

Small businesses are the economic engine of the American economy. According to the Small Business Administration, small businesses employ just over half of all private sector employees and create over 50 percent of our nonfarm GDP. Illinois alone is home to 258,000 small employers and more than 885,000 self-employers.

Small businesses are helping to lead the way on American innovation. These firms produce 13 times more patents per employee than large patenting firms, and their patents are twice as likely to be among the most cited among all patents. Small business breakthroughs led to the development of airplanes, FM radio, and the personal computer. Unfortunately, the share of small-entity patents is declining, according to a New York University researcher.

While S. 23 takes great strides in reforming our patent system, it can still be daunting for a small business owner or inventor to obtain a patent. In many instances, the value of a patent is what keeps that new small business afloat.

It is vital for America's future competitiveness, her economic growth, and her job creation that these innovators spend their time developing new products and processes that will build our future, not wading through government redtape. Our amendment would help small firms navigate the bureaucracy by establishing the U.S. Patent and Trademark Office Ombudsman Program to assist small businesses with their patent filing issues. The provision was first conceived as part of the Small Business Bill of Rights, which I introduced in the House, to expand employment and help small businesses grow. The Small Business Bill of Rights and this amendment are endorsed by the National Federation of Independent Business. I am proud to have this as part of a 10-point plan to be considered here in the Senate.

I wish to thank Senator MARK PRYOR of Arkansas, who is the lead Democratic cosponsor of this amendment. He is a strong and consistent supporter of small business, and I appreciate his partnership on this important program. I also thank Chairman LEAHY and Ranking Member GRASSLEY and their staffs for working with us on this amendment and for preserving this critical legislation.

Our Founding Fathers recognized the importance of a strong patent system that protects and incentivizes innovators. I look forward to supporting S. 23, which will provide strong intellectual property rights to further our technological advancement.

In sum, we should help foster innovation by protecting innovators, especially small business men and women, and I urge adoption of the amendment.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

#### AMENDMENT NO. 121

Mr. LEAHY. Mr. President, I thank the Senator from Illinois for his contribution to this effort.

I ask unanimous consent that we set aside the Kirk-Pryor amendment and go back to the pending business, which is the managers' amendment.

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

Mr. LEAHY. Mr. President, I understand there will be another Senator who will come down and speak, and in the meantime I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The 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. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I ask unanimous consent that the distinguished Senator from Michigan, Ms. STABENOW, be recognized as though in morning business.

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

The Senator from Michigan.

(The remarks of Ms. STABENOW are printed in today's RECORD under "Morning Business.")

#### RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:34 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. WEBB).

#### PATENT REFORM ACT OF 2011—

##### Continued

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. TOOMEY. Mr. President, it is a great privilege and honor for me to be able to represent the big, wonderful, diverse Commonwealth of Pennsylvania in the Senate. Pennsylvania is a wonderful State. It has a terrific range of great attributes. It has big, bustling cities such as Philadelphia and Pittsburgh at opposite ends; has all throughout the Commonwealth beautiful, historical boroughs such as Emmaus and Gettysburg. We go from the banks of the Delaware all the way to the shores of Lake Erie.

In a State this big, of course, we have a wide range of very vital industries. We have old industries that we have had for a long time and are still very important employers: agriculture, coal, steel, and many others. We are a big manufacturing State, manufacturing goods of all kinds. We have a huge service sector, especially in the fields of education, medicine, finance, tourism, and many others. We have some relatively new and very exciting industries in our Commonwealth that I am very hopeful will lead to an acceleration of job growth soon. I am thinking in particular of the natural gas and the Marcellus shale. I am thinking of

the life sciences, all across the Commonwealth, especially in greater Philadelphia and greater Pittsburgh as well as in points in between. The medical device sector and pharmaceutical industries are offering some of the most exciting opportunities for economic growth anywhere in the Commonwealth.

So when I think about the diversity and the strength of our Commonwealth, I am convinced that Pennsylvania's best days are ahead of us.

That said, despite all of the underlying strengths and advantages we have, we have an economy that is struggling. We have job creation that is far too slow. As I said repeatedly throughout my campaign for the Senate seat and as I have said since then, I think there are two vital priorities that we need to focus on first and foremost here in Washington. The first is economic growth and the job creation that comes with it, and the second is restoring fiscal discipline to a government that has lost all sense of fiscal discipline. These two, of course, are closely related. We will never have the kind of job growth we need and we deserve until we get our fiscal house in order.

But I look at them as separate issues. I think they should be at the top of our priority list. I am absolutely convinced we can have terrific economic growth, terrific job growth. We can have the prosperity we have been looking for.

In fact, it is actually inevitable if the Federal Government follows the right policies, remembering first and foremost that prosperity comes from the private sector, it does not come from government itself, but that government creates an environment in which the private sector can thrive and create the jobs we so badly need. I would argue that the government does that by doing four things and doing them well.

The first is to make sure we have a legal system that respects property rights, because the clear title and ownership and ability to use private property is the cornerstone of a free enterprise system.

It requires, second, that the government establish sensible regulations that are not excessive, because excessive regulation—and frankly we have seen a lot of excessive regulation recently—too much regulation always has unintended consequences that curb our ability to create the jobs we need.

A third thing a government always needs to do is provide a stable currency, sound money, because debasing one's currency is the way to ruin, not the way to prosperity.

Fourth, governments need to live within their means. They cannot be spending too much money and they cannot have taxes at too high a level.

It is so important that government spending remain limited and, frankly,

much less than we have today, for several reasons. One, of course, government spending is the political allocation of capital rather than the allocation of free people and a free economy. The political allocation is always less efficient than that of men and women engaging in free enterprise.

Secondly, the reason too much spending is problematic is because it ultimately always has to be paid for with higher taxes. Higher taxes clearly impede economic growth and prevent job creation. They do that in many ways, not the least of which is diminishing the incentives to make investments, to take risks, to launch new enterprises, to hire new workers.

I would argue that of these four priorities, the government is not doing such a great job. The failure is most egregious when it comes to the level of spending that has recently developed in this town. The recent surge in spending amounts to about a 25-percent increase in the size of the government virtually overnight.

The government is now spending—this Federal Government alone—fully 25 percent of our entire economic output. Frankly, this huge surge in spending has not worked. The unemployment rate has stayed near to 10 percent, our deficits are now over \$1½ trillion in a single year. That is more than 10 percent of our entire economy.

Of course, when you run annual deficits where you are spending more than you bring in, that shortfall is made up for with new borrowings. So we have been adding to our debt at what I think is an alarming pace. I would argue that this mounting debt is already today costing us job growth. It is costing us jobs because it creates a tremendous uncertainty in our economic future when we are not on a sustainable fiscal path. That uncertainty itself discourages entrepreneurs and job creators from doing the kinds of things we need.

The risks are very real. History is replete with examples of countries that have accumulated too much debt. Frankly, it never ends well. Very often it leads to very high rates of inflation. It can lead to much higher interest rates, which can have a crippling effect on job growth. It can even lead to financial disruptions which can be very harmful, as we have recently seen.

With the recent acceleration in the size of our deficits and the increase in our debts, we are now rapidly closing in on the statutory limit to the amount of money that the Federal Government is permitted to borrow under law. That is an amount of over \$14 trillion, but the truth is we are rapidly closing in on that limit. We will get there fairly soon.

The administration has suggested that we ought to, here in Congress, vote to raise that limit with no conditions attached. I have to tell you I think it is a very bad idea. This brings to mind the case of a family that is routinely living beyond their means. They routinely are spending more than

their income and making up for the difference by running up to the limit on their credit cards. When this family reaches the limit on all of the credit cards they have, who thinks it is a good idea to give them another credit card?

I think most folks in Pennsylvania think it is probably time to reexamine the spending and look at the real problem that has gotten the family in this situation. I think that is where we are as a government. I think we need to fundamentally reexamine the spending we have been engaged in.

I will say clearly, I think failure to raise the debt limit promptly upon reaching it is not optimal and it would be very disruptive. I hope that does not come to pass. But I happen to think the most irresponsible thing we could do is simply raise this debt limit and run up even more debt without making changes to the problems that got us into this fix.

Specifically what I think we need to do is have real cuts in spending—now, not later, not at some distant hypothetical point in time in the future but now. That is one.

Second, I think we need real reform in the spending process, reform in the way Congress goes about its business, because the process is part of what has gotten us here.

I wish to see a balanced budget amendment, one with real teeth, one that requires our books to be balanced, one that limits the total spending to a reasonable percentage of our economy, and one that makes it harder to raise taxes. I think that would be a very good development. But that will take several years, at best, if we can get that implemented. Of course, all of the States have to agree.

In the meantime, I would hope we could have statutory spending caps, limits to how much the Federal Government can spend, and a mechanism that would redress the problem if for some reason we exceeded those limits.

As we have had this debate over whether we should attach these conditions to raising the debt limit, some have suggested this is a very dangerous discussion to have, because failure to immediately raise the debt limit, some have suggested, amounts to a default on our Treasury securities, on the borrowings we have already incurred.

That is not true. I think it is irresponsible to suggest that. The fact is the ongoing revenue from taxes that will be collected whether or not we immediately raise the debt limit—the ongoing revenue is more than 10 times all the money needed to stay current on our debt service. In fact, in the last 20 years, there have been four occasions when we have reached the debt limit without immediately raising it, and we never defaulted on our debt. This country never will. So I do not think we should have a discussion about something that is not going to happen. But since some in the administration have raised the specter of a default, I have

introduced legislation that would clearly take that risk off the table entirely. My bill is called the Full Faith and Credit Act. It simply says, in the event we reach the debt limit without having raised it, it instructs the Treasury to make sure the debt service is the top priority. This guarantees that we would not default on our Treasuries, we would not create a financial crisis of any kind, and maybe, more importantly, it would be a great reinsurance to the millions of Americans who have lent this government their money, the millions of Americans who hold Treasury bonds in their IRAs, their 401(k)s, their pension plans.

The retirees who live in Allentown, PA, who have lived modestly, saved money, and with their retirement savings have invested in the U.S. Treasury, I think those folks deserve the peace of mind of knowing that the first priority is going to make sure we honor the obligations and stay current on our debts.

I want to take a moment to thank Senator VITTER, because yesterday he came down to the floor and introduced my legislation as an amendment to the current patent reform bill. I hope we will be able to soon pass my amendment. I hope we will soon get to a vote here on the Senate floor. The real reason is, I want to remove this false specter of a default on our debt, so we can have an honest debate over how we are going to get spending under control—what kind of spending cuts we are going to have right now, and what kind of reforms we are going to make to the process going forward.

I do not think we can kick this can down the road anymore. We have been doing that for a long time. As I said earlier, it never ends well when governments continue taking on too much debt. Nobody here that I know wants to see a government shutdown. Nobody wants to see the disruption that would come from failing to raise the debt limit at some point. But nor can we proceed with business as usual.

All across Pennsylvania I hear every day when I am back home how important it is that this government learn to live within its means as Pennsylvania businesses and families have done.

Let me close by saying I still remain absolutely convinced we can have a terrific economic recovery. We can have a booming economic growth and the tremendous job creation that goes with it. It is overdue, but it can still arrive if we pass the kind of policies that create the right environment.

I am convinced the 21st century will be another great American century and Pennsylvania will be at the forefront.

I yield the floor.

THE PRESIDING OFFICER. The Republican leader.

Mr. MCCONNELL. Mr. President, I want to extend my congratulations to the Senator from Pennsylvania for his initial speech, including his comments about his important amendment, which is actually pending to the patent bill

which hopefully we will have an opportunity to vote on in the very near future.

I yield the floor.

Mr. ALEXANDER. Mr. President, 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. LEAHY. 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. LEAHY. Mr. President, I am soon going to ask for a vote on the Leahy-Grassley-Kyl managers' amendment. It resolves a number of issues in the bill, including fee diversion and business method patents damages, venue issues. Senators COBURN, SCHUMER, BENNET, WHITEHOUSE, COONS, and others worked with us on those issues. I would like to vote on that and then go to the amendment offered yesterday by Senator BENNET on satellite patent offices, with a modification, as well as the modified amendment offered by Senator KIRK and Senator PRYOR on ombudsman. If we can do that, we can get much of this finished. But while I am waiting for the—just so everybody will know, I am going to ask for a vote on that very soon. But I am waiting for the ranking member to come back.

I see the distinguished senior Senator from Minnesota, and I yield to her.

Ms. KLOBUCHAR. Mr. President, first, I commend Chairman LEAHY and the entire Judiciary Committee for their work on this bill. The chairman has endured so many ups and downs and different versions, and we would not be here today if not for him.

I rise to speak in support of the America Invents Act, a bill to overhaul our patent system, which plays such a critical role in our economy. It is one of the main reasons America has been able to maintain its competitive edge.

The Commerce Department estimates that up to 75 percent of the economic growth in our Nation since World War II is due to technological innovation—innovation made possible by a patent system that protects the rights to that innovation.

I have seen the importance and success of the patent system firsthand in Minnesota, which has brought the world everything from the pacemaker to the Post-it note. In Minnesota, we know how important the patent system is to our economy. We rank sixth in the Nation in patents per capita and have the second highest number of medical device patents over the last 5 years. Companies such as 3M, Ecolab, and Medtronic are well-known leaders in innovation, but Minnesota also supports innovative small businesses such as NVE Corporation and Arizant Healthcare. We are now first per capita, in fact, for Fortune 500 companies in our State, and that is in large part because of innovation. So many of these companies started small, in-

vented products, and got patents which were protected. People weren't copying their products, and they were able to grow and produce jobs in our country.

