Will Farnell of Minnesota

Ralph Davis of Purdue

Ed McCordy of Washington University (St. Louis)

Alan Moore of Case Western

Mark Owens of the University of California

Rodger Ditzel then of Iowa State, now of University of Cal

Ed Yates of Johns Hopkins

Dennis Barnes then of the University of Virginia, now science  
aide to Senator Schmidt

Bill Burke of Georgia

Tom Evans of Michigan Tech

Joe Warner of Yale

With the first battle over, we were stronger - far stronger - than we had ever been. Rather than dismantle our army, we decided to take the offensive. Together we wrote a patent policy that was as perfect as we could make it, one totally devoid of the shortcomings associated with political expediency. In short, we set out to educate the misinformed, the untutored and the suspicious, rather than mollify them. The bill that we wrote is known today as Thornton - not the Thornton Bill or the Thornton Act - just plain Thornton. The University and Small Business Patent Act is Thornton applied to universities and small businesses. The name Thornton comes, of course, from Ray Thornton who introduced our bill to a reluctant if not hostile House of Representatives. Ray is now President of Arkansas State University, from which vantage point he must certainly look back with pride upon what he has wrought. He must also be surprised, given the fact that the bill was never reported out of committee, nor indeed were hearings ever scheduled.

We learned during these years that, of all the persuasive arts, education is the slowest. And the education of politicians is slower yet. From a purely personal point of view, I was keenly aware that time was running out. As the inauguration of President Carter approached, there remained two unfinished peices of business.

First - to prevent the imposition of federal control on Recombinant DNA experimentation, and

Second - to legislate Thornton.

The completion of these projects would depend upon the organization I left behind. In fact, more was accomplished after I left than when I was present. My successor, Jordan Baruch, pulled a Joe Califano. He repudiated Thornton absolutely and irrevocably which made everybody work twice as hard for Thornton as they might have otherwise.

Almost a year after the Carter Administration had begun, Senator Gaylord Nelson announced that his Monopoly Subcommittee would begin a truly extraordinary set of hearings:

"These hearings," Nelson said, "would examine efforts by a highly placed group of Commerce Department employees - most of them hold-overs from the two previous administrations - who are trying to persuade Congress to repeal laws that now require certain agencies to take title to the benefits of research paid for by the public."

"The Commerce Department group, known as the Government Patent Policy Committee, has been circulating a draft report among government agencies aimed at drumming up Congressional support for repeal of laws that prohibit granting exclusive marketing rights to companies which developed inventions with government financed research."

"If this group of Commerce Department employees has its way, the government would end up giving away to a small number of companies the rights to every invention produced through government financed research."

In truth and in fact, this set of hearings was intended to be a pre-emptive strike against Thornton - to prevent a Thornton-type bill from being introduced in the Senate, and to send a message to members of the House.

The witness list included a lot of my old sparring partners, including Admiral Rickover, Representative Seiberling and Senator Long, together with some new players.

By some incredible coincidence, my name popped up a couple of dozen times during these hearings, even though I've been gone for almost a year.

Representative Seiberling observes at one point that "Assistant Secretary Ancker-Johnson was almost fanatic in opposition; she was the leading protagonist in doing everything she could to stymie compulsory licensing."

Senator Long accuses me of making the same old, tired, discredited claims to justify the giving away of government owned rights. Then he gets to the heart of the problem. He says:

"In April, 1977, a bill was introduced in the other body (H.R.6249) and, I must confess, it is a beaut. This is what a real giveaway should be like. It gives everything away; it doesn't leave even a sliver of meat on the bone."

"This proposed legislation is one of the most radical, far-reaching and blatant giveaways that I have seen in the many years that I have been a member of the United States Senate."

Coming from Senator oil-depletion-allowance Long, this is high praise indeed.



Rickover then reveals how the ERDA patent lawyers have actually invited contractors to request waivers, all of which goes to show how right he was in denouncing our perfidy the first time around.

An economist I never heard of compares my views to "stale wine in old bottles." Both the Chairman of the Federal Trade Commission and the Assistant Attorney General for Antitrust conclude with dire predictions for the future of our economy, absent their careful scrutiny of the patent system in general, and government patent policy in particular.

Somehow, after listening to all these testimony, Senator Nelson changes his mind and decides that Thornton is perfect for universities and small businesses.

Meanwhile, back at DHEW, Joe Califano was working his magic. Not a single patent waiver was granted by HEW from the summer of 1977 until the fall of 1978.

Mounting pressures from the university community, among others, forced the breaking of the log-jam in late '78. The firing of Norm Latker was effected in retaliation.

