Mr. UDALL of New Mexico. Madam President, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second? There is a sufficient second.

The question is on passage of the joint resolution.

The clerk will call the roll.

The assistant legislative clerk called the roll.

The result was announced—yeas 91, nays 9, as follows:

[Rollcall Vote No. 29 Leg.]

YEAS—91

Akaka	Enzi	Mikulski
Alexander	Feinstein	Moran
Ayotte	Franken	Murkowski
Barrasso	Gillibrand	Nelson (NE)
Baucus	Graham	Nelson (FL)
Begich	Grassley	Portman
Bennet	Hagan	Pryor
Bingaman	Hoeven	Reed
Blumenthal	Hutchison	Reid
Blunt	Inhofe	Roberts
Boozman	Inouye	Rockefeller
Boxer	Isakson	Rubio
Brown (MA)	Johanns	Schumer
Brown (OH)	Johnson (SD)	Sessions
Burr	Johnson (WI)	Shaheen
Cantwell	Kerry	Shelby
Cardin	Kirk	Snowe
Carper	Klobuchar	Stabenow
Casey	Kohl	Tester
Chambliss	Kyl	Thune
Coats	Landrieu	Toomey
Coburn	Lautenberg	Udall (CO)
Cochran	Leahy	Udall (NM)
Collins	Lieberman	Vitter
Conrad	Lugar	Warner
Coons	Manchin	Webb
Corker	McCain	Whitehouse
Cornyn	McCaskill	Wicker
DeMint	McConnell	Wyden
Durbin	Menendez	
Ensign	Merkley	

NAYS—9

Crapo	Lee	Paul
Harkin	Levin	Risch
Hatch	Murray	Sanders

The joint resolution (H.J. Res. 44) was passed.

Mr. LEAHY. I move to reconsider the vote and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PATENT REFORM ACT OF 2011

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 23, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 23) to amend title 35, United States Code, to provide for patent reform.

Pending:

Leahy amendment No. 114, to improve the bill.

Bennet amendment No. 116, to reduce the fee amounts paid by small entities requesting prioritized examination under Three-Track Examination.

Bennet amendment No. 117, to establish additional USPTO satellite offices.

Lee amendment No. 115, to express the sense of the Senate in support of a balanced budget amendment to the Constitution.

Kirk-Pryor amendment No. 123, to provide a fast lane for small businesses within the U.S. Patent and Trademark Office to receive information and support regarding patent filing issues.

Menendez amendment No. 124, to provide for prioritized examination for technologies important to American competitiveness.

The ACTING PRESIDENT pro tempore. The Senator from Texas.

(The remarks of Mrs. HUTCHISON are printed in today's RECORD under ''Morning Business.'')

The ACTING PRESIDENT pro tempore. The Senator from Vermont.

Mr. LEAHY. Madam President, yesterday, we were finally able to make progress when the Senate proceeded to a vote on the managers' amendment, the Leahy-Grassley-Kyl amendment, to the America Invents Act. That was a very important amendment, with contributions from many Senators from both sides of the aisle. It should ensure our moving forward to make the changes needed to unleash American innovation and create jobs without spending a single dollar of taxpayer money. In fact, according to the Congressional Budget Office, enactment of the bill will save millions of dollars.

I also thank those Senators who have stayed focused on our legislative effort, and who joined in tabling those amendments that have nothing to do with the subject of the America Invents Act. Extraneous amendments that have nothing to do with the important issue of reforming our out-of-date patent system so that American innovators can win the global competition for the future have no place in this important bill. They should not be used to slow its consideration and passage. If America is to win the global economic competition, we need the improvements in our patent system that this bill can bring.

I continue to believe, as I have said all week, that we can finish this bill today, and show the American people that the Senate can function in a bipartisan manner. We have not been as efficient as I would have liked. We have been delayed for hours at a time, and forced into extended quorum calls rather than being allowed to consider relevant amendments to this bill. Nonetheless, we are on the brink of disposing of the final amendments and passing this important legislation.

Today we should be able to adopt the Bennet amendment on satellite offices and the Kirk-Pryor amendment regarding the creation of an ombudsman for patents relating to small businesses. I hope that we can adopt the Menendez amendment on expediting patents for important areas of economic growth, like energy and the environment, as well. I am prepared to agree to short time agreements for additional debate, if needed, and votes on those amendments.

The remaining issue for the Senate to decide will be posed by an amendment that Senator FEINSTEIN has filed to turn back the advancement toward a first-inventor-to-file system.

I want to take a moment to talk about an important component of the America Invents Act, the transition of the American patent system to a first-inventor-to-file system. I said yesterday that the administration strongly supports this effort. The administration's Statement of Administration Policy notes that the reform to a first-inventor-to-file system ''simplifies the process of acquiring rights'' and describes it as an ''essential provision [to] reduce legal costs, improve fairness and support U.S. innovators seeking to market their products and services in a global marketplace.'' I agree, and believe it should help small and independent inventors.

This reform has broad support from a diverse set of interests across the patent community, from life science and high-tech companies to universities and independent inventors. Despite the very recent efforts of a vocal minority, there can be no doubt that there is wide-ranging support for a move to a first-inventor-to-file patent system. A transition to first-inventor-to-file is necessary to fulfill the promises of higher quality patents and increased certainty that are the goals of the America Invents Act.

This improvement is backed by broad-based groups such as the National Association of Manufacturers, the American Intellectual Property Law Association, the Intellectual Property Owners Association, the American Bar Association, the Association for Competitive Technology, the Business Software Alliance, and the Coalition for 21st Century Patent Reform, among others. All of them agree that transitioning our outdated patent system to a first-inventor-to-file system is a crucial component to modernizing our patent system. I also commend the assistant Republican leader for his remarks yesterday strongly in favor of the first-inventor-to-file provisions.

A transition to a first-inventor-to-file system is needed to keep America at the pinnacle of innovation by ensuring efficiency and certainty in the patent system. This transition is also necessary to better equip the Patent and Trademark Office, PTO, to work through its current backlog of more than 700,000 unexamined patent applications through work-sharing agreements with other patent-granting offices.

The Director of the PTO often says that the next great invention that will drive our economic growth may be sitting in its backlog of applications. The time consuming ''interference proceedings'' that are commonplace in our current, outdated system are wasting valuable resources that contribute to this delay, and unfairly advantage large companies with greater resources.

A transition to a first-inventor-to-file system was recommended in the 2004 Report by the National Academy of Sciences. The transition has been a part of this bill since its introduction four Congresses ago. This legislation is the product of eight Senate hearings and three markups spanning weeks of consideration and many amendments. Until very recently, first-inventor-to-file had never been the subject of even a single amendment in committee.

Senator FEINSTEIN has worked with me on this bill, has cosponsored it in the past and has voted for it.

I urge Senators who support the goals of the America Invents Act to vote against this amendment to strike the bill's important reform represented by the first-inventor-to-file provision. Every industrialized nation other than the United States uses a patent priority system commonly referred to as a ''first-to-file'' system. In a first-inventor-to-file system, the priority of a right to a patent is based on the earlier filed application. This adds simplicity and objectivity into a very complex system. By contrast, our current, outdated method for determining the priority right to a patent is extraordinarily complex, subjective, time-intensive, and expensive. The old system almost always favors the larger corporation and the deep pockets over the small, independent inventor.

The transition to a first-inventor-to-file system will benefit the patent community in several ways. It will simplify the patent application system and provide increased certainty to businesses that they can commercialize a patent that has been granted. Once a patent is granted, an inventor can rely on its filing date on the face of the patent. This certainty is necessary to raise capital, grow businesses, and create jobs.

The first-inventor-to-file system will also reduce costs to patent applicants and the Patent Office. This, too, should help the small, independent inventor. In the outdated, current system, when more than one application claiming the same invention is filed, the priority of a right to a patent is decided through an ''interference'' proceeding to determine which applicant can be declared to have invented the claimed invention first. This process is lengthy, complex, and can cost hundreds of thousands of dollars. Small inventors rarely, if ever, win interference proceedings. In a first-inventor-to-file system, however, the filing date of the application is objective and easy to determine, resulting in a streamlined and less costly process.

Importantly, a first-inventor-to-file system will increase the global competitiveness of American companies and American inventors. As business and competition are increasingly global in scope, inventors must frequently file patent applications in both the United States and other countries for protection of their inventions. Since America's current, outdated system differs from the first-inventor-to-file system used in other patent-issuing jurisdictions, it causes confusion and inefficiencies for American companies and innovators. Harmonization will benefit American inventors.

Finally, the first-inventor-to-file provisions that are included in the America Invents Act were drafted with careful attention to needs of universities and small inventors. That is why the bill includes a 1-year grace period to ensure that an inventor's own publication or disclosure cannot be used against him as prior art, but will act as prior art against another patent application. This will encourage early disclosure of new inventions, regardless of whether the inventor ends up trying to patent the invention.

For these reasons among others, the transition is supported by the overwhelming majority of the patent community and American industry, as well as the administration and the experts at the Patent and Trademark Office.

This past weekend, the Washington Post editorial board endorsed the transition, calling the first-inventor-to-file standard a ''bright line,'' and stating that it would bring ''certainty to the process.'' The editorial also recognizes the ''protections for academics who share their ideas with outside colleagues or preview them in public seminars'' that are included in the bill.

The Small Business & Entrepreneurship Council has expressed its strong support for the first-inventor-to-file system, writing that ''small firms will in no way be disadvantaged, while opportunities in the international markets will expand.''

The Intellectual Property Owners Association calls the first-inventor-to-file system ''central to modernization and simplification of patent law'' and ''very widely supported by U.S. companies.''

Independent inventor Louis Foreman has said the first-inventor-to-file transition will help ''independent inventors across the country by strengthening the current system for entrepreneurs and small businesses.''

And, in urging the transition to the first-to-file system, the Association for Competitive Technology, which represents small and mid-size IT firms, has said the current first-to-invent system ''negatively impacts entrepreneurs'' and puts American inventors ''at a disadvantage with competitors abroad who can implement first inventor to file standards.''

If we are to maintain our position at the forefront of the world's economy, if we are to continue to lead the globe in innovation and production, if we are to win the future through American ingenuity and innovation, then we must have a patent system that is streamlined and efficient. The America Invents Act, and a transition to a first-inventor-to-file system in particular, are crucial to fulfilling this promise.

Madam President, in summary, as I said, yesterday we were finally able to make progress when the Senate proceeded to a vote on the managers' amendment, the Leahy-Grassley-Kyl amendment, to the America Invents Act. It was a very important amendment, with contributions from many Senators from both sides of the aisle.

I think it was a little bit frustrating for the public to watch. They saw us several hours in quorum calls and then having an amendment that passed 97 to 2. I would hope we might, in doing the Nation's business, move with a little bit more speed. But I do thank those Senators who supported it.

The Leahy-Grassley-Kyl amendment should ensure our moving forward to make the changes needed to unleash American innovation and create jobs without spending a single dollar of taxpayer money. In fact, according to the Congressional Budget Office, enactment of the bill will save millions of dollars. These are not bumper slogan ideas of saving money. These are actually doing the hard work necessary to save money.

I thank those Senators who have stayed focused on our legislative effort and who joined in tabling nongermane amendments that had nothing to do with the subject of the America Invents Act.

Extraneous amendments that have nothing to do with the important issue of reforming our out-of-date patent system so American innovators can win the global competition for the future have no place in this important bill.

We are at a time when China and Europe and the rest of Asia are moving ahead of us. We need the tools to keep up. We should not waste time with a lot of sloganeering amendments that would stop the bill. What we ought to focus on is making America good and making sure we can compete with the rest of the world. We should not have amendments used to slow this bill's consideration and passage. If America is going to win the global economic competition, we need the improvements in our patent system this bill can bring.

I continue to believe, as I have said all week, we can finish the bill—we actually could have finished it yesterday, when you consider all the time wasted in quorum calls—but I believe we can finish it today and show the American people the Senate can function in a bipartisan manner.

We have not been as efficient as I would have liked. We have been delayed for hours at a time and forced into extended quorum calls rather than being allowed to consider relevant amendments to the bill. But we are on the brink of disposing of the final amendments and passing this important legislation.

We should be able to adopt the Bennet amendment on satellite offices either by a voice vote or a rollcall, I would hope in the next few minutes, and the Kirk-Pryor amendment regarding the creation of an ombudsman for patents relating to small businesses.

I hope we can adopt the Menendez amendment on expediting patents for important areas of economic growth, such as energy and the environment, as well. I am prepared to agree to very short time agreements for additional debate, if needed. If a rollcall is called for, I am happy to have those.

The remaining issue for the Senate to decide will be posed by an amendment Senator FEINSTEIN filed to turn back the advancement toward a first-inventor-to-file system.

I wish to take a moment to talk about an important component of the

America Invents Act, the transition of the American patent system to a first-inventor-to-file system. This is strongly supported by the administration and by the managers of this package. The administration's Statement of Administration Policy notes that the reform to a first-inventor-to-file system ''simplifies the process of acquiring rights,'' and it describes it as an ''essential provision [to] reduce legal costs, improve fairness and support U.S. innovators seeking to market their products and services in a global marketplace.'' I agree. I also believe it should help small and independent inventors.

This reform has broad support from a diverse set of interests across the patent community, from life science and high-tech companies to universities and independent inventors. Despite the very recent efforts—and they were very recent efforts; after all, we have been working on this bill for years—of a vocal minority, there can be no doubt that there is wide-ranging support for a move to a first-inventor-to-file patent system.