Having a patent system that works for small business is particularly critical to creating jobs in America. But our patent laws haven't had a major update since 1952. The system is outdated and has become a burden on our innovators and entrepreneurs. Because of these outdated laws, the Patent and Trademark Office faces a backlog of over 700,000 patent applications and too often issues low-quality patents. One of these 700,000 patents may be the next implantable pacemaker or new therapy for fighting cancer, but it just sits in that backlog.

Our current system also seems stacked against small entrepreneurs. I have spoken to small business owners and entrepreneurs across our State of Minnesota who are concerned with the high cost and uncertainty of protecting their inventions. For example, under the current system, when two patents are filed around the same time for the same invention, the applicants must go through an arduous and expensive process called an interference to determine which applicant will be awarded the patent. Small inventors rarely, if ever, win interference proceedings because the rules for interference are often stacked in favor of companies with deep pockets. This needs to change.

Our current patent system also ignores the realities of the information age in which we live.

In 1952, back when the patent bill came about, the world wasn't as interconnected as it is today. There was no Internet. People didn't share information the way they do in this modern age. They had party telephone lines then. In 1952, most publicly available information about technology could be found in either patents or scientific publications. So patent examiners only had to look to a few sources to determine if the technology described in a patent application was both novel and nonobvious.

Today, as we all know, there is a vast amount of information readily available everywhere you look.

It is unrealistic to believe a patent examiner would know all of the places to look for this information, and even if the examiner knew where to look, it is unlikely he or she would have the time to search all of these nooks and crannies. The people who know where to look are the other scientists and innovators who also work in the field. But current law doesn't allow participation by third parties in the patent application process despite the fact that third parties are often in the best position to challenge a patent application. Without the benefit of this outside expertise, an examiner might grant a patent for technology that simply isn't a true invention—it is simply not an actual invention—and these low-quality patents clog the system and hinder true innovation.

Our Nation can't afford to slow innovation anymore. While China is investing billions in its medical technology sector, we are still bickering about regulations. While India encourages invention and entrepreneurship, we are still giving our innovators the runaround, playing a game of red light/green light with the R&D tax credit.

America can no longer afford to be a country that churns money and shuffles paper, a country that consumes, imports, and spends its way through huge trade deficits. We need to be a nation that makes things again, that invents stuff, that exports to the world, a country where you can walk into any store on any street in any neighborhood, purchase the best goods, and be able to turn it over and see the words "Made in the USA."

In the words of New York Times columnist and Minnesota native Tom Friedman, we need to be focusing on "nation building in our own Nation." Well, as innovators and entrepreneurs across Minnesota have told me, our country needs to spawn more of them. The America Invents Act would do just that.

First, the American Invents Act increases the speed and certainty of the patent application process by transitioning our patent system from a first-to-invent system to a first-inventor-to-file system. This change to a first-inventor-to-file system will increase predictability by creating brighter lines to guide patent applicants and Patent Office examiners. By simply using the filing date of an application to determine the true inventor, the bill increases the speed of the patent application process, while rewarding novel, cutting-edge innovations.

To help guide investors and inventors, this bill allows them to search the public record to discover with more certainty whether their idea is patentable, helping eliminate duplication and streamlining the system. At the same time, the bill still provides a safe harbor of a year for inventors to go out and market their inventions before having to file for their patents. This grace period is one of the reasons our Nation's top research universities, such as the University of Minnesota, support this bill. The grace period protects professors who discuss their inventions with colleagues or publish them in journals before filing their patent application. The grace period will encourage cross-pollination of ideas and eliminate concerns about discussing inventions with others before a patent application is actually filed.

Moreover, this legislation helps to ensure that only true inventions receive protection under our laws. By allowing third parties to provide information to the patent examiner, the America Invents Act helps bridge the information gap between the patent application and existing knowledge.

The legislation also provides a modernized, streamlined mechanism for third parties who want to challenge recently issued, low-quality patents that

should never have been issued in the first place. Eliminating these potentially trivial patents will help the entire patent system by improving certainty for both users and inventors.

The legislation will also improve the patent system by granting the U.S. Patent and Trademark Office the authority to set and adjust its own fees. Allowing the Office to set its own fees will give it the resources to reduce the current backlog and devote greater resources to each patent that is reviewed to ensure higher quality patents.

The fee-setting authority is why IBM, one of the most innovative companies around—by the way, the host of the “Jeopardy”-winning Watson—well, the IBM facility there that actually developed Watson was in Rochester, MN. In fact, IBM, which has its facilities in Rochester and the Twin Cities, as well as many other places in this country, was granted a record 5,896 patents in 2010. IBM supports this bill. It allows the Patent Office to set its own fees and run itself like a business, and that is good for companies such as IBM, as well as for small entrepreneurs.

Mr. President, as chair of the Subcommittee on Competitiveness, Innovation, and Export Promotion, I have been focused on ways to promote innovation and growth in the 21st century. Stakeholders from across the spectrum agree that this bill is a necessary step to ensure that the United States remains a world leader in developing innovative products that bring prosperity and happiness to those in our country. Globalization and technological advancement have changed our economy. This legislation will ensure that our patent system truly rewards innovation in the 21st century. Our patent system has to be as sophisticated as those who are inventing these products and those who at times are trying to steal their ideas. That is what this is about.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

AMENDMENT NO. 121, AS MODIFIED

Mr. LEAHY. Mr. President, we have the Leahy-Grassley managers’ amendment at the desk. I have a modification to it. I ask that the amendment be so modified.

The PRESIDING OFFICER. The amendment will be so modified.

The amendment, as modified, is as follows:

On page 1, strike line 5, and insert the following: “‘America Invents Act’”.

On page 9, line 8, strike “1 year” and insert “18 months”.

On page 32, strike line 12 and all that follows through page 35, line 2, and insert the following:

**SEC. 4. VIRTUAL MARKING AND ADVICE OF COUNSEL.**

On page 37, line 1, strike “(b)” and insert “(a)”.

On page 37, line 20, strike “(c)” and insert “(b)”.

On page 38, line 3, strike “(d)” and insert “(c)”.

On page 38, line 13, strike “(e)” and insert “(d)”.

On page 57, strike lines 17 through 23, and insert the following:

“(b) PRELIMINARY INJUNCTIONS.—If a civil action alleging infringement of a patent is filed within 3 months of the grant of the patent, the court may not stay its consideration of the patent owner’s motion for a preliminary injunction against infringement of the patent on the basis that a petition for post-grant review has been filed or that such a proceeding has been instituted.”

On page 59, strike lines 13 through 19.

On page 59, line 20, strike “(g)” and insert “(f)”.

On page 65, line 21, strike “18 months” and insert “1 year”.

On page 66, line 3, strike “18 months” and insert “1 year”.

On page 66, lines 4 and 5, strike “and shall apply only to patents issued on or after that date.” and insert “and, except as provided in section 18 and in paragraph (3), shall apply only to patents that are described in section 2(o)(1).”

On page 66, line 8, after the period insert the following: “During the 4 year period following the effective date of subsections (a) and (d), the Director may, in his discretion, continue to apply the provisions of chapter 31 of title 35, United States Code, as amended by paragraph (3), as if subsection (a) had not been enacted to such proceedings instituted under section 314 (as amended by subsection (a)) or under section 324 as are instituted only on the basis of prior art consisting of patents and printed publications.”

On page 69, line 2, strike “18 months” and insert “1 year”.

On page 69, line 14, strike “18 months” and insert “1 year”.

On page 74, line 22, strike “18 months” and insert “1 year”.

On page 75, line 16, strike “18 months” and insert “1 year”.

On page 75, line 22, strike “18 months” and insert “1 year”.

On page 76, line 5, strike “18 months” and insert “1 year”.

On page 77, strike line 23 and all that follows through page 78, line 6.

On page 78, line 7, strike “(b)” and insert “(a)”.

On page 78, line 20, strike “(c)” and insert “(b)”.

On page 79, strike lines 1 through 17, and insert the following:

(1) IN GENERAL.—The Director shall have authority to set or adjust by rule any fee established, authorized, or charged under title 35, United States Code, and the Trademark Act of 1946 (15 U.S.C. 1051 et seq.), notwithstanding the fee amounts established, authorized, or charged thereunder, for all services performed by or materials furnished by, the Office, provided that patent and trademark fee amounts are in the aggregate set to recover the estimated cost to the Office for processing, activities, services, and materials relating to patents and trademarks, respectively, including proportionate shares of the administrative costs of the Office.

On page 79, lines 19–21, strike “filing, processing, issuing, and maintaining patent applications and patents” and insert: “filing, searching, examining, issuing, appealing, and maintaining patent applications and patents”.

On page 86, between lines 8 and 9, insert the following:

(i) REDUCTION IN FEES FOR SMALL ENTITY PATENTS.—The Director shall reduce fees for providing prioritized examination of utility and plant patent applications by 50 percent for small entities that qualify for reduced fees under section 41(h)(1) of title 35, United States Code, so long as the fees of the prioritized examination program are set to recover the estimated cost of the program.

On page 86, line 9, strike “(i)” and insert “(j)”.

On page 91, between lines 14 and 15, insert the following:

(b) NO PROVISION OF FACILITIES AUTHORIZED.—The repeal made by the amendment in subsection (a)(1) shall not be construed to authorize the provision of any court facilities or administrative support services outside of the District of Columbia.

On page 91, line 15, strike “(b)” and insert “(c)”.

On page 91, line 23, strike “under either subsection” and all that follows through “shall certify” on page 92, line 2.

On page 92, line 7, before the semicolon insert the following: “, not including applications filed in another country, provisional applications under section 111(b), or international applications filed under the treaty defined in section 351(a) for which the basic national fee under section 41(a) was not paid”.

On page 92, between lines 7 and 8, insert the following:

“(3) did not in the prior calendar year have a gross income, as defined in section 61(a) of the Internal Revenue Code (26 U.S.C. 61(a)), exceeding 3 times the most recently reported median household income, as reported by the Bureau of Census; and”.

On page 92, strike lines 8 through 25.

On page 93, line 1, strike “(3) has not assigned, granted, conveyed, or is” and insert “(4) has not assigned, granted, conveyed, and is not”.

On page 93, lines 4 and 5, strike “has 5 or fewer employees and that such entity has” and insert “had”.

On page 93, line 7, strike “that does” and all that follows through line 11, and insert the following: “exceeding 3 times the most recently reported median household income, as reported by the Bureau of the Census, in the calendar year preceding the calendar year in which the fee is being paid, other than an entity of higher education where the applicant is not an employee, a relative of an employee, or have any affiliation with the entity of higher education.”

On page 93, strike lines 12 through 17, and insert the following:

(b) APPLICATIONS RESULTING FROM PRIOR EMPLOYMENT.—An applicant is not considered to be named on a previously filed application for purposes of subsection (a)(2) if the applicant has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application as the result of the applicant’s previous employment.

(c) FOREIGN CURRENCY EXCHANGE RATE.—If an applicant’s or entity’s gross income in the preceding year is not in United States dollars, the average currency exchange rate, as reported by the Internal Revenue Service, during the preceding year shall be used to determine whether the applicant’s or entity’s gross income exceeds the threshold specified in paragraphs (3) or (4) of subsection (a).”

On page 94, between lines 18 and 19, insert the following:

(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to imply that other business methods are patentable or that other business-method patents are valid.

On page 94, line 19, strike “(c)” and insert “(d)”.

On page 103, between lines 11 and 12, insert the following:

(c) DERIVATIVE JURISDICTION NOT REQUIRED.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.”

On page 103, line 12, strike “(c)” and insert “(d)”.

On page 105, between lines 22 and 23, 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 the first sentence of section 5(f)(2) 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 regu-

lations 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.

**SEC. 19. TRAVEL EXPENSES AND PAYMENT OF ADMINISTRATIVE JUDGES.**

(a) AUTHORITY TO COVER CERTAIN TRAVEL RELATED EXPENSES.—Section 2(b)(11) of title 35, United States Code, is amended by inserting “, and the Office is authorized to expend funds to cover the subsistence expenses and travel-related expenses, including per diem, lodging costs, and transportation costs, of non-federal employees attending such programs” after “world”.

(b) PAYMENT OF ADMINISTRATIVE JUDGES.—Section 3(b) of title 35, United States Code, is amended by adding at the end the following:

“(6) ADMINISTRATIVE PATENT JUDGES AND ADMINISTRATIVE TRADEMARK JUDGES.—The Director has the authority to fix the rate of basic pay for the administrative patent judges appointed pursuant to section 6 of this title and the administrative trademark judges appointed pursuant to section 17 of the Trademark Act of 1946 (15 U.S.C. 1067) at not greater than the rate of basic pay payable for Level III of the Executive Schedule. The payment of a rate of basic pay under this paragraph shall not be subject to the pay limitation of section 5306(e) or 5373 of title 5.”

**SEC. 20. 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 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.

On page 105, line 23, strike “SEC. 18.” and insert “SEC. 21.”

At the end, add the following:

**SEC. 22. BUDGETARY EFFECTS.**

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go-Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the Senate Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Mr. LEAHY. Mr. President, we are prepared to go to a rollcall vote on this right now. I don’t see the ranking member. As a courtesy, I am willing to wait a few more minutes before calling for the vote. While we are waiting for my friend, the distinguished Senator from Iowa, I will note that what we are talking about is bipartisan legislation; it is supported by both business and labor.

People ask whether Congress can work together and whether, with all the problems facing America, Republicans and Democrats can come together to get work done, make things work, and do things that can make America stronger and more competitive in the world. This is a bill that does that. That is why we have a broad group of cosponsors in both parties across the political spectrum. It enables us to actually do something.

