would have been if a pro-bin Laden movement were fueling this transformation.

It is plain we need more of what we had post-9/11 now. I am not naive. I know it cannot be conjured up or wished into existence. But if we are optimistic, if we are inspired by the Americans who died here, if we truly understand our shared history and the sacred place compromise and rationality hold at the very center of the formation of our Nation and the structure of our Constitution, then we can again take up the mantle of shared sacrifice and common purpose that we wore after 9/11 and apply some of those behaviors to the problems we now confront.

The reality of our current political climate is that both sides are off in their corners; the common enemy is faded. Some see Wall Street as the enemy many others see Washington, DC, as the enemy and to still others any and all government is the enemy.

I believe the greatest problem we face is the belief that we can no longer confront and solve the problems and challenges that confront us; the fear that our best days may be behind us; that, for the first time in history, we fear things will not be as good for our kids as they are for us. It is a creeping pessimism that cuts against the can-do and will-do American spirit. And, along with the divisiveness in our politics, it is harming our ability to create the great works our forbears accomplished: building the Empire State building in the teeth of the Great Depression, constructing the Interstate Highway System and the Hoover Dam, the Erie Canal, and so much more.

While governmental action is not the whole answer to all that faces us, it is equally true that we cannot confront the multiple and complex challenges we now face with no government or a defanged government or a dysfunctional government.

As we approach the 10th anniversary of 9/11, the focus on what happened that day intensifies—what we lost, who we lost, and how we reacted—it becomes acutely clear that we need to confront our current challenges imbued with the spirit of 9/11 and determine to make our government and our politics worthy of the sacrifice and loss we suffered that day.

To return to de Tocqueville, he also remarked that:

> The greatness of America lies not in being more enlightened than any other nation, but rather in her ability to repair her faults.

So, like the ironworkers and operating engineers and trade workers who miraculously appeared at the pile hours after the towers came down with blowtorches and hard hats in hand, let's put on our gloves, pick up our hammers and get to work fixing what ails the body politic. It is the least we can do to honor those we lost.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BROWN of Ohio). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SESSIONS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

LEAHY-SMITH AMERICA INVENTS ACT

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 1249, which the clerk will report by title.

The assistant legislative clerk read as follows:

> An Act (H.R. 1249) to amend title 35, United States Code, to provide for patent reform.

AMENDMENT NO. 600

Mr. SESSIONS. Mr. President, I ask unanimous consent to call up my amendment No. 600, which is at the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

> The Senator from Alabama [Mr. SESSIONS], for himself, Mr. MANCHIN, Mr. COBURN, and Mr. LEE, proposes an amendment numbered 600.

Mr. SESSIONS. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

AMENDMENT NO. 600

> (Purpose: To strike the provision relating to the calculation of the 60-day period for application of patent term extension)
>
> On page 149, line 20, strike all through page 150, line 16.

Mr. SESSIONS. Mr. President, the amendment that I have offered is a very important amendment. It is one that I believe is important to the integrity of the U.S. legal system and to the integrity of the Senate. It is a matter that I have been wrestling with and objecting to for over a decade. I thought the matter had been settled, frankly, but it has not because it has been driven by one of the most ferocious lobbying efforts the Congress maybe has seen.

The House patent bill as originally passed out of committee and taken to the floor of the House did not include a bailout for Medco, the WilmerHale law firm, or the insurance carrier for that firm, all of whom were in financial jeopardy as a result of a failure to file a patent appeal timely.

I have practiced law hard in my life. I have been in court many times. I spent 12 years as a U.S. Attorney and tried cases. I am well aware of how the system works. The way the system works in America, you file lawsuits and you are entitled to your day in court. But if you do not file your lawsuit in time, within the statute of limitations, you are out.

When a defendant raises a legal point of order—a motion to dismiss—based on the failure of the complaining party to file their lawsuit timely, they are out. That happens every day to poor people, widow ladies. And it does not make any difference what your excuse is, why you think you have a good lawsuit, why you had this idea or that idea. Everyone is required to meet the same deadlines.

In Alabama they had a situation in which a lady asked a probate judge when she had to file her appeal by, and the judge said: You can file it on Monday. As it turned out, Monday was too late. They went to the Alabama Supreme Court, and who ruled: The probate judge—who does not have to be a lawyer—does not have the power to amend the statute of limitations. Sorry, lady. You are out.

Nobody filed a bill in the Congress to give her relief, or the thousands of others like her every day. So Medco and WilmerHale seeking this kind of relief is a big deal. To whom much has been given, much is required. This is a big-time law firm, one of the biggest law firms in America. Medco is one of the biggest pharmaceutical companies in the country. And presumably the law firm has insurance that they pay to insure them if they make an error. So it appears that they are not willing to accept the court's ruling.

One time an individual was asking me: Oh, JEFF, you let this go. Give in and let this go. I sort of as a joke said to the individual: Well, if WilmerHale will agree not to raise the statute of limitations against anybody who sues their clients if they file a lawsuit late, maybe I will reconsider. He thought I was serious. Of course WilmerHale is not going to do that. If some poor person files a lawsuit against someone they are representing, and they file it one hour late, WilmerHale will file a motion to dismiss it. And they will not ask why they filed it late. This is law. It has to be objective. It has to be fair.

You are not entitled to waltz into the U.S. Congress—well connected—and start lobbying for special relief.

There is nothing more complicated about that than this. So a couple of things have been raised. Well, they suggest, we should not amend the House patent bill, and that if we do, it somehow will kill the legislation. That is not so. Chairman LEAHY has said he supports the amendment, but he

doesn't want to vote for it because it would keep the bill from being passed somehow.

It would not keep it from being passed. Indeed, the bill that was brought to the House floor didn't have this language in it. The first vote rejected the attempt to put this language in it. It failed. For some reason, in some way, a second vote was held, and it was passed by a few votes. So they are not going to reject the legislation if we were to amend it.

What kind of system are we now involved in in the Senate if we can't undo an amendment? What kind of argument is it to say: JEFF, I agree with your amendment, and I agree it is right that they should not get this special relief, but I can't vote for it because it might cause a problem? It will not cause a problem. The bill will pass. It should never have been put in there in the first place.

Another point of great significance is the fact that this issue is on appeal. The law firm asserted they thought—and it is a bit unusual—that because it came in late Friday they had until Monday. We can count the days to Monday—the 60 days or whatever they had to file the answer. I don't know if that is good law, but they won. The district court has ruled for them. It is on appeal now to the court of appeals.

This Congress has no business interfering in a lawsuit that is ongoing and is before an appeals court. If they are so confident their district court ruling is correct, why are they continuing to push for this special relief bill, when the court of appeals will soon, within a matter of months, rule?

Another point: We have in the Congress a procedure to deal with special relief. If this relief is necessary at all, it should go through as a special relief bill. I can tell you one reason it is not going there now: you can't ask for special relief while the matter is still in litigation, it is still on appeal. Special relief also has procedures that one has to go through and justify in an objective way, which I believe would be very healthy in this situation.

For a decade, virtually—I think it has been 10 years—I have been objecting to this amendment. Now we are here, I thought it was out, and all of a sudden it is slipped in by a second vote in the House, and we are told we just can't make an amendment to the bill. Why? The Senate set up the legislation to be brought forward, and we can offer amendments and people can vote for them or not.

This matter has gotten a lot of attention. The Wall Street Journal and the New York Times both wrote about it in editorials today. This is what the New York Times said today about it:

> But critics who have labeled the provision "The Dog Ate My Homework Act" say it is really a special fix for one drug manufacturer, the Medicines Company, and its powerful law firm, WilmerHale. The company and its law firm, with hundreds of millions of dollars in drug sales at stake, lobbied Congress heavily for several years to get the patent laws changed.

That is what the Wall Street Journal said in their editorial. The Wall Street Journal understands business reality and litigation reality. They are a critic of the legal system at times and a supporter at times. I think they take a principled position in this instance. The Wall Street Journal editorial stated:

> We take no pleasure in seeing the Medicine Company and WilmerHale suffer for their mistakes, but they are run by highly paid professionals who know the rules and know that consistency of enforcement is critical to their businesses. Asking Congress to break the rules as a special favor corrupts the law.

I think that is exactly right. It is exactly right. Businesses, when they are sued by somebody, use the statute of limitations every day. This law firm makes hundreds of millions of dollars in income a year. Their partners average over $1 million a year, according to the New York Times. That is pretty good. They ought to be able to pay a decent malpractice insurance premium. The New York Times said WilmerHale reported revenues of $962 million in 2010, with a profit of $1.33 million per partner.

Average people have to suffer when they miss the statute of limitations. Poor people suffer when they miss the statute of limitations. But we are undertaking, at great expense to the taxpayers, to move a special interest piece of legislation that I don't believe can be justified as a matter of principle. I agree with the Wall Street Journal that the adoption of it corrupts the system. We ought not be a part of that.

I love the American legal system. It is a great system, I know. I have seen judges time and time again enter rulings based on law and fact even if they didn't like it. That is the genius and reliability and integrity of the American legal system. I do not believe we can justify, while this matter is still in litigation, passing a special act to give a wealthy law firm, an insurance company, and a health care company special relief. I just don't believe we should do that. I oppose it, and I hope my colleagues will join us.

I think we have a real chance to turn this back. Our Congress and our Senate will be better for it; we really will. The Citizens Against Government Waste have taken an interest in this matter for some time. They said:

> Congress has no right to rescue a company from its own mistakes.

Companies have a right to assert the law. Companies have a right to assert the law against individuals. But when the time comes for the hammer to fall on them for their mistake, they want Congress to pass a special relief bill. I don't think it is the right thing to do.

Mr. President, let's boil it down to several things. First, if the company is right and the law firm is right that they did not miss the statute of limitations, I am confident the court of appeals will rule in their favor, and it will not be necessary for this Senate to act. If they do not prevail in the court of appeals and don't win their argument, then there is a provision for private relief in the Congress, and they ought to pursue that. There are special procedures. The litigation will be over, and they can bring that action at that time.

That is the basic position we ought to be in. A bill that comes out of the Judiciary Committee ought to be sensitive to the legal system, to the importance of ensuring that the poor are treated as well as the rich. The oath judges take is to do equal justice to the poor and the rich.

How many other people in this country are getting special attention today on the floor of the Senate? How many? I truly believe this is not good policy. I have had to spend far more hours fighting this than I have ever wanted to when I decided 10 years ago that this was not a good way to go forward. Many battle this issue, and I hope and trust that the Members of the Senate who will be voting on this will allow it to follow the legitimate process. Let the litigation work its way through the system.

If they do not prevail in the litigation, let a private relief bill be sought and debated openly and publicly to see if it is justified. That would be the right way to do it—not slipping through this amendment and then not voting to remove it on the basis that we should not be amending a bill before us. We have every right to amend the bill, and we should amend the bill. I know Senator GRASSLEY, years ago, was on my side. I think it was just the two of us who took this position.

I guess I have more than expressed my opinion. I thank the chairman for his leadership. I thank him and Senator GRASSLEY for their great work on this important patent bill. I support that bill. I believe they have moved it forward in a fair way.

The chairman did not put this language into the bill; it was put in over in the House. I know he would like to see the bill go forward without amendments. I urge him to think it through and see if he cannot be willing to support this amendment. I am confident it will not block final passage of the legislation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I will speak later about the comments made by the distinguished Senator from Alabama. He has been very helpful in getting this patent bill through. He is correct that this amendment he speaks to

is one added in the other body, not by us. We purposely didn't have it in our bill. I know Senator GRASSLEY will follow my remarks.

There is no question in my mind that if the amendment of the Senator from Alabama were accepted, it in effect will kill the bill. Irrespective of the merits, it can come up on another piece of legislation or as freestanding legislation. That is fine. But on this bill, after 6 years of effort to get this far, this bill would die because the other body will not take it up again.

HURRICANE IRENE

Mr. LEAHY. Mr. President, I will use my time to note some of the things happening in my own very special State of Vermont, the State in which I was born.

As Vermonters come together and continue to grapple with the aftermath of storm damage from Irene, I wish to focus today on the agriculture disaster that has hit us in Vermont and report to the Senate and our fellow citizens across the Nation about how the raging floodwaters wreaked havoc on our farming lands and infrastructure in Vermont.

It was 12 days ago now that this enormous, slow-moving storm hit Vermont and turned our calm, scenic brooks and creeks into raging gushers. In addition to our roads and historic covered bridges that were destroyed or carried away, we had barns, farmhouses, crops, parts of fields, and livestock washed away in the rising floodwaters. I recall the comments of one farmer who watched his herd of cows wash down the river, knowing they were going to die in the floodwaters.

Now the cameras have begun to turn away, but the cleanup and urgent repairs are underway. For major parts of Vermont's economy, the worst effects of this storm are yet to come. For our dairy farmers, who are the bedrock of our economy and keystones of our communities, the toll of this disaster has been heavy and the crises has lasted longer as they have struggled to take care of their animals while the floodwaters recede.

This is a photograph of East Pittsford, VT, taken by Lars Gange just over a week ago. The water we see is never there. It is there now. Look at this farm's fields, they are destroyed. Look at homes damaged and think what that water has done.

As I went around the state with our Governor and Vermont National Guard General Dubie the first couple of days after the storm hit, we went to these places by helicopter and I cannot tell you how much it tore at my heart to see the state, the birthplace to me, my parents, and grandparents. To see roads torn up, bridges that were there when my parents were children, washed away. Historic covered bridges, mills, barns, businesses just gone and what it has done to our farmers, it is hard, I cannot overstate it.

Our farmers have barns that are completely gone, leaving no shelter for animals. They are left struggling to get water for their animals, to rebuild fencing, to clean up debris from flooded fields and barns, and then to get milk trucks to the dairy farms. Remember, these cows have to be milked every single day. We also have farmers who do not have any feed or hay for their animals because it all washed away. As one farmer told me, the cows need to be milked two or three times every day, come hell or high water. This farmer thought he had been hit with both, hell and high water.

While reports are still coming in from the farms that were affected, the list of damages and the need for critical supplies, such as feed, generators, fuel, and temporary fencing is on the rise. As we survey the farm fields and communities, we know it will be difficult to calculate the economic impacts of this violent storm on our agriculture industry in Vermont.

Many of our farmers were caught by surprise as the unprecedented, rapidly rising floodwaters inundated their crops, and many have had to deal with the deeply emotional experience of losing animals to the fast-moving floodwaters. We have farms where whole fields were washed away and their fertile topsoil sent rushing down river. The timing could not have been worse. Corn, which is a crucial winter feed for dairy cows, was just ready for harvest, but now our best corn is in the river bottoms and is ruined. Other farms had just prepared their ground to sow winter cover crops and winter greens; they lost significant amounts of topsoil.

River banks gave way, and we saw wide field buffers disappear overnight, leaving the crops literally hanging on ledges above rivers, as at the Kingsbury farm in Warren, VT. Vegetable farming is Vermont's fastest growing agricultural sector, and, of course, this is harvest season. Our farmers were not able to pick these crops, this storm picked many fields clean.

Many Vermonters have highly productive gardens that they have put up for their families to get through the winter by canning and freezing. Those too have been washed away or are considered dangerous for human consumption because of the contaminated floodwaters. Vermont farmers have a challenging and precarious future ahead of them as they look to rebuild and plan for next year's crops, knowing that in our State it can be snowing in 1½ or 2 months.

I have been heartened, however, by the many stories I have heard from communities where people are coming together to help one another. For instance, at the Intervale Community Farm on the Winooski River, volunteers came out to harvest the remaining dry fields before the produce was hit by still rising floodwaters.

When the rumors spread that Beth and Bob Kennett at Liberty Hill Farm in Rochester had no power and needed help milking—well, people just started showing up. By foot, on bike, all ready to lend a hand to help milk the cows. Fortunately for them and for the poor cows, the Vermont Department of Agriculture had managed to help get them fuel and the Kennetts were milking again, so asked the volunteer farm hands to go down the road, help somebody else and they did.

Coping with damage and destruction on this scale is beyond the means and capability of a small State such as ours, and Federal help with the rebuilding effort will be essential to Vermont, as it will be to other States coping with the same disaster. I worry the support they need to rebuild may not be there, as it has been in past disasters, when we have rebuilt after hurricanes, floods, fires and earthquakes to get Americans back in their homes, something Vermonters have supported even though in these past disasters Vermont was not touched.

So I look forward to working with the Appropriations Committee and with all Senators to ensure that FEMA, USDA and all our Federal agencies have the resources they need to help all our citizens at this time of disaster, in Vermont and in all our states. Unfortunately, programs such as the Emergency Conservation Program and the Emergency Watershed Protect Program have been oversubscribed this year, and USDA has only limited funds remaining. We also face the grim fact that few of our farms had bought crop insurance and so may not be covered by USDA's current SURE Disaster Program.

But those are the things I am working on to find ways to help our farmers and to move forward to help in the commitment to our fellow Americans. For a decade, we have spent billions every single week on wars and projects in far-away lands. This is a time to start paying more attention to our needs here at home and to the urgent needs of our fellow citizens.

I see my friend from Iowa on the floor, and I yield the floor.

The PRESIDING OFFICER. The senior Senator from Iowa.

AMENDMENT NO. 600

Mr. GRASSLEY. Mr. President, I rise to rebut the points Senator SESSIONS made, and I do acknowledge, as he said on the floor, that 2 or more years ago I was on the same page he is on this issue. What has intervened, in the meantime, that causes me to differ from the position Senator SESSIONS is taking? It is a district court case giving justice to a company—as one client—that was denied that sort of justice because bureaucrats were acting in an arbitrary and capricious way.

Senator SESSIONS makes the point you get equal justice under the law

from the judicial branch of government and that Congress should not try to override that sort of situation. Congress isn't overriding anything with the language in the House bill that he wants to strike because that interest was satisfied by a judge's decision; saying that a particular entity was denied equal justice under the law because a bureaucrat, making a decision on just exactly what counts as 60 days, was acting in an arbitrary and capricious way. So this language in the House bill has nothing to do with helping a special interest. That special interest was satisfied by a judge who said an entity was denied equal justice under the law because a bureaucrat was acting in an arbitrary and capricious manner.

This amendment is not about a special interest. This amendment is about uniformity of law throughout the country because it is wrong—as the judge says—for a bureaucracy to have one sort of definition of when 60 days begins—whether it is after business hours, if something goes out, or, if something comes in, it includes the day it comes in. So we are talking about how we count 60 days, and it is about making sure there is a uniform standard for that based upon law passed by Congress and not upon one judge's decision that applies to one specific case.

I would say, since this case has been decided, there are at least three other entities that have made application to the Patent Office to make sure they would get equal justice under the law in the same way the entity that got help through the initial decision of the judge. So this is not about special relief for one company. This is about what is a business day and having a uniform definition in the law of the United States of what a business day is, not based upon one district court decision that may not be applied uniformly around our Nation.

So it is about uniformity and not about some bailout, as Senator SESSIONS says. It is not about some ferocious lobbying effort, as Senator SESSIONS has said. It is not just because one person was 1 hour late or 1 day late, because how do you know whether they are 1 hour late or 1 day late if there is a different definition under one circumstance of when 60 days starts and another definition under other circumstances of when a 60-day period tolls?

Also, I would suggest to Senator SESSIONS that this is not Congress interfering in a court case that is under appeal because the government lost this case and the government is not appealing. Now, there might be some other entity appealing for their own interests to take advantage of something that is very unique to them.

But just in case we have short memories, I would remind my colleagues that Congress does sometimes interject itself into the appeal process, and I would suggest one time we did that very recently, maybe 6 years ago—and that may not be very recent, but it is not as though we never do it—and that was the Protection of Lawful Commerce Act of 2005, when Congress interjected itself into an issue to protect gun manufacturers from pending lawsuits. It happens that 81 Senators supported that particular effort to interject ourselves into a lawsuit.

So, Mr. President, in a more formal way, I want to repeat some of what I said this past summer when I came to the Senate floor and suggested to the House of Representatives that I would appreciate very much if they would put into the statutes of the United States a uniform definition of a business day and not leave it up to a court to maybe set that standard so that it might not be applied uniformly and, secondly, to make sure it was done in a way that was treating everybody the same, so everybody gets equal justice under the law, they know what the law is, and they don't have to rely upon maybe some court decision in one part of the country that maybe they can argue in another part of the country, and also to tell bureaucrats, as the judge said, that you can't act in an arbitrary and capricious way. But bureaucrats might act in an arbitrary and capricious way, in a way unknown to them, if we don't have a uniform definition of what a business day is.

So I oppose the effort to strike section 37 from the patent reform bill for the reasons I have just given, but also for the reasons that were already expounded by the chairman of this committee that at this late date, after 6 years of trying to get a patent reform bill done—and we haven't had a patent reform bill for over a decade, and it is badly needed—we shouldn't jeopardize the possible passage of this bill to the President of the United States for his signature by sending it back to the other body and perhaps putting it in jeopardy. But, most important, I think we ought to have a clear signal of what is a business day, a definition of it, and this legislation and section 37 makes that very clear.

This past June, I addressed this issue in a floor statement, and I want to quote from that because I wanted my colleagues to understand why I hoped the House-passed bill would contain section 37 that was not in our Senate bill but that was passed out of the House Judiciary Committee unanimously. Speaking as ranking member of the Senate Judiciary Committee now and back in June when I spoke, I wanted the House Judiciary Committee to know that several Republican and Democratic Senators had asked me to support this provision as well.

Section 37 resulted from a recent Federal court case that had as its genesis the difficulty the FDA—the Food and Drug Administration—and the Patent Office face when deciding how to calculate Hatch-Waxman deadlines. The Hatch-Waxman law of the 1980s was a compromise between drug patent holders and the generic manufacturers. Under the Waxman-Hatch law, once a patent holder obtains market approval, the patent holder has 60 days to request the Patent Office to restore the patent terms—time lost because of the FDA's long deliberating process eating up valuable patent rights.

The citation to the case I am referring to is in 731 Federal Supplement 2nd, 470. The court found—and I want to quote more extensively than I did back in June. This is what the judge said about bureaucrats acting in an arbitrary and capricious way and when does the 60 days start.

> The Food and Drug Administration treats submissions to the FDA received after its normal business hours differently than it treats communications from the agency after normal business hours.

Continuing to quote from the decision:

> The government does not deny that when notice of FDA approval is sent after normal business hours, the combination of the Patent and Trademark Office's calendar day interpretation and its new counting method effectively deprives applicants of a portion of the 60-day filing period that Congress expressly granted them . . . Under PTO's interpretation, the date stamped on the FDA approval letter starts the 60-day period for filing an application, even if the Food and Drug Administration never sends the letter . . . An applicant could lose a substantial portion, if not all, of its time for filing a Patent Trademark Extension application as a result of mistakes beyond its control . . . An interpretation that imposes such drastic consequences when the government errs could not be what Congress intended.

So the judge is telling us in the Congress of the United States that because we weren't precise, there is a question as to when Congress intended 60 days to start to toll. And the question then is, If it is treated one way for one person and another way for another person, or if one agency treats it one way and another agency treats it another way, is that equal justice under the law? I think it is very clear that the judge said it was not. I say the judge was correct. Congress certainly should not expect nor allow mistakes by the bureaucracy to up-end the rights and provisions included in the Hatch-Waxman Act or any other piece of legislation we might pass.

The court ruled that when the Food and Drug Administration sent a notice of approval after business hours, the 60-day period requesting patent restoration begins the next business day. It is as simple as that.

The House, by including section 37, takes the court case, where common sense dictates to protect all patent holders against losing patent extensions as a result of confused counting calculations. Regrettably, misunderstandings about this provision have

persisted, and I think you hear some of those misunderstandings in the statement by Senator SESSIONS.

This provision does not apply to just one company. The truth is that it applies to all patent holders seeking to restore the patent term time lost during FDA deliberations—in other words, allowing what Hatch-Waxman tries to accomplish: justice for everybody. In recent weeks, it has been revealed that already three companies covering four drug patents will benefit by correcting the government's mistake.

It does not cost the taxpayers money. The Congressional Budget Office determined that it is budget-neutral.

Section 37 has been pointed out as maybe being anticonsumer, but it is anything but anticonsumer. I would quote Jim Martin, chairman of the 60–Plus Association. He said:

> We simply can't allow bureaucratic inconsistencies to stand in the way of cutting-edge medical research that is so important to the increasing number of Americans over the age of 60. This provision is a commonsense response to a problem that unnecessarily has ensnared far too many pharmaceutical companies and caused inexcusable delays in drug innovations.

We have also heard from prominent doctors from throughout the United States. They wrote to us stating that section 67 ''is critically important to medicine and patients. In one case alone, the health and lives of millions of Americans who suffer from vascular disease are at stake . . . Lives are literally at stake. A vote against this provision will delay our patients access to cutting-edge discoveries and treatments. We urgently request your help in preserving section 37.''

So section 37 improves our patent system fairness through certainty and clarity, and I urge my colleagues to join me in voting to preserve this important provision as an end in itself, but also to make sure we do not send this bill back to the House of Representatives and instead get it to the President, particularly on a day like today when the President is going to be speaking to us tonight about jobs. I think having an updated patent law will help invention, innovation, research, and everything that adds value to what we do in America and preserve America's greatness in invention and the advancement of science.

In conclusion, I would say it is very clear to me that the court concluded that the Patent and Trademark Office, and not some company or its lawyers, had erred, as is the implication here. A consistent interpretation ought to apply to all patent holders in all cases, and we need to resolve any uncertainty that persists despite the court's decision.

I yield the floor.

The PRESIDING OFFICER. The senior Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I thank the distinguished Senator from Iowa for his words, and I join with the Senator from Iowa in opposing the amendment for two reasons. First, as just simply as a practical matter, the amendment would have the effect, if it passed, of killing the bill because it is not going to be accepted in the other body, and after 6 years or more of work on the patent bill, it is gone. But also, on just the merits of it, the provision this amendment strikes, section 37 of H.R. 1249, simply adopts the holding of a recent district court decision codifying existing law about how the Patent and Trademark Office should calculate 5 days for the purpose of considering a patent term extension. So those are the reasons I oppose the amendment to strike it.

The underlying provision adopted by the House is a bipartisan amendment on the floor. It was offered by Mr. CONYERS, and it has the support of Ms. PELOSI and Mr. BERMAN on the Democratic side and the support of Mr. CANTOR, Mr. PAUL, and Mrs. BACHMANN on the Republican side. I have a very hard time thinking of a wider range of bipartisan support than that.

The provision is simply about how they are calculating filing dates for patent extensions, although its critics have labeled it as something a lot more. A patent holder on a drug is entitled by statute to apply for an extension of its patent term to compensate for any delay the Food and Drug Administration approval process caused in actually bringing the drug to market. The patent holder not only has to file the extension within 60 days beginning on the date the product received permission for marketing, but there is some ambiguity as to when the date is that starts the clock running.

Only in Washington, DC, could the system produce such absurd results that the word ''date'' means not only something different between two agencies—the PTO and the FDA—but then it is given two different constructions by the FDA. If this sounds kind of esoteric, it is. I have been working on this for years and it is difficult to understand. But the courts have codified it. Let's not try to change it yet again.

What happens is that the FDA treats submissions to it after normal hours as being received the next business day. But the dates of submissions from the FDA are not considered the next business day, even if sent after hours. To complicate matters, the PTO recently changed its own method of defining what is a ''date.''

If this sounds confusing even in Washington, you can imagine how it is outside of the bureaucracy. Confusion over what constitutes the ''date'' for purposes of a patent extension has affected several companies. The most notable case involves the Medicines Company's ANGIOMAX extension application request.

The extension application was denied by the PTO because of the difference in how dates are calculated. MedCo challenged the PTO's decision in court, and last August the federal district court in Virginia held the PTO's decision arbitrary and capricious and MedCo received its patent term extension.

Just so we fully understand what that means, it means PTO now abides by the court's ruling and applies a sensible ''business day'' interpretation to the word ''date'' in the statute. The provision in the America Invents Act simply codifies that.

Senator GRASSLEY has spoken to this. As he said a few weeks ago, this provision ''improves the patent system fairness through certainty and clarity.''

This issue has been around for several years and it was a controversial issue when it would have overturned the PTO's decision legislatively. For this reason Senator GRASSLEY and others opposed this provision when it came up several years ago. But now that the court has ruled, it is a different situation. The PTO has agreed to accept the court's decision. The provision is simply a codification of current law.

Is there anyone who truly believes it makes sense for the word ''date'' to receive tortured and different interpretations by different parts of our government rather than to have a clear, consistent definition? Let's actually try to put this issue to bed once and for all.

The provision may solidify Medco's patent term extension, but it applies generally, not to this one company, as has been suggested. It brings common sense to the entire filing system.

However, if the Senate adopts the amendment of the Senator from Alabama, it will lead to real conflict with the House. It is going to complicate, delay, and probably end passage of this important bipartisan jobs-creating legislation.

Keep in mind, yesterday I said on the floor that each one of us in this body could write a slightly different patent bill. But we do not pass 100 bills, we pass 1. This bill is supported by both Republicans and Democrats across the political spectrum. People on both sides of the aisle have been working on this issue for years and years in both bodies. We have a piece of legislation. Does everybody get every single thing they want? Of course not. I am chairman of the Senate Judiciary Committee. I don't have everything in this bill I want, but I have tried to get something that is a consensus of the large majority of the House and the Senate, and we have done this.

In this instance, in this particular amendment, the House expressly considered this matter. They voted with a bipartisan majority to adopt this provision the amendment is seeking to strike. With all due respect to the distinguished Senator from Alabama, who contributed immensely to the bill as

ranking member of the committee last Congress, I understood why he opposed this provision when it was controversial and would have had Congress override the PTO. But now that the PTO and court have resolved the matter as reflected in the bill, it is not worth delaying enactment of much-needed patent reform legislation. It could help create jobs and move the economy forward.

We will have three amendments on the floor today that we will vote on. This one and the other two I strongly urge Senators, Republicans and Democrats, just as the ranking member has urged, to vote them down. We have between 600,000 and 700,000 patents applications that are waiting to be taken care of. We can unleash the genius of our country and put our entrepreneur class to work to create jobs that can let us compete with the rest of the world. Let's not hold it up any longer. We have waited long enough. We debated every bit of this in this body and passed it 95 to 5. On the motion to proceed, over 90 Senators voted to proceed. It has passed the House overwhelmingly. It is time to stop trying to throw up roadblocks to this legislation.

If somebody does not like the legislation, vote against it. But this is the product of years of work. It is the best we are going to have. Let us get it done. Let us unleash the ability and inventive genius of Americans. Let us go forward.

We have a patent system that has not been updated in over a half century, yet we are competing with countries around the world that are moving light years ahead of us in this area. Let's catch up. Let's put America first. Let's get this bill passed.

I yield the floor.

AMENDMENT NO. 595

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Washington.

Ms. CANTWELL. Madam President, I call up Cantwell amendment No. 595.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Washington [Ms. CANTWELL] proposes an amendment numbered 595.

Ms. CANTWELL. Madam President, I ask unanimous consent the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To establish a transitional program for covered business method patents)

On page 119, strike line 21 and all that follows through page 125, line 11, and insert the following:

SEC. 18. TRANSITIONAL PROGRAM FOR COVERED BUSINESS-METHOD PATENTS.

(a) REFERENCES.—Except as otherwise expressly provided, wherever in this section language is expressed in terms of a section or chapter, the reference shall be considered to be made to that section or chapter in title 35, United States Code.

(b) TRANSITIONAL PROGRAM.—

(1) ESTABLISHMENT.—Not later than 1 year after the date of enactment of this Act, the Director shall issue regulations establishing and implementing a transitional post-grant review proceeding for review of the validity of covered business-method patents. The transitional proceeding implemented pursuant to this subsection shall be regarded as, and shall employ the standards and procedures of, a post-grant review under chapter 32, subject to the following exceptions and qualifications:

(A) Section 321(c) and subsections (e)(2), (f), and (g) of section 325 shall not apply to a transitional proceeding.

(B) A person may not file a petition for a transitional proceeding with respect to a covered business-method patent unless the person or his real party in interest has been sued for infringement of the patent or has been charged with infringement under that patent.

(C) A petitioner in a transitional proceeding who challenges the validity of 1 or more claims in a covered business-method patent on a ground raised under section 102 or 103 as in effect on the day prior to the date of enactment of this Act may support such ground only on the basis of—

(i) prior art that is described by section 102(a) (as in effect on the day prior to the date of enactment of this Act); or

(ii) prior art that—

(I) discloses the invention more than 1 year prior to the date of the application for patent in the United States; and

(II) would be described by section 102(a) (as in effect on the day prior to the date of enactment of this Act) if the disclosure had been made by another before the invention thereof by the applicant for patent.