One Waiver had actually occurred in the spring of 1977, shortly after Califano took office, but was cancelled illegally, only a month later. The invention in this case involved a CAT scanner. The contractor/assignee was a small business concern known as American Science and Engineering, Inc., or AS&E for short.

Three months ago, AS&E finally got its day in court. I should say the Receiver of what is left of AS&E got his day in court.

The government was found liable and the matter remanded for the assessment of damages, among other things. I don't know how much the damages will be, but every penny will come out of the taxpayers' pocket for conduct which Mr. Califano, a lawyer, should certainly have known to be unlawful. If you think that I have had difficulty in rationalizing Mr. Califano's conduct, listen to what the court has to say.

"Dr. Richmond's decision may also have been prompted by a memorandum from Joseph Califano, then serving as Secretary of HEW, in which Califano notified Dr. Richmond that he had asked the HEW Inspector General to review the decision process which led to the grant of the AS&E exclusive license. Califano's memorandum was dated July 21, 1977, the same date that Dr. Richmond wrote his letter to AS&E purporting to cancel the license agreement. In his memorandum, Califano stated, "In view of my general concern with respect to the contract procurement process within the Department, I am interested in knowing how this decision was made." This language is difficult to reconcile with that which appeared in a letter Califano had written to the Speaker of the House, Thomas (Tip) O'Neill, less than one month earlier. In his letter to the Speaker, Califano stated, "I am pleased to report that the Department has now granted and returned a limited exclusive license under these inventions to AS&E as an incentive toward their commercial development." His letter to the Speaker concluded that "this matter has now been resolved in a manner which is fair and equitable to AS&E, the Department, the public and other manufacturers of CT Scanners."

Returning to the events which were occurring in the Senate around the time of Senator Nelson's Damascus-Road conversion, you will recall that Senators Bayh and Dole introduced the University and Small Business Patent Act, and began hearings thereon. At this set of hearings our side got a chance to testify and we did so with a vengeance. Our opponents began looking for opportunities to be out of the country rather than face public cross-examination - all except Rickover who never answers questions anyway. He deserves high marks for persistence if not for perspicacity.

The remainder of the story is well known to all of you. What you may not know are the names of the heroes whose roles were played behind the scenes.

I will not reveal the identities of the remaining members of the Executive Subcommittee, since I don't want anybody to get fired the next time we have a change of administration. You already know that Norm is one of these. Nor is there time for me to tell you the exact contributions of those individuals whose names I feel compelled to mention today. It would take hours to do everyone justice. Instead, I will merely indicate the capacity in which each one came to be of significant service to our cause.

Joe Keyes - Association of American Medical Colleges

Shelly Steinback - American Council on Education

Eric Schellin - National Patent Council and National Small Business Assn.

Tom Arnold - Patent Attorney, Officer of Texas Bar Assn., the American Bar Assn., the Licensing Executive Society and the American Patent Law Society. Each of these groups supported our legislation.

Barry Leshowitz and Brenda Levenson - Aides to Senator Dole. Barry is now on the faculty of the University of Arizona. I'm not sure where Brenda is at the moment.

Ed Brenner - Former patent commissioner and President of the Association for the Advancement of Invention and Innovation.

Francis Browne - Patent Attorney and officer of ABA

Frank Cacciapaglia and Barry Grossman - Patent Office officials with responsibilities for Congressional liaison.

Dr. Gail Pesyna - House Science and Technology Committee staffer - now with DuPont.

Mike Superata - House Science and Technology Committee staffer - later with House Ways and Means.

Joe Allen - Aide to Senator Bayh - now Executive Director of Intellectual Property Owners, Inc., a non-profit association.

Darcia Bracken - Congressional Staffer to Ray Thornton. I believe that Darcia is now with NASA.

Julie McDonald - Administrative Assistant to Ray Thornton. Present whereabouts not known to my staff - though probably back in Arkansas from which she is fully expected to return as a Congresswoman in her own right. Let's hope so.

Lester Fettig - Headed up the Office of Federal Procurement Policy in the Carter Administration. Gave us more assistance than any other Carter appointee.

Julius Tabin - Patent Attorney to Salk Institute.

Rudy Vignone - Director of Governmental Relations, Goodyear Tire and Rubber Company.

Brendan Somerville - National Association of Manufacturers.

How's that for an impressive array of talent! Kind of makes you wonder sometimes why it took us so long. Could we have made it without them? Probably not, and even if we could, we wouldn't be there yet. So we really do owe them a debt of gratitude. And yet, having said that, let us not overlook one incontrovertible truth:

THEY could NEVER have made it without US!

You know, and I know, that it is we who did it, and I for one am damn proud of it!