We have a decades-old patent system, which may have made sense in the

time when you had patents that might not be superseded by new inventions for years. Now they can be superseded the day they come in. That is why we have 700,000 patents applications waiting to be processed. It is also why countries such as China and others are beginning to surpass us in their innovation, because we have been slow to catch up. We are in a situation where we are unable to compete with the rest of the industrialized nations. Their patent laws are ahead of ours. So this is a case where we in America have a chance to catch up. We do it without adding a cent to the deficit, but we also create jobs. Every major manufacturer in this country and inventors have said this is where we will create jobs.

I look at it, of course, with the point of view that my little State of Vermont on a per capita basis has more patents than any other State. We even had more than some States larger than ours. The distinguished Presiding Officer comes from a State that has spent a great deal of time and effort on innovation and is one of the leaders in the number of patents, especially in the high-tech area, in this country. But the patents don’t help us compete unless we are able to move with them. We in Vermont have a long history of innovation and invention. The first patent in the United States was signed by George Washington after being cleared by Thomas Jefferson and granted to a Vermonter.

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

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

Mr. LEE. Mr. President, I rise to speak on an issue that is very important to me. The immediate subject I am going to address is an amendment I am going to propose to our pending patent reform legislation. This amendment calls upon the Senate to get the sense of the Senate that we need a balanced budget amendment to the U.S. Constitution.

As I prepared for this day, I reviewed the maiden speeches of a number of Senators who served in this august body, and I have seen a consistent theme in the speeches that have been given over the course of the last 50 or 60 years. Over and over, they address spending. These issues have spilled over, Congress after Congress, until the point we have reached today, the point at which our national debt stands at an astounding figure, close to \$15 trillion.

As I like to say, \$15 trillion is a lot of money. A lot of people do not make \$15 trillion in a whole year. Even when you divide \$15 trillion by 300 million Americans, you are left with a figure of about \$50,000 a head. This is not an inconsequential number.

This is not a problem any of us created. It is a problem each of us inherited. Yet it is a problem I think none of us wants to leave to our successors. It is a problem that requires us to do something different than we have done in the past, and by this I mean I think we need procedural, structural, and indeed constitutional reform. We need to put Congress in a straitjacket because we have been unwilling or unable in the past to make the difficult spending decisions that have to be made.

In the past, there has been a great debate between, on the one hand, some Republicans who have been unwilling to cut some programs, to consider in any context cuts in the area of, say, national defense; you have had others, perhaps from the other party, who have been unwilling to consider any cuts to any entitlement program. But we are now faced with a scenario in which both sides of the aisle can understand that our perpetual deficit spending habit places in jeopardy every single aspect of the operations of the Federal Government.

To paint one scenario, I would like to point out that the budget projections produced by the White House just a couple weeks ago predicted, based on a fairly optimistic set of projections, that over the next 10 years we will acquire enough new debt that, when added to our existing debt, will cause us to be spending almost \$1 trillion every single year just on interest on our national debt. To put that in perspective, \$1 trillion is more than we currently spend on Social Security in an entire year. It is more than we currently spend on Medicare and Medicaid combined in an entire year. It is significantly more than we spend on national defense in any year. This \$1 trillion number is one that could actually be much larger if some of these projections turn out not to be correct.

We now face a moment when both liberals and conservatives, Republicans and Democrats, regardless of what they most want to protect in their Federal Government, have to realize that what we most want to protect is placed in grave jeopardy by our current spending practices.

I am troubled by the fact that as we approach debate surrounding a continuing resolution this week, a continuing resolution that is likely to operate for just a few weeks to keep the Government funded, we are still talking about adding, on an annualized basis, to our national debt at a rate exceeding \$1.5 trillion a year. I think the American people deserve better. I know they demand better.

Some of the things we saw in the 2010 election cycle portend something much greater for what we are going to see in the 2012 election cycle. The polls support the fact that what we can see from the 2010 election cycle is that Americans want Congress to balance its budget. They want us to do something more than just talking about it. They want us to put ourselves in a straitjacket.

Benjamin Franklin used to say: He will cheat without scruple who can without fear. I think the congressional corollary to that might be that Congress, which can continue to engage in perpetual deficit spending, will continue to do so unless or until they are held accountable by the people or required by that Congress to put itself in a straightjacket. That is the straightjacket we need. That is why I am proposing this amendment so, at a minimum, before this patent reform legislation, which I support wholeheartedly, moves forward, we can all agree as Members of this body that we need a constitutional amendment to keep us from doing what is slowly killing the economy of the United States and gradually mounting a severe challenge, an existential threat to every Federal program that currently exists.

I invite each of my colleagues to vote for and support this amendment and to support S.J. Res. 5, a constitutional amendment I have proposed that would put Congress in this type of straitjacket.

Here is, in essence, what S.J. Res. 5 says: If adopted by Congress by the requisite two-thirds margins in both Houses and approved by the States, three-fourths of them as required by article V of the Constitution, it would tell Congress it may not spend more than it receives in a given year, it may not spend more than 18 percent of GDP in a year, it may not raise taxes, and it may not raise the national debt ceiling without a two-thirds supermajority vote in both Houses of Congress. That is the kind of permanent binding constitutional measure I think we need in order to protect the government programs we value so highly and upon which 300 million Americans have come to depend, in one way or another.

I urge each of my colleagues to support this amendment and to support S.J. Res. 5.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Digest proceeded to call the roll.

Mr. KYL. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. KYL. Mr. President, I rise today to speak on the Patent Reform Act of 2011, which I understand will be retitled as the "America Invents Act."

When this bill was marked up in the Judiciary Committee in 2007 and again in 2009, I voted against it, and I submitted minority views to the committee report for the bill. In the 2009 committee report, Senators Russ Feingold and Tom Coburn joined me in identifying a set of issues that we felt needed to be addressed before the bill was ready for consideration by the full Senate. Chief among these were concerns about the bill's system of postissuance administrative review of

patents. Senior career staff at the Patent Office had expressed deep misgivings about the office's ability to administer this system. In response, at the conclusion of the 2009 mark up, Chairman LEAHY pledged to invite the Patent Office to work with the committee to address these concerns and to try to develop a system that the office would be able to administer.

Chairman LEAHY carried through on his pledge and held those meetings later that year. As a result, important changes were made to the bill, eventually resulting in a managers' amendment that was announced in 2010 by Chairman LEAHY and then-Ranking Member SESSIONS. The 2010 managers' amendment, which is also the basis of the present bill, substantially addressed all of the concerns that Senators Feingold and COBURN and I raised in the 2009 Minority Report. As a result, I became a cosponsor of that amendment, and am proud to cosponsor and support the bill that is before us today.

I will take a few moments today to describe the key changes that led to the 2010 breakthrough on this bill. But first, I would like to address an important aspect of the bill that has recently become the subject of some controversy. This is the bill's change to a first-inventor-to-file patent system.

About two-thirds of the present bill has never been controversial and has been included in all of the various iterations of this bill ever since the first patent reform act was introduced in 2005 by Mr. LAMAR SMITH, who was then the chairman of the House Intellectual Property Subcommittee. Mr. SMITH's 2005 bill, H.R. 2795, included the following proposals: it switched the United States from a first-to-invent patent system to a first-inventor-to-file system. The Smith bill enacted chapter 32 of title 35, creating a first-window, post-grant opposition procedure. It authorized third parties to submit and explain relevant prior art to the Patent Office with respect to an application before a patent is issued. The Smith bill amended the inventor's oath, and expanded the rights of assignees to prosecute a patent application under section 118. And it also eliminated subjective elements from the patent code, and included the first proposal for creating derivation proceedings. All of these elements of Mr. SMITH's original 2005 bill are retained in the bill that is before us today, and are, in fact, the most important parts of the bill. And, until recently, these provisions had not proven controversial.

After the announcement of the 2010 managers' amendment, however, members of the Judiciary Committee began to hear more from critics of the bill's move to a first-to-file system. Under current law's first-to-invent system, a patent applicant or owner has priority against other patents or applications, or against invalidating prior art, if he conceived of his invention before the

other inventor conceived of his invention or before the prior art was disclosed. Under the first-to-file system, by contrast, the same priority is determined by when the application for patent was filed. Whichever inventor files first has priority, and third-party prior art is measured against the filing date, and is invalidating if it disclosed the invention before the date when the application was filed, rather than the date when the invention was conceived.

In commentary that was published on Sunday, February 27, Mr. Gene Quinn, the writer of the IP Watchdog Web site, made some worthy points about the present bill's proposed move to a first-to-file system. Responding to critics of first to file, Mr. Quinn first noted that: in practical effect, we already have a first inventor to file system. For example, since the start of fiscal year 2005 on October 1, 2004, there have been over 2.9 million patent applications filed and only 502 Interferences decided. An Interference Proceeding occurs when multiple inventors file an application claiming the same invention, and is the hallmark of a first to invent system . . . . On top of the paltry 502 Interferences over nearly 7 years, a grand total of 1 independent inventor managed to demonstrate they were the first to invent, and a grand total of 35 small entities were even involved in an Interference.

In other words, as Mr. Quinn notes, although the first-to-invent system is supposed to help the little guy, over the last seven years, only one independent inventor has managed to win an interference contest and secure the benefits of the first to invent system. And again, this is out of nearly 3 million patent applications filed over this period.

Mr. Quinn's comments also debunk the notion that an interference proceeding is a viable means of securing first-to-invent rights for independent and other small inventors. He notes that:

On top of this, the independent inventors and small entities, those typically viewed as benefiting from the current first to invent system, realistically could never benefit from such a system. To prevail as the first to invent and second to file, you must prevail in an Interference proceeding, and according to 2005 data from the AIPLA, the average cost through an interference is over \$600,000. So let's not kid ourselves, the first to invent system cannot be used by independent inventors in any real, logical or intellectually honest way, as supported by the reality of the numbers above. . . . [F]irst to invent is largely a "feel good" approach to patents where the underdog at least has a chance, if they happen to have \$600,000 in disposable income to invest on the crap-shoot that is an Interference proceeding.

Obviously, the parties that are likely to take advantage of a system that costs more than half a million dollars to utilize are not likely to be small and independent inventors. Indeed, it is typically major corporations that invoke and prevail in interference proceedings. The very cost of the proceeding alone effectively ensures that

it is these larger parties that benefit from this system. In many cases, small inventors such as start ups and universities simply cannot afford to participate in an interference, and they surrender their rights once a well-funded party starts such a proceeding.

Mr. Quinn's article also responded to critics who allege that the present bill eliminates the grace period for patent applications. The grace period is the one-year period prior to filing when the inventor may disclose his invention without giving up his right to patent. Mr. Quinn quotes the very language of this bill, and draws the obvious conclusion:

Regardless of the disinformation that is widespread, the currently proposed S. 23 does, in fact, have a grace period. The grace period would be quite different than what we have now and would not extend to all third party activities, but many of the horror stories say that if someone learns of your invention from you and beats you to the Patent Office, they will get the patent. That is simply flat wrong.

Mr. Quinn is, of course, referring to the bill's proposed section 102(b). Under paragraph (1)(A) of that section, disclosures made by the inventor, or someone who got the information from the inventor, less than 1 year before the application is filed do not count as prior art. And under paragraph (1)(B), during the 1-year period before the application is filed, if the inventor publicly discloses his invention, no subsequently disclosed prior art, regardless of whether it is derived from the inventor, can count as prior art and invalidate the patent. This effectively creates a "first to publish" rule that protects those inventors who choose to disclose their invention. An inventor who publishes his invention, or discloses it at a trade show or academic conference, or otherwise makes it publicly available, has an absolute right to priority if he files an application within one year of his disclosure. No application effectively filed after his disclosure, and no prior art disclosed after his disclosure, can defeat his application for patent.

These rules are highly protective of inventors, especially those who share their inventions with the interested public but still file a patent application within a year. These rules are also clear, objective, and transparent. They create unambiguous guidelines for inventors. An inventor who wishes to keep his invention secret must file an application promptly, before another person discloses the invention to the public. And an inventor can also share his invention with others. If his activities make the invention publicly available, he must file an application within a year, but his disclosures also prevents any subsequently disclosed prior art from taking away his right to patent. The bill's proposed section 102 also creates clear guidelines for those who practice in a technology. To figure out if a patent is valid against prior art, all that a manufacturer needs to do is look at the patent's filing date and figure

out whether the inventor publicly disclosed the invention. If prior art disclosed the invention to the public before the filing date, or if the inventor disclosed the invention within a year of filing but the prior art predates that disclosure, then the invention is invalid. And if not, the patent is valid against a prior-art challenge.

Some critics of the first-to-file system also argue that it will be expensive for inventors because they will be forced to rush to file a completed application, rather than being able to rely on their invention date and take their time to complete an application. These critics generally ignore the possibility of filing a provisional application, which requires only a written description of the invention and how to make it. Once a provisional application is filed, the inventor has a year to file a completed application. Currently, filing a provisional application costs \$220 for a large entity, and \$110 for a small entity.

One of Mr. Quinn's earlier columns, on November 7, 2009, effectively rebuts the notion that relying on invention dates offers inventors any substantial advantage over simply filing a provisional application. As he notes:

If you rely on first to invent and are operating at all responsibly you are keeping an invention notebook that will meet evidentiary burdens if and when it is necessary to demonstrate conception prior to the conception of the party who was first to file. . . .