(D) The petitioner in a transitional proceeding, or his real party in interest, may not assert either in a civil action arising in whole or in part under section 1338 of title 28, United States Code, or in a proceeding before the International Trade Commission that a claim in a patent is invalid on any ground that the petitioner raised during a transitional proceeding that resulted in a final written decision.

(E) The Director may institute a transitional proceeding only for a patent that is a covered business-method patent.

(2) EFFECTIVE DATE.—The regulations issued pursuant to paragraph (1) shall take effect on the date that is 1 year after the date of enactment of this Act and shall apply to all covered business-method patents issued before, on, or after such date of enactment, except that the regulations shall not apply to a patent described in section 6(f)(2)(A) of this Act during the period that a petition for post-grant review of that patent would satisfy the requirements of section 321(c).

(3) SUNSET.—

(A) IN GENERAL.—This subsection, and the regulations issued pursuant to this subsection, are repealed effective on the date that is 4 years after the date that the regulations issued pursuant to paragraph (1) take effect.

(B) APPLICABILITY.—Notwithstanding subparagraph (A), this subsection and the regulations implemented pursuant to this subsection shall continue to apply to any petition for a transitional proceeding that is filed prior to the date that this subsection is repealed pursuant to subparagraph (A).

(c) REQUEST FOR STAY.—

(1) IN GENERAL.—If a party seeks a stay of a civil action alleging infringement of a patent under section 281 in relation to a transitional proceeding for that patent, the court shall decide whether to enter a stay based on—

(A) whether a stay, or the denial thereof, will simplify the issues in question and streamline the trial;

(B) whether discovery is complete and whether a trial date has been set;

(C) whether a stay, or the denial thereof, would unduly prejudice the nonmoving party or present a clear tactical advantage for the moving party; and

(D) whether a stay, or the denial thereof, will reduce the burden of litigation on the parties and on the court.

(2) REVIEW.—A party may take an immediate interlocutory appeal from a district court's decision under paragraph (1). The United States Court of Appeals for the Federal Circuit shall review the district court's decision to ensure consistent application of established precedent, and such review may be de novo.

(d) DEFINITION.—For purposes of this section, the term ''covered business method patent'' means a patent that claims a method or corresponding apparatus for performing data processing operations utilized in the practice, administration, or management of a financial product or service, except that the term shall not include patents for technological inventions. Solely for the purpose of implementing the transitional proceeding authorized by this subsection, the Director shall prescribe regulations for determining whether a patent is for a technological invention.

(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as amending or interpreting categories of patent-eligible subject matter set forth under section 101.

Ms. CANTWELL. Madam President, simply my amendment restores section 18 of the language that was passed out of the Senate. Basically it implements the Senate language.

I come to the floor today with much respect for my colleague Chairman LEAHY, who has worked on this legislation for many years, and my colleagues on the other side of the aisle who have tried to work on this important legislation and move it forward. I am sure it has been challenging. I mean no offense to my colleagues about this legislation. It simply is my perspective about where we need to go as a country and how we get there.

I am excited that we live in an information age. In fact, one of the things that I count very fortunate in my life is that this is the age we live in. I often think if I lived in the agrarian age, maybe I would be farming. That is also of great interest, given the State of Washington's interests in agriculture. Maybe I would live in the industrial age when new factories were being built. That would be interesting. But I love the fact that whether you are talking about agriculture, whether you are talking about automotive, whether you are talking about health care, whether you are talking about software, whether you are talking about communications, whether you are talking about space travel, whether you are talking about aviation, we live in an information age where innovation is

created every single day. In fact, we are transforming our lives at a much more rapid pace than any other generation because of all that transformation.

I love the fact that the United States has been an innovative leader. I love the fact that the State of Washington has been an innovative leader. If there is one thing I pride myself on, it is representing a State that has continued to pioneer new technology and innovations. So when I look at this patent bill, I look at whether we are going to help the process of making innovation happen at a faster rate or more products and services to help us in all of those industries I just mentioned or whether we are going to gum up the wheels of the patent process. So, yes, I joined my colleagues who have been out here on the Senate floor, such as Senator FEINSTEIN and others who debated this issue of changing our patent system to the ''first to file,'' which will disadvantage inventors because ''first to file'' will lead to big companies and organizations getting the ability to have patents and to slow down innovation.

If you look at what Canada and Europe have done, I don't think anybody in the world market today says: Oh, my gosh, let's change to the Canadian system because they have created incredible innovation or let's look to Europe because their ''first to file'' has created such innovation.

In fact, when Canada switched to this ''first to file'' system, that actually slowed down the number of patents filed. So I have that concern about this legislation.

But we have had that discussion here on the Senate floor. I know my colleague is going to come to the floor and talk about fee diversion, which reflects the fact that the Patent Office actually collects money on patents. That is a very viable way to make the Patent Office effective and efficient because it can take the money it collects from these patents and use it to help speed up the process of verifying these patents and awarding them. But the Senate chose good action on this issue, and good measure, and simply said that the money collected by the Patent Office should stay in the Patent Office budget.

But that is not what the House has done. The House has allowed that money to be diverted into other areas of appropriations, and the consequence will be that this patent reform bill will basically be taking the economic engine away from the Patent Office and spreading it out across government. So the reform that we would seek in patents, to make it a more expeditious process, is also going to get down.

I could spend my time here today talking about those two things and my concerns about them, but that is not even why I am here this morning. I am here to talk about how this legislation has a rifleshot earmark in it for a specific industry, to try to curtail the validation of a patent by a particular company. That is right, it is an earmark rifleshot to try to say that banks no longer have to pay a royalty to a particular company that has been awarded a patent and that has been upheld in court decisions to continue to be paid that royalty.

That is why I am here this morning. You would say she is objecting to that earmark, she is objecting to that personal approach to that particular industry giveaway in this bill. Actually, I am concerned about that, but what I am concerned about is, given the way they have drafted this language to benefit the big banks of America and screw a little innovator, this is basically drafted so broadly that I am worried that other technology companies are going to get swept up in the definition and their patents are also going to be thrown out as invalid. That is right. Every State in the United States could have a company that, under this language, could now have someone determine that their patent is no longer viable even though the Patent Office has awarded them a patent. Companies that have revenue streams from royalties that are operating their companies could now have their bank financing, everything pulled out from under them because they no longer have royalty streams. Businesses could lay off people, businesses could shut down, all because we put in broad language in the House version that exacerbates a problem that was in the Senate version to begin with.

Now I could say this is all a process and legislation follows a process, but I object to this process. I object to this language that benefits the big banks but was never debated in the committee of jurisdiction, the Judiciary Committee. It was not debated. It was not voted on. It was not discussed there. It was put into the managers' amendment which was brought to the Senate floor with little or no debate because people wanted to hurry and get the managers' amendment adopted.

Now, I objected to that process in driving this language because I was concerned about it. I sought colloquy at that point in time and was not able to get one from any of my colleagues, and I so opposed this legislation. Well, now this legislation has been made even worse in the House of Representatives by saying that this language, which would nullify patents—that is right. The Senate would be participating in nullifying patents that the Patent Office has already given to companies, and it can now go on for 8 years—8 years is what the language says when it comes back from the House of Representatives.

All I am asking my colleagues to do today is go back to the Senate language they passed. Go back to the Senate language that at least says this earmark they are giving to the big banks so they can invalidate a patent by a company because they don't like the fact they have to pay a royalty on check imaging processing to them—I am sorry you don't like to pay the royalty. But when somebody innovates and makes the technology, they have the right to charge a royalty. You have been paying that royalty. I am sorry, big banks, if you don't like paying that royalty anymore. You are making a lot of money. Trying to come to the Senate with an earmark rifle shot to X out that competition because you don't want to pay for that technology—that is not the way the Senate should be operating.

The fact that the language is so broad that it will encompass other technologies is what has me concerned. If all my colleagues want to vote for this special favor for the big banks, go ahead. The fact that my colleagues are going to basically pull us in to having other companies covered under this is a big concern.

The section I am concerned about is business method patents, and the term ''covered business method patent'' means patents or claims or method or corresponding apparatus for performing data processing or other operations. What does ''or other operations'' mean? How many companies in America will have their patents challenged because we don't know what ''or other operations'' means? How many? How many inventors will have their technology basically found null and void by the court process or the Patent Office process because of this confusing language?

I am here to ask my colleagues to do a simple thing: revert to the Senate language. It is not a perfect solution. If I had my way, I would strip the language altogether. If I had my way, I would have much more clarity and predictability to patent lawyers and the Patent Office so the next 3 or 4 years will not be spent in chaos between this change in the patent business method language and the whole process that is going to go on. Instead, we would be moving forward with predictability and certainty.

I ask my colleagues to just help this process. Help this process move forward by going back to the Senate language. I know my colleagues probably want to hurry and get this process done, but I guarantee this language with the Senate version could easily go back to the House of Representatives and be passed. What I ask my colleagues to think about is how many companies are also going to get caught in this process by the desire of some to help the big banks get out from under something the courts have already said they don't deserve to get out of.

I hope we can bring closure to this issue, and I hope we can move forward

on something that gives Americans the idea that people in Washington, DC, are standing up for the little guy. We are standing up for inventors. We are standing up for those kinds of entrepreneurs, and we are not spending our time putting earmark rifle shot language into legislation to try to assuage large entities that are well on their way to taking care of themselves.

I hope if my colleagues have any questions on this language as it relates to their individual States, they would contact our office and we would be happy to share information with them.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SCHUMER. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SCHUMER. Madam President, I rise today to urge this body to complete the extensive work that has been done on the Leahy-Smith America Invents Act and send this bill to the President for signature.

The America Invents Act has been years in the making. The time has come to get this bill done once and for all.

The importance of patent law to our Nation has been evidenced since the founding. The Constitution sets control over patent law as one of the enumerated powers of the Congress. Specifically, it gives the Congress the power ''To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.''

Today we take an important step toward ensuring that the constitutional mandate of Congress is met as we modernize our patent system. This bill is the first major overhaul of our patent laws in literally decades.

My colleagues have spoken at length about the myriad ways the America Invents Act will bring our patent law into the 21st century. What I want to focus on, of course, is jobs.

The America Invents Act is fundamentally a jobs bill. Innovation and intellectual property has always been and always will be at the heart of the American economy. By rewarding innovators for inventing newer and better products, we keep America's creative and therefore economic core healthy.

Over the last few decades, however, innovation has outpaced our patent system. We have an enormous backlog at the PTO. The result of this backlog is that it is much harder for creators to obtain the property rights they deserve in their inventions. That challenge in turn makes it harder for inventions to be marketed and sold, which reduces the incentive to be innovative. Eventually, this vicious cycle becomes poisonous.

The America Invents Act cuts this cycle by making our patent system more efficient and reliable. By providing the Patent and Trademark Office the resources it needs to reduce the backlog of nearly 700,000 patent applications, the bill will encourage the innovation that will create and protect American jobs. In addition, the bill streamlines review of patents to ensure that the poor-quality patents can be weeded out through administrative review rather than costly litigation.

I am especially pleased that H.R. 1249 contains the Schumer-Kyl provisions that we originally inserted in the Senate to help cut back on the scourge of business method patents that have been plaguing American businesses. Business method patents are anathema to the protection that the patent system provides because they apply not to novel products or services but to abstract and often very common concepts of how to do business. Often business method patents are issued for practices that have been in widespread use for years, such as check imaging or one-click checkout. Imagine trying to patent the one-click checkout long after people have been using it.

Because of the nature of the business methods, these practices aren't as easily identifiable by the PTO as prior art, and bad patents are issued. Of course, this problem extends way beyond the financial services industry. It includes all businesses that have financial practices, from community banks to insurance companies to high-tech startups. Section 18, the Schumer-Kyl provision, allows for administrative review of those patents so businesses acting in good faith do not have to spend the millions of dollars it costs to litigate a business method patent in court.

That is why the provision is supported not only by the Financial Services Roundtable and the Community Bankers, but by the Chamber of Commerce, the National Retail Foundation, and in my home State by the Partnership for a Greater New York.

Madam President, I ask unanimous consent that letters in support of section 18 from all of these organizations be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

INDEPENDENT COMMUNITY BANKERS OF AMERICA,
Washington, DC, June 14, 2011.

HOUSE OF REPRESENTATIVES,
Washington, DC.

DEAR MEMBER OF CONGRESS: On behalf of ICBA's nearly 5,000 community bank members, I write to voice strong support for Section 18 of the America Invents Act (H.R. 1249), which addresses the issue of poor-quality business-method patents. I strongly urge you to oppose efforts to strike or weaken the language in Section 18, which creates a program to review business-method patents against he best prior art.

Poor-quality business-method patents represent an extremely problematic aspect of the current system for granting, reviewing and litigating patents. The problems with low-quality patents are well documented and beyond dispute. On an escalating basis, financial firms are the target of meritless patent lawsuits brought by non-practicing entities. Such entities exploit flaws in the current system by bringing action in friendly venues, where they wring money from legitimate businesses by asserting low-quality business-method patents.

Section 18 addresses this problem by establishing an oppositional proceeding at the United States Patent and Trademark Office (PTO), where business-method patents can be re-examined, using the best prior art, as an alternative to costly litigation. This program applies only to business-method patents, which are defined using suggestions proffered by the PTO. Concerns about the scope of the definition have been addressed by exclusion of technological innovations. Additionally, it has been well-settled law for over 25 years that post-grant review of patent validity by the PTO is constitutional. The Federal Circuit explained that a defectively examined and therefore erroneously granted patent must yield to the reasonable Congressional purpose of facilitating the correction of governmental mistakes. This Congressional purpose is presumptively correct and constitutional. Congress has given the PTO a tool to ensure confidence in the validity of patents. Section 18 furthers this important public purpose by restoring confidence in business-method patents.

I urge you to oppose changes to Section 18, including changes that would create a loophole allowing low-quality business-method patent holders to wall off their patents from review by the PTO. Congress should ensure that final patent-reform legislation addresses the fundamental, and increasingly costly, problem of poor-quality business-method patents.

Sincerely,

CAMDEN R. FINE,
President and CEO.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Washington, DC, June 14, 2011.

TO THE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES: The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, supports H.R. 1249, the ''America Invents Act,'' which would encourage innovation and bolster the U.S. economy. The Chamber believes this legislation is crucial for American economic growth, jobs, and the future of U.S. competitiveness.

A key component of H.R. 1249 is section 22, which would ensure that fees collected by the U.S. Patent and Trademark Office (PTO) fund the office and its administration of the patent system. PTO faces significant challenges, including a massive backlog of pending applications, and this backlog is stifling domestic innovators. The fees that PTO collects to review and approve patent application are supposed to be dedicated to PTO operation. However, fee diversion by Congress has hampered PTO's efforts to hire and retain a sufficient number of qualified examiners and implement technological improvements necessary to ensure expeditious

issuance of high quality patents. Providing PTO with full access to the user fees it collects is an important first step toward reducing the current backlog of 1.2 million applications waiting for a final determination and pendency time of 3 years, as well as to improve patent quality.

In addition, the legislation would help ensure that the U.S. remains at the forefront of innovation by enhancing the PTO process and ensuring that all inventors secure the exclusive right to their inventions and discoveries. The bill shifts the U.S. to a first-inventor-to-file system that we believe is both constitutional and wise, ending expensive interference proceedings. H.R. 1249 also contains important legal reforms that would help reduce unnecessary litigation against American businesses and innovators. Among the bill's provisions, Section 16 would put an end to frivolous false patent marking cases, while still preserving the right of those who suffered actual harm to bring actions. Section 5 would create a prior user right for those who first commercially use inventions, protecting the rights of early inventors and giving manufacturers a powerful incentive to build new factories in the United States, while at the same time fully protecting universities. Section 19 also restricts joinder of defendants who have tenuous connections to the underlying disputes in patent infringement suits. Section 18 of H.R. 1249 provides for a tailored pilot program which would allow patent office experts to help the court review the validity of certain business method patents using the best available prior art as an alternative to costly litigation.

The Chamber strongly opposes any amendments to H.R. 1249 that would strike or weaken any of the important legal reform measures in this legislation, including those found in Sections 16, 5, 19 and 18. The Chamber supports H.R. 1249 and urges the House to expeditiously approve this necessary legislation.

Sincerely,

R. BRUCE JOSTEN,
Executive Vice President,
Government Affairs.

NATIONAL RETAIL FEDERATION,
Washington, DC, June 21, 2011.

Hon. LAMAR S. SMITH,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

Hon. JOHN CONYERS, Jr.,
Ranking Member, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR CHAIRMAN SMITH AND RANKING MEMBER CONYERS: I am writing in support of Section 18 of H.R. 1249, the American Invents Act of 2010. This provision would provide the Patent and Trademark Office (PTO) the ability to re-examine qualified business method patents against the best prior art.

As the world's largest retail trade association, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2010 sales of $2.4 trillion. Retailers have been inundated by spurious claims, many of which, after prolonged and expensive examination, are subsequently found to be less than meritorious.

Increasingly, retailers of all types are being sued by non-practicing entities for infringing low-quality business method patents which touch all aspects of our business: marketing, payments, and customer service to name a few aspects. A vast majority of these cases are brought in the Eastern District of Texas where the statistics are heavily weighted against defendants forcing our members to settle even the most meritless suits.

Section 18 moves us closer to a unified patent system by putting business method patents on par with other patents in creating a post-grant, oppositional proceeding that is a lower cost alternative to costly patent litigation. The proceeding is necessary to help ensure that the revenues go to creating jobs and bringing innovations to our customers, not paying litigation costs in meritless patent infringement litigation.

We appreciate the opportunity to support this important section and oppose any efforts to strike or weaken the provision. Please do not hesitate to contact me with any questions.

Best regards,

DAVID FRENCH,
Senior Vice President,
Government Relations.

Mr. SCHUMER. A patent holder whose patent is solid has nothing to fear from a section 18 review. Indeed, a good patent will come out of such a review strengthened and validated. The only people who have any cause to be concerned about section 18 are those who have patents that shouldn't have been issued in the first place and who were hoping to make a lot of money suing legitimate businesses with these illegitimate patents. To them I say the scams should stop.

In fact, 56 percent of business patent lawsuits come in to one court in the Eastern District of Texas. Why do they all go to one court? Not just because of coincidence. Why do people far and wide seek this? Because they know that court will give them favorable proceedings, and many of the businesses that are sued illegitimately spend millions of dollars for discovery and everything else in a court they believe they can't get a fair trial in, so they settle. That shouldn't happen, and that is what our amendment stops. It simply provides review before costly litigation goes on and on and on.

Now, my good friend and colleague, Senator CANTWELL, has offered an amendment that would change the section 18 language and return to what the Senate originally passed last March. Essentially, Senator CANTWELL is asking the Senate to return to the original Schumer-Kyl language. Of course, I don't have an inherent problem with the original Schumer-Kyl language. However, while I might ordinarily be inclined to push my own version of the amendment, I have to acknowledge that the House made some significant improvements in section 18.

First, H.R. 1249 extends the transitional review program of section 18 from 4 to 8 years in duration. This change was made to accommodate industry concerns that 4 years was short enough, that bad actors would just wait out the program before bringing their business method patent suits. The lying-in-wait strategy would be possible under the Cantwell amendment because section 18 only allows transitional review proceedings to be initiated by those who are facing lawsuits.

On a 20-year patent, it is not hard to wait 4 years to file suit and therefore avoid scrutiny under a section 18 review. It would be much harder, however, to employ such an invasive maneuver on a program that lasts 8 years.

Second, the Cantwell amendment changes the definition of business method patents to eliminate the House clarification that section 18 goes beyond mere class 705 patents. Originally, class 705 was used as the template for the definition of business method patents in section 18. However, after the bill passed the Senate, it became clear that some offending business method patents are issued in other sections. So the House bill changes the definition only slightly so that it does not directly track the class 705 language.

Finally, the Cantwell amendment limits who can take advantage of section 18 by eliminating access to the program by privies of those who are sued. Specifically, H.R. 1249 allows parties who have shared interests with a sued party to bring a section 18 proceeding. The Cantwell amendment would eliminate that accommodation.

All of the House changes to section 18 of the Senate bill are positive, and I believe we should keep them. But to my colleagues I would say this in closing: The changes Senator CANTWELL has proposed do not get to the core of the bill, and the most profound effect they would have is to delay passage of the bill by requiring it to be sent back to the House, which is something, of course, we are all having to deal with on all three of the amendments that are coming up.

I urge my colleagues to remember that this bill and the 200,000 jobs it would create are too important to delay it even another day because of minor changes to the legislation. I urge my colleagues to vote against the amendment of my good friend MARIA CANTWELL and move the bill forward.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Madam President, I rise to express my continued support for the America Invents Act. We have been working on patent reform legislation for several years now—in fact, almost the whole time I have been in the Senate—so it is satisfying to see the Senate again voting on this bipartisan bill.

It is important to note that this bill before us is the same one that was passed by the Republican-controlled House of Representatives in June. I commend House Judiciary chairman LAMAR SMITH for his leadership on this monumental legislation. He has worked hard on this for many years,

and I wish to pay a personal tribute to him.

I also wish to recognize the efforts of my colleague from Vermont, Senate Judiciary Committee chairman PATRICK LEAHY. Over the years, he and I have worked tirelessly to bring about long overdue reform to our Nation's patent system, and I personally appreciate PAT for his work on this matter.

I also wish to recognize the efforts of Senate Judiciary Committee ranking member CHUCK GRASSLEY of Iowa, as well as many other Senate colleagues who have been instrumental in this legislative process.

The Constitution is the supreme law of the land and the shortest operating Constitution in the world. America's Founders put only the most essential provisions in it, listing the most essential rights of individuals and the most essential powers the Federal Government should have. What do we think made it on to that short list? Raising and supporting the Army and maintaining the Navy? No question there. Coining money? That one is no surprise. But guess what else made the list. Here is the language: The Founders granted to Congress the power ''To promote the Progress of Science and useful Arts, by securing for . . . Authors and Inventors the exclusive Right to their Respective Writing and Discoveries.''

In other words, the governance of patents and copyrights is one of the essential, specifically enumerated powers given to the Federal Government by our Nation's Founders. In my view, it is also one of the most visionary, forward-looking provisions in the entire U.S. Constitution.

Thomas Jefferson understood that giving people an exclusive right to profit from their inventions would give them ''encouragement . . . to pursue ideas which may produce utility.'' Yet Jefferson also recognized the importance of striking a balance when it came to granting patents—a difficult task. He said:

> I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent and those which are not.

As both an inventor and a statesman, he understood that granting a person an exclusive right to profit from their invention was not a decision that should be taken lightly.

This bill is not perfect, but I am pleased with the deliberative process that led to its development, and I am confident that Congress followed Jefferson's lead in striking a balanced approach to patent reform.

There can be no doubt that patent reform is necessary, and it is long overdue. Every State in the country has a vested interest in an updated patent system. When patents are developed commercially they create jobs, both for the company marketing products and for their suppliers, distributors, and retailers. One single deployed patent affects almost all sectors of our economy.

Utahns have long understood this relationship. Ours is a rich and diverse and inventive legacy. In the early 1900s, a young teenager approached his teacher after class with a sketch he had been working on. It was a drawing inspired by the rows of dirt in a potato field the teenager had recently plowed. After examining the sketch, the teacher told the young student that he should pursue his idea, and he did. That teenager was Philo Farnsworth, a Utah native who went on to patent the first all-electronic television.

Farnsworth had to fight for many years in court to secure the exclusive rights to his patent, but he continued to invent, developing and patenting hundreds of other inventions along the way.

Another Utah native developed a way to amplify sound after he had trouble hearing in the Mormon Tabernacle. His headphones were later ordered by the Navy for use during World War I. His name was Nathaniel Baldwin.

William Clayton, an early Mormon pioneer, grew tired of manually counting and calculating how far his wagon company had traveled each day. So, in the middle of a journey across the plains, he and others designed and built a roadometer, a device that turned screws and gears at a set rate based on the rotation of the wagon wheel. It worked based on the same principles that power modern odometers.

John Browning, the son of a pioneer, revolutionized the firearm, securing his inventions through a patent. He is known all over the world for the work he did.

Robert Jarvik, who worked at the University of Utah—a wonderful doctor whom I know personally—invented the first successful permanent artificial heart while at the University of Utah.

These and countless other stories illustrate the type of ingenuity that was required by the men and women who founded Utah, the type of ingenuity that has been exemplified in every generation since.

Last year, Utah was recognized as one of the most inventive States in the Union. Such a distinction did not surprise me, especially since the University of Utah recently logged the university's 5,000th invention disclosure and has over 4,000 patent applications filed to date. This impressive accomplishment follows on the heels of news that the University of Utah overtook MIT in 2009 to become America's No. 1 research institution for creating start-up companies based on university technology.

A group of students at Brigham Young University recently designed a circuit that was launched with the shuttle Endeavour, and another group developed a prosthetic leg that costs $25 versus the $10,000 a prosthetic leg may typically cost. Utah inventors contribute to everything from electronic communications, to biotechnology, to computer games.

Like my fellow Utahns, citizens across the country recognize that technological development is integral to the well-being of our economy and the prosperity of our families and communities. As technology advances, it is necessary at times to make adjustments that will ensure Congress is promoting the healthy progress of science and useful arts.

The America Invents Act will improve the patent process, giving inventors in Utah and across the country greater incentives to innovate. Strengthening of our patent system will not only help lead us out of these tough economic times, but it will help us maintain our competitive edge both domestically and abroad. Take, for example, the transition to a first-inventor-to-file system and the establishment of a post-grant review procedure. These changes alone will decrease litigation costs so that small companies and individuals will not be dissuaded from protecting their patent rights by companies with greater resources.

This bill provides the USPTO with rulemaking authority to set or adjust its own fees for 7 years without requiring a statutory change every time an adjustment is needed. Providing the USPTO with the ability to adjust its own fees will give the agency greater flexibility and control, which, in the long run, will benefit inventors and businesses.

The legislation enables patent holders to request a supplemental examination of a patent if new information arises after the initial examination. By establishing this new process, the USPTO would be asked to consider, reconsider, or correct information believed to be relevant to the patent.

Further, this provision does not limit the USPTO's authority to investigate misconduct or to sanction bad actors. I am confident this new provision will remove the uncertainty and confusion that defines current patent litigation, and I believe it will enhance patent quality.

The America Invents Act creates a mechanism for third parties to submit relevant information during the patent examination process. This provision will provide the USPTO with better information about the technology and claimed invention by leveraging the knowledge of the public. This will also help the agency increase the efficiency of examination and the quality of patents.

This bill would create a reserve fund for user fees that exceed the amount appropriated to the USPTO. I prefer the language in the Senate-passed bill, which created a new revolving fund for

the USPTO separate from annual appropriations. Certainty is important for future planning, but the appropriations process is far from reliable.

While conceptually I understand why our House counterparts revised the Senate-passed language—and I am in agreement about maintaining congressional oversight—I believe this is one area that should be reconsidered. It is just that important. That is why I support Senator TOM COBURN's amendment. If passed, his amendment will preserve congressional oversight and give the USPTO the necessary flexibility to operate during these critical times.

The House-passed compromise language is a step in the right direction, especially since the chairman of the House Appropriations Committee has committed that all fees collected by the USPTO in excess of its annual appropriated level will be available to the USPTO. However, I remain concerned that the budget uncertainties that exist today may negatively impact the USPTO and its ability to implement many of the new responsibilities required by the America Invents Act.

I remain concerned about some provisions the House either expanded or added. On balance, however, the positives of this legislation far outweigh the negatives, and I am confident it will contribute to the greater innovation and productivity our economy demands. It provides essential improvements to our patent system, such as changes to the best mode disclosure requirement; expansion of the prior user rights defense to affiliates, with an exemption for university-owned patents; incentives for government laboratories to commercialize inventions; restrictions on false marking claims; removal of restrictions on the residency of Federal circuit judges; clarification of tax strategy patents; providing assistance to small businesses through a patent ombudsman program and establishing additional USPTO satellite offices.

We all know every piece of legislation has its shortcomings. That is the reality of our legislative process. However, taken as a whole, the America Invents Act further builds upon our country's rich heritage of intellectual property protections—a cornerstone provided by article I, section 8 of the Constitution.

Passage of the America Invents Act will update our patent system, help strengthen our economy, and provide a springboard for further improvements to our intellectual property laws. I urge all of my colleagues to join in this monumental undertaking, and I appreciate those who have worked so hard on these programs. Again, I mentioned with particularity the Congressman from Texas, LAMAR SMITH, and also my friend and colleague, Senator LEAHY, and others as well, Senator GRASSLEY especially. There are others as well whom I should mention, but I will leave it at that for this particular time.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HOEVEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. COONS). Without objection, it is so ordered.

THE ECONOMY

Mr. HOEVEN. Mr. President, I rise today to speak on a matter of great importance to our country, and that is jobs and our economy. I know the President will be speaking this evening. I want to emphasize the importance that we focus on a long-term strategy to get our economy going. By that I mean a pro-jobs, progrowth economic strategy for our country.

The things that go into that include building the best possible business climate. We have got to have a business climate that will stimulate private investment, that will stimulate entrepreneurship, ingenuity, that will stimulate job creation by businesses small and large across our economy. We need to build a strong business climate. We need a long-term, progrowth economic strategy to do that.

We also need to control our spending and live within our means. We need a comprehensive energy policy. All three of these things go into the right kind of long-term comprehensive approach this country needs to get our economy growing and get people back to work.

I wish to start by taking a minute to look at our current situation, to talk about where we are. If you look at unemployment, unemployment is more than 9 percent, and it has been more than 9 percent for an extended period of time. Weekly jobless claims: more than 400,000. We have more than 14 million people who are out of work. That does not include people who are underemployed or people who are no longer looking for work because they have been discouraged and are not included in the workforce—14 million people we need to get back to work.

We also have a tremendous deficit problem. If you look at our revenues today, we have revenues of about $2.2 trillion. Our spending is at a rate of $3.7 trillion. That is a $1.5 trillion deficit. That is adding up to more than a $14 trillion dollar debt—a $14 trillion debt that weighs on our economy. If we do not deal with it, it is a debt our children will have to pay. That is not acceptable for us and we have to deal with it at the same time we get this economy going.

If you look at our current situation, we are borrowing 40 cents of every dollar we spend, and deficit and our debt is growing at $4 billion a day. I brought some graphs so we can look at it graphically. Here you see revenues and spending.

Unfortunately, the spending line is the red line along the top here. Spending is more than $3.7 trillion a year. At the same time, our revenues are $2.2 trillion. That gap is a $1.5 trillion budget deficit we are accumulating on an annual basis. As I say, it is now leading to a debt that is more than $14 trillion.

If you look at this next chart, we talk about unemployment. Here you see annual unemployment. Currently we are at 9.1 percent. We have been there for an extended period of time. Again, that represents more than 14 million people who are unemployed that we need to get back to work.

The other thing you will notice on this chart is the blue line. This blue line is the chart for my home State. There you will see our unemployment is about 3.2 to 3.3 percent. For the last decade in our State, we have focused on a progrowth, pro-jobs economic strategy. By that I mean building the best possible business climate, making sure we live within our means, and building a comprehensive energy approach to develop all of our energy resources. There is no reason we cannot do the same thing at the Federal level. In fact, we need to do exactly that at the Federal level. So I am here today to talk about some of the things we need to do to make that happen.

The first is that I emphasize by building a good business climate, I mean a legal, tax, and regulatory certainty so businesses know the rules of the road so they can invest. They can invest shareholders' dollars so entrepreneurs can start new businesses, so existing businesses can expand. But to do that, they need to know the rules of the road. They need to know what our tax policy is. Right now we have a tax policy that expires at the end of the next year. So how do you as a business person go out there and start making investments when you do not know what the tax policy is going to be beyond the end of next year? We need tax reform.

How about regulation? We have an incredible regulatory burden. How do you go out there and make an investment, get a business going, hire people, if you do not know what the regulatory requirements are? We need to reduce that regulatory burden.

We need to pass trade agreements so our companies can sell not just here in the United States but they can sell globally. If you look at the history of our country, that is how we have grown this economy, how we have become the most dynamic economic engine in the world. It is through that private investment, that entrepreneurship, that American ingenuity.

The role of government is to create a business climate that unleashes that

potential. We have got to roll back the regulatory burden. We have got to create clear, understandable rules and tax policy to follow so these companies can make these investments, get those 14-plus million people back to work, get a growing economy, at the same time that we get a grip on our spending and start living within our means. That is how we not only raise our standard of living and our quality of life, but we make sure we do not pass on a huge debt to our children and our grandchildren.

Let me talk about some of the kinds of laws and legislation we need to pass to make sure that happens.