A transition to first-inventor-to-file system is necessary to fulfill the promises of higher quality patents and increased certainty that are the goals of the America Invents Act. This improvement is backed by broad-based groups such as the National Association of Manufacturers, the American Intellectual Property Law Association, the Intellectual Property Owners Association, the American Bar Association, the Association for Competitive Technology, the Business Software Alliance, and the Coalition for 21st Century Patent Reform, among others. All of them agree that transitioning our outdated patent system to a first-inventor-to-file system is a crucial component to modernizing our patent system.

I commend the assistant Republican leader for his remarks yesterday strongly in favor of the first-inventor-to-file provisions. It actually allows us to put America at the pinnacle of innovation by ensuring efficiency and certainty in the patent system.

This transition is also necessary to better equip the Patent and Trademark Office to work through its current backlog. That backlog has more than 700,000 unexamined patent applications.

A transition to a first-inventor-to-file system will benefit the patent community in several ways. It will simplify the patent application system and provide increased certainty to businesses that they can commercialize a patent that has been granted.

The first-inventor-to-file system will also reduce costs to patent applicants and the Patent Office. Importantly, a first-inventor-to-file system will increase the global competitiveness of American companies and American inventors. Also, the first-inventor-to-file provisions that are included in the America Invents Act were drafted with careful attention to needs of universities and small inventors. For these reasons, among others, this transition is supported by the overwhelming majority of the patent community and American industry, as well as the administration and experts at the Patent and Trademark Office.

At this time I wish to have printed in the RECORD a few letters of support for the transition to first-to-file.

The Small Business & Entrepreneurship Council says that ''by moving to a first-inventor-to-file system, small firms will in no way be disadvantaged, while opportunities in international markets will expand.''

The Intellectual Property Owners Association says the transition to first-inventor-to-file ''is central to modernization and simplification of patent law and is very widely supported by U.S. companies.''

BASF says the first-to-file system will ''enhance the patent system in ways that would benefit all sectors of the U.S. economy.''

And the American Bar Association refutes claims that the first-to-file system would disadvantage small and independent inventors, saying that the legislation ''makes it clear that the award goes to the first inventor to file and not merely to the first person to file.''

I ask unanimous consent that copies of these letters be printed in the RECORD.

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

SMALL BUSINESS
& ENTREPRENEURSHIP COUNCIL,
Oakton, VA, February 28, 2011.

Hon. PATRICK LEAHY,
U.S. Senate, Russell Senate Bldg., Washington, DC.

DEAR SENATOR LEAHY: The Small Business & Entrepreneurship Council (SBE Council) and its members across the nation have been strong advocates for patent reform. We are pleased that you have introduced the Patent Reform Act (S. 23), and we strongly endorse this important piece of legislation.

An effective and efficient patent system is critical to small business and our overall economy. After all, the U.S. leads the globe in entrepreneurship, and innovation and invention are central to our entrepreneurial successes. Indeed, intellectual property—most certainly including patents—is a key driver to U.S. economic growth. Patent reform is needed to clarify and simplify the system; to properly protect legitimate patents; and to reduce costs in the system, including when it comes to litigation and the international marketplace.

Make no mistake, this is especially important for small businesses. As the Congressional Research Service has reported: ''Several studies commissioned by U.S. federal agencies have concluded that individuals and small entities constitute a significant source of innovative products and services. Studies have also indicated that entrepreneurs and small, innovative firms rely more heavily upon the patent system than larger enterprises.''

The Patent Reform Act works to improve the patent system in key ways, including, for example, by lowering fees for micro-entities, and by shortening time periods for patent reviews by making the system more predictable.

During the debate over this legislation, it is expected that two important areas of reform will come under attack.

First, the U.S. patent system is out of step with the rest of the world. The U.S. grants patents on a first-to-invent basis, rather than the first-inventor-to-file system that the rest of the world follows. First-to-invent is inherently ambiguous and costly, and that's bad news for small businesses and individual inventors.

In a 2004 report from the National Research Council of the National Academies (titled ''A Patent System for the 21st Century''), it was pointed out: ''For those subject to challenge under first-to-invent, the proceeding is costly and often very protracted; frequently it moves from a USPTO administrative proceeding to full court litigation. In both venues it is not only evidence of who first reduced the invention to practice that is at issue but also questions of proof of conception, diligence, abandonment, suppression, and concealment, some of them requiring inquiry into what an inventor thought and when the inventor thought it.'' The costs of this entire process fall more heavily on small businesses and individual inventors.

As for the international marketplace, patent harmonization among nations will make it easier, including less costly, for small firms and inventors to gain patent protection in other nations, which is critical to being able to compete internationally. By moving to a first-inventor-to-file system, small firms will in no way be disadvantaged, while opportunities in international markets will expand.

Second, as for improving the performance of the USPTO, it is critical that reform protect the office against being a ''profit center'' for the federal budget. That is, the USPTO fees should not be raided to aid Congress in spending more taxpayer dollars or to subsidize nonrelated programs. Instead, those fees should be used to make for a quicker, more predictable patent process.

Thank you for your leadership Senator Leahy. Please feel free to contact SBE Council if we can be of assistance on this important issue for small businesses.

Sincerely,

KAREN KERRIGAN,
President & CEO.

INTELLECTUAL PROPERTY
OWNERS ASSOCIATION,
Washington, DC, February 25, 2011.

Re Amendments to S. 23, the ''Patent Reform Act of 2011.''

Honorable ____,
U.S. Senate,
____ Senate Office Building, Washington, DC.

DEAR SENATOR ____: Intellectual Property Owners Association (IPO) is pleased that the Senate is planning to proceed with consideration of S. 23, the ''Patent Reform Act of 2011.''

IPO is one of the largest and most diverse trade associations devoted to intellectual property rights. Our 200 corporate members cover a broad spectrum of U.S. companies in industries ranging from information technology to consumer products to pharmaceuticals and biotechnology.

We wish to give you our advice on amendments that we understand might be offered during consideration of S. 23:

Vote AGAINST any amendment to delete the ''first-inventor-to-file'' and related provisions in section 2 of the bill. First-inventor-to-file, explained in a 1-page attachment to this letter, is central to modernization and simplification of patent law and is very widely supported by U.S. companies.

Vote FOR any amendment guaranteeing the U.S. Patent and Trademark Office access

to all user fees paid to the agency by patent and trademark owners and applicants. Current delays in processing patent applications are totally unacceptable and the result of an underfunded Patent and Trademark Office.

Vote AGAINST any amendment that would interpose substantial barriers to enforcement of validly-granted ''business method'' patents. IPO supports business method patents that were upheld by the U.S. Supreme Court in the recent Bilski decision.

For more information, please call IPO at 202–507–4500.

Sincerely,

DOUGLAS K. NORMAN,
President.

FIRST-INVENTOR-TO-FILE IN S. 23, THE ''PATENT REFORM ACT OF 2011''

Section 2 of S. 23 simplifies and modernizes U.S. patent law by awarding the patent to the first of two competing inventors to file in the U.S. Patent and Trademark Office (PTO), a change from the traditional system of awarding the patent, in theory, to the first inventor to invent. First-inventor-to-file in S. 23 has these advantages:

Eliminates costly and slow patent interferences proceedings conducted in the PTO and the courts to determine which inventor was the first to invent.

Creates legal certainty about rights in all patents, the vast majority of which never become entangled in interference proceedings in the first place, but which are still subject to the possibility under current law that another inventor might come forward and seek to invalidate the patent on the ground that this other inventor, who never applied for a patent, was the first to invent.

Encourages both large and small patent applicants to file more quickly in order to establish an early filing date. Early filing leads to early disclosure of technology to the public, enabling other parties to build on and improve the technology. (Applicants who plan to file afterward in other countries already have the incentive to file quickly in the U.S.)

Makes feasible the introduction of post-grant opposition proceedings to improve the quality of patents, by reducing the issues that could be raised in a post-grant proceeding, thereby limiting costs and delay.

Follows up on changes already made by Congress that (1) established inexpensive and easy-to-file provisional patent applications and, (2) in order to comply with treaty obligations, allowed foreign inventors to participate in U.S. patent interference proceedings.

BASF,
Florham Park, NJ, February 28, 2011.

Hon. FRANK LAUTENBERG,
Hon. BOB MENENDEZ,
U.S. Senate,
Washington, DC.

DEAR SENATORS LAUTENBERG AND MENENDEZ: On behalf of BASF's North American headquarters located in Florham Park, New Jersey, I am writing to urge your support for S. 23, the Patent Reform Act of 2011.

At BASF, We Create Chemistry, and we pride ourselves on creating technological advances through innovation. We recognize that America's patent system is crucial to furthering this innovation and that the system is in need of modernization and reform. The United States desperately needs to enhance the efficiency, objectivity, predictability, and transparency of its patent system.

BASF likes S. 23 because we feel it will preserve the incentives necessary to sustain America's global innovation and spur the creation of high-wage, high-value jobs in our nation's economy. In particular, the shift to a ''first to file'' system, an appropriate role for the court in establishing patent damages, and improved mechanisms for challenging granted patents enhance the patent system in ways that would benefit all sectors of the U.S. economy.

I want to stress that BASF supports S. 23 in the form recently passed out of the Senate Judiciary Committee via a bipartisan 15–0 vote. This bill represents a great deal of work and hard fought consensus. We ask that you reject amendments on the floor that would substantively alter the bill, including one that would reportedly strike the ''first to file'' provision.

Please note, however, that BASF does support a planned amendment that would end the practice of diverting funds from the U.S. Patent and Trademark Office to other agencies. This amendment is necessary, since the USPTO is funded entirely by user fees and does not get any taxpayer money.

Our patent system has helped foster U.S. innovation and protect the intellectual property rights of inventors for more than 200 years, and it can continue to do so if it is updated to make sure it meets the challenges facing today's innovators, investors, and manufacturers. I urge you to work with your colleagues in the Senate to pass S. 23 without substantive amendment to the patent provisions and with language that would prevent diversion of USPTO funds.

Sincerely,

STEVEN J. GOLDBERG,
Vice President,
Regulatory Law & Government Affairs

AMERICAN BAR ASSOCIATION,
Chicago, IL, February 28, 2011.

DEAR SENATOR: This week the Senate will be considering S. 23, the ''Patent Reform Act of 2011.'' I am writing to express the support of the Section of Intellectual Property Law of the American Bar Association for Senate approval of S. 23, and our opposition to any amendment that may be offered to strike the ''first-inventor-to-file'' provisions of the bill. These views have not been considered by the American Bar Association's House of Delegates or Board of Governors and should not be considered to be views of the American Bar Association.

S. 23 is a bi-partisan product of six years of study and development within the Judiciary Committee. By necessity, it contains a number of provisions that are the result of negotiation and compromise and it is unlikely that all of the Judiciary Committee co-sponsors favor each and every provision. We too would have addressed some issues differently. However, the perfect should not be the enemy of the good and we believe that this is a good bill. S. 23 and S. 515, its close predecessor in the 111th Congress, are the only bills that we have endorsed in the six years that we have been following this legislation. The enactment of S. 23 would substantially improve the patent system of the United States and we support that enactment.

At the same time, we want to express our strong opposition to an amendment that may be offered to strike the provisions of S. 23 that would switch the U.S. patent system to one that awards a patent to the first inventor who discloses his invention and applies for a patent (''first-inventor-to-file''), rather than awarding a patent based on winning the contest to show the earliest date of conception or reduction to practice of the invention (''first-to-invent'').

The United States is alone in the world in retaining the first-to-invent system. While a first-inventor-to-file system encourages inventors to file for a patent and disclose their inventions at an early date, the first-to-invent standard increases opportunity for competing claims to the same invention, and facilitates protracted legal battles in administrative and court proceedings, which are extremely costly, in both time and money.

Some have long thought that small and independent inventors would be disadvantaged in a first-inventor-to-file environment and that competitors with more resources might learn of their inventions and get to the U.S. Patent Office first with an application. This current legislation, however, makes it clear that the award goes to the first inventor to file and not merely to the first person to file.

Equally important, recent studies show that, under the present U.S. patent system, small and independent inventors who are second to file but who attempt in the U.S. Patent Office and court proceedings to establish that they were the first to invent, actually lose more patents than they would obtain had the United States simply awarded patents to the first inventor to file.

Moreover, since 1996, an inventor based in the United States faces a much more difficult task of ever obtaining a patent. For inventions made after 1996, the U.S. patent system has been open to proofs of inventions made outside the United States—creating for many U.S.-based inventors a new and potentially even more expensive obstacle to obtaining a patent under the current first-to-invent rule.

Finally, U.S. inventors more and more are facing the need to file patent applications both at home and abroad to remain competitive in our global economy. Requiring compliance with two fundamentally different systems places undue additional burdens on our U.S. inventors and puts them at a competitive disadvantage in this global economy.

We urge you to support enactment of S. 23 and to oppose any amendment to strike the ''first-inventor-to-file'' provisions.

Sincerely,

MARYLEE JENKINS,
Chairperson,
Section of Intellectual Property Law.

Mr. LEAHY. Madam President, we are now ready to go forward on the Bennet and Kirk-Pryor amendments. I am prepared to call them up for a vote in the next few minutes if we could get somebody on the floor.

AMENDMENT NO. 117, AS MODIFIED

I understand there is a modification at the desk of Bennet amendment No. 117.

The ACTING PRESIDENT pro tempore. Without objection, the amendment is so modified.