[Y]our invention notebook or invention record will detail, describe, identify and date conception so that others skilled in the art will be able to look at the notebook/record and understand what you did, what you knew, and come to the believe that you did in fact appreciate what you had. If you have this, you have provable conception. If you have provable and identifiable conception, you also have a disclosure that informs and supports the invention. . . . [And] [i]f the notebook provably demonstrates conception, then it can be filed as a provisional patent application at least for the purpose of staking a claim to the conception that is detailed with enough specificity to later support an argument in a first to invent regime.

In other words, the showing that an inventor must make in a provisional application is effectively the same showing that he would have to make to prove his invention date under the first-to-invent system. A small inventor operating under first-to-invent rules already must keep independently-validated notebooks that show when he conceived of his invention. Under first-to-file rules, the only additional steps that the same inventor must take are writing down the same things that his notebooks are supposed to prove filing that writing with the Patent Office, and paying a \$110 fee.

Once the possibility of filing a provisional application is considered, along with this bill's enhanced grace period, it should be clear that the first-to-file system will not be at all onerous for small inventors. And once one considers the bill's clean, clear rules for prior art and priority dates, its elimi-

nation of subjective elements in patent law, its new proceeding to correct patents, and its elimination of current patent-forfeiture pitfalls that trap legally unwary inventors, it is clear that this bill will benefit inventors both large and small.

Allow me to also take a moment to briefly describe the concerns that Senators Feingold and COBURN and I raised in our 2009 Minority Report, and how the present bill addresses those concerns.

Senators Feingold and COBURN and I proposed that the bill impose a higher threshold showing for instituting an inter partes, or post-grant review. This had long been a top priority for the Patent Office, both under the previous administration and under the current one. The Patent Office made clear that a higher threshold is necessary to weed out marginal challenges and preserve the office's own resources, and that a higher threshold would also force parties to front-load their cases, allowing these proceedings to be resolved more quickly. The present bill imposes higher thresholds, requiring a reasonable likelihood of invalidity for inter partes review, and more-likely-than-not invalidity for post-grant review.

Senators Feingold and COBURN and I also recommended that the Patent Office be allowed to operate inter partes reexamination as an adjudicative proceeding, where the burden of proof is on the challenger and the office simply decides whether the challenger has met his burden. The present bill makes this change, repealing requirements that inter partes be run on an examinational model and allowing the PTO to adopt an adjudicative model.

The 2009 Minority Report also recommended that the bill restrict serial administrative challenges to patents and require coordination of these proceedings with litigation. We also called for limiting use of ex parte reexamination to patent owners, noting that allowing three different avenues for administrative attack on patents invites serial challenges. The present bill does coordinate inter partes and post-grant review with litigation, barring use of these proceedings if the challenger seeks a declaratory judgment that a patent is invalid, and setting a time limit for seeking inter partes review if the petitioner or related parties is sued for infringement of the patent. The present bill does not, however, bar the use of ex parte reexamination by third parties. The Patent Office and others persuaded me that these proceedings operate reasonably well in most cases and are not an undue burden on patent owners. The present bill does, however, impose limits on serial challenges that will also restrict the use of ex parte reexamination. The bill's enhanced administrative estoppel will effectively bar a third party or related parties from invoking ex parte reexamination against a patent if that third party has already employed post-grant or inter partes review against that patent.



Also, the bill allows the Patent Office to reject any request for a proceeding, including a request for ex parte reexamination, if the same or substantially the same prior art or arguments previously were presented to the Office with respect to that patent.

Senators Feingold and COBURN and I also recommended that the PTO be allowed to delay implementation of post-grant review if the office lacks the resources to implement that new proceeding. The present bill includes a number of safeguards that are the product of discussions with the PTO. Among other things, the present bill authorizes a ramp-up period, allowing the office to limit the number of proceedings that can be implemented during the first 4 years after the new proceeding becomes effective.

The 2009 Minority Report also recommended that treble damages be preserved as a meaningful deterrent to willful or calculated infringement of a patent. The present bill does so, eliminating the restrictive three-buckets approach and broad safe harbors that appeared in the bill in 2009. The report also recommended that the bill remove subjective elements from patent law, such as the various deceptive-intent elements throughout the code and the patent-forfeiture doctrines. The present bill effectively makes both changes. In fact, the 2007 bill had already been modified in mark up to eliminate the patent forfeiture doctrines, a point elucidated in that year's committee report and confirmed by a review of the relevant caselaw.

This last point should also help address a question that Mr. Quinn raised in his column on Sunday regarding proposed section 102(b)'s use of the word "disclosure," and whether it covers public use or sale activities of the inventor. I would have thought that the meaning of the word would be clear: a disclosure is something that makes the invention available to the public—the same test applied by section 102(a) to define the scope of relevant prior art. And "available to the public" means the same thing that "publicly accessible" does in the context of a publication. Subject matter makes an invention publicly accessible or available if

an interested person who is skilled in the field could, through reasonable diligence, find the subject matter and understand the invention from it. Obviously, Congress would not create a grace period that is narrower in scope than the relevant prior art. Thus for example, under this bill, any activity by the inventor that would constitute prior art under section 102(a)(1) would also invoke the grace period under section 102(b)(1). As a result, the inventor would be protected against his own activities so long as he files within a year, and under the bill's "first to publish" provisions, he would also be protected by any other person's disclosure of the invention, regardless of whether he could prove that the other person derived the invention from him.

The present bill is the product of almost a decade of hard work, including three Judiciary Committee mark ups, and the untold hours of work by Mr. SMITH and other members of the House of Representatives that led to the introduction of the Patent Reform Act of 2005, the foundation of today's bill. This is a bill that will protect our heritage of innovation while updating the patent system for the current century. It will fix problems with current administrative proceedings, create new means for improving patent quality, and will generally move us toward a patent system that is objective, transparent, clear, and fair to all parties. I look forward to the Senate's passage of this bill and its enactment into law.

I ask unanimous consent that Mr. Gene Quinn's columns of February 27, 2011, and November 7, 2009, with corrections of a few typos and enhancements of punctuation, be printed in the RECORD.

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

SENATE TO VOTE ON PATENT REFORM, FIRST TO FILE FIGHT LOOMS

(By Gene Quinn, President & Founder of IPWatchdog, Inc., Feb. 27, 2011)

It appears as if the time has finally arrived for an up or down vote on patent reform in the United States Senate. It has been widely reported that the full Senate will take up patent reform upon returning from recess this week, and it is now believed by many on the inside that the Senate will take up pat-

ent reform on Monday, February 28, 2011, the first day back. Some are even anticipating that the Senate will vote on patent reform bill S. 23 late in the day on Monday, February 28, 2011. See "Crunch Time: Call Your Senators on Patent Reform." That would seem exceptionally quick, particularly given the rancorous issues and Amendments still to be presented, but nothing will surprise me.

As we get closer to a vote in the Senate the rhetoric of those for and against patent reform is heating up to a fever pitch. The big fight, once again, is over first to file, with battle lines drawn that run extremely deep. Senator Diane Feinstein (D-CA) is expected to file an Amendment stripping the first to file provisions, which could be supported by Senate Majority Leader Harry Reid (D-NV).

Before tackling the first to file issue I would like to point out that regardless of whether first to file is supported or opposed, everyone, and I do mean everyone, unanimously agrees that the USPTO should be allowed to keep the fees it collects to reinvest in the agency and to do the work promised. An overwhelming majority also seem to support giving the USPTO fee setting authority. Fee setting authority is present in S. 23 (see Section 9) and Senator Tom Coburn plans to introduce an Amendment that would once and for all eliminate fee diversion and let the USPTO keep the fees it collects. So while there is argument about first to file, hopefully we won't lose sight of the fact that most everyone is on the same team relating to fixing the USPTO.

With respect to first to file, in practical effect, we already have a first inventor to file system. For example, since the start of fiscal year 2005 on October 1, 2004, there have been over 2.9 million patent applications filed and only 502 Interferences decided. An Interference Proceeding occurs when multiple inventors file an application claiming the same invention, and is the hallmark of a first to invent system because it is possible in the United States to file a patent application second and then be awarded the patent if the second to file can demonstrate they were the first to invent. On top of the paltry 502 Interferences over nearly 7 years a grand total of 1 independent inventor managed to demonstrate they were the first to invent, and a grand total of 35 small entities were even involved in an Interference. A small entity can be an independent inventor, university, non-profit or a company with 500 or fewer employees. Thus, we have a de facto first to file system and the "first to invent" system that supposedly favors independent inventors is overwhelmingly dominated by large companies with over 500 employees. See chart below.

	2005	2006	2007	2008	2009	2010	2011*	Total
Filings .....	381797	417453	468330	496886	486499	509367	153997	2914329
Allowances .....	151077	162509	184376	182556	190122	233127	93390	1197157
Interferences decided .....	96	107	95	74	63	50	17	502
Junior party winners .....	18	15	21	25	14	17	3	113
Small entity winners .....	7	2	3	6	1	5	1	25
Independent Inventor winners .....	0	0	1	0	0	0	0	1
Small Entity losers .....	1	2	2	2	1	2	0	10

On top of this, the independent inventors and small entities, those typically viewed as benefiting from the current first to invent system, realistically could never benefit from such a system. To prevail as the first to invent and second to file you must prevail in an Interference proceeding, and according to 2005 data from the AIPLA the average cost through an interference is over \$600,000. So let's not kid ourselves, the first to invent system cannot be used by independent inven-

tors in any real, logical or intellectually honest way, as supported by the reality of the numbers above. So first to invent is largely a "feel good" approach to patents where the underdog at least has a chance, if they happen to have \$600,000 in disposable income to invest on the crap-shoot that is an Interference proceeding.

I will acknowledge, however, that one of the best arguments I have seen against first to file was prepared by Hank Nothhaft,

President & CEO of Tessera and a frequent contributor to IPWatchdog.com. In his op-ed in The Hill Hank concludes by asking: "Why risk that by weakening the incentives for startups?" As I can point to the fact that we have a de facto first to file system already, Hank and others can say—so why the need for change? I readily acknowledge that the small "c" conservative thing to do, which I normally promote, would be to do nothing

and keep the status quo. That is a fine argument, but it would keep the USPTO devoting precious resources on a complex Interference system that really mirrors a first to file system anyway. Of course, if patent reform gives the USPTO fee setting authority and an end to fee diversion, then the resources problem isn't nearly the concern and Congress could layer on responsibilities for the Patent Office and Team Kappos could deliver and still reduce the backlog.

Some others who challenge the first to file changes in the patent reform bill say the Interference analysis above is misplaced because first to file is not about whether the first to invent will obtain the patent. As illogical as that sounds, they have a point. Notice, however, that the Interference data does clearly demonstrate there is no need whatsoever for a first to invent system in the United States. Thus, many who challenge the first to file system don't seem to question that first to file is acceptable, but they do not like the loss of the familiar 12 month grace period.

The truth is, however, that relying on a 12 month grace period is extremely dangerous, but it does have its place. As Bryan Lord correctly explains in "Crunch Time: Call Your Senators on Patent Reform," many start-up companies rely on the grace period, which is critical "to companies that rely upon external collaborations or have comparatively limited resources." There is absolutely no argument with the fact that a grace period does factor into the equation for small businesses and start-up companies that are strapped for cash and already need to make choices about how much, and which, innovations to protect. I also like Lord's questioning the rush to harmonize. I always like to point out that harmonization is fine, but why can't we do what makes for a good system and not just what everyone else does. Let's harmonize what the world does better and let's lobby the world to adopt what our system clearly gets right.

Having said all of this, there is absolutely no reason why we cannot move from a first to invent system to a first inventor to file system that would still retain a real and substantial grace period and still retain the right for patent applicants to swear behind references to demonstrate an earlier date of invention, at least with respect to pieces of prior art that are not the progeny of earlier filed patent applications.

Regardless of the disinformation that is widespread, the currently proposed S. 23 does, in fact, have a grace period. The grace period would be quite different than what we have now and would not extend to all third party activities, but many of the horror stories say that if someone learns of your invention from you and beats you to the Patent Office, they will get the patent. That is simply flat wrong.

As it stands now, the currently proposed 102 in S. 23 says, in relevant part:

**§102. CONDITIONS FOR PATENTABILITY; NOVELTY**

(a) **NOVELTY; PRIOR ART.**—A person shall be entitled to a patent unless—

(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or

(2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.

(b) **EXCEPTIONS.**—

(1) **DISCLOSURES MADE 1 YEAR OR LESS BEFORE THE EFFECTIVE FILING DATE OF THE**

**CLAIMED INVENTION.**—A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if—

(A) the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

Looking at the proposed 102(b), it becomes clear that despite the claims of critics, there is a grace period within S. 23. I find it sad, yet amusing, that some who challenge the bill simply refuse to quote 102(b), and even outright claim "there is no grace period." Obviously, there is a grace period.

The proposed 102(b) seeks to eliminate from the universe of prior art disclosures made by the inventor or which owe their substance to the inventor. So if the inventor discloses his or her invention less than a year before filing a patent application, the patent can still be awarded. If someone learns of the invention from the inventor and discloses less than a year before filing a patent application, the patent can likewise still be awarded. What is notably missing here are several things. First, a definition for "disclosure." Second, an exception that applies to third-party activities where the third party acted without learning of information from the inventor but yet did not file a first application themselves. So the grace period set up by proposed 102(b) excepts disclosures (whatever they are) made by or through an inventor less than 1 year before the inventor files, but does not extend to disclosures (whatever they are) made by others less than 1 year before the inventor files.

The proposed 102(b) is a departure from the current law of novelty. Nevertheless, it is simply wrong to claim there is no grace period in an attempt to manipulate independent inventors, small businesses and others to support elimination of first to file.

