

## Taking Directions from the Lost January 7, 2013

## Written by Joseph Allen

## Allen & Associates

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*That fellow seems to me to possess but one idea; and that is a wrong one. — Dr. Samuel Johnson*

The Brookings Institution’s new report [***Building an Innovation-Based Economy***](http://www.brookings.edu/research/papers/2012/11/13-innovation-technology-west-friedman-valdivia) draws on “two dozen innovation leaders” for its findings. Only one section, “Increasing Commercialization and Technology Transfer,” names no leaders backing its recommendations, perhaps with good reason.

Brookings wants new regulations imposed on university and federal laboratory patent licensing, presenting theoretical problems with no supporting facts.  Brookings lightly brushes aside the Bayh-Dole Act’s thirty-two year record of success. The Act believes that technology creators, not the bureaucracy, best understand how to manage resulting inventions.  Those recommending sweeping changes face a high burden of proof that Brookings doesn’t attempt to meet.

The report accurately describes Bayh-Dole as “streamlining the translation of research into new products.” Then the kicker: “It is less clear, however, whether this act has always been effective in directing public research into the public interest.”

“Rather, it is quite possible that *one unforeseen consequence of Bayh-Dole allows for modes of commercialization that have and* (sic) *inflationary effect on the whole healthcare system, not just new products.”*

The report alleges that “established pharmaceutical companies can outbid smaller firms seeking to license a promising university patent. New companies will not rise to replace old established ones, and any new technological platform in biomedicine will not produce the creative destruction that infects markets with dynamism.  As a result, global pharmaceutical industry can set prices for final products above what would otherwise be competitive prices.”

The lack of any evidence supporting these claims is striking.

Brookings continues:

 “If tax dollars fund an important part of biomedical innovation, it is not altogether unreasonable for the government to exercise some degree of control over pricing excesses. Yet, no such measures are currently in effect.”

Further:

*“Congress should amend Bayh-Dole to promote the formation of competitive as opposed to monopolistic markets.* A step in that direction is for the letter of the law to explicitly encourage the use of non-exclusive licenses. Without banning the use of exclusive licenses *an explicit government preference for non-exclusive licenses would increase the power of federal agencies to promote wider use of patents*, regulate monopolistic practices with the products that result from them, and shift the weight-of-proof from the bureaucracy to the licensees to justify an exclusive patent.”

Brookings wants an Executive Order requiring the federal labs to adopt “responsible licensing programs” without documenting any existing problems.

They urge preferential funding of federal grants coercing the formation of patent pools.  Their reason: patenting research tools inhibits innovation, while patent pools increase “the likelihood that patents will be used to create competitive markets of innovation rather than strengthening monopolies.” Again, no facts, just theory.

The report ignores actual practice. Universities rarely have multiple companies fighting to license their inventions. They’re lucky to find one. The rule of thumb is that a promising university technology requires 5-7 years of private sector development to turn into a product. For a drug, double the time and add a billion dollars in costs. Exclusive licenses are often essential to justify such risks.

Brookings underestimates how hard it is to spot breakthrough discoveries when they first appear.  Dominant companies are unlikely to immediately recognize them.  That’s why IBM threw Bill Gates out of their office.  The formation of the US biotechnology industry is another example.  Big drug companies didn’t scoop up early academic inventions preventing competition.  The exact opposite happened: small companies spun off campus leading to the American dominance of a revolutionary new industry.

Imposing government oversight in the name of “reasonable pricing,” or artificially requiring non-exclusive licenses to be “more fair” harms innovative small businesses, undermining their ability to secure funding and market position.

Luckily, a report by [**The President’s Council of Advisors on Science and Technology**](http://www.whitehouse.gov/administration/eop/ostp/pcast) (PCAST) just issued with a far wiser approach in the Report to the President titled [***Transformation and Opportunity: The Future of the U.S. Research Enterprise***](http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_future_research_enterprise_20121130.pdf).  After describing the importance of industry-university partnerships, it says: “The Federal Government’s primary role is not to participate directly in these relationships but to establish the policy environment in which they can flourish, through the Bayh-Dole Act… and other legislation.”

PCAST recommends that the US: “Embrace more fully the additional role of universities as hubs of the innovation ecosystem” citing the Economist Technology Quarterly:

*Possibly the most inspired piece of legislation to be enacted in America over the past half century was the Bayh-Dole Act of 1980… this unlocked all the inventions and discoveries that had been made in laboratories throughout the United States with the help of taxpayers’ money.  More than anything, this single policy measure helped to reverse America’s precipitous slide into industrial irrelevance…*

Hopefully we are wise enough to recognize which report points the way forward—and which points back into the swamp.   Two clues: (1) PCAST lists the names of its experts; and (2) It has facts backing its findings.