The amendment, as modified, is as follows:

On page 104, between lines 22 and 23, insert the following:

SEC. 18. SATELLITE OFFICES.

(a) ESTABLISHMENT.—Subject to available resources, the Director may establish 3 or more satellite offices in the United States to carry out the responsibilities of the Patent and Trademark Office.

(b) PURPOSE.—The purpose of the satellite offices established under subsection (a) are to—

(1) increase outreach activities to better connect patent filers and innovators with the Patent and Trademark Office;

(2) enhance patent examiner retention;

(3) improve recruitment of patent examiners; and

(4) decrease the number of patent applications waiting for examination and improve the quality of patent examination.

(c) REQUIRED CONSIDERATIONS.—In selecting the locale of each satellite office to be

established under subsection (a), the Director—

(1) shall ensure geographic diversity among the offices, including by ensuring that such offices are established in different States and regions throughout the Nation; and

(2) may rely upon any previous evaluations by the Patent and Trademark Office of potential locales for satellite offices, including any evaluations prepared as part of the Patent and Trademark Office's Nationwide Workforce Program that resulted in the 2010 selection of Detroit, Michigan as the first ever satellite office of the Patent and Trademark Office.

(3) Nothing in the preceding paragraph shall constrain the Patent and Trademark Office to only consider its prior work from 2010. The process for site selection shall be open.

(d) PHASE-IN.—The Director shall satisfy the requirements of subsection (a) over the 3-year period beginning on the date of enactment of this Act.

(e) REPORT TO CONGRESS.—Not later than the end of the first fiscal year that occurs after the date of the enactment of this Act, and each fiscal year thereafter, the Director shall submit a report to Congress on—

(1) the rationale of the Director in selecting the locale of any satellite office required under subsection (a);

(2) the progress of the Director in establishing all such satellite offices; and

(3) whether the operation of existing satellite offices is achieving the purposes required under subsection (b).

(f) 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) PATENT AND TRADEMARK OFFICE.—The term ''Patent and Trademark Office'' means the United States Patent and Trademark Office.

On page 104, line 23, strike ''**SEC. 18.**'' and insert ''**SEC. 19.**''.

AMENDMENTS NOS. 117, AS MODIFIED, AND 123

Mr. LEAHY. Madam President, I ask unanimous consent that the Senate resume consideration of Bennet amendment No. 117, as modified, with the changes at the desk and Kirk amendment No. 123 en bloc; further, that the amendments be agreed to en bloc and the motions to reconsider be considered made and laid upon the table, with no intervening action or debate.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. GRASSLEY. Madam President, reserving the right to object, and I will not object, I wish to say as manager of my side of the aisle that we support this. We think both of these amendments are good amendments and that we ought to move forward. I appreciate very much the majority working with us to accomplish this goal.

I yield the floor.

The ACTING PRESIDENT pro tempore. Is there objection?

Without objection, it is so ordered.

The amendments, Nos. 117, as modified, and 123, were agreed to en bloc.

Mr. LEAHY. Madam President, I am ready to go to third reading unless there are others who are otherwise tied up who knows where, but I wish they would take the time to drop by if they have amendments. Senator GRASSLEY and I spent hours on the floor yesterday just waiting for people to bring up amendments. We went through a number of quorum calls. We are talking about something that is going to be a tremendous boost to businesses and inventors. Those who are watching are wondering probably why we have spent years getting this far. So much time is being wasted.

I just want everybody to know the two of us are ready to vote. Yesterday we took hours of delay to vote on the Leahy-Grassley, et al. amendment, and then it passed 97 to 2.

So I would urge Senators who have amendments to come to the floor. As the gospel says, ''Many are called, but few are chosen.'' It may be the same thing on some of the amendments, but ultimately we will conclude. Before my voice is totally gone, unless the Senator from Iowa has something to say, I yield to the Senator from Iowa.

Mr. GRASSLEY. Madam President, supporting what the chairman has just said, outside of the fact that there might be one or two controversial nongermane amendments to this legislation, we have to look at the underlying product. The underlying product is very bipartisan. Most economic interests within our country are supporting this patent reform legislation. Everybody agrees it is something that probably should have been passed a Congress ago.

I join my Democratic manager and the chairman of the committee in urging Senators on my side of the aisle who have either germane amendments or nongermane amendments to come to the floor and offer them so the underlying piece of legislation can be passed and sent on to the House of Representatives.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Vermont.

Mr. LEAHY. Madam President, I also wish to associate myself with the distinguished senior Senator from Iowa. He has worked very hard to help us get to the floor. Considering the enormous amount of time that has been spent by both sides of the aisle on this bill, the amount of time that has been spent working out problems, I wish we could complete it. I understand there are a couple Senators who may have amendments. I am not sure where they are, but I am sure they will show up at some point. In the meantime, I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. UDALL of New Mexico). Without objection, it is so ordered.

AMENDMENT NO. 133

Mrs. FEINSTEIN. Mr. President, I call up amendment No. 133, and I ask unanimous consent to set aside the pending amendment.

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

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself, Mr. RISCH, Mr. REID, Mr. CRAPO, Mrs. BOXER, and Mr. ENSIGN, proposes an amendment numbered 133.

The amendment is as follows:

On page 2, line 1, strike ''**FIRST INVENTOR TO FILE.**'' and insert ''**FALSE MARKING.**''

On page 2, strike line 2 and all that follows through page 16, line 4.

On page 16, line 5, strike ''(1) IN GENERAL.—'' and insert ''(a) IN GENERAL.—'' and move 2 ems to the left.

On page 16, line 7, strike ''(A)'' and insert ''(1)'' and move 2 ems to the left.

On page 16, line 11, strike ''(B)'' and insert ''(2)'' and move 2 ems to the left.

On page 16, line 18, strike ''(2) EFFECTIVE DATE.—'' and insert ''(b) EFFECTIVE DATE.—'' and move 2 ems to the left.

On page 16, line 19, strike ''subsection'' and insert ''section''.

On page 16, strike line 22 and all that follows through page 23, line 2.

On page 23, strike line 3 and all that follows through page 31, line 15, and renumber sections accordingly.

On page 64, strike line 18 and all that follows through page 65, line 17.

On page 69, line 10, strike ''derivation'' and insert ''interference''.

On page 69, line 14, strike ''derivation'' and insert ''interference''.

On page 71, line 9, strike ''DERIVATION'' and insert ''INTERFERENCE''.

On page 71, lines 9 and 10, strike ''derivation'' and insert ''interference''.

On page 71, line 14, strike ''derivation'' and insert ''interference''.

On page 72, line 3, strike ''derivation'' and insert ''interference''.

On page 72, line 8, strike ''derivation'' and insert ''interference''.

On page 73, line 1, strike ''derivation'' and insert ''interference''.

On page 73, between lines 5 and 6, insert the following:

(d) CONFORMING AMENDMENTS.—Sections 41, 134, 145, 146, 154, 305, and 314 of title 35, United States Code, are each amended by striking ''Board of Patent Appeals and Interferences'' each place that term appears and inserting ''Patent Trial and Appeal Board''.

On page 73, line 6, strike ''(d)'' and insert ''(e)''.

On page 93, strike lines 6 through 8, and insert the following: by inserting ''(other than the requirement to disclose the best mode)'' after ''section 112 of this title''.

On page 98, strike lines 20 and 21, and insert the following:

''SEC. 17. EFFECTIVE DATE.

Except as otherwise provided

On page 99, strike lines 1 through 14.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that at the conclusion of my remarks the amendment be set aside and the Senate return to the previously pending business.

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

Mrs. FEINSTEIN. Thank you very much.

I rise today to offer an amendment to strike the first-to-file provisions of this bill. I am joined in this effort by my cosponsors, Senator RISCH, Majority Leader REID, and Senators CRAPO

and BOXER. I also ask unanimous consent that Senator ENSIGN be added as a cosponsor of the amendment.

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

Mrs. FEINSTEIN. I know the bill has contained these provisions for some time now, and I acknowledge I have voted for different versions of it that contain these provisions. However, I have heard more and more in the past 2 years from small inventors, startup companies, small businesses, venture capitalists, and, yes, even large companies from all around our country, but especially in my State of California, that this proposed transition from our first-to-invent system to a first-to-file system would be severely harmful to innovation, and especially burdensome on small inventors, startups, and small businesses. And I have become convinced it is the wrong thing to do.

For the benefit of my colleagues who have not been so embroiled in this rather technical issue, let me provide a little background. For over a century, our country has awarded patents to the first inventor to come up with an idea, even if somebody else beat them to the Patent Office—a first-to-invent system. And we have done very well under the first-to-invent system. This bill would change that, so that the first person to file an application for a patent for a particular invention would be entitled to that patent, even if another person actually created the invention first. This is what is known as the first-to-file system.

Now, the argument that is made for transitioning to first-to-file is that the rest of the world follows first-to-file, and that will harmonize our system with theirs. This is supported by big companies that have already made it, that have an international presence. Therefore, I understand their support for first-to-file. But under first-to-invent, we have been the world's leader in innovation, and the first-to-file countries have been playing catchup with our technological advances. So with all due respect, I wouldn't trade America's record of innovation for that of virtually any other country or certainly any first-to-file country.

The genius of America is inventions in small garages and labs, in great ideas that come from inspiration and perspiration in such settings and then take off. So many of America's leading companies—Hewlett Packard, Apple, Google, even AT&T arising from Alexander Graham Bell's lab, for example—started in such settings and grew spectacularly, creating jobs for millions of Americans and lifting our economy and standard of living.

A coalition of affected small business groups, including the National Small Business Association and others, recently said first-to-file ''disrupts the unique American start-up ecosystem that has led to America's standing as the global innovation leader . . .''

I believe it is critical that we continue to protect and nurture this culture of innovation, and preserving the first-to-invent system that has helped foster it is essential to do this.

Moreover, this bill would not actually harmonize our patent priority system with that of the rest of the world. Many first-to-file countries allow more extensive use of prior art to defeat a patent application and provide for greater prior user rights than this bill would provide. Europe does not provide even the limited 1-year publication grace period this bill does.

An important part of this debate is the change the bill makes to the so-called grace period that inventors have under U.S. current law. Presently, a person's right to their invention is also protected for 1 year from any of the following: No. 1, describing their invention in a printed publication; No. 2, making a public use of the invention; or, No. 3, offering the invention for sale. This is called the grace period, and it is critical to small inventors.

Mr. President, 108 startups and small businesses wrote last year that:

> U.S. patent law has long allowed inventors a 1-year ''grace period,'' so that they can develop, vet, and perfect their invention, begin commercialization, advance sales, seek inventors and business partners, and obtain sufficient funds to prosecute the patent application. During the grace period, many inventors learn about starting a technology-based business for the first time. They must obtain investment capital and must learn from outside patent counsel (at considerable expense) about patenting and related deadlines and how to set up confidentiality agreements. Many startups or small businesses are in a race against insolvency during this early stage. The grace period protects them during this period from loss of patent rights due to any activities, information leaks or inadvertent unprotected disclosures prior to filing their patent applications.

S. 23 eliminates this grace period from offering an invention for sale or making a public use of it, leaving only a grace period from ''disclosure'' of the invention.

There are two problems with this. First, ''disclosure'' is not defined in the bill. This will generate litigation while the courts flesh out that term's meaning. While this plays out in the courts, there will be uncertainty about whether many inventions are patentable. This uncertainty will, in turn, chill investment, as venture capitalists will be reluctant to invest until they are confident that the inventor will be able to patent and own their invention.

Secondly, because of this lack of definition, some patent lawyers interpret ''disclosure'' to mean a disclosure that is sufficiently detailed to enable a person of ordinary skill in the particular art to make the invented item. In practical terms, this means a patent application or a printed publication.

Now, this does provide some protection to universities, it is true. They often publish about their inventions. However, it is scant protection for the small inventor. They don't publish about their inventions, until they file a patent application. As the 108 small businesses put it, ''no business willingly publishes complete technical disclosures that will tip-off all competitors to a company's technological direction. . . . Confidentiality is crucial to small companies.''

The grace period from offering for sale or public use is critical for their protection; eliminating it will have the effect, in the words of these small businesses, of ''practically gutting the American 1-year grace period.'' The National Small Business Association wrote recently:

> The American first-to-invent grace period patent system has been a major mechanism for the dynamism of small business innovation. . . . It is clear that the weak or (entirely absent) [sic] grace periods used in the rest of the world's first-to-file patent system throttles small-business innovation and job creation.

Our amendment would preserve America's world-leading system.

I am also very concerned that first-to-file would proportionately disadvantage small companies and startups with limited resources. I have become convinced that this change would impede innovation and economic growth in our country, particularly harming the small, early-stage businesses that generate job growth.

Obviously, the process of innovation starts with the generation of ideas. Small California companies and inventors have described to me how most of these ideas ultimately do not pan out; either testing or development proves they are not feasible technologically, or they prove not to be viable economically.

Unfortunately, first-to-file incentivizes inventors to ''race to the Patent Office,'' to protect as many of their ideas as soon as possible so they are not beaten to the punch by a rival. Thus, first-to-file will likely result in significant overfiling of these ''dead end'' inventions, unnecessarily burdening both the Patent and Trademark Office and inventors. As Paul Michel, former chief judge of the Court of Appeals for the Federal Circuit, and Gregory Junemann, president of the International Federation of Professional and Technical Engineers, put it in a recent letter to the committee:

> As Canada recently experienced, a shift to a first-to-file system can stimulate mass filing of premature applications as inventors rush to beat the effective date of the shift or later, filings by competitors.