Not too long ago, President Obama issued an Executive order. I hope it is something he talks about this evening in his address to the joint session of Congress. In that Executive order, he said all of the agencies—all of the Federal agencies—need to look at their regulations, at their existing regulations and any regulations they are putting out, and make sure that if those regulations are costly, burdensome, if they do not make sense, if they are outmoded or outdated, they are eliminated, they are stripped away, so we empower people and companies throughout this great country to do business. He said in that Executive order make sure all of our agencies look at their regulations and eliminate those that do not make sense, that are costly, and that are burdensome, so we can stimulate economic activity and job creation in this country. I think we need to do exactly that. In fact, let's make it a law. Let's make it the law that all of the regulatory agencies need to look at their existing regulations and any regulations they are looking at putting out, to make darn sure they are clear, straightforward, understandable, that they are workable, and not only that our regulations are clear and understandable, that the regulators work with Americans and American companies to make sure they understand them and they are able to meet them so they can pursue their business plans, their business growth, their business investment, and that they hire and put people back to work. That is how it is supposed to work.

Together, Senator PAT ROBERTS of Kansas, myself, and others have put forward the Regulatory Responsibility for Our Economy Act. That is just what it says. How much more bipartisan can we get than that? The President puts out an Executive order saying we need to roll back some of these regulations that are burdening our business base, and we as Republican Senators say: Okay, here is an act to put that Executive order into law. Let's work together in a bipartisan way to reduce this regulatory burden that is stifling economic growth and job creation in our country.

That is what Congress is supposed to do. That is what we need to do. That is what the people of this country want us to do on a bipartisan basis.

When the President comes to the Capitol this evening and talks about how we get business going, let's get it going by reducing this regulatory burden so private investment can get people back to work in this country. It is not about more government spending, it is about private investment and initiative. We have to create the framework to make it happen. We can do it, and we can do it on a bipartisan basis.

Another example is that the United States has been the leader in aviation throughout its history. Throughout the history of aviation, since Kitty Hawk, the United States has led the world in aviation, in invention, development, and innovation, and all the things that have gone into the development of aviation. Again, throughout its history, the United States has been the leader. One of the key areas for growth in aviation right now is UAS, unmanned aerial systems or unmanned aircraft. They call them remotely piloted aircraft. Our military uses them to tremendous benefit in Iraq, Afghanistan, and around the world.

Even though our military flies UAS all over the globe, we can't fly them here in the United States together with manned aircraft. Yet if we are going to continue to lead the world in aviation innovation, we have to find a way to fly both manned and unmanned aircraft together in our airspace in the United States.

Others and I have been talking to the FAA and working with the FAA, saying that you have to promulgate rules, set the rules of the road—or, in this case, the rules of the air—so we can fly both manned and unmanned aircraft together in the U.S. airspace. The FAA has been working on this for I don't know how long but a long period of time. As of yet, they have not come out with those rules so we can fly both manned and unmanned aircraft in our airspace. But we need to, because if we don't, other countries will, and they will move ahead of us—maybe not in military aviation, where we are flying unmanned aircraft all over the world, but how about in commercial and general aviation and all the other applications it will have for unmanned aircraft.

The FAA bill, which we are now working to complete—a version was passed in the House and a version was passed in the Senate, and we are trying to reconcile the two versions. Again, we need to do this in a bipartisan way. I have included language that authorizes—in fact requires—that the FAA set up airspace in the United States so that manned and unmanned aircraft can be flown concurrently. Again, it is about making sure that we not only maintain our lead in aviation but create those exciting, good-paying jobs of the future. If the agency isn't going to take that step, we as the Congress have to make sure we take that step and move the aviation industry forward.

Another example is how we have to create the environment, the forum that encourages that type of innovation, entrepreneurship, and investment in job creation. That is our role, our responsibility, in this most important of all issues, which is getting the economy going and getting people back to work.

On the free trade agreements, we have three of them pending—one with South Korea, the U.S.-South Korea Free Trade Agreement, another is the Panama Free Trade Agreement, and the other is with Colombia. Those trade agreements have been negotiated for some time. For three years those trade agreements have been pending. It is time to take them from pending to being passed. We need the administration to bring those free trade agreements to the Senate and to the House and we will pass them. We have worked across the aisle in a bipartisan way to make sure that whatever issues needed to be dealt with to bring them to the Congress—whether it is trade adjustment authority or whatever, we have worked together in a bipartisan way to say, look, we have addressed the issues. Now the administration needs to bring the free trade agreements to the Senate floor. We will pass them.

With just one of those free trade agreements—for example, if we take the South Korea free trade agreement—we are talking about more than $10 billion in trade every year for our U.S. companies.

These free trade agreements reduce tariffs on the order of 85 percent. We are talking more than a quarter of a million jobs that will be created if we pass these agreements. For every 4-percent increase in trade, we are talking about 1 million American jobs that we can create. Again, it is about creating the environment that empowers investment, empowers our entrepreneurs in this country, and empowers businesses large and small to invest and get our economy going.

At the same time we get this economy growing, we have to start living within our means. Right now, as I indicated, we have a $1.5 trillion deficit and a debt that is closing in on $14.5 trillion. So at the same time we get the economy growing, which will grow our revenues—not higher taxes, but grow revenues from a growing economy, and with tax reform that empowers that economic growth, at the same time, we have to get control of our spending and live within our means.

Along with some fellow Senators, we have sponsored a number of pieces of legislation that I believe we can pass in a bipartisan way to make sure we get spending under control. The first is a balanced budget amendment. I come from a State where I was Governor for 10 years. We have a balanced budget

amendment. Every year, we are required by our Constitution to balance the budget. States have a balanced budget requirement, and businesses and families and communities all have to live within their means. Our Federal Government has to live within its means.

If you think about it, a balanced budget amendment gets everybody involved. We not only have to pass it in the Senate and in the House with a two-thirds majority, but then it goes out to the States for ratification. What better way to get everybody throughout the country directly involved in making sure that we control our spending. Every State has to deal with a balanced budget amendment. So it is all of us working together as Americans, and it is the Congress going to the people of this great country and saying: Here is a balanced budget amendment, you tell us what you think. Again, what a great way to get everybody involved, the way we should get everybody involved in making sure we live within our means not only today but tomorrow and throughout future generations.

At the same time, we need to pass other tools that can help us get control of our spending. For example, the Reduce Unnecessary Spending Act. This is a bipartisan act that I think was originally sponsored by Senator TOM CARPER, a former Governor, a Democrat from Delaware, and Senator JOHN MCCAIN. I am proud to be a cosponsor. One of the key provisions is to give the President a line-item veto. Reaching across the aisle, we are giving our President a tool—a line-item veto—to make sure we cut out waste, fraud, and abuse, and that we control our spending. As a Governor, the most effective tool I had was the line-item veto. We need to make sure our President has it as well.

I think we also need to look at a biennial budget, so that we pass a budget on a two-year cycle—make sure we get it passed and the next year we can come back and make the adjustments we have to make; but at the same time we have time for oversight and making sure spending is going in accordance with the directive of the Congress, and whether it is waste, fraud, abuse, or duplication, that we cut it out. Again, this is absolutely what the American people want us to do.

The third area I will touch on for a minute—and I will go to the next chart—is building the right kind of energy plan, a comprehensive energy policy that will help this country develop all of its energy resources. We did it in North Dakota. I know we can do it at the Federal level.

If you think about it, energy development in this country is an incredible opportunity. It is an opportunity to produce more energy more cost effectively, with better environmental stewardship that will enable all of our industries to compete in a global high-tech economy. In addition, what a great opportunity it is to create high-paying jobs. Again, I go back to what I said before. For our energy companies looking to invest hundreds of millions and billions of dollars, they need to know the rules of the road. It comes back to creating a comprehensive energy policy that sets up those rules of the road so they know what their tax situation is and what the regulation and regulatory requirements are. When they make those investments to produce more energy more cost effectively, with good environmental stewardship, they have to know they are going to be able to get a return. They have to know they can meet the regulatory requirements. Those investments may last 40 and 50 years, and they know they are going to have to be able to recoup those investments.

This first chart gives an example of some of the energy development in our State. Out West, there is oil and gas. North Dakota is now the fourth largest oil-producing State in the country. We have passed Oklahoma and Louisiana, and people don't realize it. Every State has some kind of energy. If you look at this map, we have oil, gas, coal, and wind. We are in the top 10 wind producers. We have biofuels, biomass, solar—we have all of them. Different States have different strengths. A lot of States have oil, gas, coal, or certainly wind, or they can develop the biofuels.

It comes down to creating that environment that stimulates private investment so companies will come in and do exactly what I am talking about—at the Federal level, as well as at the State level.

This next chart shows what is actually happening at the Federal level. This chart is the cost of major new regulations. What it shows over the last three decades is the cost of regulation by year, over the last 30 years. When the cost of regulation is high, if you go back and check, you will see our economy wasn't doing very well. When the cost of regulation was low, you will see that it was doing much better. Look at the cost of regulation today. It was $26.5 billion in 2010, the cost of meeting the regulatory requirements. That is what I am talking about. That is what is impeding job growth and economic growth and business investment. We have to address that. We have to roll back the regulatory burdens our companies and entrepreneurs face today.

This last chart gives one example of some of the new regulations EPA is putting out that somebody who wants to develop energy has to meet. If you are an energy company or a young person with a good idea to develop a new type of energy, or existing type of energy with a new technology, can you meet all of these requirements? Can you even begin to understand them? Do you have a big enough legal team and scientific team, or a deep enough wallet to try to figure that all out before you put your money or your shareholders' money at risk? That is what is impeding economic growth in our country, and we have to deal with it. Congress has to deal with it.

Again, this is not rocket science, and it is not about spending more Federal dollars. We have to create an environment that will encourage, stimulate, and empower private investment. It is that private investment throughout this land that will get our economy going and get people back to work. We can do it. It has to be a long-term strategy. It can't be a few stopgap measures that we put into place now for the next 90 days or for 1 year at a time. It has to be on a long-term sustained basis. I believe that is what the people want to hear this evening. I think they want to hear that kind of commitment to a long-term strategy, a progrowth, pro-jobs economic strategy that will get this economy going now, tomorrow, and for the long term. It has to be done in a bipartisan way to get it through this Congress and signed by the President. But it is that kind of vision we need for our country.

I yield the floor.

The PRESIDING OFFICER. The Senator from Montana is recognized.

Mr. BARRASSO. Mr. President, U.S. job creation in this country, as you know, has come to a halt. The Labor Department reported last Friday that zero jobs were created in August. The economic recovery that was hoped for failed to materialize, and unemployment remains at 9.1 percent.

Hope is not enough. Our economy is stagnant. The President's latest pivot to jobs is anchored on blaming the previous administration, which is now nearly 3 years past. Yet, despite repeated assurances of improvement, President Obama's own economic policies have failed. The President's stimulus plan failed to produce the 3.5 million jobs he promised. His ''green jobs'' initiative gave us more red ink but never came close to the 5 million new jobs he predicted it would. All the while the Federal bureaucracy he controls churns out expansive and expensive new regulations that amount to an assault on private sector job creation.

The facts are inescapable. Since President Obama took office, America has lost approximately 2.3 million jobs. We are in an economic crisis—a crisis that extends to America's confidence in the President to do anything that will change the current course. What the American people want is a plan, a plan that will yield results. They want leadership, and they have rejected the President's insistence that the only way forward is through more spending.

Today, western Members of the Senate and House are calling on the President to accept a new way—a progrowth

plan to create jobs in the West that will lead to broader economic recovery all across the country. The western caucus Jobs Frontier report was produced by Members of the Senate and congressional western caucuses. It contains legislative proposals already introduced in both Houses of Congress, and these are proposals that create jobs now.

The proposals we support speak largely to the economic challenges faced by Western States. They are also aimed at ruinous regulations and reliance on foreign energy and lawsuit abuse that continues to stifle our entire economy. These bills are ready to pass. They are ready to create jobs today.

Any serious job creation proposal has to start with serious steps to increase affordable American energy. For decades, westerners have worked in high-paying energy jobs, and these jobs have good benefits. Since taking office, the Obama administration has consistently pushed extreme policies and heavy-handed regulations that make it harder to develop American energy. Very simply: Fewer energy projects mean fewer American jobs. Members of the Senate and House western caucuses have proposed a wide range of proposals to increase the number of red, white, and blue jobs all across the country.

Encouraging the development of all-of-the-above energy resources will create thousands of jobs in the West and make our country less dependent on foreign energy. This administration has consistently shut down offshore energy exploration. It has arbitrarily canceled existing leases, and it continues to try to impose additional hurdles to onshore production, such as redundant environmental reviews, burdensome permitting review requirements, and delays in processing of applications.

Our bills—the ones in this report—will streamline the permitting process and break down the barriers imposed by President Obama. This will make it cheaper and easier—cheaper and easier—for the private sector to create jobs.

Westerners recognize we cannot pick and choose which forms of energy to support. When it comes to energy, we need it all, and we need it now. That is why we need a bill that will let energy producers tap existing resources of American oil and natural gas. Our plan has a bill that will do that. It is called the Domestic Jobs, Domestic Energy, and Deficit Reduction Act. It has been introduced by both Representative ROB BISHOP of Utah and Senator DAVID VITTER of Louisiana.

This bill would force the Department of the Interior to stop blocking offshore energy exploration. That department's stall tactics have gone so far that even President Bill Clinton has called them ridiculous. The Domestic Jobs, Domestic Energy, and Deficit Reduction Act would force the Obama administration to quit stalling.

The barrage of new regulations coming out of Washington continues to be a big wet blanket—a big wet blanket—thrown over the job creators in our country. In July of 2011, this administration issued 229 rules, and it finalized 379 additional rules that are going to cost our job creators over $9.5 billion. That is in July alone.

Our plan includes a bill I have introduced, called the Employment Impact Act. This bill forces Washington regulators to look before they leap when it comes to regulations that could hurt American jobs. Under the bill I have introduced, every regulatory agency would be required to prepare a jobs impact statement. They would have to do it with every new rule they propose. That statement would include a detailed assessment of the jobs that would be lost or gained or sent overseas by any given rule. It would consider whether new rules would have a bad impact on our job market in general.

The administration has also attempted to drastically increase wilderness areas, to expand Washington's jurisdiction on private waters, and to misuse the Endangered Species Act. Western lawmakers are proposing to reassert congressional authority to ensure a proper balance between job creation and conservation. Our bills in this report will increase transparency and stop any administration from issuing regulations without considering the local economic impact.

Throughout our Nation's history, American farmers and ranchers have provided an affordable, abundant, and safe domestic supply of food and energy. In recent years, America's agricultural and forestry industries have been increasingly threatened by the surge of regulations coming from Washington—especially those from the Environmental Protection Agency. Our plan is going to push back. We will strengthen these industries and their ability to meet the world's growing food and energy needs.

Westerners also recognize the mining sector is vital to our economic recovery. We know manufacturing jobs cannot be created without the raw materials needed to produce goods. Since the Obama administration will not break down barriers to American minerals, our Nation is growing increasingly dependent on foreign minerals—countries such as China and Russia. This inaction is unacceptable and it is inexcusable.

Our plan includes Senator MURKOWSKI's bill, the Critical Minerals Policy Act, which will ensure long-term viability of American mineral production. Her bill requires the U.S. Geological Survey to establish a list of minerals critical to the U.S. economy and then provide a comprehensive set of policies to address each economic sector that relies upon those critical minerals. It also creates a high-level interagency working group to optimize the efficiency of permitting in order to facilitate increased exploration and production of domestic critical minerals.

These are just some of the ideas included in our jobs frontier plan. As it says: ''Breaking Down Washington's Barriers to America's Red, White and Blue Jobs.'' We eliminate back-door cap-and-tax regulations. Finally, we will take on excessive lawsuits against Federal agencies that have increased dramatically and destroyed jobs in the West.

Every single one of the bills in the Republican jobs plan has been written and introduced in one or both Houses of Congress. This is a plan that can be implemented now. This is a plan that will work to create jobs. This is a plan that will reduce the cost of energy and restart the economy.

There is a lot that needs to be done to fix our ailing economy. These are some ideas—western ideas—that come from the lawmakers that know best how our rural communities are suffering and how we can get folks back to work. Many of these proposals come from the States. They have the support of our western Governors and legislators. These are ideas not born in Washington.

Recent jobless numbers confirm the current approach from Washington has failed. If the President is serious about incorporating the ideas of every American in every part of the country, then he needs to look beyond Washington.

I thank every Member of the Senate and congressional western caucuses for their work and their expertise on this report. I look forward to turning these ideas into policies and in that way putting all of America back to work.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

AFGHANISTAN AND AID TO PAKISTAN

Mr. KIRK. Mr. President, I want to take some time today to talk about my views on Afghanistan and why we should rethink aid to Pakistan.

I just completed my third 2-week reserve assignment in Afghanistan. While many Members of Congress get a first-hand look at the situation on fact-finding missions, my time provided me a more indepth view, with a focus on the counternarcotics objectives of NATO's ISAF mission.

Now, first, the good news. The work of our soldiers, marines, sailors and airmen is nothing short of amazing. Serving in one of the poorest, roughest, and most remote parts of the globe, they have crushed al-Qaida's training bases, they have driven the Taliban from government, they have fostered a new elected government, and welded 47

allies into a force for human rights, development, and education—especially for girls.

Now, 42 percent of Afghans live on just $1 a day. Only one in four can read. Malnutrition is a serious problem, and infant mortality is the third highest of any country. According to the United Nations, nearly 40 percent of Afghan children under 3 are moderately or severely underweight, and more than 50 percent of children under 3 experience stunted growth. Afghanistan has more than twice the population of Illinois, but its electricity generation for the entire year is less than 2 percent of the electricity generated in Illinois just for the month of May.

The nearly 30 million people of Afghanistan are victimized by a number of terrorist groups beyond just the Taliban, such as the HIG, the ETIM, and a new threat called the Haqqani network, which I will go into detail about. But the Afghans are mostly victimized by their neighbors, the Pakistanis.

I served as a reservist in Afghanistan for the first time in 2008, and I believed then that Pakistan was complicated; that we have many issues there and that we should advance our own interests diplomatically. I no longer agree with that.

Pakistan has now become the main threat to Afghanistan. Pakistan's intelligence service is the biggest danger to the Afghan Government. Pakistan also poses a tremendous threat to the lives of American troops. Let me be clear: Many Americans died in Afghanistan because of Pakistan's ISI.

Sitting in our commander's briefs for 2 weeks and talking to our headquarters' leaders and spending a few days in the field, it became clear to me if we were working in Afghanistan alone we would have had a much better chance to turn that country around more quickly, restoring it to its status as an agricultural economy with a loose government and a high degree of autonomy given to each tribe or region. But we are not alone.

While our military reduced al-Qaida in Afghanistan to a shadow of its former self, a new force is emerging. On the 10th anniversary of 9/11, al-Qaida, I must report, is still armed and dangerous, but it is far less numerous or capable than it once was. But al-Qaida is not the most potent force that is arrayed against us.

The new face of terror is called the Haqqani network. Built around its founder Jalaluddin Haqqani and his son Siraj, it has become the most dangerous, lethal, and cancerous force in Afghanistan.

One other thing. As much as Pakistani officials claim otherwise, the Haqqanis are backed and protected by Pakistan's own intelligence service. Statements by Pakistani Government officials to the contrary are direct lies. The Haqqani network kills Americans, it attacks the elected Government of Afghanistan, and remains protected in its Pakistani headquarters of Miriam Shah. Without that Pakistani safe haven, the Haqqani network would suffer the same fate as al-Qaida. Afghan and U.S. special operations teams take out many Taliban and al-Qaida commanders, and these operators operate each night also against numerous Haqqani leaders. But the Haqqanis are able to spend all day planning attacks on Afghans and Americans and then sleeping soundly in their beds in Pakistan.

In such an environment, with our deficits and debt, military aid to Pakistan seems naive at best and counterproductive at worst. I am seriously thinking we should reconsider assistance to the Pakistani military.

Recently, our President chose to withdraw 33,000 American troops from the Afghan battle. General Petraeus and Admiral Mullen did not choose this option. Nevertheless, I think our new commander, General Allen, can withdraw the first 10,000 American troops by Christmas without suffering a military reversal in Afghanistan. Afghanistan's Army and police are growing in size—now numbering over 300,000—and capability. Despite recent reports of desertions, Afghan security forces will soon reach a level where some of our troops may safely leave the country. As we withdraw, we should consider enablements, such as a pay raise for Afghan troops, to improve their retention and morale.

I spoke with General Allen about a commander's assessment that should be delivered at the end of the year. After withdrawing 10,000 troops, I hope he will clearly define when the next 23,000 can come out.

In the United States, politically there is little difference between withdrawing at the end of the year and withdrawing at the end of the fiscal year, but militarily there is a world of difference. The fighting season in Afghanistan runs through October. If General Allen is ordered to withdraw his troops by September 30, then many of his forces will disappear during the Taliban's key offensive months. But if the troops leave in November-December, we will guarantee another bad military year for the Taliban and the Haqqanis and an even stronger Afghan Army in the long term.

I hope the President sets an end-of-year deadline rather than an end-of-fiscal-year deadline. It is right to do militarily and politically. If he does this, he reduces the chance of a radical Islamic extremist victory on the Afghan battlefield in 2012.

While in Afghanistan, I worked to help update and rewrite ISAF's counternarcotics plan. Afghanistan is the source of over 80 percent of the world's heroin and opium. The drug economy fuels the insurgency and corruption of the Afghan Government itself. From 2001–09, Secretary Rumsfeld and then-Ambassador Holbrooke blocked ISAF from doing much about narcotics. This left a huge funding source for the insurgency untouched.

ISAF was able to change direction slightly in 2009 and 2010 by supporting interdiction and eradication and alternative livelihoods for Afghan farmers. While commendable, these programs didn't work and the size of the Afghan poppy crop is likely to go up.

The plan I worked on advocates a shift in ISAF to apply its military strength of intelligence, helicopters, and special operations to support Afghan decisions to arrest the top drug lords of Afghanistan, starting with the ones who heavily financially back the insurgency. We joined in 2005 to arrest bin Laden's banker Haji Bashir Noorzai, and we should do it again.

I strongly back the Afghan Counternarcotics Ministry idea to announce a top 10 drug lord list to emulate the early success of J. Edgar Hoover when he established the reputation of the FBI. In our remaining 2 years in Afghanistan, we can do a lot to cripple the insurgency and help the 2014 elections by removing a number of key bad actors from the battlefield.

What about the future? The President says our formal current mission will end in 2014. Much of his vision will be approved at the Chicago NATO summit in May of 2012. By 2014, I believe Afghans will be able to do nearly all of the conventional fighting, with some U.S. special operations support remaining.

But remember, while the Afghan Army is likely to win, its budget for this year is $11 billion. The Afghan Government collected only $1 billion in tax revenue in 2010. We will have to help. Without regular U.S. combat troops, we risk a Taliban-Haqqani-ISI alliance winning unless we do help that Afghan military.

On the 10th anniversary of 9/11, we should all agree that Afghanistan should never become a major threat to American families again. Should Pakistan not change its ways, we can do one other thing: an American tilt toward India, to encourage the world's largest democracy to bankroll an Afghan Government that fights terror and the ISI. Given the outright lying and duplicity of Pakistan, it appears a tilt toward India will allow us to reduce our forces in Afghanistan, knowing India will help bankroll an Afghan Government. This would allow us to reduce our troops while also reducing the possibility of Afghanistan once again becoming a terrorist safe haven.

Pakistanis would object to this pro-Indian outcome, but they will only have their own ISI to blame. September 11 teaches us that neither the United States nor India can tolerate a

new formal Afghan terror state. It is too bad Pakistan has chosen to back the losing side—the terrorists—against the Afghan people and the two largest democracies on Earth.

Finally, a word about our troops. Each night they combat the most dangerous narco-insurgents on Earth, and many 19- and 20-year-old Americans volunteer to serve over 7,000 miles from home. Their generation is named after September 11, but these Americans in uniform not only carry their generation's label, they are personally employed in risking their lives to ensure that all Americans will never again witness another September 11.

They are America's best hope, and I hope to God when I am older some of them run for President. From my own nursing home, I know the country would be in good hands if one of these young Americans were to guide our Nation's destiny.

I am lucky to know many of their names. MAJ Fred Tanner, U.S. Army; LT Doug McCobb, Air Force; MG Mick Nicholson, Army; and our allies, Wg Cdr Howard Marsh, Royal Air Force; GEN Renee Martin, French Army; RADM Tony Johnstone-Brute, Royal Navy; and COL Robin Vickers, British Army. I honor them and their younger comrades, wishing all the military personnel of ISAF's 47 nations a very good day as they awake in Afghanistan tomorrow morning for another hard day's work on one of the toughest battlefields in the world.

I yield back.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I wish to talk about an amendment, but also I had one of my colleagues who was sitting in your position as President pro tempore notice an error I made on July 27. Senator WHITEHOUSE questioned my numbers and, in fact, he was right. I said $115 million in regard to the savings on limousines. It was $11.5 million per year, not $115 million. It was $115 million over 10 years. So I wish to stand to put that in the RECORD that I was in error and Senator WHITEHOUSE as a cordial colleague questioned me on it and I thank him for his accountability.

We have before the Senate now a patent bill. There is no question there is a lot of work we need to do on patents. I know the President pro tempore sits on the committee that I do and we have spent a lot of time on this. But I am very concerned, I have to say, about what we are hearing in the Senate about why we wouldn't do the right thing that everybody agrees we should be doing because somebody doesn't want us to do that in the House, and I think it is the worst answer we could ever give the American people.

When we have a 12-percent approval rating, and the Republicans have worse than that, why would we tell the American people we are not going to do the right thing for the right reason at the right time because somebody in the House doesn't want us to and that we are going to say we are not going to put these corrections into a patent bill that are obviously important and we are going to say it is going to kill the bill when, in fact, it is not going to kill the bill? But that is what we use as a rationalization. So let me describe for a minute what has gone on over the years and what has not happened.

The first point I would make is there has not been one oversight hearing of the Patent Office by the Appropriations Committee in either the House or the Senate for 10 years. So they haven't even looked at it. Yet the objection to, and what we are seeing from an appropriations objection is—and even our chairman of our Committee on the Judiciary, who is an appropriator, supports this amendment but isn't going to vote for it because somebody in the House is going to object to it.

But the point is, we have money that people pay every day. From universities to businesses to individual small inventors, they pay significant dollars into the Patent Office. Do you know what has happened with that money this year? Eighty-five million dollars that was paid for by American taxpayers for a patent examination and first looks didn't go to the Patent Office. Yet we have over 1 million patents in process at the Patent Office, and over 700,000 of those haven't ever had their first look.

So when we talk about our economy and we talk about the fact that we want to do what enhances intellectual property in our country—which is one of our greatest assets—and then we don't allow the money that people actually pay for that process to go for that process and we have backlogged for years now patent applications, we have done two things. One is we have limited the intellectual property we can capture. No. 2 is we have allowed people to take those same patents, when we have limited ability, especially some of our smaller organizations, and patent them elsewhere. So the lack of a timely approach on that is lacking.

The process is broken. Since 1992, almost $1 billion has been taken out of the Patent Office. So we wonder, why in the world is the Patent Office behind?

The Patent Office is behind because we will not allow them to have the funds the American taxpayers who are trying to get ideas and innovations, copyrights, trademarks, and patents done—we will not allow the Patent Office to have the money.

The amendment I am going to be offering—and I have a modification on it that is trying to be cleared on the other side, and I will not actually call up the amendment at this time until I hear whether that has been accepted. The amendment I have says we will no longer divert the money that American businesses, American inventors, American universities pay to the Patent Office to be spent somewhere else; that it has to be spent on clearing their patents.

I ask unanimous consent to have printed in the RECORD—and I will submit a copy at this time—a letter I received August 1 from the head of the Patent Office.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES
PATENT AND TRADEMARK OFFICE,
Alexandria, VA, Aug. 1, 2011.

Hon. TOM COBURN,
U.S. Senate,
Washington, DC.

DEAR SENATOR COBURN: Per your request, I am writing today to follow up on our discussion last week regarding United States Patent and Trademark Office (USPTO) funding.

As you know, the House-passed version of the America Invents Act (H.R. 1249) replaces a key funding provision that would have created the USPTO Public Enterprise Fund—effectively sheltering the USPTO from the uncertainties of the appropriations process and ensuring the agency's ability to access and spend all of the fees it collects—with a provision creating the Patent and Trademark Reserve Fund. This provision keeps the USPTO in the current appropriations process, but requires that all fees collected in excess of the annual appropriated amount be deposited into the Reserve Fund, where they will be available to the extent provided for in appropriations acts. In a June 22, 2011 letter to Speaker Boehner, House Appropriations Committee Chairman Rogers committed to ensuring that the Committee on Appropriations carry language providing that all fees collected in excess of the annual appropriated amount would be available until expended only to the USPTO for services in support of fee-paying patent and trademark applicants. I was pleased to see that the fiscal year 2012 appropriations bill reported by the Committee did in fact carry this language.

I would like to reiterate how crucial it is for the USPTO to have access to all of the fees it collects. This year alone, we anticipate that the agency will collect approximately $80 million in fees paid for USPTO services that will not be available for expenditure in performing those services. Quite clearly, since the work for which these fees were paid remains pending at USPTO, at some point in the future we will have to collect more money in order to actually perform the already-paid-for services. If USPTO had received the authority to expend these funds, we would have paid for activities such as overtime to accelerate agency efforts to reduce the backlog of nearly 700,000 patent applications, as well as activities to improve our decaying IT systems, which are a constant drag on efficiency. As history has demonstrated, withholding user fees from USPTO is a recipe for failure. Effecting real reforms at the USPTO requires first and foremost financial sustainability. Ensuring that the agency has consistent access to adequate funding is a key component of achieving this.

Further, the unpredictability of the annual appropriations cycle severely hinders

USPTO's ability to engage in the kind of multi-year, business-like planning that is needed to effectively manage a demand-driven, production-based organization. The only way we will be able to effectively implement our multi-year strategic plan, and achieve our goals of reducing the patent backlog and pendency to acceptable levels, is through an ongoing commitment to ensuring the USPTO has full access to its fee collections—not just in fiscal year 2012, but for each and every year beyond FY 2012. Only this assurance will enable the agency to move forward with the confidence that we are basing critical multi-year decisions about staffing levels, IT investment, production, and overtime on an accurate and reliable funding scenario.

Along these lines, if America is to maintain its position as the global leader in innovation, it is essential that American businesses and inventors not suffer the adverse effects of drawn-out continuing resolutions (CR), which have become common in recent years. The constant stops and starts associated with the CR cycle can have disastrous consequences, especially for a fee-based agency with a growing workload, as is the case for USPTO. The challenges presented by the pending patent reform legislation will be particularly difficult to undertake if the agency is not allowed to grow along a steady path to address our increasing requirements. As such, we must be assured that the USPTO will have full access to its fees throughout the year—not just after a full year appropriations act is enacted. Therefore, a commitment to include language in future continuing resolutions that will address the USPTO's unique resource needs is paramount.

As outlined in our Strategic Plan and in our FY 2012 budget submission, USPTO has a multi-year plan in place to reduce patent pendency to 10 months first action and 20 months final action pendency, and to reduce the patent application backlog to 350,000. During the next three to four years, we will continue and accelerate implementation of a series of initiatives to streamline the examination process, including efforts to improve examination efficiency and provide a new, state-of-the-art end-to-end IT system, which will support each examiner's ability to process applications efficiently and effectively.

While efficiency gains are essential, we will not reach our goals without also increasing the capacity of our examination core. As outlined in the FY 2012 budget, we plan to hire an additional 1,000 patent examiners in FY 2012, with another 1,000 examiner hires planned for FY 2013. This added capacity, combined with full overtime, will allow us to bring the backlog and pendency down to an acceptable level.

Let me also be clear that while these enhancements are necessary to allow the USPTO to tackle the current backlog, the agency is not planning to continue growing indefinitely. An important part of our multi-year plan is an eventual moderation of our workforce requirements, once we have achieved a sustainable steady state.

At the same time that USPTO is working to achieve these goals, we will also be working to restructure our fees to ensure that the agency is recovering adequate costs to sustain the organization. Once our fees have been set, we will continually monitor our collections over the next several years to ensure that our operating reserve does not grow to unacceptably high levels at the expense of USPTO's stakeholders.

Thank you again for your support and your superb leadership on this important issue. With the continued commitment of the House and Senate Committees on Appropriations to ensuring the USPTO's ongoing ability to utilize its fee collections, we can put the agency on a path to financial sustainability, and enable it to deliver the services paid for and deserved by American innovators.

Sincerely,

DAVID J. KAPPOS,
Under Secretary and Director.

Mr. COBURN. I must tell you that we are so fortunate that we have Director Kappos. We have a true expert in patents, with great knowledge, who has made tremendous strides in making great changes at our Patent Office. But he requires a steady stream of money, and he requires the ability to manage the organization in a way where he can actually accomplish what we have asked him to do.

Frankly, I have spent a lot of time working with the Patent Office—not with everybody else who wants an advantage in the patent system but with the Patent Office—and I am convinced we have great leadership there.

