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INVENTION AND PATENTS - PHYLLIS SCHLAFLY'S LEGACY

BY CHARLES SCHOTT

Phyllis Schlafly (1924-2016) was an important American grassroots activist and public intellectual who was engaged in advocacy on a broad range of public issues.

As her *New York Times* obituary noted, "(h)er energy was formidable. She wrote or edited more than 20 books, published an influential monthly newsletter beginning in 1967, appeared daily on nearly 500 radio stations and delivered regular commentaries on CBS television in the 1970's and CNN in the '80s." See <https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html>.

She was known for her "conservative activism" on important issues such as opposition to the dangers posed to the U.S. by international communism, the fight for women's rights outside the confines of the proposed Equal Rights Amendment (ERA) and also on a broad range of policy and procedural issues within the Republican party. There she served as a national convention Platform Committee member and as part of the leadership of the National Federation of Republican Women.

Phyllis Schlafly engaged on a broad range of issues that did not just include family-related matters, but also on a broad array of economic, trade, education, national defense and international issues.

Her areas of interest (and associated areas of impact) were broader than her image often conveyed.

These different areas could almost always be characterized as containing a general theme that concerns the importance of fighting for the interests of the average citizen (i.e., "the little guy") in the face of the invariable behind the scenes efforts of governments, large corporations, internationalists and establishment elites (particularly those found on the U. S. east and west coasts).

PHYLLIS SCHLAFLY AND THE IMPORTANCE OF PATENTS AND INVENTION - WHO KNEW?!!

In addition to these other areas of policy interest, however, Phyllis Schlafly had a strong and enduring interest in issues relating to **invention, patents and other forms of intellectual property** (including copyrights).

These intellectual property and innovation issues were very important to her and fundamentally underpinned her views on why America was a great, successful (and unique) country.

The importance of the American system of invention and patents was a theme that she returned to again and again over the years.

WHY PHYLLIS SCHLAFLY CARED ABOUT INVENTION, PATENTS AND INTELLECTUAL PROPERTY?

Phyllis Schlafly cared about these invention, patent and intellectual property issues for a number of important reasons.

1. Patents and invention were central to the Founding of the United States and to its enduring prosperity. The rights of the average person to obtain a patent or copyright to protect his or her inventive work were contained in the body of the original Constitution (they were the only rights set forth in the original Constitution prior to the addition of the Bill of Rights). These rights to defend the value of one's inventive work product are fundamental rights, similar to the right a laborer has to the benefits of his or her own labor.

The patent system as authorized by the Constitution was both new and uniquely American, based in the creation of a property right in one's own inventions. To her it helped explain why 95% of all inventions were developed in the United States and helped explain the origins of America's prosperity (it wasn't just the presence of abundant natural resources....other countries were similarly endowed without having the productivity and creativity that our patent system unleashed). Importantly, she often noted how this economic dynamism continues to characterize the US economy *vis a vis* the rest of the world.

She was able to point to numerous examples of where the American system of encouraging invention and patents had created "an explosion of human energy, an expansion of wealth, a rise in living standards that exceeded all the

economic changes in the thousands of years that preceded our Constitution." She could also point to familiar names of important inventors in such fields as communications (Samuel Morse, Thomas Edison and Alexander Graham Bell, among others), transportation (Henry Ford, Orville and Wilbur Wright, et al.), industry and energy (Captain James Eads and the DuPont family) whose inventions transformed America and the world.

She often returned to Thomas Jefferson's comment that "(t)he issue of patents for new discoveries has given a spring to invention beyond my conception." Jefferson had been the first administrator of the American Patent System. President Lincoln had been an inventor and patent holder before being elected.

2. Phyllis Schlafly recognized that many of the matters raised concerning patents and copyright were fundamental and represented important Constitutional issues. This theme recurs time and again in her writings, involving such areas as the constitutional primacy of "first to invent" over "first to file" systems, due process claims concerning proposed new administrative post-grant reviews of patents(after they have been awarded) and also when a proposed change in existing patent rights might constitute an improper Constitutional "taking."