This presents a particular hardship for independent inventors, for startups, and for small businesses, which do not have the resources and volume to employ in-house counsel but must instead rely on more-costly outside counsel to file their patents. This added cost and time directed to filing for ideas that are not productive will drain resources away from the viable ideas that can build a patent portfolio—and a business.

At a time when the Patent and Trademark Office has a dramatic backlog of over 700,000 patents waiting to be examined and a pendency time of some 3 years, Congress should be careful to

ensure that any legislative changes will not increase patent filings that are unfruitful.

The counter-argument is made that a small inventor could file a cheap ''provisional patent application,'' and that is sufficient protection. However, patent lawyers who work with small clients have said that they advise their clients not to treat a provisional application any less seriously than a full patent application. If there is part of an invention that is left out of the provisional application, that will not be protected. And the parts that are included in the provisional application will be vulnerable too, under an attack that the inventor failed to disclose the ''best mode'' of the invention by leaving out necessary information.

The argument is made that first to file will establish a simple, clear priority of competing patent applications. Proponents of first to file argue that it will eliminate costly, burdensome proceedings to determine who actually was the first to invent, which are known as ''interference proceedings.''

However, the reality is that this is not a significant problem under our current system. There are only about 50 ''interference proceedings'' a year to resolve who made an invention first. This is out of about 480,000 patent applications that are submitted each year—in other words, one-one hundredth of 1 percent of patent applications.

Another problem with the bill's first to file system is the difficulty of proving that someone copied your invention.

The bill's proponents assert that it protects against one person copying another person's invention by allowing the first inventor to prove that ''such other patent was derived from the inventor of the invention . . .''.

Currently, you as a first inventor can prove that you were first by presenting evidence that is in your control—your own records contemporaneously documenting the development of your invention. But to prove that somebody else's patent application came from you under the bill, was ''derived'' from you, you would have to submit documents showing this copying. Only if there was a direct relationship between the two parties will the first inventor have such documents.

If there was only an indirect relationship, or an intermediary—for example, the first inventor described his invention at an angel investor presentation where he didn't know the identities of many in attendance—the documents that would show ''derivation''—copying—are not going to be in the first inventor's possession; they would be in the second party's possession. You would have to find out who they talked to, e-mailed with, et cetera to trace it back to your original disclosure. But the bill doesn't provide for any discovery in these ''derivation proceedings,'' so the first inventor can't prove their claim.

For these reasons, and many others, the first to invent system, which I believe has made our Nation the leader in the world, which our amendment would preserve, is supported by numerous people and businesses around the country, including the National Small Business Association; Coalition for Patent Fairness, a coalition of large high-tech companies; IEEE, Institute of Electrical and Electronics Engineers, which has 395,000 members; the International Federation of Professional and Technological Engineers, AFL–CIO; the University of California System; the University of Kentucky; Paul Michel—Former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, which plays the critical role of hearing appeals in patent cases; the U.S. Business and Industry Council; American Innovators for Patent Reform; National Association of Patent Practitioners; Professional Inventors Alliance USA; CONNECT, a trade association for small technology and life science businesses; and many small inventors, as represented, for instance, in a letter signed by 108 startups and small businesses from all over the country.

Mr. President, I ask unanimous consent that a copy of this letter be printed in the RECORD following my remarks.

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

(See exhibit 1.)

Mrs. FEINSTEIN. Mr. President, I don't often agree with the organization Gun Owners of America, a group that thinks the National Rifle Association is too liberal. But I do agree with them on this issue. They are part of a coalition of 23 conservative organizations that wrote to the leaders about this, arguing: ''Our competitors should have to 'harmonize up' to our superior intellectual property regime, rather than our having to weaken our patent system and 'harmonize down' to their levels.'' Other signatories on this letter include Phyllis Schlafly of the Eagle Forum; Edwin Meese III, former Attorney General under President Reagan; the American Conservative Union; and the Christian Coalition.

I think this is really a battle between the small inventors beginning in the garage, like those who developed the Apple computer that was nowhere, and who, through the first-to-invent system, were able to create one of the greatest companies in the world. America's great strength is the cutting-edge of innovation. The first-to-invent system has served us well. If it is not broke, don't fix it. I don't really believe it is broke.

I am delighted to see that my cosponsor, the distinguished Senator from California, is also on the floor on this matter, and I welcome her support.

I yield the floor.

EXHIBIT 1

JUNE 1, 2010.

Re Effective repeal of the one-year ''grace period'' under S. 515, the Patent Reform Act of 2010.

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

DEAR SENATORS, on behalf of the undersigned companies and organizations whose survival and new job creations depend on patent protection, we are writing regarding the patent reform legislation, S. 515. We write today to draw renewed attention to a proposed rewrite of 35 U.S.C. §102, which effectively eliminates the American one-year grace period during which current law permits an inventor to test and vet an invention, publically demonstrate it to obtain advance sales revenue and seek investors before filing the patent application. No representatives of small business were called to testify during five years of Senate hearings on patent legislation. This issue has been overshadowed by the debate on other provisions of S. 515, but it is no less disruptive to the technology investments fostered by the patent system. The proposed sweeping changes in §102 is another issue where some large, incumbent firms are seeking a change to the detriment of small companies, new entrants, startup innovators, independent inventors, and future businesses.

U.S. patent law has long allowed inventors a one-year ''grace period,'' so that they can develop, vet, and perfect their invention, begin commercialization, advance sales, seek investors and business partners, and obtain sufficient funds to prosecute the patent application. During the grace period, many inventors learn about starting a technology-based business for the first time. They must obtain investment capital and often must learn from outside patent counsel (at considerable expense) about patenting and related deadlines and how to set up confidentiality agreements. Many startups or small businesses are in a race against insolvency during this early stage. The grace period protects them during this period from loss of patent rights due to any activities, information leaks or inadvertent unprotected disclosures prior to filing their patent applications.

Small businesses and startups are significantly more exposed than large firms in this regard because they must rely on far greater and earlier private disclosure of the invention to outside parties. This is often required for raising investment capital and for establishing strategic marketing partnerships, licensing and distribution channels. In contrast, large established firms have substantial patenting experience, often have in-house patent attorneys and often use internal R&D investment funds. They can also use their own marketing, sales and distribution chains. Therefore, they seldom need early disclosure of their inventions to outside parties.

S. 515 amends §102 to confer the patent right to the first-inventor-to-file as opposed to the first-to-invent as provided under current law. This change is purportedly made for the purpose of eliminating costly contests among near-simultaneous inventors claiming the same subject matter, called ''interferences.'' The goal of eliminating interferences is achievable by simple amendment of only §102(g) to a first-inventor-to-file criterion. However, under the heading of First-Inventor-To-File, S. 515 does far more, it changes all of §102, redefining the prior art and practically gutting the American one-year grace period.

Without the grace period, the patent system would become far more expensive and less effective for small companies. It would create the need to ''race to the patent office'' more frequently and at great expense before every new idea is fully developed or vetted. The pressure for more filings will affect all American inventors—not only a few that end up in interferences under current law. Because filing decisions must be made based on information that will be preliminary and immature, the bill forces poor patenting decisions. Applicants will skip patent protection for some ultimately valuable inventions, and will bear great costs for applications for inventions that (with the additional information that is developed during the grace period year of current law) prove to be useless, and subsequently abandoned. The evidence for this high abandonment trend under systems having no grace period is readily available from European application statistics.

The proponents of S. 515 suggest that the harm of the weak grace period of proposed §102(b) can be overcome if an inventor publishes a description of the invention, allowing filing within a year following such publication. Underlying this suggestion are two errors. First, no business willingly publishes complete technical disclosures that will tip off all competitors to a company's technological direction. We generally do not, and will not, publish our inventions right when we make them, some 2.5 years before the 18-month publication or 5–7 years before the patent grant. Confidentiality is crucial to small companies.

Second, even if we were to avail ourselves of such conditional grace period by publishing first before filing, we would instantly forfeit all foreign patent rights because such publication would be deemed prior art under foreign patent law. No patent attorney will advise their client to publish every good idea they conceive in order to gain the grace period of S. 515. The publication-conditioned ''grace period'' in S. 515 is a useless construct proposed by parties intent on compelling American inventors to ''harmonize'' de facto with national patent systems that lack grace periods. S. 515 forces U.S. inventors to make the ''Hobson's Choice'' of losing their foreign patent rights or losing the American grace period. It should be clear that the only way for American inventors to continue to benefit from a grace period and be able to obtain foreign patent rights, is to keep intact the current secret grace period that relies on invention date and a diligent reduction to practice.

The American grace period of current law ensures that new inventions originating in American small companies and startups—the sector of the economy that creates the largest number of new jobs—receive patent protection essential for survival and that American small businesses' access to foreign markets is not destroyed. We urge you to amend S. 515 so that §102 remains intact in order to preserve the American grace period in its full scope and force.

Thank you for your consideration of our views and concerns.

Sincerely,

(SIGNED BY 108 COMPANIES).

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent that the Senator from California be permitted to speak, and then I ask that the remaining time be granted to me.

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

Mrs. BOXER. Mr. President, will the Chair cut me off at 1 minute?

The PRESIDING OFFICER. Yes.

Mrs. BOXER. Mr. President, I thank Senator HATCH so much. I thank my friend and colleague, Senator FEINSTEIN, for this critical amendment.

Mr. President, I rise in support of the amendment offered by my dear friend and colleague, Senator FEINSTEIN.

The amendment would strike the first-to-file provision in the patent reform bill.

I was pleased to work with my colleague, Dr. COBURN, in support of his amendment to allow the patent office to keep its user fees, which was accepted into the managers' amendment that passed yesterday.

To me, that was one of the most important reforms we could enact in this legislation—giving the PTO the resources it needs to serve the public.

I support efforts to improve our patent system. And there are some good things in this bill, including efforts to help small businesses navigate the PTO.

But I strongly disagree with changing the core principle of our patent system—awarding a patent to the true inventor—for the sake of perceived administrative ease.

Unlike other countries, our patent system is rooted in our Constitution. We are the only country in the world whose Constitution specifically mentions ''inventor.''

Article I, section 8 states ''The Congress shall have the power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.''

Our system recognizes the complete process of invention—from conception to completion.

The United States is still the heart of innovation in the world, and its patent system is its soul.

Despite our rich history, the bill before us today seeks to erase over 200 years of invention and achievement, and replace it with a weaker system.

Let's talk about those changes.

Section 2 of the bill awards a patent to the first person to file, regardless of whether that person was the true inventor—the one who first conceived and developed the invention to completion.

That goes directly against the express language of the Constitution, which awards patents to the inventor, not the fastest to the PTO.

Section 2 of the bill also provides a weaker grace period than current law. This is a big change that will have a significant economic effect on startups, entrepreneurs and individual inventors.

I believe it is a change that we cannot afford, especially in these tough economic times when we need our small businesses to create new jobs.

Current law allows an inventor to obtain a patent if an application is filed within a year of a public use, sale or publication of information about the invention.

That year is called the grace period, during which an inventor's right to apply is protected from disclosures or applications by others related to his invention.

The grace period is important because it allows smaller entities, like startups or individual inventors, time to set up their businesses, seek funding, offer their inventions for sale or license, and prepare a thorough patent application.

Put another way, the grace period is an integral part of the formation of a small business.

The grace period has been a part of our patent system since 1839, and it was implemented to encourage inventors to engage in commercial activity, such as demonstrations and sales negotiations, without fear of being beaten to the patent office by someone with more resources.

The new grace period in the bill, however, would no longer cover important commercial activities such as sales or licensing negotiations.

The new provision also contains vague, undefined terms that will inject more uncertainty into the system at a time when inventors and investors need more certainty.

Proponents of first-to-file will argue that there have been studies or reports that show that a first-to-file system does not harm small entities. For example, they often mention the report of the National Academies of Science that reached that conclusion.

However, those studies and reports only analyzed the rare cases where two parties claimed to be the first inventor.

Do you know how rare those cases are? Last year, there were 52 cases out of over 450,000 applications filed—.01 percent of all applications ended up in a contest.

I do not think we should change over 170 years of protection for small entities based on cases that happen with the frequency of a hole in one in golf—1 out of 12,500, or .01 percent.

Listen to the conclusion of a report analyzing the business effects of Canada's switch to a first-to-file system:

The divergence between small entities and large corporations in patenting after the Reforms supports the idea that a switch to a first-to-file system will result in relatively less inventive activity being carried out by independent inventors as well as small businesses, and more being channeled through large corporations instead.

In closing, I believe there are things we can do to improve our patent system.

But I also believe that the foundation of our Constitution-based system—a patent is awarded to the inventor—has worked well for over 220 years, and we should not change that core.

It has produced inventors such as Thomas Edison, the Wright Brothers, and George Washington Carver.

We should not change the core of our system, and I urge my colleagues to vote for the Feinstein amendment.

Mr. President, I will conclude in this way. The Feinstein amendment is necessary. It is necessary because the first

person to invent should get the protection from the Patent Office. We believe that if this amendment does not pass, it goes against the express language of the Constitution which awards patents to the inventor, not the fastest one to run down to the Patent Office. Senator FEINSTEIN has explained why this is a matter of fairness and is better for consumers. I am hopeful that the amendment passes.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have been following the debate on the patent bill closely. I wish to again voice my strong support for passage of this very important legislation.