In his letter, he talks about their inability to update their IT because the money is not there because we will not let him have the money—their money, the money from the American taxpayers.

Let me give a corollary. If, in fact, you drive your car into the gas station, you give them $100 for 25 or 28 gallons of gas, and they only give you 12 gallons of gas and they say: Sorry, the Appropriations Committee said you couldn't have all the gas for the money you paid, you would be outraged. If you go to the movie, you pay the fee to go to the movie and you buy a ticket, you walk in, and halfway through the movie they stop the projection and say: Sorry, we are not going to give you the second half of the movie even though you paid for it—inventors in this country have paid the fees to have their patents examined and evaluated and reviewed. Yet we, because of the power struggle, have decided we are not going to let that money go to the Patent Office. The amendment I have says we are going to allow that to happen. If money is paid and it goes into a proper fund that is allocatable only to the Patent Office, it cannot be spent anywhere else and has to go to the Patent Office.

Some of the objections, especially from the House Appropriations Committee, are that there is no oversight. The reason there is no oversight is because they have not done any oversight and neither have we, so you cannot claim that as an excuse as to why you are afraid. This patent bill will give an authorization for 7 years for the fees. We can change that if we want, but the fact is that we are never going to know if we need to change it if we never do oversight, which we have not done. Nobody has done oversight on patents. I am talking aggressive oversight: What did you start? What was your end? How much did you spend? Where did you spend the money? What is your employee turnover? What is your employee productivity? What should we expect?

None of that has been asked. I believe it is probably pretty good based on the fact that I have a lot of confidence in the management at the Patent Office, especially what I have seen in terms of performance for the last couple of years versus before that, but the fact is that oversight has not been done.

It is not just the Patent Office. It hasn't been done anywhere. Very little oversight has been done by the Senate, and it is one of the biggest legitimate criticisms that can be made of us as a body, that we are lazy in our oversight function. Of the $3.7 trillion that is going to be spent, we are going to have oversight of about $100 billion of the total.

The amendment does a couple of things. Let me kind of detail that for a moment. One of the things is that by returning the money to the Patent Office, the Director thinks he can actually cut the backlog in half. In other words, we have over 700,000 patents that have never been looked at sitting at the Patent Office now, and he believes that in a very short period of time they could cut that to 350,000.

From 1992 through 2011, $900 million has been taken from the PTO. In 2004 Congress diverted $100 million, in 2007 it diverted $12 million, last year it diverted $53 million, and it is $80 million to $85 million that is going to be diverted this year. In 4 years out of the last 10, Congress gave the Patent Office all the money because it was so slow, so lethargic in terms of meeting the needs of inventors. The only thing we have in the current bill is the promise of a Speaker and the promise of a chairman that they will do that. There is nothing in law that forces them to do it. There is nothing that will make sure the money is there. No matter how good we fix the patent system in this country, if there is not the money to implement it, we will not have solved the problems.

In June of 2000, the House debated the PTO funding, and an interesting exchange took place between Representative ROYBAL-ALLARD and Representative ROGERS, who was a cardinal at the time. Representative ALLARD discussed the problem of PTO fee diversion and the need for user fees to pay for the work of the agency. She asked—in the documentation of the CONGRESSIONAL RECORD, she asked Chairman ROGERS if 100 percent of the user fees would go to the PTO, and Mr. ROGERS stated that the fees would not be siphoned off for any other agency or purpose and remain in the account for future years. But according to the PTO, in fiscal year 2000, $121 million was, in fact, diverted. So when we have

the chairman of the committee say we should not doubt the word of the Appropriations Committee, yet we have in the RECORD the exact opposite of what the Appropriations Committee said was going to happen, we should be concerned and we should fix it to where the money for patent examination goes for patent examination. So we have a clear record of a statement that says it was not going to happen, and, in fact, $121 million was diverted from the Patent Office.

Finally, from 1992 to 2007, $750 million more in patent and trademark fees was collected than was allowed to be spent by the Patent and Trademark Office. Had they had that money, we would have a backlog of about 100,000 patents right now, not 750,000. We would have intellectual property as a greater value in our country, with greater advantage over our trading partners because that money would have been effectively used.

On July 12, former CBO Director Douglas Holtz-Eakin wrote to Senators REID and MCCONNELL noting:

> The establishment of the Patent and Trademark reserve fund in H.R. 1249 would be ineffective in stopping the diversion of the fees from the U.S. Patent Office.

In other words, what is in this bill now will not stop the diversion of the fees.

Just so people think I am not just picking on one area, this is a bad habit of Congress. It is not just in the Patent and Trademark Office that we tell people to pay a fee to get something done and we steal the money and use it somewhere else. For example, in the Nuclear Waste Fund at the Department of Energy, utility payments by individual consumers pay for a nuclear waste fee. That money has been spent on tons of other things through the years rather than on the collection and management of nuclear waste. To the tune of $25 billion has been spent on other things.

The Securities and Exchange Commission is a fee-based agency. Since the SEC was established, it has collected money via user fees, charged for various transactions in order to cover the cost of its regulation. The primary fees are for sales of stock, registration of a new stock, mergers, tender offers. It also collects fees for penalty fines, for bad behavior. They go into the Treasury's general fund, and amounts collected above the SEC budget were diverted to other government programs.

In 2002, Congress changed the treatment of the fees of the SEC so they would only go to a special appropriation account solely for the SEC. SEC would not have access to the fees, however, should it collect more than its appropriation.

In the Dodd-Frank bill, Congress again changed the treatment of the fees and required some of the fees to go to the General Treasury and others to the reserve fund. As a result, lots of complaints with the SEC, and they still do not have access to their funds. Thus, like the PTO, if Congress chooses not to provide all the funds in the initial appropriation, they will not have them.

In the 2012 budget justification from the Securities and Exchange Commission, they noted it had significant challenges maintaining a staffing level sufficient to carry out its core mission. From 2005 to 2077, SEC had frozen or reduced budgets that forced reduction of 10 percent of their staff and 50 percent of technology investment. What happened in 2007 in this country? What were the problems? So the diversion of the money from the SEC actually contributed to the problems we had in this country. So it does not work.

Finally, one that is my favorite and that I have fought against every year that I have been here is the Crime Victims Fund, and that is a fund where people who are criminals actually have to pay into a fund to do restitution for criminal victims, and we have stolen billions of dollars from that fund. They are not taxes, they are actually restitution moneys, but the Congress has stolen it and spent it on other areas. The morality of that I don't think leads anybody to question that that is wrong.

AMENDMENT NO. 599, AS MODIFIED

Now, if I may, let me call up amendment 599. I ask that the pending amendment be set aside and ask that the amendment be modified with the changes at the desk.

The PRESIDING OFFICER (Mr. SANDERS). Is there objection?

Mr. LEAHY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator from Oklahoma has the floor.

Is there objection?

Mr. LEAHY. Reserving the right to object, the Senator from Oklahoma knows that the basic thing he is trying to do is something I had supported. As he knows, I put it in the managers' package. He also is aware that my belief is—obviously we disagree—my belief is that the acceptance of his amendment will effectively kill the bill. Even today the leadership in the House told me they would not accept that bill with it. I say this only because tactically it would be to my advantage to object to the amendment. But the distinguished Senator is one of the hardest working members of the Judiciary Committee. He is always there when I need a quorum. Out of respect for him, I will not object.

Mr. COBURN. I thank the Senator for this. This is a minor technical correction.

The PRESIDING OFFICER. Without objection, the clerk will report.

The bill clerk read as follows:

The Senator from Oklahoma [Mr. COBURN], for himself, Mr. DEMINT, Mrs. FEINSTEIN, Mrs. BOXER, Mr. UDALL of Colorado, Mr. ENZI, and Mr. BURR, proposes an amendment (No. 599), as modified.

The amendment is as follows:

(Purpose: To amend the provision relating to funding the Patent and Trademark Office by establishing a United States Patent and Trademark Office Public Enterprise Fund, and for other purposes)

On page 137, line 1, strike all through page 138, line 9, and insert the following:

SEC. 22. PATENT AND TRADEMARK OFFICE FUNDING.

(a) DEFINITIONS.—In this section, the following definitions shall apply:

(1) DIRECTOR.—The term ''Director'' means the Director of the United States Patent and Trademark Office.

(2) FUND.—The term ''Fund'' means the public enterprise revolving fund established under subsection (c).

(3) OFFICE.—The term ''Office'' means the United States Patent and Trademark Office.

(4) TRADEMARK ACT OF 1946.—The term ''Trademark Act of 1946'' means an Act entitled ''Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes'', approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the ''Trademark Act of 1946'' or the ''Lanham Act'').

(5) UNDER SECRETARY.—The term ''Under Secretary'' means the Under Secretary of Commerce for Intellectual Property.

(b) FUNDING.—

(1) IN GENERAL.—Section 42 of title 35, United States Code, is amended—

(A) in subsection (b), by striking ''Patent and Trademark Office Appropriation Account'' and inserting ''United States Patent and Trademark Office Public Enterprise Fund''; and

(B) in subsection (c), in the first sentence—

(i) by striking ''To the extent'' and all that follows through ''fees'' and inserting ''Fees''; and

(ii) by striking ''shall be collected by and shall be available to the Director'' and inserting ''shall be collected by the Director and shall be available until expended''.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on the later of—

(A) October 1, 2011; or

(B) the first day of the first fiscal year that begins after the date of the enactment of this Act.

(c) USPTO REVOLVING FUND.—

(1) ESTABLISHMENT.—There is established in the Treasury of the United States a revolving fund to be known as the ''United States Patent and Trademark Office Public Enterprise Fund''. Any amounts in the Fund shall be available for use by the Director without fiscal year limitation.

(2) DERIVATION OF RESOURCES.—There shall be deposited into the Fund [and recorded as offsetting recipts] on or after the effective date of subsection (b)(1)—

(A) any fees collected under sections 41, 42, and 376 of title 35, United States Code, provided that notwithstanding any other provision of law, if such fees are collected by, and payable to, the Director, the Director shall transfer such amounts to the Fund, provided, however, that no funds collected pursuant to section 9(h) of this Act or section 1(a)(2) of Public Law 111–45 shall be deposited in the Fund; and

(B) any fees collected under section 31 of the Trademark Act of 1946 (15 U.S.C. 1113).

(3) EXPENSES.—Amounts deposited into the Fund under paragraph (2) shall be available, without fiscal year limitation, to cover—

(A) all expenses to the extent consistent with the limitation on the use of fees set forth in section 42(c) of title 35, United States Code, including all administrative and operating expenses, determined in the discretion of the Under Secretary to be ordinary and reasonable, incurred by the Under Secretary and the Director for the continued operation of all services, programs, activities, and duties of the Office relating to patents and trademarks, as such services, programs, activities, and duties are described under—

(i) title 35, United States Code; and

(ii) the Trademark Act of 1946; and

(B) all expenses incurred pursuant to any obligation, representation, or other commitment of the Office.

(d) ANNUAL REPORT.—Not later than 60 days after the end of each fiscal year, the Under Secretary and the Director shall submit a report to Congress which shall—

(1) summarize the operations of the Office for the preceding fiscal year, including financial details and staff levels broken down by each major activity of the Office;

(2) detail the operating plan of the Office, including specific expense and staff needs for the upcoming fiscal year;

(3) describe the long term modernization plans of the Office;

(4) set forth details of any progress towards such modernization plans made in the previous fiscal year; and

(5) include the results of the most recent audit carried out under subsection (f).

(e) ANNUAL SPENDING PLAN.—

(1) IN GENERAL.—Not later than 30 days after the beginning of each fiscal year, the Director shall notify the Committees on Appropriations of both Houses of Congress of the plan for the obligation and expenditure of the total amount of the funds for that fiscal year in accordance with section 605 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (Public Law 109–108; 119 Stat. 2334).

(2) CONTENTS.—Each plan under paragraph (1) shall—

(A) summarize the operations of the Office for the current fiscal year, including financial details and staff levels with respect to major activities; and

(B) detail the operating plan of the Office, including specific expense and staff needs, for the current fiscal year.

(f) AUDIT.—The Under Secretary shall, on an annual basis, provide for an independent audit of the financial statements of the Office. Such audit shall be conducted in accordance with generally acceptable accounting procedures.

(g) BUDGET.—The Fund shall prepare and submit each year to the President a business-type budget in a manner, and before a date, as the President prescribes by regulation for the budget program.

(h) SURCHARGE.—Notwithstanding section 11(i)(1)(B), amounts collected pursuant to the surcharge imposed under section 11(i)(1)(A) shall be credited to the United States Patent and Trademark Office Public Enterprise Fund.

Mr. COBURN. I thank the chairman of the Judiciary Committee. I noted earlier, before I came to the floor, he supported it in principle and we have a difference in principle about what would happen to the bill. This is a minimal technical correction that was recommended to us, and I appreciate the Senator for allowing that to be considered.

Let me spend a moment talking about the chairman and his belief that this will not go anywhere. This is a critical juncture for our country, when we are going to make a decision to not do what is right because somebody is threatening that they do not agree with doing what is right and that they will not receive it. In my life of 63 years, that is how bullies operate, and the way you break a bully is you challenge a bully.

The fact is, I have just recorded into the history of the House the statements by the chairman of the Appropriations Committee in the House in terms of his guarantee for protecting the funds for PTO, which he turned around and took $121 million out of the funds that very same year that he guaranteed on the floor that he wouldn't do. So what I would say is we ought not worry about idle threats. What we ought to be worried about is doing what is best and right for our country. What is best and right is to give the money to the Patent Office that people are paying for so the patents will get approved and our technological innovations will be protected. I don't buy the idea the House is not going to take this if we modify it.

Actually, what 95 percent of the people in this country would agree to is that the Patent Office ought to get the money we are paying for patent fees, just as the FDA should get the money paid by drug companies for new applications, just as the Park Service should put the money for the camping sites—the paid-for camping sites—back into the camping sites. Why would we run away from doing the right thing?

I find it very difficult when we rationalize down doing the correct thing that everybody agrees should be done but we will not do it for the right reasons. That is why we have a 12-percent approval rating. That is why people don't have confidence in Congress—because we walk away from the tough challenges of bullies who say they won't do something if we do what is right. I am not going to live that way. I am not going to be a Senator that way. I am going to stand on the position of principle.

This is a principle with which 95 Senators in this body agree. We are going to have several of our leaders try to get them not to do that on the basis of rationalization to a bully system that says: We will not do the oversight, but we still want to be in control.

In fact, in the process of that, America loses because we have 750,000 patents that are pending right now, and there should only be about 100,000.

The bullies have won in the past, and I am not going to take it anymore. I am going to stand up and challenge it every time. I am going to make the argument that if a person pays a fee for something in this country for the government to do, that money ought to be spent doing what it was paid to the government to do. It is outside of a tax; it is a fee. It is immoral and close to being criminal to not correctly spend that money from that fee.

If our body decides today we are going to table this amendment, the question the American people have to ask is, Where is the courage in the Senate to do what is best for our country? Why are the Senators here if they are not going to do what is best for the country? Why are they going to play the game of rationalization and extortion on principles that matter so much to our future? I will not do that anymore. Everybody knows this is the right thing to do. We are babysitting some spoiled Members of Congress who don't want to carry out their responsibilities in an honorable way and do the oversight that is necessary. What they want to do is complain that they do not have control.

Well, this bill authorizes funds for 7 years. We can change that number of years. We can actually change the actual amount of fees if, in fact, they are not doing a good job. But right now, as already put in the RECORD, there is no history of significant oversight to the Patent Office, so they would not know in the first place. So what we are asking is to do what is right, what is transparent, what is morally correct and give the Patent Office the opportunity to do for America what it can do for them instead of handcuffing us and handicapping us where we cannot compete on intellectual property in our country.

I have said enough. I will reserve the remainder of my time when I finish talking about one other item.

There is an earmark in this patent bill for The Medicines Company. It ought not be there. This is something that is being adjudicated in the courts right now. Senator SESSIONS has an amendment that would change it. I believe it is inappropriate to specify one company, one situation on a drug that is significant to this country, and we are fixing the wrong problem. We probably would not win that amendment. I think it is something the American people ought to look at and say: Why is this here? Why is something in this big bill that is so important to our country?

I agree with our chairman. He has worked months, if not years, over the last 6 years trying to get to this process, and now we have this put in. We did not have it in ours. The chairman did not have it in ours. It came from the House.

We ought to ask the question Why is it there? Why are we interfering in something that is at the appellate court level right now? Why are we doing that? None of us can feel good

about that. None of us can say it is the right thing to do. Why would we tolerate it?

It is this lack of confidence in America; it is about a lack of confidence in us. When people know and find out what has happened here, they are going to ask the question. The powerful and the wealthy advantage themselves at the expense of everybody else. They have access. Those who are lowly, those who are minimal in terms of their material assets do not. It is the type of thing that undermines the confidence we need to have.

I just wanted to say I am a cosponsor of Senator SESSIONS' amendment. I believe he is accurate. I think they have won this in court. It is on appeal. They will probably win it on appeal. This will end up being necessary, and there is a way for us to fix it if, in fact, they lose, if it is appropriate to do that. I believe it is inappropriate at this time.

I yield the floor and reserve the remainder of my time.

Mr. MCCAIN. Mr. President, I rise in support of the Sessions amendment which seeks to remove an egregious example of corporate welfare and blatant earmarking, to benefit a single interest, in the otherwise worthwhile patent reform bill before the Senate. Needed reform of our patent laws should not be diminished nor impaired by inclusion of the shameless special interest provision, dubbed ''The Dog Ate My Homework Act'' that benefits a single drug manufacturer, Medicines & Company, to excuse their failure to follow the drug patent laws on the books for over 20 years.

The President tonight will deliver another speech to tell us that unemployment is too high and that we need to get America back to work to turn around our near stagnant economy. While it may end up being more of the same policies that have not worked for the last 2½ years, I look forward to hearing what he has to say. But, look at what is going on here today, just a couple hours before the President tells us how he proposes to fix the economy, there are 14 million Americans out of work and a full day of the Senate's time is being spent debating a bailout of a prominent law firm and a drug manufacturer. I think the American people would be justified in wondering if they were in some parallel universe.

Patent holders who wish to file an extension of their patent have a 60-day window to make the routine application. There is no ambiguity in this timeframe. In fact, there is no reason to wait until the last day. A patent holder can file an extension application any time within the 60-day period. Indeed, hundreds and hundreds of drug patent extension applications have been filed since the law was enacted. Four have been late. Four!

Why is this provision in the patent reform bill? One reason: special interest lobbying to convince Congress to relieve the company and its law firm from their mistakes. Millions of dollars in branded drug profits are at stake for a single company who will face generic competition much earlier than if a patent extension would have been filed on time.

Let me read from the Wall Street Journal Editorial page today:

> As blunders go, this was big. The loss of patent rights means that generic versions of Angiomax might have been able to hit pharmacies since 2010, costing the Medicines Co. between $500 million and $1 billion in profits.
>
> If only the story ended there.
>
> Instead, the Medicines Co. has mounted a lobbying offensive to get Congress to end run the judicial system. Since 2006, the Medicines Co. has wrangled bill after bill onto the floor of Congress that would change the rules retroactively or give the Patent Office director discretion to accept late filings. One version was so overtly drawn as an earmark that it specified a $65 million penalty for late filing for ''a patent term extension . . . for a drug intended for use in humans that is in the anticoagulant class of drugs.''
>
> . . . no one would pretend the impetus for this measure isn't an insider favor to save $214 million for a Washington law firm and perhaps more for the Medicines Co. There was never a problem to fix here. In a 2006 House Judiciary hearing, the Patent Office noted that of 700 patent applications since 1984, only four had missed the 60-day deadline. No wonder critics are calling it the Dog Ate My Homework Act.

The stakes are also high for patients in our health care system. Let me read an excerpt from the Generic Pharmaceutical Association letter dated July 20, 2011:

> The Medicines Company amendment adopted during House consideration of H.R. 1249 modifies the calculation of the 60-day period to apply for a patent term extension and applies that new definition to ongoing litigation. We are deeply concerned about the precedent of changing the rules of the patent extension process retroactively, which appears to benefit only one company—The Medicines Company, which missed the filing deadline for a patent extension for its patent on the drug Angiomax.
>
> If enacted into law, this provision would change the rules to benefit one company that, by choice, waited until the last minute to file a simple form that hundreds of other companies have filed in a timely manner since the enactment of the Hatch-Waxman Act in 1984. In doing so, the amendment would ultimately cost consumers and the government hundreds of millions of dollars by delaying the entry of safe, affordable generic medications. . . .
>
> The rules and regulations that govern patents and exclusivity pertaining to both generic and brand drugs are important public policy. While it is Congress's prerogative to change or clarify statutory filing deadlines, we strongly urge you to do so in a manner that does not benefit one company's litigating position. GPhA urges you to strike section 37 from H.R. 1249.

Passing the Sessions amendment and removing the provision from the bill is not detrimental to passing the patent reform bill. The bailout provision was not included in the Senate-passed patent bill earlier this year. It was added in the House. The provision can and should be stripped in this vote today. The House can easily re-pass the bill without the bailout provision and send it to the President.

Support the Sessions amendment and send a loud signal to the American public, who are watching what we do, that laws matter and that this kind of business has no place in Congress.

Mr. LEAHY. Mr. President, this is an amendment that can derail and even kill this bill—a bill that would otherwise help our recovering economy, unleash innovation and create the jobs that are so desperately needed. I have worked for years against Patent Office fee diversion, but oppose this amendment at this time. Its formulation was rejected by the House of Representatives, and there is no reason to believe that the House's position will change. Instead, for ideological purity, this amendment can sink years of effort and destroy the job prospects represented by this bill. So while I oppose fee diversion, I also oppose the Coburn amendment.

I kept my commitment to Senator COBURN and included his preferred language in the managers' amendment which the Senate considered last March. The difference between then and now is that the Republican leadership of the House of Representatives rejected Senator COBURN's formulation. They preserved the principle against fee diversion but changed the language.

The language in the bill is that which the House devised and a bipartisan majority voted to include. It was worked out by the House Republican leadership to satisfy House rules. The provision Senator COBURN had drafted and offers again with his amendment today apparently violates House Rule 21, which prohibits converting discretionary spending into mandatory spending. So instead of a revolving fund, the House established a reserve fund. That was the compromise that the Republican House leadership devised between Chairmen SMITH, ROGERS and RYAN. Yesterday I inserted in the RECORD the June letter for Congressmen ROGERS and RYAN to Chairman SMITH of the House Judiciary Committee. Today I ask consent to insert into the RECORD the commitment letter from Chairman ROGERS to Speaker BOEHNER.

The America Invents Act, as passed by the House, continues to make important improvements to ensure that fees collected by the U.S. Patent and Trademark Office (USPTO) are used for Patent and Trademark Office activities. That office is entirely fee-funded and does not rely on taxpayer dollars. It has been and continues to be subject to annual appropriations bills. That allows Congress greater opportunity for oversight.

The legislation that passed the Senate in March would have taken the Patent and Trademark Office out of

the appropriations process, by setting up a revolving fund that would have allowed the office to set fees and collect and spend money without appropriations legislation and congressional oversight. Instead of a revolving fund, the House formulation against fee diversion establishes a separate account for the funds and directs that they be used for U.S. Patent and Trademark Office. The House Appropriations Chairman has committed to abide by that legal framework.

The House forged a compromise. Despite what some around here think, that is the essence of the legislative process. The Founders knew that when they wrote the Constitution and included the Great Compromise. Ideological purity does not lead to legislative enactments. This House compromise can make a difference and make real progress against fee diversion. It is something we can support and there are many, many companies and organizations that do support this final workout in order to get the bill enacted without further delay, as do I.

The America Invents Act, as passed by the House, creates a new Patent and Trademark Fee Reserve Fund (the ''Reserve Fund'') into which all fees collected by the USPTO in excess of the amount appropriated in a fiscal year are to be deposited. Fees in the Reserve Fund may only be used for the operations of the Patent and Trademark Office. Through the creation of the Reserve Fund, as well as the commitment by House appropriators, H.R. 1249 makes important improvements in ensuring that user fees collected for services are used by the Patent and Trademark Office for those services.

Voting for the Coburn amendment is a vote to kill this bill. It could kill the bill over a formality—the difference between a revolving fund and a reserve fund. It would require the House to reconsider the whole bill again. They spent days and weeks working out their compromise in good faith. And it was worked out by the House Republican leadership. There is no reason to think they will reconsider and allow the original Coburn language to violate their rules and avoid oversight. They have already rejected that language, the very language proposed by the Coburn amendment.

We should not kill this bill over this amendment. We should reject the amendment and pass the bill. The time to put aside individual preferences and ideological purity is upon us and we need to legislate. That is what the American people elected us to do and expect us to do. The time to enact this bill is now. Vote no on the Coburn amendment.

I have listened to the Senator from Oklahoma, and no matter what we say about it, his is an amendment that can derail and even kill this bill. He expresses concern as to why the bill should be sought because somebody objects to the bill. I sometimes ask myself that question. Of course, the distinguished Senator from Oklahoma has objected to many items going forward on his own behalf, but this is an amendment that could derail or even kill the bill. This is a bill that would otherwise help our recovering economy to unleash innovation, create the jobs so desperately needed.

I probably worked longer in this body than anybody against Patent Office fee diversion. As the Senator from Oklahoma knows, I put a provision in the managers' package to allow the fees to go to the Patent Office. Now it is a lobby to keep that in in the other body. Its formulation was rejected by the House of Representatives.

There is no reason to believe the House position will change. I checked with both the Republican and Democratic leaders over there. There is no reason to believe their position will change, but we insist on ideological purities—including something I would like. The amendment would take years of effort, destroy the job prospects represented by this bill. While I oppose the fee diversion, I also oppose this amendment.

Does this bill have every single thing in it I want? No. We could write 100 patent reform legislations in this body where each one of us has every single thing we want, and we would have 100 different bills. We only have one. It does not have all the things I like, but that is part of getting legislation passed.

I did keep my commitment to Senator COBURN. I kept his language in the managers' amendment, and I caught a lot for doing that—I am a member of the Appropriations Committee—but I kept it in there. The difference between then and now is that the Republican leadership of the House of Representatives rejected Senator COBURN's formulation. They preserved the principle against fee diversion but changed the language. In doing that, however, it is not a total rejection. They actually tried to work out a compromise. The language of the bill, which the House devised—a bipartisan majority voted to include—was worked out by the House Republican leadership to satisfy the House rules.

The provision that Senator COBURN has drafted and offers, again, with his amendment today apparently violates House rule 21 which prohibits converting discretionary spending into mandatory spending.

What the House did—and actually accomplished what both Senator COBURN and I and others want—instead of a revolving fund was to establish the reserve fund. That was the compromise that the Republican House leadership devised between Chairman SMITH, Chairman ROGERS, and Chairman RYAN.

Yesterday, I inserted into the RECORD the June letter from Congressmen ROGERS and RYAN to Chairman SMITH to the House Judiciary Committee.

I ask unanimous consent to have printed in the RECORD the commitment letter from Chairman ROGERS to Speaker BOEHNER.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COMMITTEE ON APPROPRIATIONS,
Washington, DC, June 22, 2011.

Hon. JOHN BOEHNER,
Speaker of the House, House of Representatives, Washington, DC.

Hon. ERIC CANTOR,
Majority Leader, House of Representatives, Washington, DC.

DEAR SPEAKER BOEHNER AND LEADER CANTOR: I write regarding provisions in H.R. 1249, The America Invents Act, affecting funding of the Patent Trademark Office (PTO). Following constructive discussions with Chairman Smith of the Judiciary Committee, this legislation now includes language that will preserve Congress' ''power of the purse,'' under Article I, Section 9, Clause 7 of the Constitution. The language ensures: the PTO budget remains part of the annual appropriations process; all PTO collected fees will be available only for PTO services and activities in support of the fee paying community; and finally, this important agency will continue to be subject to oversight and accountability by the Congress on an annual basis.

To assure that all fees collected for PTO remain available for PTO services, H.R. 1249 provides that if the actual fees collected by the PTO exceed its appropriation for that fiscal year, the amount would continue to be reserved only for use by the PTO and will be held in a ''Patent Trademark Fee Reserve Fund''.

At the same time, consistent with the language included in H.R. 1249, the Committee on Appropriations will also carry language that will ensure that all fees collected by PTO in excess of its annual appropriated level will be available until expended only to PTO for support services and activities in support of the fee paying community, subject to normal Appropriations Committee oversight and review.

I look forward to working with the relevant stakeholders in efficiently implementing this new process.

I believe this approach will help U.S. innovators remain competitive in today's global economy and this in turn will contribute to significant job creation here in the United States, while holding firm to the funding principles outlined in the Constitution.

Sincerely,

HAROLD ROGERS,
Chairman, House Committee on Appropriations.

Mr. LEAHY. I would note that it has been suggested somehow the Appropriations chairman is not going to keep his word. Well, Chairman ROGERS is a Republican. I have worked with him a lot. He has always kept his word to me, just as we have the most decorated veteran of our military serving in either body as chairman of the Senate Appropriations Committee, the only Medal of Honor recipient now serving, Senator

INOUYE. Both he and the ranking Republican, Senator COCHRAN, have always kept their word to me certainly in more than the third of a century I have served on that committee.

The America Invents Act, as passed by the House, continues to make important improvements. It ensures the fees collected by the U.S. Patent and Trademark Office are used for Patent and Trademark Office activities. The one thing in there is that we in the Congress at least have a chance to make sure they are using it the way they are supposed to.

The office is entirely fee funded. It does not rely on taxpayer dollars. It has been and continues to be subject to the annual appropriations bill which allows the oversight that we are elected and paid for by the American people to do.

The legislation we passed in March would have taken the Patent Trademark Office out of the appropriations process by setting up a revolving fund. Instead of a revolving fund, the House formulation against fee diversion established a separate account and directs that account be used only by the U.S. Patent and Trademark Office. The House Appropriations chairman is committed to abide by that legal framework. The Speaker is committed to that. The House forged a compromise. That is the essence of the legislative process.

The Founders knew when they wrote the Constitution to include the Great Compromise. Ideological purity does not lead to legislative enactments. Ideological purity does not lead to legislative enactments.

The House compromise can make a difference. It made real progress against fee diversion, which is something we can support. There are many companies and organizations that do support this in order to get the bill enacted without delay. After 6½ years, let's not delay any more.

This is going to create jobs. We have 600,000 to 700,000 patents sitting there waiting to be processed. Let's get on with it. For all of these fees and the reserve fund can only be used for the operations of the Patent and Trademark Office. I don't know what more we can do. But I would say I am perfectly willing to accept what the House did because it assures that the fees go to the Patent Office.

I am also well aware that voting for this amendment kills the bill. It could kill the bill over a formality—the difference between a reserve fund and a revolving fund.

I think the House Republican leadership worked out their compromise in good conscience, and I agree with it.

The U.S. Patent and Trademark Office is funded entirely by user fees, and the Leahy-Smith America Invents Act will ensure the PTO has access to the fees it collects. We have heard from a number of organizations which agree with that, and I ask unanimous consent that a sample of these letters from the Business Software Alliance, the Small Business and Entrepreneurship Council, DuPont, and other financial organizations be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BUSINESS SOFTWARE ALLIANCE,
June 29, 2011.

Hon. HARRY REID,
Majority Leader,
Washington, DC.
Hon. MITCH MCCONNELL,
Minority Leader,
Washington, DC.

DEAR SENATOR REID AND SENATOR MCCONNELL: We urge you to bring H.R. 1249 to the Senate floor as soon as the Senate's schedule permits.

The Business Software Alliance (BSA) strongly supports modernizing our patent system. An efficient and well-operating patent system is necessary to promote healthy and dynamic innovation. Innovation is critically important to software and computer companies' ability to provide new and better tools and technologies to consumers and customers.

BSA member companies believe H.R. 1249 establishes a transparent and efficient patent system. It will make the Patent and Trademark Office more accessible and useful to all inventors, large and small. In addition, the provisions of H.R. 1249 on Patent and Trademark Office funding will ensure that the user fees paid to the USPTO will be available to the Office for processing patent applications and other important functions of the Office.

H.R. 1249 and S. 23 are the products of many years of skillful and difficult legislative work in both the House and the Senate. H.R. 1249 represents a thoughtful and balanced compromise that is endorsed by virtually all stakeholders. We urge the Senate to adopt H.R. 1249 as acted upon by the House and pass it without amendment as soon as possible.

Sincerely,

ROBERT W. HOLLEYMAN,
President and CEO.

SBE COUNCIL,
Oakton, VA, June 29, 2011.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: The Small Business & Entrepreneurship Council (SBE Council) has been a leading advocate for patent reform within the small business community, and we urge you to work with the leadership of the Senate to bring the America Invents Act (H.R. 1249) to the Senate floor for approval.