In any event, under the current 102(b), a patent applicant is entitled to a patent unless—the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . .

Under current 102(b) an inventor can create their own bar to patentability as a result of activity such as publication, public use in the U.S. or sale in the U.S. if it occurs more than 1 year before a U.S. patent application is filed. A bar can likewise be created if a third party, either known or unknown to the inventor, engages in the same activity more than one year before a U.S. patent application is filed. What this necessarily means, and has long been interpreted to mean, is that a patent can be awarded so long as the invention has not been patented, published, on public use in the U.S. or on sale in the U.S. for more than 1 year. The current 102(b) provides a solid grace period that applies across the board, the proposed 102(b) does not.

Independent inventors and start-ups are rightly concerned about whether they will be able to enjoy a grace period relative to third party activities. They are rightly concerned to wonder whether the term "disclosure" in 102(b) would mean that the exception applied to their own public use or sale activities, which is anything but clear. Inventors and start-ups are also rightly concerned about whether they will be able to swear behind

and prove prior inventorship relative to prior art not associated with an earlier filed patent application. In short, I see no reason why we cannot have a first inventor to file system that does away with Interference proceedings, awards patents to the first inventor who files a patent application, but which also preserves a 12 month grace period under current law.

Of course, if first to file as stated in 102(b) becomes the law of the land, it will encourage independent inventors to do exactly what they should do, which is file patent applications earlier in the process. I hear the most ridiculous strategies from independent inventors who almost universally don't understand the requirements to prove they were the first to invent, see "Much Ado About Nothing," so a simpler system that they can understand will no doubt benefit them. Small businesses and start-ups should likewise file earlier in the process, and frankly that is why there is so much opposition to first to file.

Small businesses and start-up companies do need a grace period to try and figure out what to pursue, and the proposed grace period should keep much of the law in its place [but] will not be as widespread as currently enjoyed. While resources are always limited with start-ups, I think they incorrectly argue that there is an over-burdensome cost in terms of both money and time associated with filing provisional patent applications to preliminarily protect rights. In fact, I have offered to demonstrate just how the preparation and filing of streamlined provisional patent applications can be accomplished to many of those making the argument that it is too costly and time consuming to prepare quality provisional patent applications. As yet I have had no takers. So if cost and time are such concerns, why aren't they willing to consider a better, faster, cheaper way?

I think Bryan Lord's call to reach out to your Senators is absolutely the right thing to do. Get involved and be heard!

**MUCH ADO ABOUT NOTHING OVER FIRST TO FILE**

(By Gene Quinn, President & Founder of IPWatchdog, Inc., Nov. 7, 2009)

Just about 24 hours ago I posted an article relating to my changing position with respect to first to file, and already there is something of a firestorm. I understand there are those who feel I have abandoned them and adopted a naive view of the world. But excuse me for recognizing the new tone and identifiable actions taking place at 600 Dulany Street. Yes, I have been an ardent supporter of first to invent for years, but I have been questioning my views for some time, as I speak with attorneys, inventors and others. Then several things recently caused me to realize the benefits of first to file for the independent inventor community, and then I heard USPTO Director David Kappos explain that in 2007 only 7 cases were decided in favor of an individual who invented first and filed second. Kappos explained, "we already have a de facto first to file system." All this arguing for 7 cases? Cases where once the rule changes, behaviors will change to the point where some, perhaps most, or even all of those 7 cases will never happen again because everyone will know they need to file rather than wait. On top of that, it is inarguably good, correct, legally sound and business-appropriate advice to file sooner rather than later.

In a spirited comment chain associated with the aforementioned first to file article many supporters of first to invent are coming out in force, and they don't even realize they are making arguments that hardly support their position and in fact support the

exact opposite position. I would like to address several here.

First, it seems that many believe it is not appropriate to file provisional patent applications because many of the applications that are filed are inadequate and insufficient. It has been brought up that an appropriate and good provisional patent application needs to be identical to a nonprovisional patent application, perhaps without having been spell-checked. Obviously this is a gross overstatement of the law, and not correct. It is true that a provisional patent application needs to be as complete as a nonprovisional patent application in terms of disclosure, but nothing more. There are no formalities that need to be met, and it is the substance that matters. Nonprovisional patent applications exalt form over substance in large part, but a good provisional patent application needs to focus on substance. Whatever someone of skill in the art would understand to be described and disclosed has been described and disclosed. So those who think they need to write a nonprovisional patent application and file it as a provisional are overstating, don't understand the law or have not developed a sophisticated strategy. But don't vilify those who do understand the law, business realities and have developed fundamentally sound strategies.

Second, there seems to be a belief that first to invent can be relied upon while provisional patent applications are inappropriate to rely upon if an invention matters. But what exactly does this mean? If you rely on first to invent and are operating at all responsibly you are keeping an invention notebook that will meet evidentiary burdens if and when it is necessary to demonstrate conception prior to the conception of the party who was first to file. You are also keeping an invention record that will demonstrate diligence as well, but let's focus on the substance of what is in the notebook or record for a moment. Appropriate notebooks and/or invention records will be able to identify conception and when it occurs. Of course you never want to box yourself in when you present evidence to say a date certain was the date of conception, but you had better have an appropriate record for if and when it does matter, as it did in *Oka v. Youssefyeh*, where the senior party and junior party both were able to prove the same date of conception. Ultimately the Federal Circuit said any ties go to the senior party, so it is not fanciful to identify an oddball fact pattern where actual dates matter. Here is a real case, and given the extremely limited number of interference proceedings even one case is a statistically relevant sample.

Now, if you are relying on first to invent and keeping the records that you should be keeping, your invention notebook or invention record will detail, describe, identify and date conception so that others skilled in the art will be able to look at the notebook/record and understand what you did, what you knew, and come to the believe that you did in fact appreciate what you had. If you have this, you have provable conception. If you have provable and identifiable conception, you also have a disclosure that informs and supports the invention. It is pure folly to suggest that a provisional patent application, albeit perhaps not as formally structured as a nonprovisional patent application, is a waste of time but also believe that the cryptic notes of an engineer or scientist are superior and even preferable. If the notebook provably demonstrates conception then it can be filed as a provisional patent application at least for the purpose of staking a claim to the conception that is detailed with enough specificity to later support an argument in a first to invent regime.

Finally, let me address the matter of what gets included in a typical invention note-

book or invention record. It is almost unbelievable for me to hear patent attorneys state that they prefer the notes of inventors, scientists and engineers with respect to detailing and describing conception over a provisional patent application. Every patent attorney and patent agent knows the level of detail that is provided by inventors, even those who work for large corporations. The invention disclosures are as a rule laughably inadequate. One paragraph passes for a "complete" explanation of the invention. The truth is that patent attorneys are typically given very little from an inventor at the beginning of the process. In fact, inventors give such little information that at times the true inventor on the patent application that is actually filed should really be the patent attorney, not the inventor. That is obviously not always the case, but this is the big joke in the patent attorney community. Getting information from inventors is a little like herding cats. They are creative and they understand their invention, and they seem to universally believe that cryptic information ought to suffice. Remember, the goal is not to explain the invention so that the inventor understands, the goal is to explain the invention so that those who are not the inventor understand.

It borders on the absurd to prefer cryptic invention notes and invention records over provisional patent applications that are drafted by an attorney or agent who understands the legal requirements for providing an enabling disclosure that also satisfies the written description requirement. It also strikes me as particularly odd to say that those with nothing more than an idea will not have any time to figure out the particulars required to describe their invention. Why exactly are we worried that those without an invention may be impacted by first to file? They are already negatively impacted under first to invent because they have not yet invented and have no conception.

Most are undoubtedly familiar with the 80-20 rule, which goes something like this—it takes 20% of the time to complete 80% of the project, and the remaining 20% of the project takes 80% of the time to complete. That is true certainly with respect to software, which is my area of expertise, and it is true for many other areas of invention. It also happens to be true for writing patent applications as well, at least if you think outside the box and adopt a business friendly approach to writing patent applications, mining inventions, and identifying open space that can be filed. I realize that somewhere between 70-80% of patent attorneys and patent agents start by writing the claims, and then write the specification. I do it the other way, and I can't for the life of me understand those who write claims first. It is not wrong, just a different approach, but not the way I think.

I write text and then translate into claim language, which I find much easier to do. By doing this, and starting with a thorough patent search, patentability assessment, some mapping, and working with the inventor to continually refine understanding of what is most unique compared with the prior art, I am able to identify the base target, describe it in English, layer on specifics that take the form of alternative embodiments and versions and ultimately create an extraordinarily detailed specification that will support a multitude of claims. To do this takes about 20% of the time. The remaining 80% of the time is spent explaining how hip bone 15 is connected to thigh bone 18, writing sets of claims, and going back to continue to expand upon the disclosure to continually mine new areas and expand scope. I do not support filing crappy provisional patent applications, and it doesn't mean that a provisional pat-

ent application cooperatively created between inventor and patent attorney is "easy to get around" or at all inferior compared to an invention notebook or invention record.

Stop looking at first to file as a curse. It is an opportunity for inventors, small businesses and start-ups that are willing to see opportunity rather than obstacles. Venture capitalists who are savvy and willing to explore new methods and models for protecting early-stage technologies will be handsomely rewarded. Savvy independent inventors, closely held businesses and businesses that are ordered to take direction from venture capitalists or lose funding will clean up, and clean up big. And for crying out loud, when only 7 cases out of nearly 500,000 applications a year change as a result of first to file versus first to invent, there is no way that first to file will cripple the economy or cost jobs.

Mr. KYL. I would urge my colleagues to fully participate in this debate, come to the floor with any questions or comments they have, and at the end of this process Chairman LEAHY will finally be rewarded with a bill that will bear his imprimatur and support, a bill that will be extraordinarily important to the future well-being of the people of the United States of America.

Mr. LEAHY. Mr. President, the Senator has been involved in this right from the beginning. We have worked at having a bill that would be in the best interests of the Senate under both Republicans and Democrats across the political spectrum. We have worked very closely together.

We run the risk of countries in Asia and Europe out-innovating the United States, and the patent systems in other countries are well ahead of us. If we want to compete, as I know the Senator from Arizona does, and I know I do, we want to have the best tools to compete. I believe Americans can compete with any country in the world, but they should at least have the tools to do it and be able to play—it becomes almost a cliché, but we have to play on a level playing field. This will allow us to do that.

I compliment the Senator from Arizona for the way he has worked in his constant efforts in the committee, the public meetings, but that is the tip of the iceberg; it is the hundreds of hours of behind-the-scenes working to reach where we are. So I hope sometime in the next few minutes or so we can at least vote on the managers' package and then get going with the bill, because this is something that can be voted on, can be passed. We have been working, as the Senator from Arizona knows, very closely with our counterparts in the other body. I know Chairman SMITH would like to move quickly. We could have a bill on the President's desk in a relatively short time.

I thank the Senator for his kind words.

Mr. KYL. I thank the chairman of the committee.

The ACTING PRESIDENT pro tempore. The Senator from Louisiana.

AMENDMENT NO. 112

Mr. VITTER. Madam President, I ask for regular order on the Vitter amendment.

The ACTING PRESIDENT pro tempore. The amendment is now pending.

Mr. LEAHY. Madam President, I thought the amendment pending is the managers' amendment.

The ACTING PRESIDENT pro tempore. The Senator from Louisiana has just called for the regular order with respect to his amendment.

AMENDMENT NO. 112, AS MODIFIED

Mr. VITTER. Madam President, I now send a modification to the desk.

The ACTING PRESIDENT pro tempore. The amendment is so modified.

The amendment, as modified, is as follows:

At the appropriate place, insert the following:

SEC. \_\_\_\_\_. FULL FAITH AND CREDIT ACT.

(a) SHORT TITLE.—This section may be cited as the "Full Faith and Credit Act".

(b) PRIORITIZE OBLIGATIONS ON THE DEBT HELD BY THE PUBLIC.—In the event that the debt of the United States Government, as defined in section 3101 of title 31, United States Code, reaches the statutory limit, the authority of the Department of the Treasury provided in section 3123 of title 31, United States Code, to pay with legal tender the principal and interest on debt held by the public shall take priority over all other obligations incurred by the Government of the United States.

(c) PRIORITIZE PAYMENT OF SOCIAL SECURITY BENEFITS.—Notwithstanding subsection (b), in the event that the debt of the United States Government, as so defined, reaches the statutory limit, the authority described in subsection (b) and the authority of the Commissioner of Social Security to pay monthly old-age, survivors', and disability insurance benefits under title II of the Social Security Act shall be given equal priority over all other obligations incurred by the Government of the United States.

Mr. VITTER. Madam President, I will be happy to explain the context to the chairman of the committee.

This modification simply merges what was previously a separate Toomey amendment and a separate Vitter amendment. We had hoped to have votes on those as a first-degree and second-degree amendment. That wasn't possible, so this is a merged amendment. Let me explain what this amendment does.

The basis of this amendment is Senator TOOMEY's Full Faith and Credit Act. It is very important. It simply says if we ever as a country reach our debt ceiling, then even if we go beyond the debt ceiling, we will use all the tools available to the Treasury Secretary to continue for as long as possible to pay to make good on U.S. debt, we are not going to immediately default on U.S. debt.

There have been a lot of scare tactics, in my opinion, suggesting that if we ever reach that day of bumping up against our statutory debt ceiling, the very next day, the very next hour, the United States would default on its debt—not make good on our obligations of the U.S. Treasury. That isn't true. It doesn't have to be true. This important reform will ensure that it is not true. We get far more revenue into the U.S. Treasury than has to be spent

simply to service the debt. So the underlying Toomey bill, which is the heart of this amendment, says we will make good on those obligations. They will be the top priority.