We have been working on this bill for a number of years and it is satisfying to finally see the full Senate consider it now. As I have said before, the patent reform bill is about moving our Nation toward the future. It will equip America's inventors with an improved patent system that will enable them to better compete in today's global economy. Toward that end, I would like to discuss some of the key provisions of this bill and what they will do to improve and modernize our patent system.

There are some misconceptions about the proposed first-inventor-to-file provision. Some have questioned why we cannot maintain the current first-to-invent system, in which priority is established by determining which applicant actually invented the claimed invention first. Under this system, if there is a dispute, it costs applicants an average of $500,000 in legal fees to prove they were the first-to-invent. This amount does not include extra expenses that can follow if the decision is appealed. Unfortunately, many small businesses and independent inventors do not have the resources to engage in the process we have now.

Conversely, moving to a first-inventor-to-file system would provide inventors a cost-effective and certain path to protect one's invention through the filing of a provisional application, at a much more reasonable cost of about $100.

The purpose of the proposed transition is certainly not to hurt small businesses or independent inventors. Quite the contrary. These innovators are too important to our Nation's economic health. But let's consider some facts: in the past 7 years, more than 3,000,000 applications have been filed, and only 25 patents were granted to small entities that were the second inventor to file, but later proved that they were first to invent. Of those 25, only one patent was granted to an individual inventor who was the second to file. Thus, in the last 7 years, only one inventor in over 3,000,000 patent filings would have gotten a different outcome if we, like the rest of world, used a first-inventor-to-file patent system. I assure you that I do not want to minimize the reluctance that some have with changing to this new system; however, the facts speak for themselves. Simply put, moving to a first-inventor-to-file system does not appear to have the level of risk some have feared.

Additionally, the American Bar Association's Section of Intellectual Property Law recently confirmed the importance of the proposed transition by stating:

> For inventions made after 1996, the U.S. patent system has been open to proofs of inventions made outside the United States—creating for many U.S.-based inventors a new and potentially even more expensive obstacle to obtaining a patent under the current first-to-invent rule. Finally, U.S. inventors more and more are facing the need to file patent applications both at home and abroad to remain competitive in our global economy. Requiring compliance with two fundamentally different systems places undue additional burdens on U.S. inventors and puts them at a competitive disadvantage in this global economy.

Indeed, the transition to the first-inventor-to-file system is long overdue and will help our U.S. companies and inventors out-compete their global challengers.

The proposed legislation would also give the USPTO rulemaking authority to set or adjust its own fees, without requiring a statutory change every time an adjustment is needed. Providing the USPTO the ability to adjust its own fees will give the agency greater flexibility and control, which, in the long run, will benefit inventors and businesses.

Speaking of greater fiscal flexibility for the USPTO, let me take a moment to discuss the importance of ensuring full access to the fees the agency collects.

American inventors, who create jobs and keep our economic engine running, should not have to wait for years after they have paid their fees to have their patent applications processed. This is tantamount to a tax on innovation and it creates disincentives for inventors and entrepreneurs.

A fully funded USPTO, with fiscal flexibility, would—at the very least—mean more and better trained patent examiners, greater deployment of modern information technologies to address the agency's growing needs, and better access to complete libraries of prior art.

Over the years, fee diversion has forced a vicious cycle of abrupt starts and stops in the hiring, training, and retention of qualified office personnel. To make matters worse, under current conditions, outdated computer systems are not keeping pace with the volume of work before the agency. It is clear to most that the USPTO has yet to recover from the negative impact of diverting close to a billion dollars from its coffers, for its own use. That has not only been wrong, it is obscene.

I agree with what has been said that there cannot be true patent reform without full access to collected fees from the USPTO. We owe it to our inventor community to do this. We all have a vested interest in ensuring that our country's unique spirit of ingenuity and innovation continues to thrive and flourish. Last night, an overwhelming majority of the Senate voted to finally put an end to fee diversion from the USPTO. It was a historic moment, and I hope our House colleagues will maintain this momentum. I understand some people on the Appropriations Committee do not like it. They do not like it because they like to be able to play with that money. But it is disastrous to not have that money stay with the USPTO so we can move forward faster, better and get a lot more done and still be the leading innovative nation in the world.

The legislation also enables patentholders to request a supplemental examination of a patent if new information arises after the initial examination. By establishing this new process, the USPTO would be asked to consider, reconsider or correct information believed to be relevant to the patent. The request must be made before litigation commences. Therefore, supplemental examination cannot be used to remedy flaws first brought to light in the course of litigation, nor does it interfere with the court's ability to address inequitable conduct. That is an important point. Further, this provision does not limit the USPTO's authority to investigate misconduct or to sanction bad actors.

In a nutshell, the supplemental examination provision satisfies a long-felt need in the patent community to be able to identify whether a patent would be deemed flawed if it ever went to litigation and enables patentees to take corrective action. This process enhances the quality of patents, thereby promoting greater certainty for patentees and the public.

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

The pending legislation also provides a new postgrant review opposition proceeding to enable early challenges to the validity of patents. This new but time-limited postgrant review procedure will help to enhance patent quality and restore confidence in the presumption of validity that comes with issued patents.

Finally, this bipartisan patent bill provides many improvements to our patent system which include, among other provisions, just some of the following:

Changes to the best mode disclosure requirement, increased incentives for government laboratories to commercialize inventions, restrictions on false

marking claims, removal of restrictions on the residency of Federal circuit judges, clarification of tax strategy patents, providing assistance to small businesses through a patent ombudsman program, establishing additional USPTO satellite offices, and creation of a transitional postgrant proceeding specific to business method patents.

As we can see, this bipartisan bill represents significant changes to our patent laws. They will enable our great country to more effectively compete in the 21st century global economy. I encourage my colleagues to take action and vote in favor of this bill. We cannot afford to allow this opportunity to pass us by.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, I thank the Senator from Utah for his strong statement of support for the America Invents Act, a bill that is, at its heart, all about moving our economy forward. When we think about the brass tacks of our country, we think about ideas, we think about inventions. It was our inventors who developed the light bulb, the assembly line, the Internet, the iPod, and, of course, my 15-year-old daughter's favorite invention, Facebook. This all came from our great country.

I wish to comment, briefly—I know Senator ROCKEFELLER has an important issue to talk about, the issue we have just been discussing.

First of all, we have heard from stakeholders from across the spectrum—from high tech and life sciences to universities and small inventors—in support of the transition to the first-to-file system.

I ask unanimous consent to have printed in the RECORD a list of supporters of the transition to the first-to-file system that is contained in the America Invents Act.

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

SUPPORTERS OF THE FIRST-TO-FILE TRANSITION

AdvaMed; American Bar Association; American Council on Education; American Intellectual Property Law Association; Association of American Medical Colleges; Association for Competitive Technology; Association of American Universities; Association of Public and Land-grant Universities; Association of University Technology Managers; BASF, the Chemical Company; Biotechnology Industry Organization; Business Software Alliance; Caterpillar; Coalition for 21st Century Patent Reform; Council on Governmental Relations; Gary Michelson, Independent Inventor; Genentech; Intellectual Property Owners Association; Louis J. Foreman, Enventys, independent inventor; National Association of Manufacturers; Small Business and Entrepreneurship Council; and Software & Information Industry Association.

Ms. KLOBUCHAR. Mr. President, we have heard also on the floor that there is, as Senator HATCH mentioned, strong support throughout the Senate for this change. In fact, Commerce Secretary Locke emphasizes that support in a column appearing in the Hill newspaper today. He states:

[P]atent reform adopts the ''first-inventor-to-file'' standard as opposed to the current ''first-to-invent'' standard. First inventor to file is used by the rest of the world and would be good for U.S. businesses, providing a more transparent and cost-effective process that puts them on a level playing field. . . .

I could not agree more. Small businesses, independent investors, and stakeholders across the spectrum support this important transition.

I wish to mention one other aspect of this system. With the current first-to-invent system, when two patents are filed around the same time for the same invention, it also creates problems. It means 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 interferences are often stacked in favor of companies that can spend more money. We believe this needs to change. There was a recent article about this in the Washington Post in which David Kappos, the Director of the Patent Office and Under Secretary for Intellectual Property, described the current system is similar to parking your car in a metered space and having someone else come up and say they had priority for that space and then having your car towed. Instead, we need a system in which, if you are the first to pull in and pay your fee, you can park there and no one else can claim it is their space.

The America Invents Act would create that system. It transitions our patent system from a first-to-invent system to a first-inventor-to-file system. By simply using the file date of an application to determine the true inventor, the bill increases the speed of a patent application process, while also rewarding novel, cutting-edge inventions.

A first-to-file system creates more certainty for inventors looking to see if an idea has already been patented. At the same time, the bill still provides a safe harbor of 1 year for inventors to go out and market their inventions before having to file for their patent. This grace period is one of the reasons our Nation's top research universities, such as the University of Minnesota, support the bill. The grace period protects professors who discuss their inventions with colleagues or publish them in journals before filing their patent application.

Mr. President, I know Senator ROCKEFELLER is here to discuss a very important issue.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent to set aside the pending amendment so I may call up amendment No. 134.

The PRESIDING OFFICER. Is there objection?

The Senator from Utah.

Mr. HATCH. Mr. President, I have to object on behalf of the manager of the bill who is not here right now. If the Senator can at least wait until Senator GRASSLEY returns to make his request.

Mr. ROCKEFELLER. I know the Senator from Utah, and I remind him he was the lead author of the Hatch-Waxman Act, creating the 180-day period for generics.

Mr. HATCH. I object right now, but as soon as Senator GRASSLEY gets back——

Mr. ROCKEFELLER. Will the Senator from Utah object if I talk about it?

Mr. HATCH. No.

The PRESIDING OFFICER. An objection has been heard.

The Senator from West Virginia is recognized.

AMENDMENT NO. 134

Mr. ROCKEFELLER. Mr. President, my amendment is based on legislation I introduced earlier this year, obviously quite recently. The cosponsors of that bill, which is called the Fair Prescription Drug Competition Act, are Senator SHAHEEN, Senator LEAHY, who chairs the Judiciary Committee, Senator INOUYE, Senator STABENOW, and Senator SCHUMER, who is on the Judiciary Committee.

I wish to acknowledge that the managers of this bill, Chairman LEAHY and Senator GRASSLEY, have been steadfast partners in pushing the Federal Trade Commission to investigate further consumer access to generic drugs, which is a huge problem. We do a lot of talking about the health care bill and a lot of other things about saving money and saving consumers money. This is a bill which would do this, if I were allowed to actually proceed to it.

This amendment eliminates one of the most widely abused loopholes that brand-name drug companies use to extend their shelf life, their monopoly, and limit consumer access to lower cost generic drugs which are just as good and just the same, but they have a system to work on that. It ends the marketing of so-called authorized generic drugs during the 180-day marketing exclusivity period that Congress designed to give real low-cost generics a major incentive to enter the market.

What was happening was the brand-name drug companies had their 18 years of exclusivity. That is a monopoly time unrivaled. Then somebody else would come in with a cheaper way of doing the same thing, an FDA-approved drug, but it would be a generic drug. It would be the same drug, have the same effect, but it would be much cheaper. Since millions of people buy these drugs, that would seem to be a good thing in a budget-conscious era for American families, as well as for the government.

As I say, this amendment ends the so-called authorized generic drugs during the 180-day marketing exclusivity

period Congress designated to give real low-cost generics a major incentive to enter the market. You have to be able to enter the market to compete and to get your lower priced, equally good drugs out there. They do that by challenging a brand-name patent. That is the only way they can do it.

An authorized generic drug is a brand-name prescription drug produced by the same brand manufacturer yet repackaged as a generic. That is clever, but it is also a little devious. Many brand-name drug manufacturers are repackaging their drugs as generics for the purpose of extending their market shares after their patents expire. They have a little subsidiary which produces something which they shift over to them.

Unfortunately, this often eliminates the incentive for an independent generic to enter the marketplace. Therefore, the price of drugs remains much higher, and that would seem to be not in the interest of the American people.

In 1984, Congress passed the Hatch-Waxman Act to provide consumer access to lower cost generic drugs. Under the law which the Senator from Utah led, if a true generic firm successfully challenges a brand-name patent, the generic firm is provided a 180-day period for that drug to exclusively enter the market. This is a crucial incentive for generic drug companies to enter that market and make prescription drugs more affordable for consumers. It would seem to me this would be a very laudable pursuit.

Every American agrees on the need to reduce health care costs. Generic drugs save consumers an estimated total of $8 billion to $10 billion a year—$8 billion to $10 billion-a-year savings for the same quality of drug. Of course, they get that at the retail pharmacies where the prescription is handed out. For working families, these savings can make a huge difference, particularly during very tough economic times, which we are going through.

This amendment would restore the main incentive generic drug companies have to challenge a brand-name patent and enter the market. We give them the incentive to challenge the brand-name prescriber.

That is what this amendment is about. It is profoundly important. It has been before this body many times. I guess it is a question of do we want to help people who have to take a lot of prescriptions and older people—any kind of people. Do we want to help them pay less? I guess it divides into if you do or if you don't. I am in the camp of, yes, I want to have people pay less. So I would just say that.

Mr. President, I yield the floor for the time being.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. ROBERTS. Mr. President, I ask unanimous consent to speak as in morning business for approximately 20 minutes, and I probably will not use all of that time and will yield back.

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

Mr. ROBERTS. I thank the Chair.

EXECUTIVE ORDER ON REGULATIONS

Mr. President, I rise today to speak again about President Obama's January 18 Executive order that directed all Federal agencies within the administration to review or repeal those significant regulatory actions that are duplicative, overly burdensome, or would have a significant economic impact on ordinary Americans.