H.R. 1249 would improve the patent system in key ways. For example, the U.S. patent system would be brought in step with the rest of the world. The U.S. grants patents on a first-to-invent basis, rather than the first-inventor-to-file system that the rest of the world follows. First-to-invent is inherently ambiguous and costly, and that's bad news for small businesses and individual inventors.

A shift to a ''first-inventor-to-file'' system creates greater certainty for patents, and amounts to a far simpler and more transparent system that would reduce costs in the rare cases when conflict exists over who has the right to a patent. By moving to a first-inventor-to-file system, small firms will in no way be disadvantaged, as some claim, while opportunities in international markets will expand.

In addition, an Associated Press report, for example, noted ''that it takes an average of three years to get a patent approved and that the agency has a backlog of 1.2 million pending patents, including more than 700,000 that haven't reached an examiner's desk.'' Part of the problem here is that revenues from patent fees can be drained off by Congress to be spent elsewhere.

The agreement reached in the House on USPTO funding will assure that the fees paid to the USPTO by inventors will not be diverted elsewhere, but instead be made available for processing patent applications. While the Senate's approach in S. 23 to prevent diversion of USPTO funds would have been a better choice, the House bill still provides an effective option.

Patent reform is needed to clarify and simplify the system; to properly protect legitimate patents; and to reduce costs in the system, including when it comes to litigation and the international marketplace. All of this, of course, would aid small businesses and the overall economy.

H.R. 1249, like S. 23, is a solid bill, and the opportunity for long overdue and much-needed patent reform should not be lost.

Thank you for considering the views of the small business community. Please feel free to contact SBE Council with questions or if we can be of assistance on this important issue for small businesses.

Sincerely,

KAREN KERRIGAN.
President & CEO.

DUPONT,
Wilmington, DE, July 6, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, Washington, DC.
Hon. CHARLES E. GRASSLEY,
Ranking Member, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: As a world leader in science and innovation, including agriculture and industrial biotechnology, chemistry, biology, materials science and manufacturing, DuPont recognizes the nation's patent system is a cornerstone in fostering innovation and creating jobs. Patents continue to be one of the engines for innovation and a process for discovery that leads to rich, new offerings for our customers and gives our company the edge to continue transforming markets and society. Our stake in the patent system is significant—in 2010, DuPont filed over 2,000 patent applications and was awarded almost 700 U.S. patents. Given the importance of its patents, DuPont has been a strong supporter of efforts to implement patent reform legislation that will improve patent quality and give the U.S. Patent and Trademark Office the resources it needs to examine and grant patents in a timely manner.

We believe that any changes to the patent system need to be made in a way that strengthens patents and supports the important goals of fostering innovation and creating jobs. In our view, the Leahy-Smith America Invents Act, H.R. 1249, achieves these objectives, and we urge you to consider adoption of this bill.

The agreement reached in the House on USPTO funding will assure that the fees paid to the USPTO by inventors will not be diverted and will be made available to the Office for processing patent applications and other important functions of the Office.

While we would have preferred the Senate's approach in S. 23 to prevent diversion of USPTO funds, we believe that acceptance of the House bill provides an effective and the most immediate path forward to address problems of the patent office. H.R. 1249, like S. 23, is an excellent bill. These bills are the product of many years of skillful and difficult legislative work in both the House and the Senate. We believe the time has now come for the Senate to take the final legislative act required for enactment of these historic reforms.

We look forward to patent reform becoming a reality in the 112th Congress, due in significant measure to your leadership, and we thank you for your efforts in this critical policy area.

Very truly yours,

P. MICHAEL WALKER,
Vice President, Assistant General Counsel and Chief Intellectual Property Counsel.

JUNE 29, 2011.

Hon. HARRY REID,
Majority Leader, U.S. Senate,
Washington, DC.
Hon. MITCH MCCONNELL,
Republican Leader, U.S. Senate,
Washington, DC.

DEAR LEADERS REID AND MCCONNELL: We are writing to encourage you to bring H.R. 1249, the ''Leahy-Smith America Invents Act,'' to the Senate floor at your earliest possible convenience and send the bill to the President's desk to be signed into law. H.R. 1249 closely mirrors the Senate bill that passed earlier this year by an overwhelming 95–5 vote.

Patent reform is essential legislation: enactment will spur innovation creating jobs and ensure that the Patent and Trademark Office (PTO) has the tools necessary to maintain our patent system as the best in the world. We strongly support the improved reexamination procedures in H.R. 1249, which will allow the experts at PTO to review low-quality business-method patents against the best prior art. Equally important, the bill provides the PTO with increased and predictable funding. This certainty is absolutely critical if the PTO is to properly allocate resources and hire and retain the expertise necessary to benefit the entire user-community.

This bill has been nearly a decade in the making and is supported by a vast cross-section of all types of inventors and businesses. It is time to send patent reform to the President for signature, and we strongly encourage the Senate to take up and pass H.R. 1249 without delay.

Sincerely,

American Bankers Association, American Council of Life Insurers, American Financial Services Association, American Insurance Association, The Clearing House Association, Consumer Bankers Association, Credit Union National Association, The Financial Services Roundtable, The Independent Community Bankers of America, Mortgage Bankers Association, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, Securities Industry and Financial Markets Association.

Mr. LEAHY. Mr. President, I ask unanimous consent that I be allowed to reserve the remainder of my time, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. COBURN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. COBURN. Mr. President, I wish to respond to my chairman's comments. First of all, what we have proposed came out of the Judiciary Committee in the House 32 to 3. In other words, only three people on the Judiciary Committee in the House objected to this.

The other point I wish to make is the letter from Chairman ROGERS does not bind the next Appropriations Committee chairman. I think everybody would agree with that. It only binds him and it only binds him as long as he honors his commitment. I have no doubt he will honor his commitment as long as he is chairman.

The third point I wish to make is what the House has set up doesn't make sure the funds go to the PTO, it just means they can't go somewhere else. That is what they have set up. They do not have to allow all the funds collected to go to the PTO. So they can reserve $200 million or $300 million a year and put it over there in a reserve fund and send it to the Treasury which will cause us to borrow less, but the money won't necessarily go to the PTO. There is nothing that mandates the fees collected go to the Patent and Trademark Office.

I understand my chairman. I understand his frustration with trying to get this bill through, and I understand that he sees this as a compromise. I don't. I understand we are going to differ on that and agree to disagree.

With that, I yield the floor to allow the chairman to speak, and I reserve the remainder of my time.

Mr. LEAHY. I thank the Senator. I reserve the remainder of my time and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. SANDERS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. LEAHY). Without objection, it is so ordered.

FLOODING IN VERMONT

Mr. SANDERS. Mr. President, I wish to pick up on a point the senior Senator from Vermont made earlier today. Both he and I have had the opportunity to travel throughout the State of Vermont to visit many of our towns which have been devastated by one of the worst natural disasters in our State's history.

We have seen in the southern part of the State—in Wilmington, for example—the entire business district severely damaged. I have seen in central Vermont a mobile home park almost completely wiped out, with people who are in their eighties and are now having to look to find new places in which to live. I have seen a public housing project for seniors in Brattleboro severely damaged. A lot of seniors there are now having to find new places to live. We have seen the State office complex in Waterbury—the largest State office building in the State, housing 1,700 Vermont workers, the nerve center of the State—devastated. Nobody is at work there today.

We have seen hundreds of bridges and roads destroyed, and right now, as we speak, there are rains coming in the southern part of the State, causing more flooding, more damage. We have seen a wonderful gentleman from Rutland lose his life because he was doing his job to make sure the people of that area were protected. So we have seen damage the likes of which we have never seen in our lifetime.

What I would say—and I know I speak for the senior Senator from Vermont as well—is that our country is the United States of America—the United States of America. What that means is we are a nation such that when disaster strikes in Louisiana or Mississippi in terms of Hurricane Katrina—I know the Presiding Officer remembers the outpouring of support from Vermont for the people in that region. All of our hearts went out to the people in Joplin, MO, when that community suffered an incredible tornado that took 150 or so lives and devastated that city. What America is about and what a nation is about is that when disaster hits one part of the country, we unite as a nation to give support to help those communities, those businesses, those homeowners who have been hurt get back on their feet.

I know the senior Senator from Vermont has made this point many times: Right now we are spending billions of dollars rebuilding communities in Afghanistan and Iraq. Well, I think I speak for the vast majority of the people in this country and in my State of Vermont that if we can spend billions rebuilding communities in Iraq and Afghanistan, we surely can rebuild communities in Vermont, New Jersey, North Carolina, and other parts of the United States of America that have been devastated by Hurricane Irene.

I think as a body, as a Congress, the House and Senate have to work as expeditiously as we can to come up with the funds to help rebuild all of the communities that have been so severely damaged by this terrible flood. I look forward to working with my colleagues to make that happen.

With that, I yield the floor and note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SANDERS). Without objection, it is so ordered.

Mr. LEAHY. Mr. President, when the America Invents Act was first considered by the Senate last March, I spoke about the contributions Vermonters have made to innovation in America since the founding of our Nation. The distinguished Presiding Officer and I know about what Vermont has done. I wish to remind everybody that from the first patent ever issued by our government to cutting-edge research and inventions produced today Vermonters have been at the forefront of innovation since the Nation's birth.

Many may think of our Green Mountain State as being an unlikely hotbed of innovation, but we have actually over the last few years issued the most patents per capita of any State in the country—actually more patents than a lot of States that are larger than we are. It is a small State, to be sure, but it is one that is bursting with creativity.

The rich history of the inventive spirit of Vermont is long and diverse. Vermonters throughout have pursued innovations from the time of the Industrial Revolution to the computer age. Vermont inventors discovered new ways to weigh large objects as well as ways to enjoy the outdoors. They have perfected new ways to traverse rivers and more environmentally friendly ways to live in our homes. Over the years, as America has grown and prospered, Vermont's innovative and creative spirit has made the lives of all Americans better and possibly made them more productive. The patent system in this country has been the catalyst that spurred these inventors to take the risks necessary to bring these ideas to the marketplace.

The story of innovation in Vermont is truly the American story. It has been driven by independent inventors and small businesses taking chances on new ideas. A strong patent system allowed these ideas to flourish and brought our country unprecedented economic growth. These same kinds of inventors exist in Vermont today, as they do throughout our great country.

But these inventors need to be assured that the patent system that served those who came before them so well can do the same today. The America Invents Act will provide that assurance for years to come.

My distinguished colleague from Vermont and I have both spoken several times on the Senate floor since the Senate came back in session about the devastation in Vermont. I cannot help but think of the devastation that Irene has caused in so many of our communities at home. Just as Senator SANDERS and Congressman WELCH and Governor Shumlin, I have seen the damage and heartbreak firsthand. But I also saw the fruits of innovation that will help bring recovery to communities throughout Vermont: the heavy machinery that helped to clear debris and that will build our roads and our bridges and our homes; the helicopters that brought food and water to stranded residents; and the bottles that allowed safe drinking water to reach them.

The American patent system has helped to develop and refine countless technologies that drive our country in times of prosperity but also in times of tragedy. It is critical we ensure that this system remains the best in the world.

Vermont and the rest of the country deserve the world's best patent system. The innovators of the past had exactly that, but we can ensure that the innovators who are among us today and those who will come in succeeding generations will have it as well by passing the America Invents Act.

I am proud of the inventive contributions that Vermonters have made since the founding of this country. I hope to honor their legacy. I hope to inspire the next generation by securing the passage of this legislation.

I have been here for a number of years, but this is one of those historic moments. The patent system is one of the few things enshrined in our Constitution, but it is also something that has not been updated for over half a century. We can do that. We can do that today with our vote. We can complete this bill. We can send it to the President. The President has assured me he will sign it. We will make America stronger. We will create jobs. We will have a better system. And it will not cost American taxpayers anything. That is something we ought to do.

Mr. President, the America Invents Act is supported by dozens of businesses and organizations, large and small, active in all 50 States.

The America Invents Act is the product of more than 6 years of debate and compromise. The stakeholders have crossed the spectrum—from small businesses to high-tech companies; financial institutions to labor organizations; life sciences to bar associations.

More than 180 companies, associations, and organizations have endorsed the Leahy-Smith America Invents Act. I ask unanimous consent that a list of these supporters be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

LIST OF SUPPORTERS OF THE AMERICA INVENTS ACT

3M; Abbott Adobe Systems Incorporated; Advanced Micro Devices; Air Liquide; Air Products; American Bar Association; American Bankers Association; American Council of Life Insurers; American Council on Education; American Financial Services Association; American Institute of Certified Public Accountants; American Insurance Association; American Intellectual Property Law Association; American Trucking Association; Apple, Inc.; Applied Materials, Inc.; Aruba Networks, Inc.; Assoc. for Competitive Technology; Assoc. of American Medical Colleges.

Association of American Universities; Association of Public and Land-grant Universities; Association of University Technology Managers; AstraZeneca; Atheros Communications, Inc.; Autodesk, Inc.; Avaya Inc.; Avid Technology, Inc.; Bank of America; Baxter Healthcare Corporation; Beckman Coulter; Biotechnology Industry Organization; Borealis Ventures; Boston Scientific; BP; Bridgestone American Holdings, Inc.; Bristol-Meyers Squibb; Business Software Alliance; CA, Inc.; Cadence Design Systems, Inc.; California Healthcare Institute.

Capital One; Cardinal Intellectual Property; Cargill, Inc.; Caterpillar; Charter Communications; CheckFree; Cisco Systems Citigroup; The Clearing House Association; Coalition for Patent and Trademark Information Distribution; Collexis Holdings, Inc.; Computer & Communications Ind. Assoc.; Computing Technology Industry Association; Consumer Bankers Association; Corning; Council on Government Relations; Courion; Credit Union National Association; Cummins, Inc.; Dell; The Dow Chemical Company.

DuPont; Eastman Chemical Company; Eastman Kodak; eBay Inc.; Electronics for Imaging; Eli Lilly and Company; EMC Corporation; EnerNOC; ExxonMobil; Facebook; Fidelity Investments; Financial Planning Association; FotoTime; General Electric; General Mills; Genzyme; GlaxoSmithKline; Google Inc.; Hampton Roads Technology Council; Henkel Corporation.

Hoffman-LaRoche; HSBC North America; Huntington National Bank; IAC; IBM; Illinois Technology Association; Illinois Tool Works; Independent Community Bankers of America; Independent Inventors; Infineon Technologies; Information Technology Council; Integrated DNA Technologies; Intel; Intellectual Property Owners Association; International Trademark Association; International Intellectual Property Institute; Intuit, Inc.; Iron Mountain; Johnson & Johnson; Kalido.

Lexmark International, Inc. Logitech, Inc.; Massachusetts Technology Leadership Council; Medtronic; Merck & Co, Inc.; Micron Technology, Inc.; Microsoft; Millennium Pharmaceuticals; Milliken and Company; Molecular; Monster.com; Motorola; Mortgage Bankers Association; National Association of Federal Credit Unions; National Association of Manufacturers; National Assoc. of Mutual Insurance Cos.; National Association of Realtors; National Semiconductor Corporation; National Retail Federation; National Treasury Employees Union; Native American IP Enterprise Council; Net Coalition; Netflix, Inc.; Network Appliance, Inc.; Newegg Inc.; News Corporation; Northrop Grumman; Novartis; Numenta, Inc.; Nvidia OpenAir, Inc.; Oracle; Overstock.com; Partnership for New York City; Patent Cafe.com, Inc.; PepsiCo, Inc.; Pfizer; PhRMA; Procter & Gamble Company; Property Casualty Insurers Association of America; Red Hat.

Reed Elsevier Inc.; RIM; Salesforce.com, Inc.; SanDisk Corporation; San Jose Silicon Valley Chamber of Commerce; SAP America, Inc.; SAS Institute; Seagate Technology,

LLC; Sebit, LLC; Securities Industry & Financial Markets Association; SkillSoft; Small Business and Entrepreneurship Council; Software Information and Industry Association; Sun Microsystems, Inc.; Symantec Corporation; Tax Justice Network USA; TECHQuest Pennsylvania; Teradata Corporation; Texas Instruments; Texas Society of CPAs.

The Financial Services Roundtable; Toyota Trimble Navigation Limited; The United Inventors Association of America; United Steelworkers; United Technologies; U.S. Chamber of Commerce; USG Corporation; VeriSign Inc.; Verizon; Visa Inc.; Visi-Trak Worldwide, LLC; VMware, Inc.; Vuze, Inc.; Western Digital Technologies, Inc.; Weyerhaeuser; Yahoo! Inc.; Ze-gen; Zimmer; ZSL, Inc.

Mr. LEAHY. I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mrs. MCCASKILL). The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. KERRY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KERRY. Madam President, regarding the parliamentary situation, how much time remains for Senator CANTWELL?

The PRESIDING OFFICER. Thirteen minutes remains.

Mr. KERRY. It is my understanding that Senator CANTWELL wants to preserve a component of that, so I would, on behalf of Senator CANTWELL, yield myself 5 minutes at this time.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 600

Mr. KERRY. Madam President, I appreciate the comments of our friend from Alabama, Senator SESSIONS, regarding his amendment to strike section 37 of the patent reform bill, but I disagree with him on substantive terms, and I ask our colleagues to look carefully at the substance of this amendment and the importance of this amendment with respect to precedent not for one company from Massachusetts or for one entity but for companies all over the country and for the application of patent law as it ought to be applied.

The only thing section 37 does—the only thing—is it codifies what a Federal district court has already said and implements what the U.S. Patent and Trademark Office is already doing. There is no breaking of new ground here. This is codifying a Federal district court, codifying what the Patent Office has done, and, in fact, codifying common sense. It is putting into effect what is the right decision with respect to how we treat patents in our country.

Section 37 is, in fact, a very important clarification of a currently confusing deadline for filing patent term extension applications under the Hatch-Waxman Act. Frankly, this is a clarification, I would say to the Senator from Alabama, that benefits everybody in the country. In fact, this is a clarification which has already been put into effect for other types of patents that were once upon a time treated with the same anomaly. They rectified that. They haven't rectified it with respect to this particular section of patent law.

So all we are doing is conforming to appropriate law, conforming to the standards the Patent Office applies, and conforming for all companies in the country, for any company that might be affected similarly. If this were a bailout for a single firm or a pharmaceutical company, as some have tried to suggest it might be, why in the world did a similar provision previously get reported out of the Senate Judiciary Committee by a vote of 14 to 2? How in the world could this provision have then passed the House of Representatives as it did? And why would many House Republicans have supported it as they did? The answer is very simple: Because it is the right thing to do under the law and under the common sense of how we want patents treated in the filing process.

The law as currently written, frankly, was being wrongly applied by the Patent and Trademark Office. And you don't have to take my word for that; that is what a Federal court has said on more than one occasion. Each time, the court has ruled that it was the Patent and Trademark Office, not an individual firm called WilmerHale or Medicines Company—not those two—that made a mistake.

Let me make that very clear so the record is as clear as it can be. The current law as it is written says that "to obtain an extension of the term of a patent under this section, the owner of record of the patent or its agent shall submit an application to the Director. . . . Such an application may be only submitted within the sixty-day period beginning on the date the product received permission" under the appropriate provision of law.

Now, the FDA reasonably interprets this language to mean that if something is received after the close of business on a given business day, it is deemed to be received the next business day. Under this interpretation, the filing by the Medicines Company was indisputably timely.

So my colleagues should not come to the floor and take away from entities that are trying to compete and be in the marketplace over some technicality: the suggestion that because something was filed electronically on a particular given day at 5 o'clock in the afternoon when people had gone home—they weren't open—that somehow they deem that not to have been appropriately filed.

But rather than accept that commonsense interpretation, the Patent and Trademark Office told the Medicines Company it was late. They just decided that. They said: You are late, despite the fact that interpretation contradicted the same-business-day rule the FDA uses when interpreting the very same statute. So as a result, the issue went to court, and guess what. The court told the PTO it was wrong. A Federal judge found that the Patent Office and FDA had been applying inconsistent interpretations of the exact same statutory language in the Hatch-Waxman Act. The FDA uses one interpretation that has the effect of extending its own internal deadlines, but the PTO insisted on using a different interpretation. The result was a "heads I win, tails you lose."

The PRESIDING OFFICER. The Senator's time has expired.

Mr. KERRY. Madam President, I ask unanimous consent to speak for 1 additional minute.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KERRY. For companies investing in innovative medicines, the court found that the PTO failed to provide any plausible explanation for this inconsistent approach. It further found that the PTO's interpretation had the effect of depriving applicants of a portion of their time for filing an application.

After considering all the relevant factors, the court adopted the FDA's interpretation. So the court told the PTO that they were wrong and it was they, and not the Medicines Company, who made a mistake.

So this is not an earmark. It isn't, as Senator SESSIONS contends, a single-company bailout. It is a codification of a court ruling. It is a clarification. It is common sense. It puts a sensible court decision into legislative language, and it is legislative language that applies to all companies across the country equally. It doesn't single out any particular company but amends the patent law for the benefit of all applicants.

I ask my colleagues to oppose the Sessions amendment on the merits. More importantly, we need to move forward with this important bill on which Chairman LEAHY and Senator GRASSLEY have worked so hard. Passing the Sessions amendment would stop that. It would require a House-Senate conference on the bill, and it would at best seriously delay and at worst make it impossible to exact patent reform during this Congress. So this is, on the merits, for all companies. This is common sense. This is current law. This is current practice. So I ask my colleagues accordingly to vote appropriately.

Madam President, I ask unanimous consent that at 4 p.m. the Senate proceed to the votes in relation to the amendments and passage of H.R. 1249, the America Invents Act, with all other provisions of the previous order

remaining in effect; that the final 10 minutes of debate be equally divided between the chairman and ranking member of the Judiciary Committee or their designees, with the chairman controlling the final 5 minutes; further, that there be 4 minutes equally divided between proponents and opponents prior to each vote.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. KERRY. Madam President, I reserve the remainder of Senator CANTWELL's time.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. May I inquire of the Chair how much time remains for me to speak before getting to the last order?

The PRESIDING OFFICER. There is 4½ minutes remaining.

TEXAS WILDFIRES

Mr. CORNYN. Madam President, I wish to speak for about 4½ minutes on the natural disasters that have been confronting our Nation and in particular Texas, where the State has had about 3½ million acres of land burned, with many people now finding themselves literally homeless as a result of fires that many of my colleagues have seen on TV or watched on the Internet but which, frankly, do not capture the scale of the devastation.

Just to give you an idea of the scope of this natural disaster, so far, in 2011, more than 18,000 wildfires have been reported in the State. As I mentioned, it has burned an area roughly the size of Connecticut. Nearly 2,900 structures have been lost and, unfortunately, there has also been a loss of life in these fires, as well as 5,000 Texans have now been evacuated from their homes. Unfortunately, these fires have been a feature of life in parts of Texas for most of the year because we are in the middle of a historic drought where, because of La Nina, the weather pattern, we have had an abnormally dry year, and, indeed, it has caused more than $5 billion of agricultural losses alone as a result of that drought.

I have not only seen some of the devastation myself before I left Austin, but I have also talked to a number of people on the ground who are well informed.

Representative Tim Kleinschmidt, who represents the Texas district east of Austin in sort of the Bastrop area, told me that as many as 1,000 people have been evacuated from their homes in that area and have been living in shelters since Sunday. Water and electricity are also down in many areas, and the wind has unfortunately swept the fire into other areas and now is only about 30 percent contained.

I have also talked to some of our other local leaders, our county judges, such as Grimes County judge Betty Shiflett, who told me that while they have no unmet needs right now, they are very concerned about the threat to life and property and are working as hard as they can to contain the fires.

I have also talked to our outstanding chief of the Texas Department of Emergency Management and the Director of the Texas Forest Service who tell me that as many as 2,000 Americans from places other than Texas have come to the State to help fight these fires and help protect property and life.

We have had a good Federal response to one extent, and that is the U.S. Forest Service has provided planes, bulldozers, and other equipment. Unfortunately, we have seen the White House so far not extend the disaster declaration beyond the original 52 counties approved for FEMA assistance on May 3. I should say that assistance ran out on May 3, more than 4 months ago. Suffice it to say, the disaster declaration should be extended to cover the rest of the State, at least 200 more Texas counties that need Federal assistance.

I am informed from reading the newspaper that President Obama reached out to Governor Perry yesterday to extend his condolences. But, frankly, more than condolences, what we need are the resources to help fight these fires to deal with the disaster and to help get people back into their homes as soon as possible.

I would just say in conclusion, Madam President, that the majority leader has raised the question of whether disaster relief should be paid for or whether it should be borrowed money. I come down on the side of believing that we can't keep borrowing money we don't have. That is what the American people keep telling us. That is what the last election was all about. That is what the financial markets are telling us, and I believe the American people believe we have plenty of money in the Federal Government for Congress to do its job by setting priorities and funding those priorities.

I believe emergency assistance to the people who have been hit hardest by these natural disasters is one of those priorities. We should fund it instead of funding wasteful spending and duplicative programs and engaging in failed Keynesian stimulus schemes.

I yield the floor.

SECTION 5

Mr. BLUNT. Madam President, a significant change contained in H.R. 1249 from S. 23, the version of the bill debated and overwhelmingly passed by the Senate earlier this year, is the inclusion of the defense of prior commercial use against infringement of a later granted patent. Specifically, section 5 of H.R. 1249 creates a prior user right for processes, or machines, or compositions of matter used in a manufacturing or other commercial process, that would otherwise infringe a claimed invention if: (1) the person commercially used the subject matter in the United States, either in connection with an internal commercial use or an actual arm's length sale or other arm's length commercial transfer of a useful end result of such commercial use; and (2) the commercial use occurred at least one year before the earlier of either the effective filing date of the claimed invention or the date on which the claimed invention was disclosed to the public in a manner that qualified as an exception from prior art.

As the distinguished chairman of the Committee on the Judiciary knows, such prior user rights, if properly crafted and understood, can be of great benefit to keeping high paying jobs in this country by giving U.S. companies a realistic option of keeping internally used technologies as trade secrets.

Mr. LEAHY. Madam President, my colleague and friend from Missouri is correct Prior user rights, if properly crafted and asserted, can be of great benefit to keeping high-paying jobs here at home.

Mr. BLUNT. I thank my good friend. A robust prior user right is not needed in today's first-to-invent regime. This is because, if a prior-user was sued for infringement, the patent could be invalidated under section 102(g)(2) because the prior-user was the first-to-invent. However, should H.R. 1249's first-to-file system become law, the prior invention bar to patentability under section 102(g)(2) will be eliminated. This switch to first-to-file then presents the question of whether a non-patent-filing manufacturer should be given some prior user rights that would continue to allow these non-patented internal uses. Section 5 of H.R. 1249 attempts to settle the question by granting prior user rights but only when the prior use is for certain ''commercial'' uses.

The prior user rights provided under section 5 of H.R. 1249 will allow developers of innovative technologies to keep internally used technologies in-house without publication in a patent. This will help U.S. industry to keep jobs at home and provide a basis for restoring and maintaining a technology competitive edge for the U.S. economy. For these reasons, I believe the Senate should support this valuable addition to the America Invents Act and I applaud the leadership of my friend from Vermont.

Mr. LEAHY. I thank the Senator.

Mr. BLUNT. However, as noted a moment ago, the utility of the prior user defense is linked to its clarity surrounding its scope and its limitations. Many innovative companies may be reticent to opt for the protection of prior user rights for fear that the defense may not stand against a charge of infringement by a later patent owner who sues for infringement. Many innovators may feel the need to rush to the patent office in order to assure their long term freedom to operate. I

do not need to belabor my colleagues with the attendant benefit the publication of patents provides to global competitors who are not respectful of intellectual property rights.

The reason for this detrimental reliance on patents for internal technology is that the utility and reliability of section 5 is dependent on the prior use being an ''internal commercial use''—a term for which there is no readily available judicial precedent. Should section 5 of H.R. 1249 become law, an innovator and his legal counsel need some reasonable assurance that an internal use will, in fact, be deemed to be a commercial use protectable under the law. These assurances are all the more important for U.S. companies in the biotechnology field with extraordinarily long lead times for commercialization of its products. Does my colleague from Vermont understand the concern I am raising?

Mr. LEAHY. Madam President, I will say to my good friend that he is not the first to raise this issue with me and the other Members of the House and Senate Judiciary Committees who have worked on this bill. I have discussed section 5 at length with the distinguished House Judiciary Committee Chairman LAMAR SMITH. Perhaps I can help provide some of the needed clarity for my colleague concerning what we intend to be within the confines of the definition of ''internal commercial use'' as it is used in section 5 of the bill.

Mr. BLUNT. I thank my colleague for his willingness to discuss this matter here on the floor of the Senate. It is my reading of the bill's language under section 5 that prior use rights shall vest when innovative technology is first put into continuous internal use in the business of the enterprise with the objective of developing commercializable products. Does the chairman of the Judiciary Committee share this understanding?

Mr. LEAHY. Yes. My colleague and I are in agreement that it is our intention, as the sponsors of this comprehensive measure, that the prior use right set forth in section 5 of H.R. 1249 shall vest when innovative technology is first put into continuous internal use in the business of an innovator's enterprise with the objective of making a commercializable product.

Mr. BLUNT. I thank my colleague from Vermont. If he would permit me to clarify this matter further. Am I correct in understanding that, so long as that use begins more than 1 year prior to the effective filing date of a subsequent patent or publication by a later inventor, the initiation of continuous internal use by an original innovator in a manufacturing of a product should guarantee the defense of prior use regardless of whether the product is a prototype with a need for quality improvements?

Mr. LEAHY. I thank my colleague for the question. His understanding is correct. So long as the prior use begins more than 1 year prior to the effective filing date of a subsequent patent or publication by a later inventor, the initiation of continuous internal use in the manufacture of products should guarantee the defense of prior use.

Mr. BLUNT. I thank my colleague. Let me illustrate by showing the impact of the ambivalence of the statutory language on agricultural research which is a major industry not only in Midwestern States like Missouri, Iowa, Kansas, Nebraska, Illinois, but in States ranging from California to Connecticut from Texas to Minnesota from North Carolina to Idaho. Virtually every State in this Union has an investment in agricultural research. The productivity of U.S. farmers provides a significant positive input to the U.S. balance of trade due in large part to the high technology adopted by U.S. farmers. That high technology is provided from multiple sources ranging from research at land grant universities, the USDA and private for-profit companies all of whom have internal technology that provides a competitive edge for maintaining agricultural competitive advantage for the U.S. economy.

To specifically illustrate let us consider that U.S. researchers are leading the world in discovering genetic markers that are associated with important agronomic traits which serves as breeding production tools. Instead of teaching foreign competitors these production tools, a preferred alternative may be to rely on prior user rights for such innovative crop breeding technology which is used in the manufacture of new plant varieties although the use may only occur once a year after each growing season and for many years to selectively manufacture a perfected crop product that is sold.

As another example let us consider an innovation in making potential new genetically modified products all of which need years of testing to verify their viability, repeatabilty and commercial value. Of the thousands of new potential prototype products made, only a few may survive initial screening to begin years of field trials. We should agree that a continuously used process qualifies as internal commercial use despite the fact that many prototypes will fail to have commercial merit.

As my examples illustrate, for section 5 to have its intended benefit, internal commercial use must vest when an innovator reduces technology to practice and takes diligent steps to maintain continuous, regular commercial use of the technology in manufacturing operations of the enterprise.

Mr. LEAHY. My colleague is correct in his reasoning and his understanding of what is intended by section 5. The methods used by Edison in producing multiple failures for electric light bulbs were no less commercial uses before the ultimate production of a commercially successful light bulb. Let us agree that internally used methods and materials do qualify for the defense of prior user rights when there is evidence of a commitment to put the innovation into use followed by a series of diligent events demonstrating that the innovation has been put into continuous—into a business activity with a purpose of developing new products for the benefit of mankind.

Mr. BLUNT. I thank my colleague.

SECTION 5

Mr. KOHL. Madam President, I have long supported reforming our patent system and was pleased with the bill the Senate passed in March. It was not what everyone wanted, but it was an effective compromise that would spur innovation and economic growth. I am disappointed with changes the House made to the bill, specifically the expansion of the ''prior user rights'' defense a provision which raises serious concerns for the University of Wisconsin's patent licensing organization which fosters innovative discoveries, spawning dozens of small businesses and spurring economic growth in Wisconsin.

Let me explain why. A patent grants an innovator the right to exclude others from using an invention in exchange for making that invention public. The publication of patents and the research behind them advance further innovation and discovery. Anyone who uses the invention without permission is liable for infringement, and someone who was using the invention prior to the patent has only a limited defense for infringement. The purpose of limiting this defense to infringement is to encourage publication and disclosure of inventions to foster innovation. So by expanding the prior user defense we run the real risk of discouraging disclosure through the patent system. This is concerning to the University of Wisconsin because they depend on publication and disclosure to further research and innovation.