The original Vitter amendment, which is now merged together with the Toomey amendment, says the exact same thing with regard to Social Security payments. I am sure we would all agree that seniors on fixed incomes depend on their Social Security checks. So the Vitter part of this now merged Toomey-Vitter amendment says we will honor Social Security payments in the same status as debt payments and we will use Federal revenues first for those purposes before we do anything else. What that means is, if we ever do bump up on the debt ceiling, we would not stop Social Security checks the next day. We would not stop Social Security checks the next month. We could have many weeks—probably a few months—honoring all of those commitments in the areas of Social Security and debt on U.S. Treasury notes.

So that is the purpose of this now merged Toomey-Vitter amendment. We are not suggesting that it is necessarily a good idea to bump up the debt ceiling. We are saying, Let's all take a deep breath, let's not use scare tactics, let's not use hysteria, and let's plan ahead.

What we hope will be the outcome is that we will not only deal with the debt ceiling in a responsible way, but before that, we will also deal with our underlying fiscal crisis in a responsible way. We will make real and serious budget reforms to get on a fiscally sustainable path which we are clearly not on right now.

This morning Senator TOOMEY and I were in the Banking Committee hearing where Chairman Ben Bernanke of the Federal Reserve testified. Chairman Bernanke said again, as he has numerous times over the last year and more, that the fiscal path we are on as a Federal Government is completely unsustainable. He also said that is the single biggest long-term threat to our economy, and he also said while it is a long-term problem, it could manifest itself in serious negative consequences in the short term. So this could rattle our economy and even begin to create an economic crisis—who knows when—possibly in the short term.

So the clock is ticking and we need serious budget reform, and this combined Toomey-Vitter amendment would take the hysteria out of the discussion and hopefully urge us to take concrete action on that serious budget reform before it is too late.

With that, I wish to yield to my distinguished colleague from Pennsylvania.

Mr. LEAHY. Madam President, before he does that, would the Senator yield for a question?

Mr. VITTER. Yes.

Mr. LEAHY. The Senator from Louisiana has been talking about amendment No. 112. Does that mean you are withdrawing 113?

Mr. VITTER. Yes. We will be seeking a single vote on the amendment, as modified.

Mr. LEAHY. So am I correct that amendment No. 113 is withdrawn?

The ACTING PRESIDENT pro tempore. It is not withdrawn at this time.

Mr. VITTER. First of all, as I understand it, it has been modified, so it has become—

Mr. LEAHY. You modified No. 112. I didn't know what you wanted to do with amendment No. 113.

Mr. VITTER. If I could yield to my colleague from Pennsylvania, I think he can help answer the question. But to clarify from my point of view, we are seeking a vote—a single vote, which I think we are very close to locking in—on the new modified amendment, which is a combination of the separate Vitter and Toomey amendments.

Mr. TOOMEY. Madam President, I thank my colleague for yielding. I would say that as soon as we can work out the specifics with the staff, that is exactly the intention that Senator VITTER and I came to. So a single vote on the merger of two amendments.

I would take a moment to thank Senator VITTER for his help. Senator VITTER was kind enough to offer the text of my legislation as an amendment to the patent reform bill. What he is adding is suggesting that the legislation should require the Treasury to prioritize not only the debt service so we can avoid under all circumstances a default by the U.S. Government, but also making sure Social Security payments get the priority they deserve.

The fact is, in the unlikely—and I would say certainly unfortunate—event that we were to reach the debt limit without having raised it, the Federal Government would still take in more than enough revenue to pay all of the interest service on the debt and all Social Security benefits. It is entirely manageable from an operational and functional point of view. Total revenue to the government from taxes alone is on the order of 70 percent of all expected expenditures. Debt service is only about 6 percent.

I appreciate the help of the Senator from Louisiana. By combining this, what we do—if we can pass this legislation, which I hope we will—is take off the table the specter of a default. We can take off the table the specter of any senior citizen not getting their Social Security payment. What we can then do is have an honest discussion about how are we going to reform a process that has gotten us into this fix—gotten us to the point where we are running a deficit of 10 percent of GDP, where our total debt is screaming toward totally unsustainable levels.

I can tell my colleagues, the folks in Pennsylvania know very well we cannot continue living beyond our means as this government has been. I see this as a very constructive, important opportunity to begin to have this discussion about how we are going to get this process under control.

I appreciate the help from Senator VITTER, and I yield.

Mr. VITTER. Madam President, I thank my distinguished colleague. Again, this amendment, as modified, simply says that if we were ever to reach the statutory debt limit for the Federal Government, then revenue coming in would go first to service two things: Social Security checks and interest on the Federal debt. So that would not be put in jeopardy for months down the line.

The purpose of this amendment is to try to take, quite frankly, some of the scare tactics and some of the hysteria out of the debate and to urge us to act. None of us wants to bump up on the debt ceiling. None of us is advocating that. What we are advocating is to take action now, real serious budget reform, to put us on a more fiscally sustainable path. We need to do that now. That is why we came to the floor with these concerns on the patent bill. We need to do that now. We need to act now. We need to get on a fiscally sustainable path now. The clock is ticking, as Chairman Bernanke reminded us before the Banking Committee this morning.

With that, I look forward to locking in a vote on this matter, and in the consent that establishes that, we will be happy to withdraw the other amendment and simply have one vote on the now combined Toomey-Vitter amendment.

With that, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. COBURN. Madam President, I wish to thank the chairman of the committee for his work on this patent bill. I still have a few small problems with it, but I am extremely grateful for his consideration of our amendment. Most people don't understand there are no tax dollars taken from the general fund for the Patent Office. It is all fees paid when you file a patent or a trademark or a copyright. Unfortunately, over the last 10, 15 years, \$800 million of those fees have not been left at the Patent Office. They have been taken and used somewhere else. So when you pay a fee for a patent, that money isn't going to pay for the examination of the patent.

Right now, we find ourselves with 718,000 patents waiting for first action. If I file a patent today, what we will see is that 26 months from now my patent will have first action—the first reading by an examiner.

If we want to create jobs and stay on top of the world in terms of innovation, we cannot allow that process to continue. So what the amendment does is

say we are not going to take the money people use to pay for a patent application and spend it somewhere else; we are actually going to spend it on patent applications. That is what it was set up for.

Quite frankly, it is immoral to take money for a specific purpose for advantaging an American company or inventor or a university and not apply that money for the intended purpose under the statute. Although this is controversial, most Americans would think, if you are paying \$10 on a toll road, the money is going to keep the toll road up. Yet we haven't been doing that with the Patent Office.

We are in trouble not because of our Patent Office but because we have not enforced intellectual property rights owned by Americans around the world. So as we work on getting a patent bill and blending it with whatever the House passes, it is as important—again, I thank the chairman because he was kind enough to have a hearing on the intellectual property for us, in terms of its enforcement.

There are two key points for American innovation to bring jobs to America. One is when you get a good idea and have an ability to get it patented and can defend the patent. The other side of that is to enforce that patent throughout the world with our own Justice Department, in terms of our State Department and in terms of the intellectual property rights.

It is amazing how much of our intellectual property is being stolen by China today. I wish to relate a conversation I had with their Secretary of Commerce—their equivalent to ours—in China 3 years ago. I asked him about intellectual property rights. He was bold in his statement to say: We are not going to honor them. We are a developing nation and you would not have honored them either—even though they are a signatory to the World Trade Organization. It is important we understand whom we are dealing with—people who will cheat and steal intellectual property from America. Fixing the patent apparatus will help us get there, but it is just as important to have tough laws on our books that create sanctions on nations that do not honor intellectual property.

Again, this is a simple, straightforward, moral response to an immoral act: collecting fees for something and not spending it on that, which has put us behind the curve. This will bring us back. We have a wonderful new Director, over the last 18 months, in the Patent Office. It is being run better than ever. They are catching up. But last year we took \$53 million of the fees that were for patents and spent it elsewhere. What this amendment does is stop that.

It may come to a time in this bill that we allow the Patent Office to set their fees. It will come to a time when we have to say: Wait a minute. You are charging too much. You have to be more efficient.

We don't do anything with oversight. We still have the oversight capability of all the Appropriations Committees. We have the ability to change this in the future in terms of their fee setting. If we do the proper oversight, we will spring forward with tremendous new technology that is protected and enable that capital expenditure that was spent to get that technology to flourish in terms of American jobs.

Again, I thank the chairman. He worked with me judiciously. It has been a pleasure to work with him. I thank him for his efforts on my behalf and that of the American inventors in this country.

Mr. LEAHY. Madam President, the Senator raised some questions with me, both in committee and out of the committee, with respect to each other's positions. I appreciate his work in the committee to expedite getting the bill out of the committee. Like him, I believe it is extraordinarily important to level the playing to allow American innovators to compete in the world and within our country. I compliment the Senator and, as he knows, I have included his proposal in the managers' amendment because I thought it was a good proposal.

Madam President, I ask unanimous consent that the time until 5 p.m. be for debate on the Leahy-Grassley amendment No. 121, as modified, which I believe is pending, and the Vitter for Toomey amendment No. 112, as modified, en bloc, and divided between the two leaders or their designees; that upon the use or yielding back of time, the Senate proceed to a vote in relation to the Leahy-Grassley amendment No. 121, as modified; that upon disposition of the Leahy-Grassley amendment, the Senate vote in relation to the Vitter for Toomey amendment No. 112, as modified; that the motions to reconsider be considered made and laid upon the table with no intervening action or debate; and that there be no amendments in order to any of the amendments listed in this agreement prior to the vote; further, that the Vitter amendment No. 113, as modified, be withdrawn.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. LEAHY. Madam President, I suggest the absence of a quorum, and I ask unanimous consent that the time be charged equally.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Iowa.

Mr. GRASSLEY. Madam President, I would like to express my strong support for Senator COBURN's proposal to

end Patent and Trademark Office fee diversion. It is a commonsense, entrepreneur friendly solution to many of the problems plaguing the Patent and Trademark Office.

Over the years, we have heard numerous complaints from constituents about the long time it takes the Patent and Trademark Office to review patent applications and render a final disposition. It is my understanding that in most cases, it takes almost 3 years for the Patent and Trademark Office to make a final decision on an application which can be costly to the applicant.

We have also heard from Patent and Trademark Office officials about the difficulties that have arisen because of their lack of control over the agency's funding model. There are 1.2 million patent applications currently pending at the Patent and Trademark Office but not enough resources to tackle the workload. The patent application backlog situation, while improving, is still a significant problem.

Senator COBURN's proposal strikes at the heart of both of these concerns by creating a revolving fund at the Treasury Department where patent and trademark fees that are paid to the Patent and Trademark Office are directly allocated back to the office. That way those funds can be utilized in a fashion most beneficial to inventors, small businesses, and academic institutions.

At his confirmation hearing in 2009, Patent and Trademark Office Director David Kappos told the Judiciary Committee that one of the most immediate challenges facing the office was "the need for a stable and sustainable funding model." The financial crisis affecting the Patent and Trademark Office is a direct result of its current funding structure. The Patent and Trademark Office receives no taxpayer funds—it is solely funded by patent and trademark user fees. Yet, those fees are not deposited within the Patent and Trademark Office. They are instead diverted to the Treasury Department, forcing the Patent and Trademark Office to ask for funds generated by their own office to be appropriated back to them.

The Patent and Trademark Office often requests lower than the amount generated by patent and trademark fees, which results in any extra fees being diverted by Congress to address "general revenue purposes." In fact, since 1992, Congress has diverted more than \$750 million from the Patent and Trademark Office.

For example, as recent as 2007, 12 million user-fee generated dollars were diverted from the Patent and Trademark Office for "other purposes." With 1.2 million patent applications pending—735,000 of which are simply waiting for a patent examiner to take a first action—it is clear that the Patent and Trademark Office is in dire need of those funds. I believe those fees belong to the Patent and Trademark Office and are needed by their offices to make the patent and trademark process more

accessible and efficient for America's innovators.

By ending fee diversion and allowing the Patent and Trademark Office to structure its own funding model, resources would be directly allocated to areas of most concern for both the Patent and Trademark Office and American innovators. The Coburn proposal does both, and ensures that the ever expanding backlog of unexamined patent applications and the timeframe for actual examination would be addressed in an efficient manner. It is time for Congress to take action and allow the Patent and Trademark Office to control the user fees that we think they deserve so they can effectively serve our Nation's inventors and small businesses.

Madam President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. GRASSLEY. I ask unanimous consent that the quorum call be equally charged to both sides.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. GRASSLEY. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### MEMBERS' PAY

Mrs. BOXER. Madam President, I think the managers are aware that I am going to make a unanimous consent request shortly on a bill that deals with Members' pay in the event of a government shutdown. I have been told we are waiting to see—there is apparently one objection on the Republican side. If we can clear it, then this will be passed. If not, then I will be back later to make the same request.

I say to my friend from Vermont and my friend from Iowa that I support the managers' package. It is terrific. One of the things in there is a Coburn-Boxer amendment that would keep the patent fees in the Patent Office. I am so glad the chairman sees it that way because we have such a tremendous backlog.

I will be happy to yield to my friend.