3. She also pointed out how inventors had been (and continued to be) the "liberators" of women throughout American history. In 1970, Phyllis published an important article in *The Phyllis Schlafly Report*, by Vicki Rutledge called, *"You've Come A Long Way Baby, But Who Gave You A Lift?"* The article pays tribute to the many inventors (many of them men) whose inventions "have liberated women from the once all time-consuming drudgery of housework. Because of their help, women today have time to fulfill their own ambitions..."

4. The policy issues associated with invention and patents were also a key battlefield in the fight between the rights of the average citizen and the large economic entities who could play the game in secret and behind the scenes. It was always presented as an important area where sunlight and logical argument could serve as an important public disinfectant whenever "the fix was in!" These issues arose in various settings, such as in the attempt to transform the Patent Trademark Office (PTO) into a private corporation (with an "advisory" board of directors consisting mostly of big company executives) and the diversion of PTO filing fees to other non-patent purposes by the Congress. Phyllis Schlafly recognized the truth in the old

libertarian adage that "no person's life and property are truly safe so long as the Legislature is in session."

5. Phyllis Schlafly also recognized the importance of the international dimension of invention, patent and other intellectual property

issues. Other nations did not have patent regimes until the United States' example showed them the way (and the benefits). Even so, she often pointed out how foreign patent regimes tend to be designed to benefit of large companies and the elites in other societies. Often, these other countries' interest in the US patent system has been to make it easier for them to appropriate (she would say "steal") the secrets of American inventors.

"Foreign countries are free to copy our system," she wrote. "Instead they want to copy our inventions."

The "secret deal" made between Commerce Secretary Ron Brown and Japan concerning various issues of so-called "patent reform" is one such example. China's largely successful effort to improperly take American intellectual property in connection with its "indigenous innovation" policy is another.

6. Phyllis Schlafly will also be remembered for her constant vigilance against efforts aimed at the "harmonization" of the U.S. patent systems with other systems internationally. She would write that all such efforts were aimed at making the US system more inferior (as it sought to make the US system more like other countries' systems around the world). She was clear that she would not object to efforts aimed at the "harmonization" of the rest of the world to make their patent systems more like the superior U.S. one.

7. She also recognized the importance of mobilizing the opposition to so-called "patent reform" efforts, that she referred to as "no reform at all," but rather "a direct attack on the unique, successful American patent system created by the U.S. Constitution." This was done by mobilizing the grass-roots organizations she had founded to engage in letter and editorial writing and in contacting members of Congress. The letter written against the patent reform bill in 1997 by 26 Nobel Prize Laureates is an excellent example of this. These internationally renowned, individually recognized experts made the point that the patent "reform" bill being considered "could result in lasting harm to the United States and the world." They observed how the unique American patent system is "a delicate structure," which "should not be subject to frequent modifications."

8. She also saw the important "national security" dimension of invention and patent issues. She noted how proposed patent "reform" threatens individual and corporate research and development, which is the "backbone of our national defense and economic security" in the U.S.. This was seen as particularly true *vis-a-vis* the efforts to change the U.S. from a "first to invent" to a "first to file" system, which "will enable Chinese hackers to steal U.S. innovation secrets while they are in development, then file an application with the U.S. Patent Office under First-to-File, and thereby own new U.S. technology instead of merely stealing it."

9. It is important to recognize that these issues were also personal to Phyllis Schlafly. Her father had been an inventor and had to fight hard to obtain the patent he received for his invention. Patent rights had been at the foundation of Phyllis Schlafly's family history and it was something important that she took with her from growing up.

"I have been interested in inventions and patents all my life. I had a father who worked many years to get a patent and he did, and likewise for a son, and, they didn't sell them and they didn't make any money and they didn't change the world, but at any rate they were very proud of them and they were *theirs*. And no one can take them away from them, because of our wonderful system."

The above points were ones that Phyllis Schlafly returned to over and over again!