I appreciate the inclusion of a carveout to the prior user rights defense provision so that it does not apply to patents owned by a university ''or a technology transfer organization whose primary purpose is to facilitate the commercialization of technologies developed by one or more such institutions of higher education.'' However, I have some concerns about how the carve out will work in practice and I would like to clarify its application.

It is my understanding that the term ''primary purpose'' in this exception is intended to be consistent with and have a similar scope as the ''primary functions'' language in the Bayh-Dole Act. In particular, if a nonprofit entity is entitled to receive assignment of inventions pursuant to section 207(c)(7) of

title 35 because one of its primary functions is the management of inventions, presumably it falls under the primary purpose prong of the prior user rights exception. Is that the Senator's understanding of the provision?

Mr LEAHY. The senior Senator from Wisconsin is correct. That is also my view of the exception. I understand the Senator has consistently opposed the expansion of prior user rights, but I agree with his analysis of the scope of the exception in section 5 of H.R. 1249.

SECTION 18

Mr. PRYOR. I would like to ask my colleague from Vermont, the Chairman of the Judiciary Committee and lead sponsor of the America Invents Act before us today, to further clarify an issue relating to Section 18 of that legislation. Ideally, I would have liked to modify the Section 18 process in accordance with the Cantwell amendment. It is of crucial importance to me that we clarify the intent of the process and implement it as narrowly as possible.

As I understand it, Section 18 is intended to enable the PTO to weed out improperly issued patents for abstract methods of doing business. Conversely, I understand that Section 18 is not intended to allow owners of valid patents to be harassed or subjected to the substantial cost and uncertainty of the untested review process established therein. Yet I have heard concerns that Section 18 would allow just such harassment because it enables review of patents whose claims have been found valid both through previous reexaminations by the PTO and jury trials. In my mind, patent claims that have withstood multiple administrative and judiciary reviews should be considered presumptively valid. It would not only be unfair to the patent holder but would be a waste of both PTO's time and resources to subject such presumptively valid patent claims to yet another administrative review. It would be particularly wasteful and injurious to legitimate patent holders if the ''transitional review'' only considered prior art that was already considered in the previous administrative or judicial proceedings. Can the Chairman enlighten me as to how the PTO will ensure that the ''transitional process'' does not become a tool to harass owners of valid patents that have survived multiple administrative and judicial reviews''?

Mr. LEAHY. The proceeding created by Section 18 is modeled on the proposed post-grant review proceeding under Section 6 of the Act. As in other post-grant proceedings, the claims should typically be evaluated to determine whether they, among other things, meet the enablement and written description requirements of the act, and contain patentable subject matter under the standards defined in the statutes, case law, and as explained in relevant USPTO guidance. While the program will generally otherwise function on the same terms as other post-grant proceedings, the USPTO should implement Section 18 in a manner that avoids attempts to use the transitional program against patent owners in a harassing way. Specifically, to initiate a post issuance review under the new post grant or transitional proceedings, it is not enough that the request show a substantial new question of patentability but must establish that ''it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.'' The heightened requirement established by this bill means that these proceedings are even better shielded from abuse than the reexamination proceedings have been. In fact, the new higher standard for post issuance review was created to make it even more difficult for these procedures to be used as tools for harassment. Therefore, the rule that bars the PTO from reconsidering issues previously considered during examination or in an earlier reexamination still applies. While a prior district court decision upholding the validity of a patent may not preclude the PTO from considering the same issues resolved in that proceeding, PTO officials must still consider the court's decision and deviate from its findings only to the extent reasonable. As a result, I expect the USPTO would not initiate proceedings where the petition does not raise a substantial new question of patentability than those that had already been considered by the USPTO in earlier proceedings. Does that answer my colleague's question?''

Mr. PRYOR. I thank my colleague for that explanation.

SECTION 18

Mr. DURBIN. I would like to clarify an issue with my colleague from New York, who is the author of Section 18. Legislative history created during earlier consideration of this legislation makes clear that the business method patent problem that Section 18 is intended to address is fundamentally an issue of patent quality. Does the Senator agree that poor quality business method patents generally do not arise from the operation of American companies who use business method patents to develop and sell products and employ American workers in doing so?

Mr. SCHUMER. My friend from Illinois is correct. I have previously inserted into the RECORD a March 3 letter from the Independent Community Bankers of America which stated that ''Under the current system, business method patents of questionable quality are used to force community banks to pay meritless settlements to entities that may have patents assigned to them, but who have invented nothing, offer no product or service and employ no one. . . . The Schumer-Kyl amendment is critical to stopping this economic harm.''

Mr. DURBIN. I thank the Senator. I want to point out that there are a number of examples of companies that employ hundreds or thousands of American workers in developing and commercializing financial sector products that are based on business method patents. For example, some companies that possess patents categorized by the PTO as class 705 business method patents have used the patents to develop novel software tools and graphical user interfaces that have been widely commercialized and used within the electronic trading industry to implement trading and asset allocation strategies. Additionally, there are companies that possess class 705 patents which have used the patents to manufacture and commercialize novel machinery to count, sort, and authenticate currency and paper instruments. Are these the types of patents that are the target of Section 18?

Mr. SCHUMER. No. Patent holders who have generated productive inventions and have provided large numbers of American workers with good jobs through the development and commercialization of those patents are not the ones that have created the business method patent problem. While merely having employees and conducting business would not disqualify a patentholder from Section 18 review, generally speaking, it is not the understanding of Congress that such patents would be reviewed and invalidated under Section 18.

Mr. COBURN. Madam President, today, I rise to discuss section 18 of H.R. 1249, the Leahy-Smith America Invents Act. Consistent with the statement in the RECORD by Chairman LAMAR SMITH on June 23, 2011, I understand that section 18 will not make all business method patents subject to review by the U.S. Patent and Trademark Office. Rather, section 18 is designed to address the problem of low-quality business method patents that are commonly associated with the Federal circuit's 1998 State Street decision. I further understand that section 18 of the bill specifically exempts ''patents for technological inventions'' from this new review at USPTO.

Patents for technological inventions are those patents whose novelty turns on a technological innovation over the prior art and are concerned with a technical problem which is solved with a technical solution. The technological innovation exception does not exclude a patent from section 18 simply because it recites technology. Inventions related to manufacturing and machines that do not simply use known technology to accomplish a novel business process would be excluded from review under section 18.

For example, section 18 would not cover patents related to the manufacture and distribution of machinery to count, sort, and authenticate currency.

It is the intention of section 18 to not review mechanical inventions related to the manufacture and distribution of machinery to count, sort, and authenticate currency like change sorters and machines that scan paper instruments, including currency, whose novelty turns on a technological innovation over the prior art. These types of patents would not be eligible for review under this program.

American innovation is an important engine for job growth and our economic revitalization. To this end, the timely consideration of patent applications and the issuance of quality patents are critical components and should remain the primary goal of the U.S. Patent and Trademark Office.

Mr. KYL. Madam President, I rise today to say a few words about aspects of the present bill that differ from the bill that passed the Senate in March. I commented at length on the Senate bill when that bill was before this body. Since the present bill and the Senate bill are largely identical, I will not repeat what I said previously, but will simply refer to my previous remarks, at 157 Cong. Rec. 1368–80, daily ed. March 8, 2011, which obviously apply to the present bill as well.

As I mentioned earlier, Mr. SMITH negotiated his bill with Senators LEAHY, GRASSLEY, and me as he moved the bill through the House of Representatives. The final House bill thus represents a compromise, one which the Senate supporters of patent reform have agreed to support in the Senate. The provisions that Mr. SMITH has added to the bill are ones that we have all had an opportunity to consider and discuss, and which I fully support.

Section 19(d) of the present bill adds a new section 299 to title 35. This new section bars joinder of accused infringers as codefendants, or consolidation of their cases for trial, if the only common fact and transaction among the defendants is that they are alleged to have infringed the same patent. This provision effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas. See *Rudd* v. *Lux Products Corp.*, 2011 WL 148052. (N.D. Ill. January 12, 2011), and the committee report for this bill at pages 54 through 55.

H.R. 1249 as introduced applied only to joinder of defendants in one action. As amended in the mark up and in the floor managers' amendment, the bill extends the limit on joinder to also bar consolidation of trials of separate actions. When this change was first proposed, I was skeptical that it was necessary. A review of legal authority, however, reveals that under current law, even if parties cannot be joined as defendants under rule 20, their cases can still be consolidated for trial under rule 42. For example, as the district court held in *Ohio* v. *Louis Trauth Dairy, Inc.*, 163 F.R.D. 500, 503 (S.D. Ohio 1995), ''[e]ven when actions are improperly joined, it is sometimes proper to consolidate them for trial.'' The same conclusion was reached by the court in *Kenvin* v. *Newburger, Loeb & Co.*, 37 F.R.D. 473 (S.D.N.Y. 1965), which ordered severance because of misjoinder of parties, concluding that the claims against the defendants did not arise out of single transaction or occurrence, but then suggested the desirability of a joint trial, and expressly made its severance order without prejudice to a subsequent motion for consolidation under rule 42(a). Similarly, in *Stanford* v. *TVA*, 18 F.R.D. 152 (M.D. Tenn. 1955), a court found that the defendants had been misjoined, since the claims arose out of independent transactions, and ordered them severed. The court subsequently found, however, that a common question existed and ordered the defendants' cases consolidated for trial.

That these cases are not just outliers is confirmed by Federal Practice and Procedure, which comments as follows at § 2382:

> Although as a general proposition it is true that Rule 42(a) should be construed in harmony with the other civil rules, it would be a mistake to assume that the standard for consolidation is the same as that governing the original joinder of parties or claims. . . . [M]ore than one party can be joined on a side under Rule 20(a) only if there is asserted on behalf of or against all of them one or more claims for relief arising out of the same transaction or occurrence or series of transactions or occurrences. This is in addition to the requirement that there be some question of law or fact common to all the parties. But the existence of a common question by itself is enough to permit consolidation under Rule 42(a), even if the claims arise out of independent transactions.

If a court that was barred from joining defendants in one action could instead simply consolidate their cases for trial under rule 42, section 299's purpose of allowing unrelated patent defendants to insist on being tried separately would be undermined. Section 299 thus adopts a common standard for both joinder of defendants and consolidation of their cases for trial.

Another set of changes made by the House bill concerns the coordination of inter partes and postgrant review with civil litigation. The Senate bill, at proposed sections 315(a) and 325(a), would have barred a party or his real party in interest from seeking or maintaining an inter partes or postgrant review after he has filed a declaratory-judgment action challenging the validity of the patent. The final bill will still bar seeking IPR or PGR after a declaratory-judgment action has been filed, but will allow a declaratory-judgment action to be filed on the same day or after the petition for IPR or PGR was filed. Such a declaratory-judgment action, however, will be automatically stayed by the court unless the patent owner countersues for infringement. The purpose of allowing the declaratory-judgment action to be filed is to allow the accused infringer to file the first action and thus be presumptively entitled to his choice of venue.

The House bill also extends the deadline for allowing an accused infringer to seek inter partes review after he has been sued for infringement. The Senate bill imposed a 6-month deadline on seeking IPR after the patent owner has filed an action for infringement. The final bill extends this deadline, at proposed section 315(b), to 1 year. High-technology companies, in particular, have noted that they are often sued by defendants asserting multiple patents with large numbers of vague claims, making it difficult to determine in the first few months of the litigation which claims will be relevant and how those claims are alleged to read on the defendant's products. Current law imposes no deadline on seeking inter partes reexamination. And in light of the present bill's enhanced estoppels, it is important that the section 315(b) deadline afford defendants a reasonable opportunity to identify and understand the patent claims that are relevant to the litigation. It is thus appropriate to extend the section 315(b) deadline to one year.

The final bill also extends intervening rights to inter partes and postgrant review. The bill does not allow new matter to be introduced to support claims in IPR and PGR and does not allow broadening of claims in those proceedings. The aspect of intervening rights that is relevant to IPR and PGR is section 252, first paragraph, which provides that damages accrue only from the date of the conclusion of review if claim scope has been substantively altered in the proceeding. This restriction applies even if the amendment only narrowed the scope of the claims. *See Engineered Data Products, Inc.* v. *GBS Corp.*, 506 F.Supp.2d 461, 467 (D. Colo. 2007), which notes that ''the Federal Circuit has routinely applied the intervening rights defense to narrowing amendments.'' When patent-defeating prior art is discovered, it is often impossible to predict whether that prior art will be found to render the entire invention obvious, or will only require a narrowing amendment. When a challenger has discovered such prior art, and wants to practice the invention, intervening rights protect him against the risk of gong forward—provided, of course, that he is correct in his judgment that the prior art at least requires a substantive narrowing of claims.

The final bill also adds a new subsection to proposed section 257, which authorizes supplemental examination of patents. The new subsection provides that the Director shall refer to the U.S. Attorney General any ''material fraud'' on the Office that is discovered during the course of a Supplemental Examination. Chairman

Smith's explanation of this addition, at 157 Cong. Rec. E1182–83 (daily ed. June 23, 2011), clarifies the purpose and effect of this new provision. In light of his remarks, I find the addition unobjectionable. I would simply add to the Chairman's remarks that, in evaluating whether a fraud is ''material'' for purpose of referral, the Director should look to the Federal Circuit's decision in *Therasense, Inc.* v. *Becton, Dickinson and Co.*, ___F.3d___, 2011 WL 2028255 (May 25, 2011). That case holds, in relevant part, that:

> [T]he materiality required to establish inequitable conduct is but-for materiality. When an applicant fails to disclose prior art to the PTO, that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art. Hence, in assessing the materiality of a withheld reference, the court must determine whether the PTO would have allowed the claim if it had been aware of the undisclosed reference.

Finally, perhaps the most important change that the House of Representatives has made to the America Invents Act is the addition of a prior-commercial-use defense. Current law, at section 273, creates a defense of prior-user rights that applies only with respect to business-method patents. The final bill rewrites section 273, creating a PCU defense that applies to all utility patents.

University researchers and their technology-transfer offices had earlier objected to the creation of such a defense. Their principal concern was that the defense would lead to a morass of litigation over whether an infringer was entitled to assert it, and the expense and burden of this litigation would ultimately prevent universities and small companies from enforcing valid patents. The compromise reached in the House of Representatives addresses university concerns by requiring a defendant to show that he commercially used the subject matter that infringes the patent at least 1 year before the patent owner either filed an application or disclosed the invention to the public. The House compromise also precludes assertion of the defense against most university-owned patents.

The PCU defense is similar to the prior-user right that exists in the United Kingdom and Germany. The defense is a relatively narrow one. It does not create a general license with respect to the patented invention, but rather only allows the defendant to keep making the infringing commercial use that he establishes that he made 1 year before the patentee's filing or disclosure. The words ''subject matter,'' as used in subsection (a), refer to the infringing acts of the defendant, not to the entire patented invention. An exception to this limit, which expands the defense beyond what would be allowed in the United Kingdom, appears in subsection (e)(3), which allows the defendant to increase the quantity or volume of the use that he establishes that he made of the invention. Subsection (e)(3) also confirms that the defendant may improve or otherwise modify his activities in ways that do not further infringe the patent, although one would think that this would go without saying.

The PCU defense is principally designed to protect the use of manufacturing processes. For many manufacturing processes, the patent system presents a catch-22: if the manufacturer patents the process, he effectively discloses it to the world. But patents for processes that are used in closed factories are difficult to police. It is all but impossible to know if someone in a factory in China is infringing such a patent. As a result, unscrupulous foreign and domestic manufacturers will simply use the invention in secret without paying licensing fees. Patenting such manufacturing processes effectively amounts to giving away the invention to competitors. On the other hand, if the U.S. manufacturer does not patent the process, a subsequent party may obtain a patent for it, and the U.S. manufacture will be forced to stop using a process that he was the first to invent and which he has been using for years.

The prior-commercial-use defense provides relief to U.S. manufacturers from this Catch-22, allowing them to make long-term use of a manufacturing process without having to give it away to competitors or run the risk that it will be patented out from under them.

Subsection (a) expands the defense beyond just processes to also cover products that are used in a manufacturing or other commercial process. Generally, products that are sold to consumers will not need a PCU defense over the long term. As soon as the product is sold to the public, any invention that is embodied or otherwise inherent in that product becomes prior art and cannot be patented by another party, or even by the maker of the product after the grace period has expired. Some products, however, consist of tools or other devices that are used only by the inventor inside his closed factory. Others consist of substances that are exhausted in a manufacturing process and never become accessible to the public. Such products will not become prior art. Revised section 273 therefore allows the defense to be asserted with respect to such products.

The defense can also be asserted for products that are not used to make a useful end result that is sold to others, but that are used in an internal commercial process. This would include, for example, customized software that is used to run a company's human-resources system. So long as use of the product is integrated into an ongoing commercial process, and not merely fleeting or experimental or incidental to the enterprise's operations, the PCU defense can be asserted with respect to that product.

The present bill requires the defendant to commercially use the invention in order to be able to assert the defense. Chairman SMITH has suggested, at 157 Cong. Rec. E1219 (daily ed. June 28, 2011), that in the future Congress should expand the defense so that it also applies when a company has made substantial preparations to commercially use an invention. Some have also suggested that the defense should be expanded to cover not just using, but also making and selling an invention if substantial preparations have been made to manufacture the invention. This would expand the defense to more fully compensate for the repeal of current section 102(g), which allows a party to invalidate a patent asserted against it if the party can show that it had conceived of the invention earlier and diligently proceeded to commercialize it.

On the one hand, universities and others have expressed concern that a ''substantial preparations'' predicate for asserting the PCU defense would lead to expensive and burdensome litigation over whether a company's activities reflect conception and diligent commercialization of the invention. Some argue that it is often the case that different companies and researchers are working on the same problem, and it is easy for the unsuccessful parties to later recharacterize their past efforts as capturing or diligently implementing the successful researcher's invention. Questions have also arisen as to how tentative preparations may be and still qualify as ''substantial preparations.'' For example, if a company had not broken ground for its factory, but had commissioned an architect to draw up plans for it, would that qualify? Would taking out a loan to build the factory qualify as substantial preparations?

On the other hand, proof of conception and diligent commercialization are currently used to apply section 102(g)(2), and I have not heard complaints that the current defense has resulted in overly burdensome litigation.

In the end, however, a substantial-preparations predicate is not included in this bill simply because that was the agreement that was struck between universities and industry in the House of Representatives last summer, and we are now effectively limited to that agreement. Perhaps this issue can be further explored and revisited in a future Congress, though I suspect that many members will want a respite from patent issues after this bill is completed.

The final bill also drops the requirement of a showing of a reduction to practice that previously appeared in subsection (b)(1). This is because the use of a process, or the use of product in a commercial process, will always constitute a reduction to practice.

One change made by the original House bill that proved contentious is the expansion of the personal nature of the defense, now at subsection (e)(1)(A), to also include uses of the invention made by contractors and vendors of the person asserting the defense. The House bill originally allowed the defendant to assert the defense if he performed the commercial use or ''caused'' its performance. The word ''caused,'' however, could be read to include even those uses that a vendor made without instructions or even the contemporaneous knowledge of the person asserting the defense. The final bill uses the word ''directed,'' which limits the provision only to those third-party commercial uses that the defendant actually instructed the vendor or contactor to use. In analogous contexts, the word ''directed'' has been understood to require evidence that the defendant affirmatively directed the vendor or contractor in the manner of the work or use of the product. See, for example, *Ortega* v. *Puccia*, 75 A.D. 54, 59, 866 N.Y.S.2d 323, 328 (N.Y. App. 2008).

Subsection (e)(1)(A)'s reference to entities that ''control, are controlled by, or under common control with'' the defendant borrows a term that is used in several federal statutes. See 12 U.S.C. 1841(k), involving bank holding companies, 15 U.S.C. 78c(a)(4)(B)(vi), involving securities regulation, 15 U.S.C. 6809(6), involving financial privacy, and 49 U.S.C. 30106(d)(1), involving motor vehicle safety. Black's Law Dictionary 378 (9th ed. 2009) defines ''control'' as the ''direct or indirect power to govern the management and policies of a person or entity, whether through ownership of securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.''

A few other aspects of the PCU defense merit brief mention. Subsection (e)(5)(A), the university exception, was extended to also include university technology-transfer organizations, such as the Wisconsin Alumni Research Foundation. Subparagraph (B), the exception to the university exception, is only intended to preclude application of subparagraph (A) when the federal government is affirmatively prohibited, whether by statute, regulation, or executive order, from funding research in the activities in question.

In the course of the recodification of former subsection (a)(2) as new (c)(2), the former's subparagraph (B) was dropped because it is entirely redundant with subparagraph (A).

Finally, subsection (e)(4), barring assertion of the defense if use of the subject matter has been abandoned, should not be construed to necessarily require continuous use of the subject matter. It is in the nature of some subject matter that it will be used only periodically or seasonally. If such is the case, and the subject has been so used, its use has not been abandoned.

I would also like to take a moment to once again address the question of the grace period created by this bill. During the House and Senate debates on the bill, opponents of the first-to-file system have occasionally asserted that they oppose the bill's move to first to file because it weakens the grace period. See 157 Cong. Rec. S1094, S1096, S1112 (daily ed. March 2, 2011), and 157 Cong. Rec. H4424, H4430 (daily ed. June 22, 2011).

Some of these arguments are difficult to understand, in part because opponents of first to file have used the term ''grace period'' to mean different things. Some have used the term to mean the period between the time when the inventor conceives of the invention and the time when he files a full or even provisional application. Obviously, if the ''grace period'' is defined as the first-to-invent system, then the move to first to file eliminates that version of the grace period. Others, however, have suggested that public uses, sales, or ''trade secrets'' will bar patenting under new section 102(b), even if they consist of activities of the inventor during the year before filing.

This is not the case, and I hope that courts and executive officials interpreting this act will not be misled by arguments made by opponents of this part of the bill. The correct interpretation of section 102 and the grace period is that which has been consistently advanced in the 2007 and 2011 committee reports for this bill, see Senate Report 110–259, page 9, and House Report 112–98, page 43, as well as by both Chairman SMITH and Chairman LEAHY, see 157 Cong. Rec. S1496–97 (daily ed. March 9, 2011), and 157 Cong. Rec. H4429 (daily ed. June 22, 2011). These two chairmen are the lead sponsors and authorizing chairmen of this year's bills, which are identical with respect to section 102. As Chairman SMITH most recently explained in his June 22 remarks, ''contrary to current precedent, in order to trigger the bar in new 102(a) in our legislation, an action must make the patented subject matter 'available to the public' before the effective filing date.'' Therefore, ''[i]f an inventor's action is such that it triggers one of the bars under 102(a), then it inherently triggers the grace period in section 102(b).''

When the committee included the words ''or otherwise available to the public'' in section 102(a), the word ''otherwise'' made clear that the preceding items are things that are of the same quality or nature. As a result, the preceding events and things are limited to those that make the invention ''available to the public.'' The public use or sale of an invention remains prior art, thus making clear that an invention embodied in a product that has been sold to the public more than a year before an application was filed, for example, can no longer be patented. Once an invention has entered the public domain, by any means, it can no longer be withdrawn by anyone. But public uses and sales are prior art only if they make the invention available to the public.

In my own remarks last March, I cited judicial opinions that have construed comparable legislative language in the same way. Since that time, no opponent of the first-to-file transition has identified any caselaw that reads this legislative language any other way, nor am I aware of any such cases. I would hope that even those opponents of first to file who believe that supporters of the bill cannot rely on committee reports and sponsors' statements would at least concede that Congress is entitled to rely on the consistent judicial construction of legislative language.

Finally, I would note that the interpretation of 102 that some opponents appear to advance—that nondisclosing uses and sales would remain prior art, and would fall outside the 102(b) grace period—is utterly irrational. Why would Congress create a grace period that allows an invention that has been disclosed to the world in a printed publication, or sold and used around the world, for up to a year, to be withdrawn from the public domain and patented, but not allow an inventor to patent an invention that, by definition, has not been made available to the public? Such an interpretation of section 102 simply makes no sense, and should be rejected for that reason alone.

Let me also address two other misstatements that have been made about the bill's first-to-file system. In remarks appearing at 157 Cong. Rec. S1095 (daily ed. March 2, 2011), it was suggested that a provisional application filed under the first-to-file system will be vulnerable to an attack that the inventor failed to disclose the best mode of the invention. This is incorrect. Section 15 of this bill precludes the use of the best-mode requirement as a basis for cancelling a claim or holding it invalid. It was also suggested, at the same place in the record, that discovery would not be allowed in the derivation proceedings created by section 3(i) of the bill. That is incorrect. Section 24 of title 35 allows discovery in any ''contested case.'' The Patent Office's regulations, at 37 CFR 41.2(2), indicate that contested cases included Board proceedings such as interferences. It is not apparent to me why these laws and regulations would suggest anything other than that discovery will be allowed in derivation proceedings.

Finally, let me close by commenting on section 18 of the bill. Some legitimate interests have expressed concern that non-business-method patents will be subject to challenge in this proceeding. I have been asked to, and am

happy to, reiterate that technological inventions are excluded from the scope of the program, and that these technological inventions include inventions in the natural sciences, engineering, and computer operations—and that inventions in computer operations obviously include software inventions.

This does not mean that a patent is ineligible for review simply because it recites software elements or has been reduced to a software program. If that were the case, then very few of even the most notorious business-method patents could be reviewed under section 18. Rather, in order to fall within the technological-invention exclusion, the invention must be novel as software. If an invention recites software elements, but does not assert that it is novel as software, or does not colorably appear to be so, then it is not ineligible for review simply because of that software element. But an actual software invention is a technological invention, and is not subject to review under section 18.

Mr. LEVIN. Madam President, I support the America Invents Act.

Right now, as our economy struggles to recover, this legislation is needed to help create jobs and keep our manufacturers competitive. It will further strengthen and expand the ability of our universities to conduct research and turn that research into innovative products and processes that benefit Michigan and our Nation.

Because of this legislation, we will be able to see that boost up close in my home State of Michigan, where a new satellite Patent and Trademark Office will be established in Detroit. This office will help modernize the patent system and improve the efficiency of patent review and the hiring of patent examiners.

In addition, in an important victory after years of effort to address the problem, section 14 of the act finally bans tax patents, ending the troubling practice of persons seeking patents for tax avoidance strategies.

Issuing such patents abuses the Tax Code by granting what some could see as a government imprimatur of approval for dubious tax strategies, while at the same time penalizing taxpayers seeking to use legitimate strategies. The section makes it clear that patents can still be issued for software that helps taxpayers prepare their tax returns, but that provision is intended to be narrowly construed and is not intended to authorize patents for business methods or financial management software.

The bill will put a halt to both new and pending tax patent applications. Although it does not apply on its face to the 130-plus tax patents already granted, if someone tries to enforce one of those patents in court by demanding that a taxpayer provide a fee before using it to reduce their taxes, I hope a court will consider this bill's language and policy determination when deciding whether such efforts are consistent with public policy.

This legislation is an important step forward and I urge my colleagues to support it.

Mr. SCHUMER. Madam President, I would like to clarify the record on a few points related to section 18 of the America Invents Act. Section 18, of which Senator KYL and I were the authors, relates to business method patents. As the architect of this provision, I would like to make crystal clear the intent of its language.

It is important that the record reflect the urgency of this provision. Just today, while the Senate has been considering the America Invents Act, Data Treasury—the company which owns the notorious check imaging patents and which has already collected over half a billion dollars in settlements—filed suit in the Eastern District of Texas against 22 additional defendants, primarily community banks. These suits are over exactly the type of patents that section 18 is designed to address, and the fact that they continue to be filed highlights the urgency of signing this bill into law and setting up an administrative review program at the PTO.

I would like to elucidate the intent behind the definition of business method patents. Other Members have attempted to suggest a narrow reading of the definition, but these interpretations do not reflect the intent of Congress or the drafters of section 18. For example, in connection with the House vote on the America Invent Act, H.R. 1249, Congressman SHUSTER submitted a statement in the RECORD regarding the definition of a ''covered business method patent'' in section 18. 157 Cong. Rec. H4497 (daily ed. June 23, 2011).

In the statement, Mr. SHUSTER states: ''I would like to place in the record my understanding that the definition of 'covered business method patent' . . . is intended to be narrowly construed to target only those business method patents that are unique to the financial services industry.'' Mr. SHUSTER's interpretation is incorrect.

Nothing in the America Invents Act limits use of section 18 to banks, insurance companies or other members of the financial services industry. Section 18 does not restrict itself to being used by petitioners whose primary business is financial products or services. Rather, it applies to patents that can apply to financial products or services. Accordingly, the fact that a patent is being used by a company that is not a financial services company does not disqualify the patent from section 18 review. Conversely, given the statutory and regulatory limitations on the activities of financial services companies, if a patent is allegedly being used by a financial services company, the patent will qualify as a ''covered business method patent.''

The plain meaning of ''financial product or service'' demonstrates that section 18 is not limited to the financial services industry. At its most basic, a financial product is an agreement between two parties stipulating movements of money or other consideration now or in the future. Types of financial products include, but are not limited to: extending credit, servicing loans, activities related to extending and accepting credit, leasing of personal or real property, real estate services, appraisals of real or personal property, deposit-taking activities, selling, providing, issuing or accepting stored value or payment instruments, check cashing, collection or processing, financial data processing, administration and processing of benefits, financial fraud detection and prevention, financial advisory or management consulting services, issuing, selling and trading financial instruments and other securities, insurance products and services, collecting, analyzing, maintaining or providing consumer report information or other account information, asset management, trust functions, annuities, securities brokerage, private placement services, investment transactions, and related support services. To be eligible for section 18 review, the patent claims must only be broad enough to cover a financial product or service.

The definition of ''covered business method patent'' also indicates that the patent must relate to ''performing data processing or other operations used in the practice, administration, or management'' of a financial product or service. This language makes it clear that section 18 is intended to cover not only patents claiming the financial product or service itself, but also patents claiming activities that are financial in nature, incidental to a financial activity or complementary to a financial activity. Any business that sells or purchases goods or services ''practices'' or ''administers'' a financial service by conducting such transactions. Even the notorious ''Ballard patents'' do not refer specifically to banks or even to financial transactions. Rather, because the patents apply to administration of a business transactions, such as financial transactions, they are eligible for review under section. To meet this requirement, the patent need not recite a specific financial product or service.

Interestingly, Mr. SHUSTER's own actions suggest that his interpretation does not conform to the plain meaning of the statute. In addition to his statement, Mr. SHUSTER submitted an amendment to the Rules Committee that would exempt particular types of business-method patents from review under section 18. That amendment was later withdrawn. Mr. SHUSTER's subsequent statement in the RECORD appears

to be an attempt to rewrite through legislative history something that he was unable to change by amendment.

Moreover, the text of section 18 further demonstrates that section 18 is not limited to patents exclusively utilized by the financial services industry. As originally adopted in the Senate, subsection (a)(1)(B) only allowed a party to file a section 18 petition if either that party or its real parties in interest had been sued or accused of infringement. In the House, this was expanded to also cover cases where a ''privy'' of the petitioner had been sued or accused of infringement. A ''privy'' is a party that has a direct relationship to the petitioner with respect to the allegedly infringing product or service. In this case, it effectively means customers of the petitioner. With the addition of the word ''privy,'' a company could seek a section 18 proceeding on the basis that customers of the petitioner had been sued for infringement. Thus, the addition of the ''privy'' language clearly demonstrates that section 18 applies to patents that may be used by entities other than the financial services industry.

The fact that a multitude of industries will be able to make use of section is evident by the broad based support for the provision, including the U.S. Chamber of Commerce and the National Retail Federation, among many others.

Mr. KIRK. Madam President, I support H.R. 1249, the Leahy-Smith America Invents Act, because this long-overdue patent reform will spur innovation, create jobs and strengthen our economy.

In particular, I am proud that this legislation contains a provision I worked to include in the Senate companion, S.23, that would establish the US Patent and Trademark Office Ombudsman Program to assist small businesses with their patent filing issues. This Ombudsman Program will help small firms navigate the bureaucracy of the patent system. Small businesses are the economic engine of our economy. According to the Small Business Administration, these companies employ just over half of all private sector employees and create over fifty percent of our nonfarm GDP. Illinois alone is home to over 258,000 small employers and more than 885,000 self-employers. Small businesses are also helping to lead the way on American innovation. These firms produce thirteen times more patents per employee than large patenting firms, and their patents are twice as likely to be the most cited among all patents. Small business breakthroughs led to the development of airplanes, FM radio and the personal computer. It is vital that these innovators spend their time developing new products and processes that will build our future, not wading through government red tape.