The President went on to say—I am paraphrasing from his words—they are costly, they are duplicative, in many cases they aren't necessary, we need to review them, and in some cases, actually, they are stupid. That is a direct quote from the President. I am paraphrasing, but he did say the word ''stupid.''

Probably ''stupid'' would be the word, or maybe ''egregious'' or ''fed up'' that almost any group or any organization back home would use when you visit with them. I know Senators, on their past break or our work period, if you will, probably spoke to a lot of groups. I will tell you what happened to me.

I would walk into a group—any organization, be it farmers, ranchers, educators, health care, whatever—and they would say: PAT, what on Earth are you doing back there, passing all these regulations, a wave of regulations that do not make common sense and do not fit the yardstick, if you will, of cost and benefit? We can't even wake up any morning without some new regulation popping up across the desk, and we just don't have the people to do this. You are about to put us out of business.

The first thing I say is, I am not a ''you guy,'' I am an ''us guy.'' And I am very much aware of these regulations. We have to do something about it. I brought up the fact the President himself recognized these problems.

But I have to say that while I applauded this decision by the President, I noted there were some loopholes in his Executive order, and they are roughly these—if I could sort of summarize them: No. 1, if you are doing something for the public good—and, obviously, the secretary of any agency is going to say: Sure, we are doing something for the public good—well, then, you are exempt. That is a pretty big loophole to drive the truck through.

Secondly, it was if you are an independent agency. Well, let's try the IRS. I think more people than most would say: Yes, we have some regulatory problems with the IRS.

Several more, and I won't go into those. Then you have this paragraph, which I am going to read, that agencies can apply to their decision as to whether they are going to review the regulations they have on the books and regulations coming down the pike. They can apply this to see if they are exempt, and this is within the Executive order.

In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.

I can't imagine anybody being opposed to that.

Where appropriate and permitted by law, each agency may consider and discuss qualitatively values that are difficult or impossible to quantify—

I don't know how you do that—

including equity, human dignity, fairness and distributive impacts.

That is about as amorphous as any language that I could possibly put together. If any secretary, or anybody in any agency who promulgates all the regulations they think they are forced to under some congressional act or perhaps an Executive order they are trying to issue applies this language, of course, they are exempt.

So there are loopholes, again, that you can drive trucks through in regards to the fact that this Executive order is basically not going to be adhered to because everybody will stand up and say: We are exempt. We are doing public good. We are doing this language—whatever that means.

So while I applaud the decision by the President, I decided last week I would introduce legislation to strengthen and codify his Executive order. All that means is, when I say we codify it, we say: OK, the Executive order stands but, sorry, no exemptions.

What a day that would bring to Washington, with all the Federal agencies saying: Whoa, stop. We are going to take a look at all the regulations we have out there now, and we are going to take a look at all the ones we are promulgating—which are hundreds of them. And, I might just note, there were 44 major regulatory decisions that cost the American business community $27 billion just last year, according to one study. We are finding more and more people coming to Washington who have an agenda in regards to these regulations, but the folks out there who are being impacted seem to be overlooked.

I have 30, 32, 35 cosponsors on this bill. I asked on both sides of the aisle for cosponsors. I think it is a good bill. It would be a brandnew day in Washington if every Federal agency had to stop and say: Whoa, wait a minute. Let's apply a cost-benefit yardstick. The Executive order sort of goes into what that would mean. They have one individual who is supposed to be doing all of this, so they could report to him, although that would be quite a load. My goodness, if all the Federal agencies stopped their regulatory process, there would be a cheer out in the hinterland in regards to every business I can think of.

Well, as the administration moves forward with this review, I am going to have something to say in several areas: health care, energy, and financing, to people who are lending agencies and the effect of the regulatory reform. But today I want to talk about agriculture.

Today I want to talk about the EPA and what is going on in regards to what I think is regulatory overkill for sure.

I am privileged to be the ranking Republican and to serve with the Senator from Michigan, our chairwoman of the committee, Senator STABENOW. Basically, as the administration moves forward with its review, I recommend the President and his advisers pay particularly close attention to the activities of three specific agencies when they are determining which proposed regulations will place the greatest burden on agriculture—a key component of our Nation's economy and the ability to feed this country and a troubled and hungry world—the Environmental Protection Agency, the Department of Agriculture, and the Commodity Futures Trading Commission.

Since fiscal year 2010, 10 new regulations promulgated—that is a fancy word in Washington which means issued—by the EPA have accounted for over $23 billion in new cost to the American taxpayer. Now, that is outrageous, and they are just getting started. The EPA has several new proposals, many of which will have immediate negative impacts on the ability of America's farmers and ranchers to continue to produce enough food to feed our communities, our States, our country, and, yes, the world. Think of how valuable that is as we look down the road with about a 9.3 billion increase in population compared to 6 billion today. We are going to have to double agriculture production, and I will talk about that a little later.

Why on Earth would we want to do anything to the farmer and rancher whose job it is to do that? That is beyond me. I will highlight two such proposals that many producers have brought to my attention. I just addressed the Commodity Classic in Kansas, in Great Bend, of about 200 farmers. Guess what their No. 1 concern was. Overregulation, regulation that could put them out of business. They are concerned about the farm bill and they are concerned about lending and they are concerned about debt. But first, in only 7 short weeks, the EPA will require farmers—who are applying pesticide to kill pests so they can save the crop—to obtain a permit under the Clean Water Act, even though that activity is already highly regulated under the Federal pesticide law. The President said we don't need regulations that are duplicative. We don't need two agencies having a different agreement on one regulation. We probably don't even need that regulation because we have very strong regulations under the FIFRA act that we have right now.

Farmers and other pesticide applicators, under this regulatory impact, would not be facing these requirements if the administration had chosen to vigorously defend its longstanding policy that protections under the Federal pesticide law were sufficient to protect the environment.

Excuse me, Mr. President. That was probably a phone call from some farmer listening to this and saying: Go ahead and give them you know what, PAT.

Unfortunately, the administration chose a different path and now estimates suggest this duplicative regulation will require 365,000 individuals to get a Clean Water Act permit—365,000 individuals—a requirement that will cost $50 million and require 1 million hours per year to implement. Bottom line, it will not add any environmental protection.

This layer of redtape will place a huge financial burden on the shoulders of farm families all across the country, as well as State governments responsible for enforcement while at the same time facing dire budget situations. Last month, John Salazar, a former Member of the House of Representatives and newly appointed Colorado Commissioner of Agriculture stated in his testimony before the House:

> It is no secret that States across the country face dire budget situations and many have had to close State parks, cancel transportation projects and cut funding to higher education. It is very difficult to justify diverting even more resources to manage paperwork for a permit that is duplicative of other regulatory programs and has no appreciable environmental benefits. However, if Colorado's estimates are reflective of the situation in other States, the true cost to States will quickly outstrip EPA's estimates. More than 365,000 individuals, $50 million, and 1 million hours per year to implement on the backs of our farmers and ranchers.

Mr. President, these expenses are not just limited to the cost of compliance and enforcement. The April 9 effective date is near. There is still significant confusion and uncertainty about what pesticide applications will fall under these new regulations. This means farmers and other pesticide applicators may very well find themselves subject to massive penalties. On top of the fact that they shouldn't be filling out the paperwork in the first place, if they do not, they could be held responsible for massive penalties for minor paperwork violations to the tune of—get this—$37,500 per day per violation. Unbelievable.

Beyond agency enforcement, they will also now be exposed to the threat of litigation under the clean water law's citizen suit provisions. With the volatile nature of agricultural markets and increased demand, these sort of risks and resulting costs are something that producers and the hungry mouths who depend on them simply cannot afford.

Next, EPA is undertaking an effort to control particulate matter—this is a favorite of mine—otherwise known as dust. They call it rural fugitive dust. This is a dust-off of the old 1970s effort to control rural fugitive dust. I remember that. Somebody must have pulled it from the file. This is part of the EPA's review of the PM standard under the Clean Air Act.

The agency is currently considering the most stringent regulations on farm dust that have ever been proposed. I finally reached the person who, when they first proposed this, was in charge of promoting it, or she was going to promulgate these regulations on rural fugitive dust. Before I could get a word in—I finally reached the person in charge; it took me 3 days—finally, before I could get a word in, she said: Did you realize—at that point I was a Congressman, and she said: Do you realize, Mr. ROBERTS, you have a lot of dust in your part of the country?

I said: I think I know that. That is why we had the Great Plains Conservation Program. Each farmer has to have a conservation program if they are going to apply or for it to be applicable to the farm bill. We have a Conservation Reserve Program. We are doing everything we can to control dust, rest assured. Nobody likes that.

I said: What would you have us do to comply with rural fugitive dust rules?

She said: You know the grain trucks at harvest go up and down gravel roads, and they cause a lot of dust.

No kidding.

I said: What would you have us do?

She said: Why don't you send out water trucks at 10 o'clock in the morning and 2 in the afternoon to every community in Kansas that has those gravel roads where you harvest wheat.

I said: Great idea. That would be marvelous. Maybe we could get a grant. Today, that would be a stimulus grant to small communities in regard to rural areas where we are doing the wheat harvest to, No. 1, buy the trucks and, No. 2, find the water.

That is just how ridiculous this is with rural fugitive dust. To put it simply, this defies common sense, whether it is cattle kicking up dust in a feedlot in Dodge City, KS, or Larned, KS, or anywhere in Kansas during harvest on a hot afternoon on the high plains in June. Dust is a naturally occurring event. Standards beyond the current limit would be impossible to meet, particularly in the western portion of the Nation where rainfall is often scarce. I don't even know why I am taking this seriously in regard to that kind of regulation.

In a bipartisan June letter, 23 Members of this body wrote a letter to express these concerns to Administrator Jackson stating:

> Considering the Administration's focus on rural America and rural economic development, a proposal such as this could have a negative effect on those very goals . . . Common sense requires the EPA to acknowledge that the wind blows and so does dust.

As we think about EPA's actions impacting agriculture, it is critical to recognize that no one cares more about maintaining a clean environment than the American farmer and rancher. Producers across the country manage their operations responsibly because of their desire to keep farming and to one day pass along that ranch or field to their sons, daughters and grandchildren if

they can. They know firsthand that clean air and water and healthy soil go hand-in-hand with a healthy economy. Our producers deserve respect and appreciation from the EPA, not costly and redundant and yes, even ridiculous regulation.

Shifting departments now, the Department of Agriculture's Grain Inspection, Packers and Stockyards Administration—GIPSA—released a proposed rule that would dramatically increase the redtape governing the business relationships surrounding production and marketing of livestock in the United States. The rule was initially proposed last summer without the benefit of a meaningful cost-benefit analysis—something we have been trying to get and something the administration should have included.

However, the proposal has since received significant criticism from ranchers, industry and members of Congress alike and is now being further evaluated by USDA officials.

As written, the proposal would dramatically reduce consumer choice and increase costs. The proposal exposes packers to liability for use of alternative marketing arrangements and other innovative procurement methods, thereby ultimately depressing the prices received for America's most efficient and successful producers while potentially reducing the quality available to consumers.

Further, the proposed rule would actually increase concentration in the sector as businesses are forced to change their current organizational structure—exacerbating the very issue the rule is allegedly designed to address. For example, in Kansas, we have a highly successful rancher-owned company made up of individual producers who own both cattle and shares in the company's processing infrastructure. Under this proposal, many of the individual members of the company may now be prohibited from selling cattle directly to other processors, creating the need for a middleman that would then lower the price the producer actually receives.

If implemented, the GIPSA rule poses a substantial threat to the continued viability of the domestic livestock sector. In Kansas, this industry contributes over $9.5 billion to our economy. With an economic footprint of this magnitude, the GIPSA regulation is a burden that Kansas and many other rural States and many of the livestock producers simply cannot afford.

Another agency falling through the President's Executive order loophole is the Commodity Futures Trading Commission. As a result of the Dodd-Frank Act, the CFTC is charged with developing dozens of new regulations impacting participants up and down the swaps and futures chain.

Shouldn't these regulations be held to the same standard of cost-effectiveness and undue burden as others? Yes—but no. I talked to Chairman Gensler in my office just a couple of days ago. He is a very nice man, very pleasant. He believes very strongly that the CFTC is exempt from the President's Executive order because the President said it was exempt. I indicated that I didn't think so, especially since the CFTC is presently pushing 40-plus rules out the door in 1 year with little or no priority.

We were told the intent of Dodd-Frank was to reduce systemic risk in the financial marketplace. However, several of CFTC's proposals appear to increase risk management costs on those who do not pose a systemic threat. The CFTC must be mindful that increased costs through high margin and capital requirements on certain segments of the marketplace may decrease a user's ability to use appropriate risk management tools.

A rigorous cost-benefit analysis is tailor-made for the CFTC's current situation: dozens of economically significant rules; the potential to negatively impact risk management costs of American businesses; and a simple question needing to be answered—do the benefits of this proposed regulation—we are talking about anywhere from 40 to 60 now—in the form of lower systemic risk in our financial system outweigh the increased costs on businesses?

Let me say something. In talking with Chairman Gensler—again, I really appreciate him coming by the office and talking. It became obvious to me that with all these regulations, maybe the first one ought to be a definition regulation. What is a swap? Who is a dealer? It has not been done yet. So we are going to propose 39 more regulations and we have not even defined whom the regulations will affect and what the subject matter is that they are going to regulate. That is really unbelievable.