Mr. LEAHY. Madam President, I wish to ask a question about the proposal that the Senator from California will make on pay, which is fine with me. Can we not have an alternative in the bill that we give the money to

charity so somebody would actually see it? This would be one one-hundred thousandth of 1 percent, according to the Treasury. The last time we had a shutdown, I just voluntarily gave \$4,000, \$5,000 to charity. Would it not make a lot more sense, and actually people might get some benefit from it, especially places such as homeless shelters? They are going to be hurt by a government shutdown. Why not do something where they would get the money directly?

Mrs. BOXER. That is a good idea. The reason I have done it this way is because I am trying to say that we in the Senate and in the House have an obligation to keep the government running, and we should be treated just like other Federal employees. That is the simplicity of this legislation. We cannot force a Member to give money to charity.

Mr. LEAHY. We could, actually, by saying either return it to the Treasury or give an equal amount to charity and file with the Secretary of the Senate to which charity they gave it.

Mrs. BOXER. Again, that is treating us differently than other Federal employees. That would be a tax writeoff.

Mr. LEAHY. Not if one gives the full amount.

Mrs. BOXER. It is a tax writeoff to give to charity. All I am saying is that is certainly another option if my friend wanted to change it.

I just think it is simple. We just want to be treated the same as other Federal employees, and that is how I have structured it.

I spoke about this issue this morning. I wrote this bill with the support of CASEY, MANCHIN, TESTER, NELSON of Nebraska, BENNET, WARNER, WYDEN, COONS, HARKIN, HAGAN, MENENDEZ, STABENOW, MERKLEY, and ROCKEFELLER. There is a growing consensus that we want to avoid a shutdown at any cost. I am hoping we will avoid it. There could come a moment where it is forced upon us. There are lots of stories—who will get the blame for this, that, and the other. To me, that is not important. What is important to me is that we sacrifice—we in the Senate and in the House as well.

I am hopeful that if we get this done and send this over to Speaker BOEHNER that he will get it through his body over there, and we can get this done and send it to the President. It impacts the President too. We say the President cannot get paid either because the deal is we have to work with the President to come up with a compromise.

Senator LEAHY has a good suggestion. Some people might like that option better. I believe this should be kept very simple; that in the case of a government shutdown we are treated the same way as other Federal employees. The reason we have to do this is Members of Congress and the President are paid by separate statute rather than by the annual appropriations process. We have to pass a separate statute on this issue. It is a very simple bill.

Again, I hope we never have to come to this, where we have any type of a shutdown. Maybe this bill will make some colleagues who believe they will be protected from sacrifice realize it is painful. It is painful for a lot of people. Certainly, it would be painful if somebody on Social Security or disability cannot get their payment. It is painful if veterans who are on disability do not get their check. It is certainly painful if a citizen is planning a trip and cannot get a passport. It is painful if Superfund sites cannot be cleaned up. It is painful if there is, God forbid, an oil well explosion because we did not have people there to inspect the oil well.

For our business people who are government contractors it is painful if they do not get paid. Export licenses must be granted, and our troops should be paid. So there is no reason why we should shut down this government, and I am very hopeful we will have unanimous consent to do it.

I have a parliamentary inquiry to ask the Chair: Is it true that we no longer have secret objections here; that a person has to identify themselves if they are objecting?

The ACTING PRESIDENT pro tempore. There are provisions that address people objecting to unanimous consent requests.

Mrs. BOXER. So would I be correct if I said that if someone objects, we would know who that individual is so we can speak with that individual? You said there are provisions. Could you be more specific about that?

The ACTING PRESIDENT pro tempore. If the Senator will hold for a minute.

Mrs. BOXER. Certainly.

The ACTING PRESIDENT pro tempore. We will get the provision and read it to you.

Mr. LEAHY. While the Senator is waiting for that, if I might ask the Senator a question.

Article 2 of the Constitution says:

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall be elected.

Would the Senator's amendment be constitutional under that provision? And remember that we voted to increase the pay of the President when President Clinton—if I could have the attention of the Senator—

Mrs. BOXER. I know this issue, yes.

Mr. LEAHY. Between the time when President Clinton was in office, but it did not take effect until President George W. Bush came in and it doubled the salary for President Bush but not President Clinton. How do you, by statute, change, even for a matter of days, a Presidential salary? Doesn't it violate article 2 of the Constitution?

Mrs. BOXER. We did check this with legal counsel, and they told us that the legislation, as drafted, does not increase or diminish the annual salary of the President. It withholds pay during

a shutdown or failure to raise the debt ceiling.

There are definitely standing questions, and we are told that only the President would be able to challenge this legislation in a court of law.

Mr. LEAHY. But you are saying that even though it goes directly against the Constitution, which says his compensation shall neither be increased nor diminished during the period for which he shall be elected, that unless he objected—well, by the same token, why couldn't we raise the pay of a President unless he objected?

Mrs. BOXER. Well, I will repeat what I said. This legislation—

Mr. LEAHY. It seems to be a total violation of the Constitution.

Mrs. BOXER. This legislation, as drafted, does not increase or decrease the salary. If you withhold it, and if the President felt that was a violation, he himself would have to challenge it.

Mr. LEAHY. But we have some responsibility in this body to actually pass laws that are constitutional. It would, if there were a shutdown, and if upon a per-diem basis his salary was decreased, why isn't that de facto a violation of the Constitution?

Mrs. BOXER. Because we are not changing—diminishing—his salary.

Mr. LEAHY. Of course you are.

Mrs. BOXER. It is only in the case of an extraordinary event—a government shutdown.

Mr. LEAHY. The Constitution doesn't say anything about an extraordinary event.

Mrs. BOXER. The Senator may oppose it.

Mr. LEAHY. That is not my question.

Mrs. BOXER. I will repeat. We don't diminish, we withhold it during a period of a government shutdown or a failure to raise the debt ceiling. There is a reason we do it. It is very rare we have a government shutdown, but, in my view, and in the view of the cosponsors, this is a major function of our body and of the President—to avert a government shutdown. We don't think it is fair to treat some people differently than others. If other Federal employees are going to get their pay cut and your Social Security recipients don't get their checks, we think the Congress and the President ought to have a bite taken out of their pay as well.

Mr. LEAHY. I don't disagree with anything the Senator is saying, but how do you get—it would be like reducing a judge's salary. The Constitution specifically prohibits that. You say it is not reducing, but of course it is. If you say we are shut down 5 days, take whatever percentage 5 days of the President's annual salary is, you withhold it—you are not going to give it back when the government comes back into service—you have decreased his salary.

I am not suggesting not doing it for the Congress, but I don't see how—I am not sure what kind of example we set if we pass a piece of legislation which on

the face of it violates the Constitution. I am not talking about Members of Congress. As I said, the last time we had a shutdown I took whatever was my amount and added it to the thousands and thousands of dollars I give every year to charity. I added it to that. But in this case, you go against article 2 by decreasing the President's salary.

Mrs. BOXER. No, we do not.

Mr. LEAHY. Of course you do.

Mrs. BOXER. We are not changing a penny of the President's pay. What we are saying is, in the event of a government shutdown, he will be treated the same way other Federal employees are treated and be treated in the same way we are treated. He can determine if he wants to challenge this in a court of law.

We hope we don't ever face this. So we are not in any way changing his salary. We hope never to have to use this.

Mr. LEAHY. So is the Senator saying we set the right example by passing a bill which, on the face of it, violates the Constitution, but it is okay unless somebody challenges it?

Mrs. BOXER. No, I am not. I will reiterate again what I said, which is this: We do not increase or decrease the President's pay.

Mr. LEAHY. You just cut it for those days.

Mrs. BOXER. Can I finish? I let you talk. Now I think I have a turn. I don't have a legal degree, my friend has. It is common sense. It seems to me it is a question of fairness. Those of us who are responsible for keeping this government open—

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mrs. BOXER. Then I will finish this thought.

We are responsible to keep this government open. If we fail to do that, we ought to be punished.

I am going to make a unanimous consent request at this time, and I understand there is an objection.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mrs. BOXER. Madam President, I have just been told a Republican colleague objects to this. I don't understand why. I don't think it is a constitutional objection. I don't know the reason.

The ACTING PRESIDENT pro tempore. The Senator is out of time.

Mrs. BOXER. Madam President, I ask unanimous consent to make my request.

The ACTING PRESIDENT pro tempore. The Senator from Louisiana.

Mr. VITTER. On behalf of Senator COBURN, I object.

The ACTING PRESIDENT pro tempore. Objection is heard.

Mrs. BOXER. Madam President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The Senator does not have enough time under her control to suggest the absence of a quorum.

The Senator from Louisiana.

Mr. VITTER. Madam President, I rise in strong support of the Toomey-Vitter amendment, which we will vote on in the series of two votes starting at 5 p.m. The idea behind the Toomey-Vitter amendment is very simple. It says if we ever reach the debt ceiling, the government, as a top first priority, will use revenue to pay two things: first, proper interest payments on our U.S. Government debt; and secondly, Social Security checks to seniors.

The motivation behind this amendment is simple. First, those two things should be legitimately a top priority. No one should want the U.S. Government to default on its debt and no one should want the immediate stoppage, or the stoppage at any time, of Social Security checks to seniors. So first, it is legitimate to rank those two functions as an absolute top priority.

The second motivation behind this amendment is to take some of these scare tactics and hysteria out of this debate. Too many people, in my opinion, have been saying if we ever reach the debt ceiling, the next day all Social Security checks will stop and all payments will stop on U.S. Treasury bills—on government debt. That is not true. There is no reason it has to be true. This amendment, when passed into law, will ensure it is not true. It will ensure we look at this situation with focus and calmness and not hysteria and scare tactics.

The goal, I am certain—and I know it is for Senator TOOMEY, my distinguished colleague from Pennsylvania—is not that we not default on our debt and not that we reach the debt ceiling, but it is that we take strong, responsible action well ahead of any threatened event to put us on a fiscally sustainable path.

Just this morning, both Senator TOOMEY and I were in a hearing of the Senate Banking Committee and the witness—the only witness—was Ben Bernanke, Chairman of the Board of Governors of the Federal Reserve. He said very clearly several things directly pertinent to this discussion. First, he said we are on a fiscally unsustainable path. Our budget situation is absolutely unsustainable. Second, he said that is the biggest long-term threat to our economy—the biggest threat. Third, he said that although it is a long-term problem, it could create a short-term crisis. It could create a crisis that could hit immediately, at any time. So we need to act and we need to act strongly.

Madam President, I yield time to the distinguished Senator from Pennsylvania.

The ACTING PRESIDENT pro tempore. The Senator from California.

Mrs. BOXER. Madam President, I want say I object to the Vitter-Toomey

bill. I am not going to pay China before I pay people.

The ACTING PRESIDENT pro tempore. The Senator has no time. The Senator's time has expired.

Mrs. BOXER. I ask unanimous consent that the Homeland Security and Governmental Affairs Committee be discharged from—

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mrs. BOXER. I ask unanimous consent to speak to make a unanimous consent request.

Mr. VITTER. Madam President, I think I control the floor and I yield to the Senator from Pennsylvania.

The ACTING PRESIDENT pro tempore. Is there objection to the Senator's request for unanimous consent to make a unanimous consent request?

Mr. VITTER. I object.

The ACTING PRESIDENT pro tempore. Objection is heard.

Mrs. BOXER. I want an answer, please, to my question: Can people object to a unanimous consent request without saying who they are, No. 1? And No. 2, what is the parliamentary procedure here?

The ACTING PRESIDENT pro tempore. The Senator from Louisiana objected to the unanimous consent request on behalf of the Senator from Oklahoma, Senator COBURN. The Senator from Louisiana objected to the extension of the unanimous consent request for additional time on his own behalf.

Mrs. BOXER. So it is the Senator from Oklahoma, Senator COBURN, who objects to the bill we have that would say we don't get paid in the case of a shutdown; is that correct? Senator COBURN is objecting to that?

The ACTING PRESIDENT pro tempore. That is the Chair's understanding.

All time remaining is under control of the minority.

Mrs. BOXER. Thank you.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. TOOMEY. Madam President, I wish to thank Senator VITTER for yielding his time and for his help on this effort. I want to be very clear. First, I am not aware of anybody in this body or anybody I know who wants to see a government shutdown. I am not aware of anybody who wants to see the disruption that would result from failing to raise the debt ceiling at the appropriate time. But I also feel strongly it is critical we take this opportunity to begin to address the structural problems we have.

The fact is we have a burden of debt right now that is costing us jobs in this country today. The uncertainty it creates, the cost of financing this, the question of whether and for how long we can roll this over, the extent to which inflation becomes a problem, all of these risk factors are already weighing on our economy and our ability to create jobs now. For the future, it is an even bigger risk.

Senator VITTER and I have taken this step so we can have an honest discussion about how we are going to bring this spending under control and the process reforms we are going to make so we can hopefully get off this unsustainable path and get on a sustainable trajectory for the economic growth we need. That is ultimately what this measure is all about. It simply says that in the event we reach the debt limit without having raised it first—and let's face it, we have been there before. This has happened in the past. In the last 20 years, it has happened on several occasions. So it is entirely possible that, despite the best efforts of those of us who want to avoid it, it could happen again.

If it were to happen again, we want to make sure that we have no default on our debt, that interest is paid, and that Social Security checks go to the recipients as they should. There will be plenty of resources from ongoing tax revenue to make sure that happens, and anything less would be very irresponsible.

I urge my colleagues to vote in favor of this amendment.