However, I vote for this legislation with the understanding that Section 18, which establishes a review process for business-method patents, is not too broadly interpreted to cover patents on tangible products that claim novel and non-obvious software tools used to execute business methods. H.R. 1249 seeks to strengthen our patent system in order to incentivize and protect our inventors so that Americans can grow our economy and bolster our global competiveness. Thus, it would defy the purpose of this bill if its authority were used to threaten the viable patents held by companies that employ hundreds of Americans by commercializing software products they develop and engineer.

Our Founding Fathers recognized the importance of a strong patent system. I am proud to support H.R. 1249, which will provide strong intellectual property rights to further our technological advancement.

Mr. DURBIN. Madam President, I rise to speak about the Leahy-Smith America Invents Act. This is bipartisan legislation that will enhance and protect innovation in our country. I want to commend Senator LEAHY, the chairman of the Judiciary Committee, for his leadership and tireless work on this bill. I also want to commend my Republican colleagues on the Judiciary Committee, particularly Senators GRASSLEY, KYL, and HATCH, who have worked diligently with Chairman LEAHY in this effort to reform our patent system.

In this country, if you have a good idea for a new and useful product, you can get a patent and turn that idea into a thriving business. Millions of good American jobs are created in this way. The goals of today's legislation are to improve the operations of the Patent and Trademark Office and to help inventors in this country better protect their investments in innovation. By protecting innovations, we will help grow our economy and help businesses create jobs for American workers.

I regret that after the Senate passed a version of this legislation in March in a broadly bipartisan vote of 95–5, the House of Representatives modified the Senate-passed legislation. Not all of those changes improved the bill. Today, we voted on several amendments that responded to changes made by the House. I voted in support of an amendment that sought to strike Section 37, which the House had added to the bill. This section unnecessarily interferes with a matter that is currently being considered on appeal in the federal courts. I also voted reluctantly to table an amendment to restore the Senate-passed language regarding funding of the Patent and Trademark Office. I supported the tabling motion because of the significant risk that the bill would fail if the Senate sent it back to the House with that amendment included. It is unfortunate that disagreement between the House and Senate has prevented the PTO funding issue from being more clearly resolved in the current legislation, and I believe Congress must work diligently in the future to ensure PTO has the funding and resources it needs to effectively carry out its mission.

I also voted against an amendment relating to section 18 of the bill which creates a transitional review process for certain business method patents. I cast this vote after receiving assurances from my colleagues that the scope and application of section 18 would be appropriately constrained, as it is critically important that this section not be applied in a way that would undermine the legislation's focus on protecting legitimate innovation and job creation.

I want to note specifically that there are companies in many states, including my state of Illinois, that employ large numbers of American workers in bringing to market legitimate, novel and non-obvious products that are based on and protected by business method patents. Examples of such patent-protected products include machinery that counts, sorts or authenticates currency and paper instruments, and novel software tools and graphical user interfaces that are used by electronic trading industry workers to implement trading or asset allocation strategies. Vibrant industries have developed around the production and sale of these tangible inventions, and I appreciate that patents protecting such job-creating products are not understood to be the target of section 18.

I also note that there is an exemption in section 18 for patents for technological inventions. House Judiciary Chairman SMITH provided useful clarification with respect to the scope of that exemption in the June 23, 2011, RECORD, stating that:

> Patents for technological inventions are those patents whose novelty turns on a technological innovation over the prior art and are concerned with a technical problem which is solved with a technical solution. The technological innovation exception does not exclude a patent simply because it recites technology. Inventions related to manufacturing and machines that do not simply use known technology to accomplish a novel business process would be excluded from review under Section 18.
>
> Section 18 would not cover patents related to the manufacture and distribution of machinery to count, sort, and authenticate currency. It is the intention of Section 18 to not review mechanical inventions related to the manufacture and distribution of machinery to count, sort and authenticate currency like change sorters and machines that scan currency whose novelty turns on a technological innovation over the prior art. These types of patents would not be eligible for review under this program.

I agree with Chairman SMITH, and would note again that vibrant and job-

creating industries have developed around the types of mechanical inventions he describes that deal with the counting, sorting, authentication and scanning of currency and paper instruments. I am confident that the PTO will keep this in mind as it works to craft regulations implementing the technological invention exception to section 18. I also expect the PTO to keep in mind as it crafts these regulations Congress's understanding that legitimate and job-creating technological patents such as those protecting the novel electronic trading software tools and graphical user interfaces discussed above are not the target of section 18.

Overall, I am pleased that the Congress has passed patent reform legislation with strong bipartisan support and has sent the legislation to the President's desk. It has been a long time in the making, and I again want to congratulate Chairman LEAHY for his leadership and hard work on this issue.

The PRESIDING OFFICER. The Senator from Iowa has 5 minutes.

Mr. GRASSLEY. Madam President, I urge my colleagues to oppose all three amendments to the patent bill so we can send this important jobs bill to the President of the United States for his signature.

I then urge my colleagues to support final passage of the Leahy-Smith America Invents Act. This is a strong bipartisan bill that will enhance America's innovation and give us economic growth. It will protect inventors' rights and improve transparency and third-party participation in the patent review process. It will strengthen patent quality and reduce costs and will curb litigation abuses and improve certainty for investors and innovators.

The Leahy-Smith America Invents Act will also help small entities with their patent applications and provide for reduced fees for micro entities and small businesses. It will help companies do business more efficiently both here and abroad.

The bill includes a provision that will prevent patents from being issued on claims of tax strategies. These strategies can add unwarranted fees on taxpayers for attempting to comply with the Tax Code.

Finally, the bill will enhance the operations of the Patent and Trademark Office with administrative reforms, give the Patent and Trademark Office fee-setting authority which we hope will then lead to a reduction of backlog and improve the ability of the Patent and Trademark Office to manage its affairs.

I thank Chairman LEAHY and Senator HATCH, the lead sponsors of this legislation, for the tremendous amount of work they put into this America Invents Act, not only for this Congress but over the past 3 to 4 years that this bill has been worked on. This has been a long process spanning those several Congresses, and without the leadership of these two Senators on patent reform we wouldn't be ready to cross the finish line today.

In addition, I thank the staff of the Judiciary Committee: Bruce Cohen, Aaron Cooper, Curtis LeGeyt of Chairman LEAHY's staff, Matt Sandgren of Senator HATCH's staff, and Joe Matal of Senator KYL's staff. I would like to thank the floor staff for their help in processing this bill in an efficient manner, and I would like to especially thank Kolan Davis and Rita Lari Jochum of my staff for their hard work on the bill.

So for a third time I urge my colleagues to vote for the Leahy-Smith America Invents Act and to oppose the three amendments we are going to be voting on so we can keep the bill clean and send it to the President without delay.

Senator LEAHY has made it very clear to all 100 Senators that, if we support this bill, it is a gamble to say it will be law if we have to move it beyond the Senate to the House. This bill will help American inventors create innovative new products and services and stimulate job creation. The bill will upgrade and strengthen our patent system and keep America competitive in an increasingly global economy. This is a good bill, and I urge all of my colleagues to support it.

Madam President, how much time do I have?

The PRESIDING OFFICER. There is 1 minute remaining.

Mr. GRASSLEY. I would urge my colleagues—because I rebut Senator SESSIONS' amendment—to keep in mind that when somebody tells us this is to bail out one company, understand that one company has gotten justice from the judicial branch of our government because a judge has said for that company that they were denied their rights under the 60-day rule to file for an extension of patent. So what that judge said was bureaucrats in our agencies acted in an arbitrary and capricious manner by not having the same rules that designate when the 60-day period of time starts.

So we have a judge that says so, so maybe people can refer to that opinion and get what they want. But we ought to have it in the statute of what is uniform, and that is what the bill does, and the Sessions amendment would strike that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont has the remainder of the time until 4 p.m.

Mr. LEAHY. Madam President, I thank the distinguished Senator from Iowa for his strong support of this bill.

In a few moments the Senate is going to have the opportunity to make significant reforms to our Nation's patent system for the first time in more than half a century.

The America Invents Act is the product of extensive consideration. We have worked on this for four Congresses. We have had dozens of hearings, weeks of committee debate, and I have lost count of the hundreds of other meetings we have had. This bill is an opportunity to show the American people that Democrats and Republicans can come together to enact meaningful legislation for the American people. The time to do that is now.

The only remaining issues that stand in the way of this long overdue reform are three amendments. Each of them carries some merit. In the past, I might have supported them. But this is a compromise. No one Senator can have everything he or she may want.

The underlying issues have been debated. The bill as written represents a bipartisan, bicameral agreement that should be passed without changes. Any amendment to this bill risks killing it.

I would urge all Senators, Republicans and Democrats alike, to join me and join Senator GRASSLEY in opposing these amendments. They are the final hurdles standing in the way of comprehensive patent reform.

I ask unanimous consent to have printed in the RECORD letters from businesses and workers representing the spectrum of American industry and labor urging the Senate to pass the America Invents Act without amendment.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE COALITION FOR 21ST CENTURY PATENT REFORM.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, Washington, DC.

Hon. CHARLES E. ''CHUCK'' GRASSLEY,
Ranking Member, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: We urge you to work with the leadership of the Senate to bring H.R. 1249 to the Senate floor as soon the Senate's schedule might permit and pass the bill as is.

Our Coalition believes that this legislation will fully modernize our patent laws. Indeed, it will give the world the first truly 21st century patent law—creating patentability standards that are transparent, objective, predictable and simple in their application. It will enhance the inventor-friendly and collaboration-friendly features of our existing patent law. At the same time, it will increase public participation in the patenting process, while maintaining strong protections for inventors in the provisions that do so.

The agreement reached in the House on USPTO funding will assure that the fees paid to the USPTO by inventors will not be diverted and will be made available to the Office for processing patent applications and other important functions of the Office. While we would have preferred the Senate's approach in S. 23 to prevent diversion of USPTO funds, we believe that acceptance of the House bill provides an effective and the most immediate path forward to address problems of the patent office. H.R. 1249, like S. 23, is an excellent bill. These bills are the

product of many years of skillful and difficult legislative work in both the House and the Senate. We believe the time has now come for the Senate to take the final legislative act required for enactment of these historic reforms.

Sincerely,

GARY L. GRISWOLD.

COALITION FOR PATENT FAIRNESS,
June 27, 2011.

Hon. PATRICK J. LEAHY,
Chairman, U.S. Senate, Committee on the Judiciary, Washington, DC.
Hon. CHARLES E. GRASSLEY,
Ranking Member, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: After years of effort, both houses of Congress have now successfully passed patent reform by impressive margins. On behalf of the high tech community, we congratulate you, as well as your House colleagues, on this achievement.

The Coalition for Patent Fairness supports Senate acceptance of H.R. 1249 as passed by the House. While neither bill is as we would have written it, we believe that the House passed bill represents the best opportunity to improve the patent system at the present time. We are also quite aware that House leaders worked very hard to take into account the views of the Senate during their deliberations.

H.R. 1249, as passed, offers us a chance of consensus and we believe it should be passed and signed into law. We are looking forward to advancing other policy matters that boost innovation and growth in this country.

Sincerely,

COALITION FOR PATENT FAIRNESS.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Washington, DC, September 6, 2011.

TO THE MEMBERS OF THE UNITED STATES SENATE: The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, strongly supports H.R. 1249, the ''America Invents Act,'' which would encourage innovation and bolster the U.S. economy. The Chamber believes this legislation is crucial for American economic growth, jobs, and the future of U.S. competitiveness.

A key component of H.R. 1249 is section 22, which would help ensure that fees collected by the U.S. Patent and Trademark Office (PTO) fund the office and its administration of the patent system. PTO faces significant challenges, including a massive backlog of pending applications, and this backlog is stifling domestic innovators. The fees that PTO collects to review and approve patent applications should be dedicated to PTO operation. However, fee diversion by Congress has hampered PTO's efforts to hire and retain a sufficient number of qualified examiners and implement technological improvements necessary to ensure expeditious issuance of high quality patents. Though the PTO funding compromise embodied in the House-passed bill could be strengthened to match the fee diversion provision originally passed by the Senate, as crafted, Section 22 represents a meaningful step toward ensuring that PTO has better access to the user fees it collects, and would better allow the agency to address the current backlog of 1.2 million applications waiting for a final determination and pendency time of three years, as well as to improve patent quality.

In addition, the legislation would help ensure that the U.S. remains at the forefront of innovation by enhancing the PTO process and ensuring that all inventors secure the exclusive right to their inventions and discoveries. The bill shifts the U.S. to a first-inventor-to-file system that the Chamber believes is both constitutional and wise, ending expensive interference proceedings. H.R. 1249 also contains important legal reforms that would help reduce unnecessary litigation against American businesses and innovators. Among the bill's provisions, Section 16 would put an end to frivolous false patent marking cases, while still preserving the right of those who suffered actual harm to bring actions. Section 5 would create a prior user right for those who first commercially use inventions, protecting the rights of early inventors and giving manufacturers a powerful incentive to build new factories in the United States, while at the same time fully protecting universities. Section 19 also restricts joinder of defendants who have tenuous connections to the underlying disputes in patent infringement suits. Section 18 of H.R. 1249 provides for a tailored pilot program which would allow patent office experts to help the court review the validity of certain business method patents using the best available prior art as an alternative to costly litigation.

The Chamber strongly opposes any amendments to H.R. 1249 that would strike or weaken any of the important legal reform measures in this legislation, including those found in Sections 16, 5, 19 and 18.

The Chamber strongly supports H.R. 1249. The Chamber may consider votes on, or in relation to, H.R. 1249—including procedural votes, and any weakening Pamendments—in our annual How They Voted scorecard.

Sincerely,

R. BRUCE JOSTEN,
Executive Vice President, Government Affairs.

UNITED STEELWORKERS,
Pittsburgh, PA, July 15, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY: On behalf of the United Steelworkers, I am writing to urge you to consider support for the recently passed House bill, H.R. 1249. Over the past several years the USW has been deeply involved in discussions concerning comprehensive patent reform. We were principally concerned with issues dealing with how damages are calculated for infringed patents, new post-grant review procedures, and publication requirements for pending patents. H.R. 1249, as did S. 23 which passed earlier this year, satisfactorily addresses these issues and has our support. While we prefer the provision in the Senate bill dealing with USPTO funding, we nevertheless believe that the House bill moves in the right direction and will help insure that the patent office has the appropriate and necessary resources to do its important work.

Certainly, no bill is perfect. But H.R. 1249 goes a long way toward balancing different interests on a very difficult and contentious issue. We believe it warrants your favorable consideration and enactment by the Senate so that it can be moved to the President's desk and signed into law without undue delay.

We worked closely with your office, and others in the Senate, in finding a consensus approach that would promote innovation, investment, production and job creation in the U.S. We believe that H.R. 1249, which builds on your work in the Senate, strikes a proper balance.

The U. S. economy remains in a very fragile state with high unemployment and stagnant wages. Patent reform can be an important part of a comprehensive approach to getting the economy moving again and I urge its enactment.

Sincerely,

LEO W. GERARD,
International President.

JUNE 27, 2011.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Washington, DC.
Hon. CHUCK GRASSLEY,
Ranking Member,
Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: We write on behalf of six university, medical college, and higher education associations to encourage you to work with the leadership of the Senate to bring H.R. 1249 before the Senate as soon as possible for a vote on passage of the bill as is.

The patent system plays a critical role in enabling universities to transfer the discoveries arising from university research into the commercial sector for development into products and processes that benefit society. H.R. 1249 closely resembles S. 23; both bills contain provisions that will improve patent quality, reduce patent litigation costs, and provide increased funding for the USPTO. Although we preferred the USPTO revolving fund established in S. 23, we believe that the funding provisions adopted by the House in the course of passing H.R. 1249 provide an effective means of preventing fee diversion. Together with the expanded fee-setting authority included in both bills, H.R. 1249 will provide USPTO with the funding necessary to carry out its critical functions.

We very much appreciate the leadership of the Senate Judiciary Committee in crafting S. 23, which brought together the key elements of effective patent reform and formed the basis for H.R. 1249. These bills represent the successful culmination of a thorough, balanced effort to update the U.S. patent system, strengthening the nation's innovative capacity and job creation in the increasingly competitive global economic environment of the 21st century. Senate passage of H.R. 1249 will assure that the nation secures these benefits.

Sincerely,

HUNTER R. RAWLINGS III,
President, Association of American Universities.
MOLLY CORBETT BROAD,
President, American Council on Education.
DARRELL G. KIRCH,
President and CEO, Association of American Medical Colleges.
PETER MCPHERSON,
President, Association of Public and Land-grant Universities.
ROBIN L. RASOR,
President, Association of University Technology Managers.
ANTHONY P. DECRAPPEO,

President, Council on Governmental Relations.

JUNE 25, 2011.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: As an independent inventor and someone who has personally interacted with thousands of other independent inventors and entrepreneurs, we urge you to work with the leadership of the Senate to bring H.R. 1249 to the Senate floor as soon the Senate's schedule might permit and pass the bill as is.

Over the past few months, my enthusiasm and belief in the legislative process has grown as I have participated in the debate over patent reform. I believe that this legislation will fully modernize our patent laws. It will give independent inventors and entrepreneurs the speed and certainty necessary to go out and commercialize their inventions, start companies, and create jobs.

There has been a great deal of compromise amongst industries to balance the unique needs of all constituents. The independent inventor has been well represented throughout this process and we are in a unique situation where there is overwhelming support for this legislation.

The fee diversion debate has been important, since it has shed light on the fact that nearly a billion dollars has been diverted from the USPTO. These are dollars that inventors have paid to the USPTO expecting the funds to be used to examine applications as expeditiously as possible. While I would have preferred the Senate's approach in S. 23 to prevent diversion of USPTO funds, I believe that acceptance of the House bill provides the best way to ensure that the funds paid to the patent office will be available to hire examiners and modernize the tools necessary for it to operate effectively.

H.R. 1249 is the catalyst necessary to incentivize inventors and entrepreneurs to create the companies that will get our country back on the right path and generate the jobs we sorely need. I hope that you will take the needs of the ''little guy'' into consideration and move this legislation forward and enact these historic reforms.

Sincerely,

LOUIS J. FOREMAN,
CEO.

Mr. LEAHY. The bill is important for our economy. It is important for job creation. It is a product of bipartisan and bicameral collaboration. It is the way our system is supposed to work. I look forward to passing the bill and sending it directly to the President's desk for his signature.

I know my friends both on the Republican side and Democratic side have amendments to this bill, but they are not amendments that should pass. I mentioned the one earlier. I talked about the amendment that would put all our—well, Madam President, which amendment is the first in order?

The PRESIDING OFFICER. Sessions amendment No. 600.

Mr. LEAHY. Madam President, I yield the floor. I know both Senator SESSIONS and Senator GRASSLEY wish to speak to that.

The PRESIDING OFFICER. The Senators will have 4 minutes equally divided.

The Senator from Alabama.

Mr. SESSIONS. Madam President, the oath that judges take is to do equal justice, and it says for the poor and the rich.

Every day statutes of limitations require that a litigant file a lawsuit within so many days and file petitions in so many days. I see Senator CORNYN, a former justice on the Texas Supreme Court and attorney general of Texas. He fully understands that. I know he supports my view of this issue; that is, that the rules have to be equally applied.

It is just not right to the little widow lady, it is not right that somebody with a poor lawyer, or whatever, misses a deadline and a judge throws the case out. And they do. Big law firms such as WilmerHale file motions every day to dismiss cases based on delay in filing those cases. Big insurance companies file lawsuits, file motions to dismiss every day against individuals who file their claims too late—and they win. So when this big one has a good bit of risk, presumably they have a good errors and omissions policy—that is what they are supposed to do.

One reason they get paid the big bucks—and the average partner makes $1 million-plus a year—is because they have high responsibilities, and they are required to meet those responsibilities and be responsible.

So I believe it is improper for us, while this matter is on appeal and in litigation, to take action driven by this continual lobbying pressure that would exempt one company. They can say it is others involved, but, look, this is always about one company. I have been here for 10 years. I know how it is played out. I have seen it. I have talked to the advocates on their behalf. I just haven't been able to agree to it because I see the average person not getting the benefit they are due.

So I urge my colleagues to join in support of this amendment. The Wall Street Journal and others have editorialized in favor of it, and I urge my colleagues to support it.

Mr. GRASSLEY. How much time do I have?

The PRESIDING OFFICER. Two minutes in opposition to the amendment.

Mr. GRASSLEY. I think the Senator from Alabama has given me a reason to suggest the importance of the language of the bill he wants to strike because he said that law ought to be equally applied.

The law for this one company is that they were not given justice by bureaucrats who acted in an arbitrary and capricious manner and they were denied their rights under the law. So that company is taken care of because there was an impartial judge who believed they had been abused in their rights under Hatch-Waxman to be able to extend their patent.

You might be able to argue in other places around the country when you are likewise denied your right that you have this court case to back you up, but we cannot have one agency saying when a 60-day period of time starts for mail going in or mail going out to exercise your 60-day period, and for another agency to do it another way. That is basically what the judge said, that Congress surely could not have meant that.

The language of this section 37 does exactly what Senator SESSIONS wants, which is to guarantee in the future that no bureaucrat can act in an arbitrary and capricious way when they decide when does the 60-day period of time start. We put it in the statute of the United States so the courts look at it and the bureaucrats look at it in exactly the same way.

If you are a citizen of this country, you ought to know what your rights are. You ought to know that a bureaucrat treats you the same way they treat, in like situations, somebody else. You cannot have this sort of arbitrary and capricious action on the part of faceless bureaucrats that denies the rights. This puts it in statute and solidifies it so everybody knows what the law is, rather than relying upon one judge or in the future having to rely upon the court someplace else. I ask my colleagues not to support the Sessions amendment because it would deny equal rights to some people in this country, as this judge said those equal rights were already denied.

The PRESIDING OFFICER (Ms. KLOBUCHAR). The time has expired. The Senator from Vermont.

Mr. LEAHY. Madam President, I ask unanimous consent that after the first vote—we have several more votes—the remaining votes be 10-minute votes.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Vermont.

Mr. LEAHY. Have the yeas and nays been ordered?

The PRESIDING OFFICER. They have not.

The question is on agreeing to the Sessions amendment No. 600.

Mr. SESSIONS. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. ROCKEFELLER) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Indiana (Mr. COATS).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 47, nays 51, as follows:

[Rollcall Vote No. 126 Leg.]

YEAS—47

Alexander	Enzi	Murkowski
Ayotte	Hatch	Paul
Barrasso	Heller	Portman
Baucus	Hoeven	Risch
Boozman	Hutchison	Rubio
Boxer	Inhofe	Sessions
Cantwell	Isakson	Shelby
Casey	Johanns	Snowe
Chambliss	Johnson (WI)	Stabenow
Coburn	Kirk	Tester
Conrad	Lee	Thune
Corker	Manchin	Toomey
Cornyn	McCain	Udall (CO)
Crapo	McCaskill	Vitter
DeMint	McConnell	Wicker
Durbin	Moran	

NAYS—51

Akaka	Graham	Merkley
Begich	Grassley	Mikulski
Bennet	Hagan	Murray
Bingaman	Harkin	Nelson (NE)
Blumenthal	Inouye	Nelson (FL)
Blunt	Johnson (SD)	Pryor
Brown (MA)	Kerry	Reed
Brown (OH)	Klobuchar	Reid
Burr	Kohl	Roberts
Cardin	Kyl	Sanders
Carper	Landrieu	Schumer
Cochran	Lautenberg	Shaheen
Collins	Leahy	Udall (NM)
Coons	Levin	Warner
Feinstein	Lieberman	Webb
Franken	Lugar	Whitehouse
Gillibrand	Menendez	Wyden

NOT VOTING—2

Coats	Rockefeller

The amendment was rejected.

Mr. LEVIN. Madam President, I move to reconsider the vote.

Mr. KERRY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 595

The PRESIDING OFFICER. There will now be 4 minutes equally divided prior to a vote in relation to the Cantwell amendment.

The Senator from Washington.

Ms. CANTWELL. Madam President, I encourage my colleagues to support the Cantwell amendment. The Cantwell amendment is the reinstatement of section 18 language as it passed the Senate. So casting a vote for the Cantwell amendment will be consistent with language previously supported by each Member.

The reason we are trying to reinstate the Senate language is because the House language broadens a loophole that will allow for more confusion over patents that have already been issued. It will allow for the cancellation of patents already issued by the Patent Office, throwing into disarray and legal battling many companies that already believe they have a legitimate patent.

The House language, by adding the word ''other,'' broadens the definition of section 18 and extends it for 8 years, so this chaos and disarray that is supposedly targeted at a single earmark for the banking industry to try to get out of paying royalties is now so broadened that many other technology companies will be affected.

I urge my colleagues to support the Cantwell amendment and reinstate the language that was previously agreed to.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Madam President, I rise in opposition to the amendment of my dear friend, Senator CANTWELL.

Business method patents are a real problem. They never should have been patented to begin with. Let me give an example: double click. We double click on a computer or something such as that and after it becomes a practice for awhile, someone files a patent and says they want a patent on double clicking. Because of the way the Patent Office works, the opponents of that never get a chance to weigh in as to whether it should be a patent. The Patent Office has gone way overboard in allowing these business method patents.

One might say: Then you get your day in court. That is true, except 56 percent—more than half—of all the business method patent litigation goes to one district, the Eastern District of Texas, which is known to be extremely favorable to the plaintiffs. It takes about 10 years to litigate. It costs tens of millions of dollars. So the people who are sued over and over for things such as double clicking or how to photograph a check—common things that are business methods and not patents—settle. It is a lucrative business for a small number of people, but it is wrong.

What this bill does is very simple. What the bill does, in terms of this amendment, is very simple. It says the Patent Office will make an administrative determination before the years of litigation as to whether this patent is a legitimate patent so as not to allow the kind of abuse we have seen. It applies to all financial transactions, whether it be a bank or Amazon or a store or anybody else, and it makes eminent sense.

So as much respect as I have for my colleague from Washington, I must strongly disagree with her argument and urge that the amendment be voted down.

I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Ms. CANTWELL. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. PAUL (when his name was called). Present.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. ROCKEFELLER) is necessarily absent.

The result was announced—yeas 13, nays 85, as follows:

[Rollcall Vote No. 127 Leg.]

YEAS—13

Boxer	Johnson (WI)	Sessions
Cantwell	Lee	Udall (CO)
Coburn	McCaskill	Vitter
DeMint	Murray	
Hatch	Pryor	

NAYS—85

Akaka	Franken	Merkley
Alexander	Gillibrand	Mikulski
Ayotte	Graham	Moran
Barrasso	Grassley	Murkowski
Baucus	Hagan	Nelson (NE)
Begich	Harkin	Nelson (FL)
Bennet	Heller	Portman
Bingaman	Hoeven	Reed
Blumenthal	Hutchison	Reid
Blunt	Inhofe	Risch
Boozman	Inouye	Roberts
Brown (MA)	Isakson	Rubio
Brown (OH)	Johanns	Sanders
Burr	Johnson (SD)	Schumer
Cardin	Kerry	Shaheen
Carper	Kirk	Shelby
Casey	Klobuchar	Snowe
Chambliss	Kohl	Stabenow
Coats	Kyl	Tester
Cochran	Landrieu	Thune
Collins	Lautenberg	Toomey
Conrad	Leahy	Udall (NM)
Coons	Levin	Warner
Corker	Lieberman	Webb
Cornyn	Lugar	Whitehouse
Crapo	Manchin	Wicker
Durbin	McCain	Wyden
Enzi	McConnell	
Feinstein	Menendez	

ANSWERED ''PRESENT''—1

Paul

NOT VOTING—1

Rockefeller

The amendment was rejected.

AMENDMENT NO. 599, AS MODIFIED

The PRESIDING OFFICER. There is now 4 minutes equally divided prior to the vote in relation to the Coburn amendment.

The Senator from Oklahoma is recognized.

Mr. COBURN. Madam President, this is a straightforward amendment that says if you pay into the Patent Trademark Office to have a patent evaluated, that money ought to be spent on the process. We have now stolen almost $900 million from the Patent Office. We have almost a million patents in arrears. We have fantastic leadership in the Patent Office, and we will not send them the money to do their job. It is unconscionable that we will not do this.

I understand the arguments against it, and I reserve the remainder of our time.

Mrs. FEINSTEIN. Madam President, I rise today in support of Senator COBURN's amendment to prevent the diversion of patent and trademark fees to other purposes.

I am pleased to be a cosponsor of this amendment. I believe this amendment is critical for this bill to have the innovation-encouraging, job-creating effects that its proponents say it will.

Prior to 1990, taxpayers supported the operations of the Patent and Trademark Office, or PTO. In 1990, this was

changed through a 69 percent user fee ''surcharge,'' so that the PTO became funded entirely through fees paid by its users, the American inventors who seek to protect the genius of their inventions from those who would copy these innovations for their own profit.

In short order, Congress began using the funds that inventors paid to protect their inventions for other purposes. In 1992, $8.1 million in user fees were diverted. In 1993, $12.3 million was diverted. In 1994, $14.7 million. And so it continued, escalating every year, until what started as a trickle became a flood in 1998, with $200.3 million in PTO user fees diverted. All told, since 1992, an estimated $886 million in fees that were paid for the efficient and effective operation of the Patent and Trademark Office have been diverted to other uses, according to the Intellectual Property Owners Association.

Meanwhile, at the same time that these fees were being taken away, the length of time that it takes to get a patent out of the Patent Office has steadily increased. In fiscal year 1991, average patent pendency was 18.2 months. By fiscal year 1999, it had increased to 25 months. By fiscal year 2010, average patent pendency had increased all the way to 35.3 months.

These are not just numbers. This is innovation being stifled from being brought to market. The longer it takes to get a patent approved, the longer a new invention, a potential technological breakthrough, sits on the shelf gathering dust instead of spurring job growth and scientific and economic progress.

Ultimately, this hurts the competitiveness of the American economy. America has a stunning record of leading the world in innovation, which has provided us a competitive edge over the decades and even centuries. By stifling the progress of our innovation within the PTO, we are dulling that competitive edge.

Obviously, there is a direct relationship between fee diversion and patent pendency. The more fees that are diverted away from the PTO, the fewer patent examiners they can hire, the more patents each examiner has to process, and the longer it takes them to get to any individual patent—a longer patent pendency.

The manager of this bill, the distinguished chairman of the Judiciary Committee, has argued that ''the bill will speed the time it takes for applications on true inventions to issue as high quality patents, which can then be commercialized and used to create jobs. . . . The America Invents Act will ensure that the PTO has the resources it needs to work through its backlog of applications more quickly. The bill accomplishes this objective by authorizing the PTO to set its fees . . .''

But what this bill gave with the one hand, in authorizing the PTO to set its fees, the House of Representatives took away with the other hand, by striking the strong antifee diversion language that the Senate included in its patent bill earlier this year. Setting higher fee levels to reduce patent pendency does no good if those fees are simply diverted away from the PTO, and not used to hire additional patent examiners. Indeed, requiring the payment of higher patent fees which are then used for general government purposes really amounts to a tax on innovation—which is the last thing we should be burdening in today's technology-driven economy.

The chairman argues that the bill ''creates a PTO reserve fund for any fees collected above the appropriated amounts in a given year—so that only the PTO will have access to these fees.'' However, with all due respect, the language that the House put into the bill is not really different from previous bill language that proved ineffective to prevent diversion.

The 1990 law that authorized the patent user surcharge provided that the surcharges ''shall be credited to a separate account established in the Treasury . . .; '' and ''shall be available only to the Patent and Trademark Office, to the extent provided in appropriation Acts. . . .''

However, notwithstanding this language, the Congressional Budget Office found in 2008 that $230 million had been diverted from the surcharge account.

Similarly, the House changed the bill before us today to ''establish[] in the Treasury a Patent and Trademark Fee Reserve Fund . . .; '' and ''to the extent and in the amounts provided in appropriations Acts, amounts in the Fund shall be made available until expended only for obligation and expenditure by the Office . . .''

The key language is the same—''to the extent provided in appropriation Acts.'' Calling it a ''fund'' rather than an ''account'' should not lead anyone to expect a different result.

Indeed, the Senate bill that we passed earlier this year explicitly struck the existing statutory language, ''To the extent and in the amounts provided in advance in appropriations Acts . . .'' And the House specifically restored that language, omitting only the words ''in advance.'' The Coburn amendment would restore the changes we made earlier this year, eliminating that language again.

The Coburn amendment, like the Senate bill, contains other key language, providing that amounts in the fund it establishes ''shall be available for use by the Director without fiscal year limitation.'' The bill before us today provides no such protection against diversion.

In short, this bill will permit the continued diversion of patent fees, to the detriment of American inventors and innovation.

But don't just take my word for this. The Intellectual Property Owners Association, which includes more than 200 companies, just yesterday said:

> The greatest disappointment with the House-passed patent reform bill H.R. 1249 . . . is its failure to stop USPTO fee diversion. The House-passed patent reform bill creates another USPTO account, a ''reserve fund,'' but nothing in the proposed statutory language guarantees the USPTO access to the funds in this new account. The language of H.R. 1249 defers to future appropriations bills to instruct the USPTO on how to access fees in the new USPTO account. Therefore, despite some claims to the contrary, the creation of this new account, alone, will not stop diversion.