PHYLLIS' POLICY CONNECTION TO SILICON VALLEY, VENTURE CAPITAL AND THE MODERN TECHNOLOGY ERA IS REAL - ESTABLISHED AND SUCCESSFUL COMPANIES OFTEN VIEW THE INDEPENDENT INVENTOR (WORKING IN HIS OR HER GARAGE) AS A NUISANCE!

The important role of the inventor in the American economy represents the area where Phyllis Schlafly connects with the dynamic, innovative *and uniquely American high-tech* world of Silicon Valley and the venture capital (VC) industry.

It is the role of the entrepreneur and the high-tech venture capital industry associated with Silicon Valley in northern California, their important and unique role creating competitive new companies from forward thinking yet practical "ideas on a sheet of paper," ideas that are transformed into tangible

business entities operating at the rate of hundreds of millions of dollars in sales in short order (sometimes in less than a single year).

The Silicon Valley start-up company's natural targets are the large established companies in the US and world economies; large established incumbent companies with their own goals to use patents primarily (1) to "stave off upstarts" and (2) to control the pace of industry change and development (so as to allow for the gradual and predictable harvesting of the value of their existing business franchises).

In this regard, it has been interesting over time to watch as the VC industry's view of patents has changed. In earlier days, VC's often viewed patents as an area not worth the investment of scarce resources in a fast changing market (e.g., "would you rather invest \$30K in obtaining a patent that you will then have to pay lawyers to enforce or would you rather hire another marketing person to help in executing the business plan now?").

More recently, the VC view of patents has become one where patent assets are viewed as extremely important to a start-up company's competitive future (and, on the other side of the coin, they have been recognized as perhaps the only start-up assets with any tangible value in bankruptcy or recapitalization, thus allowing the VC's to recapture some or all of their original investment in the portfolio companies that inevitably fail).

It should be mentioned that this view can reasonably be expected to change as VC-backed "insurgent" companies become mature and traditionally successful public companies which become the "incumbents" in their respective markets.

It will surprise some readers how Phyllis Schlafly's philosophical "conservatism" in this area fits so well with the priorities of the most economically dynamic Silicon Valley entrepreneurs and the early stage venture capitalists who back them.

ISSUES RELATING TO PATENTS, INVENTION AND INTELLECTUAL PROPERTY ARE AN IMPORTANT PART OF PHYLLIS SCHAFLY'S LEGACY - THEY WILL BE BETTER APPRECIATED AND UNDERSTOOD OVER TIME.

The newly published volume, *Phyllis Schlafly on Patents and Invention*, is intended to do help begin this process. It represents another chance to appreciate the full extent of Phyllis Schlafly's multi-faceted legacy and the

debt Americans owe to her for "a public life well lived" in the context of her important work upholding the core values and traditions of this country.

Charles Schott is a management and policy consultant and a Senior Advisor at the Center for Financial Stability, a public policy think tank based in New York City. He has extensive experience in international investment and finance policy, as well as in matters involving international trade, telecommunications, technology, venture capital and business strategy.

Mr. Schott served as Deputy Assistant Secretary for Trade and Investment Policy at the U.S. Treasury during the George W. Bush Administration, where he was responsible for trade negotiations and for matters relating to international investment.

In the private sector, Mr. Schott has utilized his strategic business and consulting expertise for firms such as Intellectual Ventures, where he served as head of strategic sales and marketing; McKinsey & Company, where he worked as a management consultant in that firm's London office; and Charles Schott and Associates where he currently leads a management consulting practice.

He also served as one of the founding executives of Hearst New Media & Technology, an operating group of the Hearst Corporation, where he was responsible for the creation and operation of Hearst New Media Ventures and, subsequently, as the founder of Paradigm Partners, LLC, a strategic advisory firm based in Greenwich, CT. He started his career as a corporate attorney in the New York and Washington, DC offices of Dewey Ballantine.

Mr. Schott's bio appears at the Center for Financial Stability's website:
<http://www.centerforfinancialstability.org/CSchott.php>