#### DAMAGES LANGUAGE

Mrs. FEINSTEIN. Madam President, I commend the chairman of the Judiciary Committee for his hard work in putting together this managers' amendment and building consensus for this bill. Part of the managers' amendment strikes most of section 4 of the bill, relating to damages. As the chairman knows, I worked very hard on the "gatekeeper" damages language in this section of the bill. That language represented a compromise between high-technology companies, many located in my State of California, which believed that the law relating to patent damages needed reform, and other interests, including universities, biotech, pharmaceutical companies, and small inventors, who were greatly concerned that the preferred solution of the high-technology companies, namely apportionment of damages, would be destructive to the value of patents. However, since then, the courts have further developed the law relating to damages, so I understand that the chairman proposes to now strike the gatekeeper damages language from the bill.

Mr. LEAHY. Yes, the Senator is correct. I thank her for her hard work in putting together the gatekeeper damages language with Senator Specter and myself in committee last Congress. It was instrumental in helping to move this bill forward. However, as the Senator from California recognizes, the courts have advanced the law regarding damages since then. For example, in *Uniloc USA, Inc. v. Microsoft Corp.*, decided just this year, the Federal Circuit held that expert testimony regarding a "rule of thumb" for allocating profits between a patent user and a patent owner did not meet the Daubert test for expert testimony, and was inadmissible. And in *Lucent Technologies Corp. v. Gateway, Inc.*, the



Federal Circuit found that no rational jury could have concluded a “tiny feature of one part of a much larger software program with numerous features . . . appear[ing] to account for the overwhelming majority of consumer demand” was worth an 8% royalty.” This represented a new, greater level of review for jury damages assessment. In light of cases like these, it no longer appears necessary for this bill to contain language regarding the assessment of damages.

Mrs. FEINSTEIN. Yes, many businesses in my State agree. I also believe that if the bill remains silent on damages, as the managers’ amendment would do, that no harm will be done to the value of patents, which is so important for encouraging innovation. Is it the chairman’s intention, in future discussions with the House of Representatives, to continue to have the bill remain silent on damages?

Mr. LEAHY. Yes, it is. The courts have been making good progress in developing the law in this area, and I do not believe patent reform legislation should interfere with this progress. Should the House propose or pass some language on damages, I will certainly consult with the Senator from California to obtain her views on that language.

Mrs. FEINSTEIN. I thank the chairman, very much, for his consideration. The PRESIDING OFFICER (Mr. CASEY). All time has expired.

Mr. LEAHY. Mr. President, I ask for the yeas and nays on the Leahy-Grassley-Kyl, et al., managers’ amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the amendment.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Hawaii (Mr. AKAKA) is necessarily absent.

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

The result was announced—yeas 97, nays 2, as follows:

[Rollcall Vote No. 27 Leg.]

YEAS—97

Alexander	Coons	Kerry
Ayotte	Corker	Kirk
Barrasso	Cornyn	Klobuchar
Baucus	Crapo	Kohl
Begich	DeMint	Kyl
Bennet	Durbin	Landrieu
Bingaman	Ensign	Lautenberg
Blumenthal	Enzi	Leahy
Blunt	Feinstein	Lee
Boozman	Franken	Levin
Boxer	Gillibrand	Lieberman
Brown (MA)	Graham	Lugar
Brown (OH)	Grassley	Manchin
Burr	Hagan	McCain
Cantwell	Harkin	McCaskill
Cardin	Hatch	McConnell
Carper	Hoeven	Menendez
Casey	Hutchison	Merkley
Chambliss	Inhofe	Moran
Coats	Inouye	Murkowski
Coburn	Isakson	Murray
Cochran	Johanns	Nelson (NE)
Collins	Johnson (SD)	Nelson (FL)
Conrad	Johnson (WI)	Paul

Portman	Schumer	Udall (NM)
Pryor	Sessions	Vitter
Reed	Shaheen	Warner
Reid	Snowe	Webb
Risch	Stabenow	Whitehouse
Roberts	Tester	Wicker
Rockefeller	Thune	Wyden
Rubio	Toomey	
Sanders	Udall (CO)	

NAYS—2

Mikulski

Shelby  
NOT VOTING—1

Akaka

The amendment (No. 121) was agreed to.

Mr. LEAHY. Mr. President, I move to reconsider the vote.

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

The motion to lay upon the table was agreed to.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I ask unanimous consent for 1 minute equally divided for each side to explain this next amendment.

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

Mr. BAUCUS. Mr. President, the next amendment is Vitter amendment No. 112, which potentially says the United States must pay its interest debt and Social Security benefits before it makes any other government obligations. I think that is a bad idea. That would bring economic chaos to our country. If we default, we default.

Just because the bondholders in China would get priority over our troops overseas or get priority over tax refunds does not mean we are not in default. Besides, it is bad policy anyway. This amendment would bring chaos. If we were ever to get to the point of being unable to raise our debt, it would bring chaos to pay the Chinese bondholders first before we pay anybody else. That is the wrong thing to do.

I do not think we want to get into a situation where we are going to tell the American people they are second to foreign investors. I strongly urge that this amendment be defeated. At the appropriate time I will move to table the amendment.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. TOOMEY. Mr. President, if I can take the minute to rebut my colleague, first of all, it is true it would be very disruptive and there would be some chaos if we had a shutdown or if we eventually failed to raise the debt limit. This amendment, of course, does not cause that. This amendment, in fact, is designed precisely to prevent the kind of chaos that might otherwise ensue by simply ensuring that under no circumstances whatsoever would the United States Government default on its debt.

I think we all agree that the last thing we should ever tolerate would be a situation in which the United States Government would default on our debt. The chaos that would result from that would be devastating. So this is an amendment that says, in the event the

debt limit is not raised when we reach it—and, by the way, we have been there before, so it is not inconceivable—that we would make sure we, under no circumstances, would default on the debt.

Because Senator VITTER offered a modification to this amendment, essentially the merger of these amendments ensures that Social Security payments would also go out. By the way, there is more than sufficient revenue from ongoing taxes to ensure that could be done. So in the interests of avoiding the chaos of an actual default, I think this absolutely should occur.

By the way, I think it is also important to note that a majority of all of the debt issued by this government is held by Americans. They are held by senior citizens who live in Allentown, PA, and who have saved their whole life and invested that savings in U.S. Treasury securities.

I think it is very important that we send the message to them that even if we are not able to get our work done and raise the debt limit, as I hope we will at the appropriate time, we certainly would not default on the debt they hold.

I yield the floor.

VOTE ON AMENDMENT NO. 112

Mr. BAUCUS. Mr. President, I move to table the Vitter-Toomey amendment No. 112, as modified, and ask for the yeas and nays on my motion to table.

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 assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Hawaii (Mr. AKAKA) is necessarily absent.

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

The result was announced—yeas 52, nays 47, as follows:

[Rollcall Vote No. 28 Leg.]

YEAS—52

Baucus	Harkin	Nelson (FL)
Begich	Inouye	Pryor
Bennet	Johnson (SD)	Reed
Bingaman	Kerry	Reid
Blumenthal	Klobuchar	Rockefeller
Boxer	Kohl	Sanders
Brown (OH)	Landrieu	Schumer
Cantwell	Lautenberg	Shaheen
Cardin	Leahy	Stabenow
Carper	Levin	Tester
Casey	Lieberman	Udall (CO)
Conrad	Manchin	Udall (NM)
Coons	McCaskill	Warner
Durbin	Menendez	Webb
Feinstein	Merkley	Whitehouse
Franken	Mikulski	Wyden
Gillibrand	Murray	
Hagan	Nelson (NE)	

NAYS—47

Alexander	Brown (MA)	Cochran
Ayotte	Burr	Collins
Barrasso	Chambliss	Corker
Blunt	Coats	Cornyn
Boozman	Coburn	Crapo

DeMint	Johnson (WI)	Risch
Ensign	Kirk	Roberts
Enzi	Kyl	Rubio
Graham	Lee	Sessions
Grassley	Lugar	Shelby
Hatch	McCain	Snowe
Hoeben	McConnell	Thune
Hutchison	Moran	Toomey
Inhofe	Murkowski	Vitter
Isakson	Paul	Wicker
Johanns	Portman	

NOT VOTING—1

Akaka

The motion was agreed to.

Mr. LEAHY. I want to thank all Senators for supporting adoption of the Leahy-Grassley-Kyl managers' amendment. This consensus amendment is a compromise that resolves a number of the key outstanding issues in the bill, including fee diversion, business method patents, damages and venue. I want to take a moment to discuss the importance of these provisions.

First, the provisions in this managers' amendment that end fee diversion from the PTO are supported by all corners of the patent community. Today, users fund 100 percent of the PTO's operations. The PTO does not take a dime of taxpayer money. For all of the improvements that this legislation makes to our patent system, the Patent Office will always be hindered if it cannot retain the funds it generates to more adequately plan for its future. Today, as we ask our Patent Office to unleash the best in innovation from our businesses, our Patent Office does not have the funding to do the same for itself. Ending fee diversion will better equip the patent office with the resources to tackle the complexities of the 21st century.

Second, the managers' amendment creates a temporary proceeding at the Patent Office to reexamine certain business method patents. I appreciate the work that Senator SCHUMER has done on this issue, and the provisions included in the managers' amendment represents a middle-ground that bridges a divide on this issue between the financial and tech communities that reside in all of our States.

Third, the managers' amendment strikes provisions on damages and venue. Removing these provisions addresses recent concerns voiced by certain Members of the House, and raised by the high-tech community.

Finally, this managers' amendment wraps in Senator BENNET's previously offered amendment to provide a 50-percent reduction in fees for small business accelerated patent applications at the PTO, as well as some technical amendments. This break for small businesses, which drive innovation and create jobs, will better enable them to compete with the demands of the 21st century.

As we return to the America Invents Act, I encourage any Senator who has a germane amendment to come and debate it now. This is bipartisan legislation that our economy desperately needs. It will allow the PTO to function, and our inventors and innovators to flourish. If any other Senators have

amendments, this is the time. We need to move on to other pressing matters as soon as we complete work on this bill.

Mr. BENNET. Mr. President, I would like to speak briefly on my amendment to strike the damages and venue provisions from this legislation. I thank the chairman and committee for working with my office on this important amendment and incorporating it into the managers' amendment.

I know the committee has been working tirelessly to address concerns with this bill, and I applaud their efforts for trying to build consensus.

As I discussed yesterday, I believe a well-functioning patent system is critical for our economic growth. The reforms in this legislation will promote innovation and create jobs.

In my State alone, nearly 20,000 patent applications have been granted between the years 2000 and 2009. These applications have created the foundation for our clean energy economy and emerging tech and bio industries.

Small inventors start new Colorado companies, and more established companies are able to expand their operations in a very competitive, knowledge-based economy.

An efficient and high-quality U.S. Patent and Trademark Office is essential to maintaining American leadership in innovation. The improvements to the patent system in this bill will help us grow new industries and will help cure the backlog and delay that has stunted the ability of inventors to patent their ideas.

Right now, the average pendency period for a patent application is 36 months. That is unacceptable if we are to compete with the rest of the world. This doesn't even account for those patents that have been tied up in years of litigation after they are granted.

This is why we need to ensure that patent owners have certainty. Consistency, uniformity, and fairness are essential to innovation.

Prolonged litigation and legal uncertainty only serve to stifle the incentive to innovate. We need clarity and efficient review by the courts to make sure we don't have a system where patents are tied up for years. Likewise, we also need to make sure there is a fair outcome where there is an infringement. Those whose rights are infringed have every right to take their case to court and receive the appropriate damages.

This is why I introduced my amendment on damages and venue. We need more certainty for patent owners, and I think portions of the bill may not do enough in this regard, in the face of litigation. In fact, the venue and damages portions of the bill may actually generate more uncertainty, not less.

The Federal Circuit Court of Appeals has made significant progress on damages and venue issues. The courts are moving in the right direction, and I believe it is wiser to allow this process to run its course than to add a new layer

of laws that could only serve to confuse patent litigants. So in my view, congressional intervention on damages and venue is not needed at this time.

I would like to close by again thanking the chairman for his leadership and willingness to take into account the views of others on these important issues.

The PRESIDING OFFICER. The Senator from California is recognized.

PROHIBITING MEMBERS OF CONGRESS AND THE PRESIDENT FROM RECEIVING PAY DURING GOVERNMENT SHUTDOWNS

Mrs. BOXER. Mr. President, I ask unanimous consent that the Homeland Security and Governmental Affairs Committee be discharged from further consideration of S. 388 and the Senate proceed to its immediate consideration.

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

The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 388) to prohibit Members of Congress and the President from receiving pay during Government shutdowns.

There being no objection, the Senate proceeded to consider the bill.

Mrs. BOXER. Mr. President, I ask unanimous consent that the bill be read the third time and passed; that the motion to reconsider be laid upon the table, with no intervening action or debate; and that any statements relating to the matter be printed in the RECORD.

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

The bill (S. 388) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 388

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. PROHIBITION ON PAY DURING GOVERNMENT SHUTDOWN.**

(a) IN GENERAL.—Members of Congress and the President shall not receive basic pay for any period in which—

(1) there is more than a 24-hour lapse in appropriations for any Federal agency or department as a result of a failure to enact a regular appropriations bill or continuing resolution; or

(2) the Federal Government is unable to make payments or meet obligations because the public debt limit under section 3101 of title 31, United States Code, has been reached.

(b) RETROACTIVE PAY PROHIBITED.—No pay forfeited in accordance with subsection (a) may be paid retroactively.

Mrs. BOXER. Mr. President, in 1 minute or less, I thank the occupant of the Chair very much for his strong co-sponsorship of this bill, along with other colleagues.

Basically, we are saying that if we fail to keep this government open, or to lift the debt ceiling, we Members of Congress should not receive our pay. It is pretty straightforward.