The Innovation Alliance, a major coalition of innovative companies, and CONNECT, an organization dedicated to supporting San Diego technology and life science businesses, among others, also believe that the House language is insufficient to prevent fee diversion.

Without this protection from fee diversion, this bill could well make our patent system worse, not better. Many of the changes made by this bill will impose additional burdens on the PTO. For example, the CBO found that the new post-grant review procedure would cost $140 million to implement over a 10-year period; the new supplemental review procedure would cost $758 million to implement over that period; and the changes to the inter partes reexamination procedure would cost $251 million to implement.

All told, these changes would impose additional duties on the PTO costing over $1 billion to implement over a 10-year period. If the PTO is not permitted to keep the fees it needs to meet these obligations, patents will take even longer to be issued, and the promised improvements in patent quality may prove to be ephemeral. We won't encourage innovation; we won't create new jobs.

Therefore, I urge my colleagues to support the amendment by the Senator from Oklahoma, to support the strong antidiversion language that we passed this Spring, and to end fee diversion once and for all.

Ms. MIKULSKI. Madam President, I rise in opposition to the amendment to the America Invents Act offered by the Senator from Oklahoma.

I, along with my fellow members of the Appropriations Committee, share the Senator from Oklahoma's goal of ensuring that all fees paid by inventors to the U.S. Patent and Trademark Office, PTO, are used only for the operations of the PTO. The PTO fosters American innovation and job creation by providing protections for ideas and products developed by our entrepreneurs, businesses and academic institutions.

As the chairwoman of the Appropriations Subcommittee that funds the PTO, I have worked to ensure that PTO

receives every dollar it collects from inventors. But, while I share the Senator's goal, I oppose his amendment for three reasons.

First, the amendment is unnecessary. It is a solution in search of a problem. The underlying America Invents Act before the Senate today ensures that PTO can keep and spend all of the fees collected. This legislation establishes a Patent and Trademark Fee Reserve Fund. Any fees collected in excess of annual appropriations would be deposited into the fund, and those fees would remain available until expended solely for PTO operations.

The creation of this fund is not a new idea. Provisions of several bills reported out of the Senate Appropriations Committee in prior years allowed PTO to keep and spend fee revenue in excess of appropriations levels. I can assure my colleagues that the committee will continue to support such language.

Second, the amendment would significantly reduce oversight of the PTO. The Senator from Oklahoma's amendment would establish a new, off-budget revolving fund for PTO fees. This would put the PTO on autopilot, without the oversight of an annual legislative vehicle to hold the agency accountable for progress and wise use of taxpayer funding.

Since fiscal year 2004, funding for PTO has increased by over 70 percent. At the same time, however, the backlog of patent applications has climbed to more than 700,000. It now takes over three years for PTO to make a decision on a patent application. This is unacceptable. While America's inventors are waiting in line, their ideas are being stolen by other countries.

Through annual appropriations bills, the Appropriations Committee has succeeded in forcing management reforms that have slowed the growth of PTO's backlogs and improved employee retention. While further accountability is needed, the America Invents Act keeps PTO on budget and on track for continued oversight by the Appropriations Committee each year.

Finally, the Senator's amendment could have unintended consequences. If PTO were permitted to operate on autopilot, the agency could face fee revenue shortfalls and the Appropriations Committee would not be poised to assist. The committee continually monitors the agency's fee projections to ensure the agency can operate effectively. It is not widely known, but over the past 6 years, PTO has actually collected nearly $200 million less than the appropriated levels.

In fact, I recently received a letter from the Director of the PTO informing my Subcommittee that fee estimates for fiscal year 2012 have already dropped by $88 million. I will ask consent to have this letter printed in the RECORD. If PTO was put on autopilot as proposed by the Senator's amendment, the committee would no longer have the tools to provide the necessary funding to keep our patent and trademark system operating should a severe funding gap occur.

The PTO's full access to fee revenue is critical to American innovation and job creation. I commend Chairman LEAHY for his efforts to improve the patent system and ensure that PTO funding is spent wisely and effectively. I support the funding provisions of the America Invents Act and oppose the Coburn amendment. I urge my colleagues to do the same.

Madam President, I ask unanimous consent to have printed in the RECORD the letter to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES PATENT
AND TRADEMARK OFFICE,
Alexandria, VA, September 1, 2011.

Hon. BARBARA A. MIKULSKI,
Chairwoman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, U.S. Senate, Washington, DC.

DEAR MADAM CHAIR: This letter provides you with the United States Patent and Trademark Office's (USPTO) current, revised fee collection estimates for fiscal year (FY) 2012, as requested in the report accompanying H.R. 3288 (Pub. L. No. 111–117).

The President's FY 2012 Budget supports an aggressive approach to improving operations at the Agency, reducing the patent backlog and contributing to economic recovery efforts. The fee collection estimate submitted with the FY 2012 President's Budget earlier this year was $2,706.3 million, including a 15% interim increase to certain patent user fee rates. This increase will help fund efforts to reduce the backlog of unexamined patent applications. Using more recent information, outcomes of events, and projections of demand for USPTO services, we now expect fee collections for FY 2012 to be in the $2,431.9 million to $2,727.6 million range, with a working estimate of $2,618.2 million (a decrease of $88.1 million from the FY 2012 President's Budget estimate).

The projected decrease is attributable to factors both internal and external to the USPTO; namely, a change in strategic direction resulting in the Office not pursuing a cost recovery regulatory increase to Request for Continued Examination fee rates (this was estimated to generate about $70 million in patent application fees), the decision not to pursue a Consumer Price Index increase to patent statutory fees, and the decrease in demand for USPTO services as a result of processing reengineering gains from compact prosecution. The USPTO bases these revisions on current demand as well as discussions with our stakeholders about expected trends. The USPTO also reviews filing trends in foreign patent offices, which have experienced similar difficulties in estimating demand.

In closing, the USPTO would like to thank the subcommittee for their support of the Leahy-Smith America Invents Act. We are especially grateful for the subcommittee's support in ensuring all fees collected by the USPTO will be made available for the USPTO to use in examination and intellectual property activities supporting the fee paying community.

If you or your staff have any questions, please contact Mr. Anthony Scardino, the USPTO's Chief Financial Officer, at (571) 272–9200. Thank you for your continued support of the United States Patent and Trademark Office.

Sincerely,

DAVID J. KAPPOS,
Under Secretary and Director.

Identical Letters sent to:

The Hon. Kay Bailey Hutchison, Ranking Member, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. ÷Senate, Washington, DC.

The Hon. Frank R. Wolf, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives, Washington, DC.

The Hon. Chaka Fattah, Ranking Member, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, House of Representatives, Washington, DC.

The PRESIDING OFFICER. Who yields time?

The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I understand what the Senator from Oklahoma says, but the Coburn amendment can derail and even kill this bill. So, as I have told the Senator, I will move to table in a moment. But this bill would otherwise help our recovering economy. It would unleash innovation and create jobs.

I have worked for years against Patent Office fee diversion, but I oppose this amendment. Its formulation was already rejected by the House of Representatives. They have made it very clear. There is no reason they will change. This amendment can sink years of efforts by both Republicans and Democrats in this body and the other body to pass it. Actually, this amendment could kill the bill over a mere formality: the difference between a revolving fund and a reserve fund.

We have worked out a compromise in good faith. The money, the fees—under the bill as it is here—can only be spent at the PTO, but the only thing is, we actually have a chance to take a look at what they are spending it on, so they could not buy everybody a car or they could not have a gilded palace. They actually have to spend it on getting through the backlog of patents. It will not go anywhere else. It will only go to the Patent Office.

So we should not kill the bill over this amendment. We should reject the amendment and pass the bill. It is time for us to legislate. That is what the American people elected us to do. That is what they expect us to do. Let's not kill the bill after all this work over something that will really make no difference in the long run. So I therefore will move to table the Coburn amendment.

The PRESIDING OFFICER. All time has not yet expired.

Mr. COBURN. Madam President, I think I have reserved my time.

The PRESIDING OFFICER. The Senator from Oklahoma has reserved his time. He has 1½ minutes.

Mr. COBURN. Madam President, I will make the following points, and I would ask for order before I do that.

The PRESIDING OFFICER. Could we please have order so the Senator from Oklahoma can speak.

Mr. COBURN. It is true that the House bill moves the money to where it cannot be spent elsewhere, but there is no requirement that the money be spent in the Patent Office. There is a written agreement between an appropriations chairman and the Speaker that is good as long as both of them are in their positions. This is a 7-year authorization. It will not guarantee that the money actually goes to the Patent Office.

This bill, with this amendment in it, went out of the House Judiciary Committee 32 to 3 in a strong, bipartisan vote. It was never voted on in the Senate because the appropriators objected because of a technical error, which has been corrected in this amendment. So it violates no House rules, it violates no condition and, in fact, will guarantee that the Patent Office has the funds it needs to have to put us back in the place we need to be.

This bill will not be killed because we are going to make sure the money for patents goes to the Patent Office. Anybody who wants to claim that, ask yourself what you are saying. We are not going to do the right thing because somebody says they will not do the right thing? We ought to do the right thing.

I yield back the remainder of my time.

Mr. LEAHY. Madam President, because this amendment would kill the bill, I move to table the amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. ROCKEFELLER) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Florida (Mr. RUBIO).

The PRESIDING OFFICER (Mr. FRANKEN). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 50, nays 48, as follows:

[Rollcall Vote No. 128 Leg.]

YEAS—50

Akaka	Brown (OH)	Coons
Baucus	Cardin	Durbin
Bennet	Carper	Franken
Bingaman	Casey	Gillibrand
Blumenthal	Cochran	Grassley
Brown (MA)	Collins	Hagan
Harkin	Lieberman	Reed
Hoeven	Lugar	Reid
Inouye	Manchin	Sanders
Johnson (SD)	Menendez	Schumer
Kerry	Merkley	Shaheen
Kohl	Mikulski	Shelby
Kyl	Murkowski	Stabenow
Landrieu	Murray	Udall (NM)
Lautenberg	Nelson (NE)	Webb
Leahy	Nelson (FL)	Whitehouse
Levin	Pryor	

NAYS—48

Alexander	DeMint	McConnell
Ayotte	Enzi	Moran
Barrasso	Feinstein	Paul
Begich	Graham	Portman
Blunt	Hatch	Risch
Boozman	Heller	Roberts
Boxer	Hutchison	Sessions
Burr	Inhofe	Snowe
Cantwell	Isakson	Tester
Chambliss	Johanns	Thune
Coats	Johnson (WI)	Toomey
Coburn	Kirk	Udall (CO)
Conrad	Klobuchar	Vitter
Corker	Lee	Warner
Cornyn	McCain	Wicker
Crapo	McCaskill	Wyden

NOT VOTING—2

Rockefeller	Rubio

The motion was agreed to.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, we have one more vote. We will have 4 minutes of debate and then a vote on final passage. This is important legislation.

The President's speech is at 7 o'clock. We will gather here at 6:30 to proceed to the House Chamber.

When the President's speech is over, we will come back here, and I will move to proceed to the debt ceiling vote that we know is coming. If that motion to proceed fails, then we will be through for the week as far as votes go. If the vote to proceed is affirmative in nature, we will be back tomorrow, and there will be 10 hours allowed, but we don't have to use it all.

We will have to finish this matter tomorrow. I think it is clear that I hope we don't proceed to that, but we will have to see. I am here tomorrow. That vote will start very quickly tonight, as soon as the speech is over. We will be in recess subject to the call of the Chair. The vote will start quickly.

Also, I have talked to the Republican leader about how we are going to proceed next week. We don't have that defined, but I am waiting to hear from the Speaker, either tonight or tomorrow, to make more definite what we need to do next week.

Again, we have one more vote after the President's speech tonight.

Mr. President, I move to reconsider the last vote.

Mr. KERRY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. There will now be 4 minutes of debate equally divided prior to the vote on passage of the measure. Who yields time?

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, 6 months ago, the Senate approved the America Invents Act to make the first meaningful, comprehensive reforms to the Nation's patent system in nearly 60 years. Today, the Senate has come together once again, this time to send this important, job-creating legislation to the President to be signed into law.

Casting aside partisan rhetoric, and working together in a bipartisan and bicameral manner, Congress is sending to President Obama the most significant jobs bill of this Congress. The bill originated 6 years ago in the House of Representatives, when Chairman SMITH and Mr. BERMAN introduced the first patent reform proposals.

After dozens of congressional hearings, markup sessions, and briefings, and countless hours of Member and staff meetings, through two Presidential administrations, and three Congresses, patent reform is finally a reality.

The Leahy-Smith America Invents Act is a bipartisan bill and a bipartisan accomplishment. This is what we in Washington can do for our constituents at home when we come together for the benefit of the country, the economy, and all Americans.

I especially thank Senator KYL for his work in bringing this bill to the floor of the Senate—twice—and Senator GRASSLEY for his commitment to making patent reform the Judiciary Committee's top priority this year. Chairman SMITH, in the other body, deserves credit for leading the House's consideration of this important bill. I look forward to working with him on our next intellectual property priority—combating online infringement.

I thank the members of the Senate Judiciary Committee, who worked together to get quorums and get this passed. I thank them for their contribution.

Mr. President, I acknowledge several members of my Judiciary Committee staff, specifically Aaron Cooper, who sits here beside me. He spent more hours than I even want to think about, or his family wants to think about, working with me, other Senators, Members of the House, other staff, and stakeholders to preserve the meaningful reforms included in the America Invents Act, as did Susan Davis before him. Ed Pagano, my chief of staff, kept everybody together. I also thank Bruce Cohen, my chief counsel on the Judiciary Committee, who every time I thought maybe we are not going to make it would tell me ''You have to keep going,'' and he was right. Erica Chabot, Curtis LeGeyt, and Scott Wilson of my Judiciary Committee staff have also spent many hours working on this legislation.

I also commend the hard-working staff of other Senators, including Joe Matal, Rita Lari, Tim Molino, and Matt Sandgren for their dedication to this legislation. Chairman SMITH's dedicated staff deserves thanks as well,

including Richard Hertling, Blaine Merritt, Vishal Amin, and Kim Smith.

I would also like to thank the majority leader for his help in passing this critical piece of legislation.

The America Invents Act is now going to be the law of the land. I thank all my colleagues who worked together on this.

In March, the Senate passed its version of the America Invents Act, S. 23, by a 95–5 vote. One of the key provisions of the legislation transitions the United States patent system from a first-to-invent system to a first-inventor-to-file system. The Senate considered and rejected an amendment to strike this provision, with 87 Senators voting to retain the transition.

When this body first considered the America Invents Act, some suggested that along with the first-inventor-to-file transition, the legislation should expand the prior user rights defense. The prior user rights defense, in general, is important for American manufacturers because it protects companies that invent and use a technology, whether embodied in a process or product, but choose not to disclose the invention through the patenting process, and instead rely on trade secret protection. The use of trade secrets instead of patenting may be justified in certain instances to avoid, for example, the misappropriation by third parties where detection of that usage may be difficult. These companies should be permitted to continue to practice the invention, even if another party later invents and patents the same invention.

In the United States, unlike in our major trading partners, prior user rights are limited to inventions on methods of doing or conducting business. The Senate bill included only a very limited expansion of this defense, and required the Director of the Patent and Trademark Office, ''PTO'', to study and report to Congress on the operation of prior user rights in other countries in the industrialized world, and include an analysis of whether there is a particular need for prior user rights given the transition to a first-inventor-to-file system.

The House-originated bill, the Leahy-Smith America Invents Act, which the Senate is considering today, makes important improvements to expand prior user rights beyond just methods of doing business. These improvements will be good for domestic manufacturing and job creation. I agree with the chairman of the House Committee on the Judiciary that inclusion of expanded prior user rights is essential to ensure that those who have invested in and used a technology are provided a defense against someone who later patents the technology.

I understand that there is some confusion regarding the scope of the defense in the bill. The phrase ''commercially used the subject matter'' is intended to apply broadly, and to cover a person's commercial use of any form of subject matter, whether embodied in a process or embodied in a machine, manufacture, or composition of matter that is used in a manufacturing or other commercial process. This is important particularly where businesses have made substantial investments to develop these proprietary technologies. And if the technology is embedded in a product, as soon as that product is available publicly it will constitute prior art against any other patent or application for patent because the technology is inherently disclosed.

The legislation we are considering today also retains the PTO study and report on prior user rights. I again agree with the chairman of the House Committee on the Judiciary, that one important area of focus will be how we protect those who make substantial investments in the development and preparation of proprietary technologies. It is my hope and expectation that Congress will act quickly on any recommendations made by the PTO.

Section 27 of the Leahy-Smith America Invents Act requires a study by the United States Patent and Trademark Office, USPTO, on effective ways to provide independent, confirming genetic diagnostic test activity where gen patents and exclusive licensing for primary genetic diagnostic tests exist. I support this section, which was championed by Ms. WASSERMAN SCHULTZ, and look forward to the USPTO's report.

I want to be clear that one of the reasons I support section 27 is that nothing in it implies that ''gene patents'' are valid or invalid, nor that any particular claim in any particular patent is valid or invalid. In particular, this section has no bearing on the ongoing litigation in *Association for Molecular Pathology* v. *Myriad Genetics*, _____ F.3d _____, 2011 WL 3211513 (Fed. Cir. July 29, 2011).

In *Kappos* v. *Bilksi*, _____ U.S. _____, 130 S. Ct. 3218 (2010), the Court found that the fact that a limited defense to business method patents existed in title 35 undermined the argument that business method patents were categorically exempt from patentability. Specifically, the Court held that a ''conclusion that business methods are not patentable in any circumstances would render §273 [of title 35] meaningless.'' *Bilski*, 130 S. Ct. at 3228. But the section 27 study is readily distinguishable from the substantive prior user rights defense codified in title 35 referenced in Bilski. A ''gene patent'' may or may not be valid, and that has no impact on the USPTO study, which mentions the existence of gene patents issued by the USPTO (but still subject to a validity challenge), but focuses on the effect of patents and exclusive licensing of genetic diagnostic tests, regardless of whether there are relevant patents. This study will be useful and informative for policymakers no matter how section 101 of title 35 is interpreted by the courts.

There has been some question about the scope of patents that may be subject to the transitional program for covered business method patents, which is section 18 of the Leahy-Smith America Invents Act. This provision is intended to cover only those business method patents intended to be used in the practice, administration, or management of financial services or products, and not to technologies common in business environments across sectors and that have no particular relation to the financial services sector, such as computers, communications networks, and business software.

A financial product or service is not, however, intended to be limited solely to the operation of banks. Rather, it is intended to have a broader industry definition that includes insurance, brokerages, mutual funds, annuities, andan array offinancial companies outside of traditional banking.

Section 34 of the Leahy-Smith America Invents Act requires a study by the Government Accountability Office, GAO, on the consequences of patent infringement lawsuits brought by nonpracticing entities under title 35, United States Code. The legislation requires that GAO's study compile information on (1) the annual volume of such litigation, (2) the number of such cases found to be without merit, (3) the impact of such litigation on the time to resolve patent claims, (4) the related costs, (5) the economic impact, and (6) the benefit to commerce.

Following the House passage of H.R. 1249, the Comptroller General expressed concern that Section 34 may require it to answer certain questions for which the underlying data either does not exist, or is not reasonably available. Where that is the case, I want to make clear my view that GAO is under no obligation to include or examine information on a subject for which there is either no existing data, or that data is not reasonably obtainable. Further, GAO is not required to study a quantity of data that it deems unreasonable.

In my view, GAO can satisfy its requirements under section 34 by compiling reasonably available information on the nature and impact of lawsuits brought by non-practicing entities under title 35 on the topics outlined in section 34(b). Where it deems necessary, GAO may use a smaller sample size of litigation data to fulfill this obligation. GAO should simply note any limitations on data or methodology in its report.

I ask unanimous consent to have printed in the RECORD a letter from Gene L. Dodaro, Comptroller General of the United States, detailing GAO's

possible limitations in complying with section 34.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES
GOVERNMENT ACCOUNTABILITY OFFICE
Washington, DC, September 7, 2011.

Hon. PATRICK J. LEAHY, *Chairman,*
Hon. CHARLES E. GRASSLEY, *Ranking Member, Committee on the Judiciary, U.S. Senate.*
Hon. LAMAR S. SMITH, *Chairman,*
Hon. JOHN CONYERS, Jr., *Ranking Member, Committee on the Judiciary, House of Representatives.*
Hon. JASON CHAFFETZ,
House of Representatives.

I am writing to express our concern regarding a provision relating to GAO in H.R. 1249, the Leahy-Smith America Invents Act. Section 34 of the bill would require GAO to conduct a study of patent litigation brought by so-called non-practicing entities, that is, plaintiffs who file suits for infringement of their patents but who themselves do not have the capability to design, manufacture, or distribute products based on those patents. As the Supreme Court and Federal Trade Commission have noted, an industry of such firms has developed; the firms obtain patents not to produce and sell goods but to obtain licensing fees from other companies.

The GAO study required by H.R. 1249 would mandate a review of: (1) the annual volume of such litigation for the last 20 years; (2) the number of these cases found to be without merit after judicial review; (3) the impacts of such litigation on the time required to resolve patent claims; (4) the estimated costs associated with such litigation; (5) the economic impact of such litigation on the economy; and (6) the benefit to commerce, if any, supplied by such non-practicing entities.

We believe this mandate would require GAO to undertake a study involving several questions for which reliable data are not available and cannot be obtained. In the first instance, the mandate would require identification of non-practicing entities that bring patent lawsuits. While some information about these entities may be obtainable, a definitive list of such entities does not exist and there is no reliable method that would allow us to identify the entire set from court documents or other available databases. Moreover, quantifying the cases found to be meritless by a court would produce a misleading result, because we understand most of these lawsuits are resolved by confidential settlement. Similarly, there is no current reliable source of information from which to estimate the effects of litigation by such entities on patent claims, litigation costs, economic impacts, or benefits to commerce. Further, because GAO does not have legal access to these private parties, we would have to rely on voluntary production of such information, a method we believe would be unreliable under these circumstances and would yield information that is not likely to be comparable from entity to entity.

Finally, empirical estimates of the effects of patent litigation on various economic variables would likely be highly tenuous. Measures of the cost of litigation or other variables related to quantifying patents or litigation would be highly uncertain and any relationships derived would likely be highly sensitive to small changes in these measures. Such relationships are likely to lead to inconclusive results, or results so heavily qualified that they likely would not be meaningful or helpful to the Congress. In that regard, we understand recent regulatory efforts to determine the economic and anticompetitive effects of such litigation have not been successful.

We appreciate your consideration of this matter and we would be happy to work with your staff regarding potential alternatives. GAO could, for example, identify what is currently known about each of the specific elements identified in Section 34. Managing Associate General Counsel Susan Sawtelle, at (202) 512–6417 or *SawtelleS@gao.gov*, or Congressional Relations Assistant Director Paul Thompson, at (202) 512–9867 or *ThompsonP@gao.gov*, may be contacted regarding these matters.

Sincerely yours,

GENE L. DODARO,
Comptroller General of the United States.

Mr. LEAHY. The America Invents Act is now going to be the law of the land. I thank all my colleagues who worked together on this.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Ms. CANTWELL. Mr. President, rising in opposition, this is not a patent reform bill, this is a big corporation patent giveaway that tramples on the rights of small inventors. It changes ''first to invent'' to ''first to file,'' which means if you are a big corporation and have lots of resources, you will get there and get the patent.

Secondly, it doesn't keep the money where it belongs. It belongs in the Patent Office. Yet, instead of having reforms that will help us expedite patents, it is giving away the money that is needed to make this kind of innovation work.

Third, the bill is full of special giveaways to particular industry corporations, as we have just witnessed with votes on the floor.

Fourth, by taking away the business patent method language, you will make it more complicated and have years and years of lawsuits on patents that have already been issued. If this is job creation, I have news for my colleagues; in an innovation economy, it is siding with corporate interests against the little guy. I urge a ''no'' vote.

Mr. LEAHY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on the third reading and passage of the bill.

The bill (H.R. 1249) was ordered to a third reading and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill pass?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. ROCKEFELLER) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Florida (Mr. RUBIO).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 89, nays 9, as follows:

[Rollcall Vote No. 129 Leg.]

YEAS—89

Akaka	Gillibrand	Moran
Alexander	Graham	Murkowski
Ayotte	Grassley	Murray
Barrasso	Hagan	Nelson (NE)
Baucus	Harkin	Nelson (FL)
Begich	Hatch	Portman
Bennet	Heller	Pryor
Bingaman	Hoeven	Reed
Blumenthal	Hutchison	Reid
Blunt	Inhofe	Risch
Boozman	Inouye	Roberts
Brown (MA)	Isakson	Sanders
Brown (OH)	Johanns	Schumer
Burr	Johnson (SD)	Sessions
Cardin	Kerry	Shaheen
Carper	Kirk	Shelby
Casey	Klobuchar	Snowe
Chambliss	Kohl	Stabenow
Coats	Kyl	Tester
Cochran	Landrieu	Thune
Collins	Lautenberg	Toomey
Conrad	Leahy	Udall (CO)
Coons	Levin	Udall (NM)
Corker	Lieberman	Vitter
Cornyn	Lugar	Warner
Crapo	Manchin	Webb
Durbin	McConnell	Whitehouse
Enzi	Menendez	Wicker
Feinstein	Merkley	Wyden
Franken	Mikulski	

NAYS—9

Boxer	DeMint	McCain
Cantwell	Johnson (WI)	McCaskill
Coburn	Lee	Paul

NOT VOTING—2

Rockefeller	Rubio

The bill (H.R. 1249) was passed.

Mr. MCCAIN. Mr. President, today I voted against passage of the patent reform bill because it contained an egregious example of corporate welfare and blatant earmarking. Unfortunately, this special interest provision was designed to benefit a single interest and was tucked into what was otherwise a worthwhile patent reform bill. As I noted earlier today when I spoke in support of the amendment offered by my colleague from Alabama, Senator SESSIONS, needed reform of our patent laws should not be diminished nor impaired by inclusion of the shameless special interest provision, dubbed ''The Dog Ate My Homework Act'' that benefits a single drug manufacturer, Medicines & Company, to excuse their failure to follow the drug patent laws on the books for over 20 years.

Again, as I said earlier today, patent holders who wish to file an extension of their patent have a 60-day window to make the routine application. There is no ambiguity in this timeframe. In fact, there is no reason to wait until the last day. A patent holder can file an extension application anytime within the 60-day period. Indeed, hundreds and hundreds of drug patent extension applications have been filed since the law was enacted. Four have been late. Four.

I remind my colleagues of what the Wall Street Journal had to say about this provision:

As blunders go, this was big. The loss of patent rights means that generic versions of Angiomax might have been able to hit pharmacies since 2010, costing the Medicines Co. between $500 million and $1 billion in profits.

If only the story ended there.

Instead, the Medicines Co. has mounted a lobbying offensive to get Congress to end run the judicial system. Since 2006, the Medicines Co. has wrangled bill after bill onto the floor of Congress that would change the rules retroactively or give the Patent Office director discretion to accept late filings. One version was so overtly drawn as an earmark that it specified a $65 million penalty for late filing for ''a patent term extension . . . for a drug intended for use in humans that is in the anticoagulant class of drugs.''

. . . no one would pretend the impetus for this measure isn't an insider favor to save $214 million for a Washington law firm and perhaps more for the Medicines Co. There was never a problem to fix here. In a 2006 House Judiciary hearing, the Patent Office noted that of 700 patent applications since 1984, only four had missed the 60-day deadline. No wonder critics are calling it the Dog Ate My Homework Act.

This bailout provision was not included in the Senate-passed Patent bill earlier this year. It was added by the House of Representatives. The provision should have been stripped by the Senate earlier today. The fact that it wasn't required me to vote against final passage.

● Mr. RUBIO. Mr. President, due to health concerns of my mother, I was absent for the motion to table amendment No. 599 offered by Senator COBURN to H.R. 1249, the America Invents Act, final passage of H.R. 1249, and on S.J. Res. 25.

Had I been present for the motion to table amendment No. 599 offered by Senator COBURN to H.R. 1249, I would have opposed the motion in support of the underlying amendment, and would have voted ''nay'' on final passage of the America Invents Act. H.R. 1249 is significantly different than the original Senate bill that I supported, and will ultimately not accomplish the goal of modernizing the patent process in the United States in the most effective manner.

The patent process in our country is painfully slow and inefficient. It takes years from the time an invention is submitted to the Patent and Trade Office, PTO, to the time that the patent is granted and the holder of the patent gains legal rights to their invention. Currently, there are over 700,000 patents waiting for their first review by the PTO. I supported the original Senate bill, S.23, which would have ensured that the PTO was properly funded, reducing the time between the filing of a patent and the granting of the same. This bill, which passed the Senate by a 95–5 margin on March 8, 2011, included critical provisions that would have ensured that user fees paid to the PTO would stay within the Office to cover its operating costs, rather being diverted to fund unrelated government programs.

Unfortunately, the House of Representatives removed these important provisions, which were critical to securing my support for patent reform. A modernized patent process that restricted ''fee diversion'' would have spurred innovation and job creation. Small inventors have raised concerns about the new patent processes that the bill sets forth, and without adequate protections against fee diversion, I am unable to support this bill. Additionally, I have concerns about House language that resolves certain legal issues for a limited group of patent holders. I support the underlying goals of this bill, but for the aforementioned reasons, I would have voted ''nay'' on H.R. 1249 had I been present.

Had I been present for the rollcall vote on S.J. Res. 25, I would have voted ''yea.'' I strongly disapprove of the surge in Federal spending that has pushed our national debt to $14.7 trillion, and firmly believe that Congress must cut spending immediately and send a strict constitutional balanced budget amendment to the States for ratification. We must also give job creators the certainty they need to hire new workers and expand operations, growing the economy and increasing revenue in the process. Instead of pretending that more debt-financed spending will create prosperity, Congress should take job-destroying tax hikes off the table, overhaul our burdensome regulatory system, and immediately pass the pending free trade agreements with South Korea, Colombia, and Panama.●

Mr. BENNET. Mr. President, I rise to explain my vote on one amendment today. But I would first like to commend Chairman LEAHY for his long years of work on patent reform, which culminated in final passage this evening of the America Invents Act. I proudly supported this legislation, and I am sure it's gratifying for the senior Senator from Vermont that the Senate overwhelmingly voted to send this bill to the President's desk.

But like most bills that the Senate considers, this legislation is not perfect, as I know the chairman himself has said. There is one major way that the bill we approved today could have been improved, and that is if we had retained language in the original Senate bill that guaranteed that the U.S. Patent and Trademark Office would be able to maintain an independent funding stream. For that reason, I commend Senator COBURN for his effort to amend the bill to revert back to that better funding mechanism. For years, we have asked the PTO to do more than its funding levels have allowed it to do well. And while the bill we passed today takes important steps towards committing more resources to the PTO, I did prefer the independent funding stream approach.

Senator COBURN's amendment may have been the better approach, but I voted to table the amendment because it could well have permanently sunk this enormously important legislation. Sending the bill back to the House with new language that the House has rejected and says it would reject again would have, at best, substantially delayed the reform effort and, at worst, stymied the bill just when we were reaching the finish line. And this bill is important it can help our economy at a critical juncture and can even result in my state of Colorado getting a satellite PTO office, which would be a major jobs and economic driver. I also worked with colleagues on both sides of the aisle to include important provisions that will help small businesses. None of this would have been possible if we amended the bill at this late stage.

I remain committed to working with colleagues in the coming months and years to make sure that PTO gets the resources it needs to do the job that Congress has asked it to do.

Mr. REID. Mr. President, I move to reconsider the vote by which the bill was passed, and I also move to lay that motion on the table.

The motion to lay on the table was agreed to.

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to morning business until 6:10 p.m. today and that Senators, during that period of time, be permitted to speak up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROVIDING FOR RECESS SUBJECT TO THE CALL OF THE CHAIR

Mr. REID. I ask unanimous consent that upon the conclusion of the joint session, the Senate stand in recess, subject to the call of the Chair.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Montana.

REMEMBERING 9/11

Mr. TESTER. Mr. President, on Sunday, this Nation will pause to remember a painful day in American history.

On September 11, 2001, I was glued to the radio in my pickup on a long drive back home to Big Sandy. It wasn't until I stopped at a Billings restaurant that I finally saw on TV what I had heard about all day. The pictures were surreal.

Although the attacks of 9/11 weren't America's first test of uncertainty, all of us knew this Nation would change forever.

In the hours and days and weeks following the attacks of September 11, 2001, Americans, neighbors, and perfect strangers joined together to fill the