We are going to have a hearing tomorrow in the Senate Agriculture Committee. Chairman Gensler will attend and give his testimony. We are going to be very welcoming to him in regard to the committee, but that is something I am going to ask him. Why on Earth are you going ahead with 40 regulations and you can't even define whom you are going to regulate or what you are going to regulate? There is no definition. That, to me, is pretty bad. You have the cart before the horse there.

In closing, I wish to make two points. First, in many rural areas of Kansas and the rest of the country, agriculture is the cornerstone of the economy. Second, in the coming decades we will be even more reliant on America's farmers and ranchers to feed an ever-growing world population. I said that before.

We must truly commit to a real and robust—here is a good Senate word—robust review and revocation of any and all unduly burdensome regulations that could inhibit American agriculture's ability to produce the safest, most abundant, and affordable food, feed, and fiber supply in the world. What are we talking about? We are talking about 9.3 billion people. What are we talking about? The ability for our agriculture—for everybody in agriculture to double our production, all the farmers and ranchers. Why on Earth would we want this whole business of regulatory impact—most of which is highly questionable, none of which fits the President's Executive order to take a look at the cost-benefit—why on Earth would we do this to the very person whose job it is to feed this country and the hungry world?

Look at the Mideast—in turmoil. I remember one interview on TV where somebody stuck a microphone in and asked one of the protesters in Libya: What are you protesting for? Democracy?

He said: No, a loaf of bread.

Where people are hungry and malnourished, you have no economic opportunity. Where you have people who are hungry, they will go and join extremist groups, even on over into terrorism groups.

I had the privilege of being the chairman of the Intelligence Committee here in the Senate. That was one of the big considerations we had in whole areas of the world where people do not have the ability to feed themselves, where they are in a food-deficient area. It really poses problems for the future of that part of the world. Yet here we ask our farmers and ranchers to double our ag production in a couple of decades. I don't know how we are going to do this with this regulatory nightmare.

Let's hope we wake up soon. I hope everybody will take a look at my bill to codify the President's Executive order—I give him credit for doing that—but not with all these loopholes that are going to drive us nuts out there in rural, smalltown America.

I yield the floor.

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

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

Mr. BARRASSO. I ask unanimous consent to speak as in morning business.

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

SECOND OPINION

Mr. BARRASSO. Mr. President, I come to the floor today as someone who has practiced medicine in Wyoming, taken care of families there for a quarter of a century, working with people all across our great State, as a physician who has also served in our State senate.

Both in my practice, as well as in my service in the State senate, I have dealt with the issue of Medicaid, a program that was set up to help low-income Americans obtain health care. So I came today with a doctor's second

opinion about recent developments and findings with regard to the health care law because, day after day, we see news reports showing States all across the country facing extreme financial budget pressures, even bankruptcy. One of the key factors exacerbating State fiscal troubles is the Medicaid Program. Over the next 10 years, Washington will spend about $4.4 trillion on Medicaid. At the State level, Medicaid spending now consumes roughly one-quarter of the budgets of each of the States.

Increases in Medicaid costs often force Governors and State legislators to make drastic cuts to local priorities, such as education, law enforcement, public safety. As I mentioned, I did serve in the Wyoming State Legislature—5 years in the Wyoming State Senate—and was there last week to address the legislatures, the Wyoming State Senate and House, to talk with them, listen to them about their concerns.

In the State of Wyoming, we are required, on an annual basis, to balance our budget. We do it every year. So I know from a firsthand experience that tough choices need to be made. That is why I can tell you this current health care law, President Obama's health care law, is not going to make it any easier for our States to close the budget gaps they are facing, and, as a matter of fact, it is going to make the situation worse.

The President's health care law created the biggest Medicaid expansion in history. The law says every State must provide Medicaid for every one of their citizens who earns up to 133 percent of the Federal poverty limit. This does not work for the States, and it does not work for the people who will be forced onto Medicaid.

The health care law does not provide additional resources to States that are already strapped for cash in order to try to deal with paying for this incredible expansion of Medicaid, and it certainly does not give States additional financial help so they can pay health care providers enough to participate in Medicaid—because about 40 percent of physicians across the country refuse to see Medicaid patients. My partners and I took care of everyone in Wyoming who would call or come to our office, regardless of ability to pay, but across the country about 40 percent of physicians refuse to see Medicaid patients.

So I have said, over and over throughout this health care reform debate over the last year or so, that having a health care government insurance card does not mean someone will automatically have access to medical care. The President frequently talks about making sure people have coverage, but that does not necessarily mean they will have access to care.

So I wish to be very clear. The States, especially my home State of Wyoming, do an incredible job of running the Medicaid programs. They do it with limited resources. But a weak economy, combined with a high unemployment rate, drove Medicaid enrollment to record levels. So it is not a surprise that Medicaid is quickly consuming greater and greater portions of State budgets, cutting into money that is being used to pay for teachers, for police, and for firefighters.

Former Governor Phil Bredesen of Tennessee, a Democrat, said it best when he called the health care law's Medicaid expansion ''the mother of all unfunded mandates.'' Governor Bredesen went on to say that ''Medicaid is a poor vehicle for expanding coverage.'' Let me repeat that. Medicaid, which the President has used as the approach to expand coverage, the Governor, the Democratic Governor, says Medicaid is a poor vehicle for expanding coverage. He want to say:

> It's a 45-year-old system originally designed for poor women and their children. It's not health care reform to dump more money into Medicaid.

Well, the former Governor of Tennessee is not alone. On November 9, 2010, Governor Brian Schweitzer, of my neighboring State of Montana, also a Democrat, met with his State's health industry leaders to talk about Medicaid, the challenges they are facing.

What he said was: ''As the manager of Montana's budget, I am worried because there are only three states that will increase the number of people on Medicaid at a faster rate than Montana, thanks to the new health care bill.''

He said: ''My job is to try and find ways to go forward that Montana can continue to fund Medicaid and not be like 48 other States . . . broke.''

So, in January, 33 Governors and Governors-elect sent a letter to President Obama, to Congressional leadership, and to Health and Human Services Secretary Sebelius. What did they say? Well, the letter asks Federal lawmakers to lift the constraints placed on them by the health care law's mandates. The Governors are begging Congress for help.

They each have very unique Medicaid Programs across the country, the different States, and they want, they asked, they need the flexibility to manage their programs, their individual programs as effectively and efficiently as possible.

Well, they all need to make tough but necessary budget decisions, and they cannot do it when Washington bureaucrats and the enduring wisdom of those in Washington will not allow it. You want to add insult to injury? This week, the President claimed, as he was addressing Governors at the National Governors Association, that the health care law offers States flexibility to create their own health care plans.

This was Monday in an address to the National Governors Association. The President made an announcement. He announced: ''If your state can create a plan that covers as many people as affordably and comprehensively as the Affordable Care Act does—without increasing the deficit—you can implement that plan.''

Well, that is quite a tall and almost impossible order. The American people and certainly the Governors who were listening to him in the audience on Monday saw right through the President's PR stunt. The President's plan requires States to create health care plans that imitate his health care law, rather than actually offering States true freedom to innovate better solutions. There are better solutions out there than what this body and the House of Representatives passed and the President signed into law almost 1 year ago.

It seems to me the President wants to have his cake and eat it too. He tells the States they already have the ability to craft a different health care plan, but, of course, there is a catch. What the President does not say, what he would not tell the Governors, is that States can only design different health care plans if—if, and only if—they meet the health care law's litany of Washington mandates.

States still must pass legislation mandating all its citizens buy health insurance. States must still provide Washington-approved insurance coverage—Washington levels, Washington approved—limiting use of innovative health care products such as health savings accounts. Oh, no, that is not allowed by the President. States are still locked into the law's Medicaid expansion spending requirements. During these tough economic times, the States need certainty, they need consistency, not more Washington doublespeak.

Last month, I introduced, along with Senator LINDSEY GRAHAM, a bill giving the States exactly what they need: flexibility, freedom, and choice. The bill is called the State Health Care Choice Act. This legislation is simple, it is straightforward, and it protects States rights by allowing them to voluntarily opt out of portions of the health care law.

Specifically, our bill offers States the chance to opt out of the law's individual mandate, to opt out of the law's employer mandate and penalties, to opt out of the Medicaid expansion, and to opt out of the insurance benefit mandates.

Why should the Federal Government, why should Washington, force the States to adopt a one-size-fits-all health care plan? States can decide what works best for them. They need to be able to act on those decisions. They do not need Washington to tell them what to do.

Well, some of the most innovative health care policy ideas truly do originate at the State and local levels. Governors, State legislators, State insurance commissioners, each have much greater insight into what works for their citizens and what does not. States are feeling trapped by the new health care law's mandates.

My bill, the one along with Senator GRAHAM, gives the States the sovereignty to pursue their own reform ideas and approaches. Each State deserves the right—let me repeat that:

each State deserves the right—to pursue health care reforms they think actually help the citizens of their State.

The States have always been the laboratories of democracy, the laboratories to test good ideas. Unfortunately, this health care law locks them into a one-size-fits-all approach. The States want their freedom. The States deserve their freedom. Our bill gives it to them, offering the flexibility needed to generate better health care reform solutions, solutions that do not require the States to follow a Washington plan that may ultimately leave them broke.

In writing the State Health Care Choice Act, I started with the assumption that people generally can be trusted to do the right thing, and society prospers when government has less to say about how people run their lives. Others, many in this body, start by assuming Washington knows best and should take more authority over everyone else.

Well, the States, the American people are telling us they want health care reform. But they are telling us loudly and clearly that they do not want this health care law. So it is time to give the States the autonomy to create health care systems that work best for them, and we do not have to dismantle the Nation's current health care system, build it up in the image of big government, shift costs to the States, add billions to our national debt, and then try to sell it as reform.

There are better ideas, and I have put forward mine. I ask all Senators to join me in cosponsoring the State Health Care Choice Act.

I yield the floor.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from Maryland.

Mr. CARDIN. Mr. President, I ask unanimous consent to speak as in morning business.

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

COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. CARDIN. Mr. President, we have all watched in awe during the past weeks as the unquenchable desire for liberty and human dignity has inspired the people of the Middle East to lift themselves from oppression and move their country toward a new dawn.

Sadly, we now also watch in horror the brutality of Colonel Qadhafi, who murders his own people as he clings to power. I join President Obama in calling for Colonel Qadhafi to leave Libya immediately and support our efforts, in concert with the international community, to help the Libyan people.

What happens next? No one knows. I certainly do not have the answer. I pray that peace and stability comes quickly to Libya and hope the people of Egypt and Tunisia make a swift and concrete progress in establishing democratic institutions and the rule of law.

While each country in the region must find its own path in this journey, I would suggest the international community currently has a process in place that can serve as a way forward for the countries in the Middle East and North Africa in establishing a more democratic process, that guarantees free elections and free speech.

I am referring to the Organization for Security and Cooperation in Europe, the OSCE. The OSCE traces its origins to the signing of the Helsinki Accords in 1975, and for more than 35 years has helped bridge the chasm between Eastern and Western Europe and Central Asia, by ensuring both military security for member countries and the inalienable human rights of its citizens.

There are three baskets in OSCE. One basket deals with human rights because it is critically important that the countries respect the rights of their citizens. Another basket deals with security because you cannot have human rights unless you have a secured country that protects the security of its people. The third basket deals with economics and environment because you cannot have a secure country and you cannot have human rights unless there is economic opportunity for your citizens and you respect the environment in which we live. The three baskets are brought together.

In the United States, the Congress passed the U.S. Helsinki Commission that monitors and encourages compliance by the member states in the OSCE.

I am privileged to serve as the Senate chairman of the U.S. Helsinki Commission, and I represent our Commission on most, on these issues. Today Egypt and Tunisia, along with Algeria, Israel, Jordan, and Morocco, are active Mediterranean partners within the OSCE and have made a commitment to work toward the principles of the organization.

In 1975, the Helsinki Final Act recognized that security in Europe is closely linked with security in the Mediterranean and created this special partnership between the signatory states and the countries in the Mediterranean as a way to improve relations and work toward peace in the region. Libya was an original partner in this endeavor but, regrettably—and, in my view, to its detriment—ultimately, turned its back on the organization.

More recently, the U.S. Helsinki Commission has made the Mediterranean partnership a priority on our agenda. Parliamentary assembly meetings have taken place in which all of the member states were present, including our partners, and we have had sidebar events to encourage the strengthening of the relationship between our Mediterranean partners for more cooperation to deal with human rights issues, to deal with free and fair elections, to deal with their economic and environmental needs, including trade among the Mediterranean partners and, yes, to deal with security issues to make sure the countries and the people who live there are safe.

A Helsinki-like process for the Middle East could provide a pathway for establishing human rights, peace, and stability in Egypt, Tunisia, and other countries in the Middle East. As a member of the Helsinki Commission since 1993, I have discussed the possibility of a Helsinki-like process for the region with Middle Eastern leaders, a process that could result in a more open, democratic society with a free press and fair elections. The Helsinki process, now embodied in the Organization for Security and Cooperation in Europe, bases relations between countries on the core principles of security, cooperation, and respect for human rights. These principles are implemented by procedures that establish equality among all the member states through a consensus-based decision-making process, open dialog, regular review of commitments, and engagement with civil society.

We have seen the Helsinki process work before in a region that has gone through generations without personal freedom or human rights. Countries that had been repressed under the totalitarian regime of the Soviet Union are now global leaders in democracy, human rights, and freedom. One need only look as far as the thriving Baltic countries to see what the Middle East could aspire to. Lithuania now chairs both the OSCE and the Community of Democracies. Estonia has just joined the Unified European common currency, and Latvia has shown a commitment to shared values as a strong new member of the NATO alliance.

Enshrined among the Helskini Accord's 10 guiding principles is a commitment to respect human rights and fundamental freedoms, including free speech and peaceful assembly. The Helsinki process is committed to the full participation of civil society. These aspects of the Helsinki process—political dialog and public participation—are critical in the Middle East, and we have watched these principles in action today in Egypt and Tunisia.

The principles contained in the Helsinki Accords have proven their worth over three decades. These principles take on increasing importance as the people of the Middle East demand accountability from their leaders. Whether the countries of the region choose to create their own conference for security and cooperation or, as some have suggested, the current OSCE Mediterranean partners and their neighbors seek full membership in the OSCE, I believe such an endeavor could offer a path for governments in the region to establish human rights, establish a free press, and institute fair elections.

Finally, as the citizens of both Tunisia and Egypt demand more freedom, I urge both countries to permit domestic and international observers to participate in any electoral process. The OSCE and its parliamentary assembly have extensive experience in assessing and monitoring elections and could serve as an impartial observer as both countries work to meet the demands of openness and freedom of their citizens.

The election monitoring which takes place within the OSCE states is a common occurrence. During our midterm elections, there were OSCE observers in the United States. So they are present in most of the OSCE states because we find this a helpful way to make sure we are doing everything we can to have an open and fair election system. Free and fair elections are critical, but they must be built upon the strengthening of democratic institutions and the rule of law. I believe the principles contained in the Helsinki Accords have a proven track record and could help guide this process.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

AMENDMENT NO. 133

Mr. KYL. Mr. President, I wish to get back to the underlying patent legislation to talk on a particular amendment. I am talking about the America Invents Act, legislation that would modernize our patent laws, legislation which I believe will have very strong support as soon as we are able to bring our debate to a close and have a vote.

There is one amendment that would be very troublesome if adopted. It is offered by my friend from California, Senator FEINSTEIN. It would strike the bill's first-to-file provisions. This would not be a good idea. In fact, it would be a very bad idea. I wish to describe why.

First-to-file, which is just a concept, the filing date of the patent dates to the time one files it, is not new. The question is whether we would codify that. It has been a subject of debate now for about 20 years. But at this point it has been thoroughly explored by hearings before the House and Senate Judiciary Committees. We considered this at the outset of the drafting of our patent reform legislation, and it has been in every version of the bill since 2005.

Importantly, this provision we have in the bill that would be taken out by the Feinstein amendment is supported by all three of the major patent law organizations that represent all industries across the board. It has the support of the American Bar Association's Intellectual Property Law section. It is supported by Intellectual Property Owners, which is a trade group or association of companies which own patents and cuts across all industrial sectors. And, very importantly, our language also has the support of independent inventors, many of whom have signed letters to the Senate in support of the codification of the first-to-file rule embedded in the Leahy bill.

The bottom line is there is a strong consensus to finally codify what is the practice everywhere else in the world; namely, that patents are dated by when they were filed, which obviously makes sense.

Let me respond to a couple arguments raised in favor of the Feinstein amendment. One argument is that the current first-to-invent system is better for the little guy, the small independent inventor. It turns out that is actually not only not true but the opposite is the case.

Under the first-to-invent system, if the big company tries to claim the same innovation that a small innovator made, that innovator would prevail if he could prove that he actually invented first, even if he filed last. But to prove he invented first, the independent inventor would need to prevail in what is called an interference proceeding. These are proceedings before the Patent and Trade Office in which there is a determination by the PTO of who actually invented first. The PTO looks at all the parties' notebooks and other documents to determine issues such as conception of the idea and reduction to practice, the elements of a workable patent.

Yesterday I quoted from commentary published on Sunday, February 27, by Mr. Gene Quinn, a patent lawyer who writes for the IP Watchdog Web site. I quoted his commentary noting that only one independent inventor has actually prevailed in an interference proceeding in the last 7 years. In other words, if the idea is that we need to preserve something that is used by small inventors, by independent inventors, it just isn't the case that first-to-invent actually does that.

In his column, Mr. Quinn does a very good job of explaining why the interference proceeding is largely an illusory remedy for small or independent inventors. I will quote from what he said:

> [T]he 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 $1½ million 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 can benefit from this system. In many cases, small inventors such as startups and universities simply cannot afford to participate in an interference, and they surrender their rights once a well-funded party starts such a proceeding.

I think that first argument is unassailable. Since only one small inventor in the last 7 years has prevailed in such a proceeding, it doesn't seem it is something that favors the small or independent inventor.

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 1-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 the 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.

He, of course, is 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 one year before the application is filed do not count as prior art. 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, for example, or otherwise makes it publicly available has an absolute right to priority if he files an application within 1 year of his disclosure. No application effectively filed after his disclosure and no prior art disclosed after his disclosure can defeat his application for the 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 1 year.

These rules are also clear, objective, and transparent. That is what we are trying to achieve with this legislation, so that there is uniformity, clarity, and it is much easier to defend what one has done. In effect, the rules under the legislation create unambiguous guidelines for inventors. A return to the proposal of Senator FEINSTEIN would create the ambiguity we are trying to get away from.

The bottom line is, an inventor who wishes to keep his invention secret must file an application promptly before another person discloses the invention to the public or files a patent for it. 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 disclosure 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 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. If not, then 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. But these critics 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 the completed application. Currently, filing a provisional application only costs $220 for a large entity and $110 for a small entity.

So this is easily accomplished and quite affordable.

In fact, 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. Here is what he says:

> 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 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. . . .

In other words, what you would ordinarily have in any event can be used as the provisional application.

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 the 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 the same inventor must take are writing down the same things 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 the bill's enhanced grace period, it should be clear that the first-to-file system will not be at all onerous for small inventors. Once one considers the bill's clean, clear rules for prior art and priority dates, its elimination of subjective elements in patent law, its new proceeding to correct patents, and its elimination of current patent-forfeiture pitfalls that trap legally unweary inventors, it is clear this bill will benefit inventors both large and small.

So because this issue has been considered from the inception of the debate about the legislation, in all of the testimony and markups in every version of the bill since 2005, is supported by all the industry groups who believe patent reform is necessary, conforms to the rules of all other countries in the world, and provides clear and easily demonstrable evidence of your patent, we believe the first-to-file rule is the best rule—date it from the date you filed your patent rather than this rather confusing notion of first-to-invent, which has not worked especially well, and certainly has not worked well for the small inventor, which is the point, I gather, of the amendment proposed by Senator FEINSTEIN.

I urge my colleagues, if there are questions or confusion about this, those of us who have been involved in this will be happy to try to answer them. I will be happy to be on the Senate floor to discuss it further. But at such time as we have a vote, I hope my colleagues would go along with what the committee did and what all of the versions of the bill have written in the past and support the bill as written and not approve this amendment.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, I thank the Senator from Arizona for his very strong comments and also for his support for this important bill. As you know, this has come through the Judiciary Committee. Senator KYL is a member of that committee, as I am, as well. We appreciate Senator LEAHY's leadership on this bill, as well as all the other Senators who have worked so hard on a difficult bill where there are so many interests. But in the end, what guided us to get this America Invents Act on this floor was the fact that innovation is so important to our economy, that the protection of ideas in America is what built our economy over the years. So I want to thank Senator KYL.

Before we hear from Senator BINGAMAN, who is here on another matter, I just want to support Senator KYL's statements about the need to transition to the first-inventor-to-file system. As I noted before, we have heard from many small inventors and entrepreneurs who support this transition. Independent inventor Louis Foreman has said the first-to-file system will strengthen the current system for entrepreneurs and small businesses. We have heard from nearly 50 small inventors in more than 20 States who share Mr. Foreman's view.

I ask unanimous consent that a list of those supporters, as well as Mr. Foreman's letter to the Judiciary Committee in support of the America Invents Act, be printed in the RECORD.

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

The following independent inventors posted support for S. 23 on EdisonNation.com:

Krissie Shields, Palm Coast, Florida 32164; Sarkis Derbedrosian, Glendale, CA 91206; Frank White, Randleman, North Carolina; Ken Joyner, Pasadena, CA 91109; Charlie Lumsden, Kula, HI 96790; Timothy J. Montgomery, Altoona, PA 16601; Katherine Hardt, Escanaba, MI 49829; Toni Rey, Houston, TX 77095; Shawn Head, Delaware, OH 43015; Emily Minix, Niceville, Florida; Betsy Kaufman, Houston, Texas; Eric Huber, San Juan Capistrano, CA 92675; Perry Watkins, Dunedin, FL; Jim Hacsi, Pueblo, Colorado; Brian Neil Smith, Orlando, FL; Clint Baldwin, Roseburg, Oregon 97471; Paul Wightman, Cedar City, Utah 84721; Shalon Cox, Beverly Hills, CA 90209; Darwin Roth, Jacksonville, Florida 32256; Dorinda Splant, Eatonton, GA 31024.

Don Francis, Vista, CA 92083; Greg Bruce, Galveston, Texas; Sandra McCoy, Longwood, FL 32750; Jerry Bradley, Joliet, IL 60435; Phillip L. Avery, Bethlehem, PA 18015; Julie Brown, Yuma, AZ 85367; Eduardo Negron, Beach Park, IL 60083; Betty Stamps, Greensboro, NC 27407; Victor Hall, Compton, CA; Todd Bouton, Janesville, WI 53548; Denise Sees, Canal Fulton, OH; Kevin McCarty, Antioch, IL 60002; Jerry Vanderheiden, Aurora NE 68818; Sherri English, Savannah, TX; Amy Oh, Portland, OR; Mark Stark, St. Louis, MO 63123; Toni LaCava, Melbourne, Florida 32935; Luis J. Rodriguez, South Orange, NJ 07079; Michael Pierre, Newark, New Jersey; Patricia Herzog-Mesrobian, Milwaukee, Wisconsin.

Derrick L. James, Beloit, WI 53511; Richard J. Yost, Newman Lake, Washington; Ken Espenschied, Cleveland, OH; Roger Brown, North Augusta, SC 29861; Jared Joyce, Bozeman, MT; Jane Jenkins, Clayton, Ohio; Tammy Turner, McDonough, GA; Diane Desilets, North Attleboro, MA; John Nauman, Hollywood, Florida 33020.

FEBRUARY 14, 2011.

Hon. PATRICK J. LEAHY,
Chairman,
Hon. CHUCK GRASSLEY,
Ranking Member, U.S. Senate, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: First, please accept my congratulations on the overwhelming, bipartisan Judiciary Committee vote on compromise patent reform legislation. I strongly urge you to continue your efforts toward comprehensive reform by pushing for a vote on the Senate floor at the first available opportunity.

Your bill will make independent inventors, such as myself, more competitive in today's global marketplace. America's economic future rests on our ability to innovate new technologies that change the way people work, live and play. Yet, as you know, today's patent system hinders this process, rather than cultivating entrepreneurship and the new ideas needed to create more jobs and foster economic growth.

As executive producer of the Emmy Award-winning series, ''Everyday Edisons,'' and

publisher of Inventors Digest, a long-standing publication serving the independent-inventor community, I am continually in contact with individuals across the country dedicating their lives in search of the next big idea. Some of these efforts bear fruit, while others falter. However, what ensures the continuity of their efforts, are the legal protections afforded under U.S. patent law.

I started my first business as a sophomore in college and twenty years later, I can point to 8 successful start-ups, along with being an integral part of twenty additional ventures. As a result, I have registered ten U.S. patents and my firm has helped develop and file another 400 patents. These experiences have shaped my views on how the current system functions at a practical level for those attempting to translate their inventions into a profitable business endeavor. Let me begin by commending the USPTO for its tireless efforts to make the current system work in an efficient manner. Unfortunately, the USPTO is hampered by a system that is in dire need of reform.

From my perspective, the Judiciary Committee-passed bill helps independent inventors across the country by strengthening the current system for entrepreneurs and small businesses by including the following:

Lower fees for micro-entities;

Shorter times for patent prosecution creating a more predictable system;

First-Inventor-to-File protections to harmonize U.S. law with our competitors abroad while providing independent inventors with certainty;

Stronger patent quality and reliability by incorporating ''best practices'' into patent application examination and review, making it easier for independent inventors to attract start-up capital; and

Resources for the USPTO to reduce the current patent backlog of 700,000 patents.

Your efforts in the Committee represent a critical milestone for passage of comprehensive reform and highlight an opportunity for progress. I also hope that Committee action paves the way for vigorous bicameral discussions on enacting legislation in the near future.

We cannot afford to wait. The need for these types of common sense reforms dates back to 1966 when the President's Commission to the Patent System issued thirty-five recommendations to improve the system. Some of these measures have been enacted over the years, but the economic challenges inherent in today's global market necessitate a broader modernization of the patent system. The 2004 National Research Council of the National Academy of Sciences report echoed this sentiment pointing to how economic and legal changes were putting new strains on the system.

America's economic strength has always rested on our ability to innovate. While a number of positive economic indicators provide hope for the future, the environment for small businesses remains mixed. Patent modernization is a tangible way to help America's small entrepreneurs in a fledgling economy. Not only will these reforms help create new jobs and industries, but they will help ensure our economic leadership for years to come.

Please do not hesitate to contact me if I can be of any assistance in helping expedite passage of this critical legislation.

Sincerely,

LOUIS J. FOREMAN,
Chief Executive Officer.

Ms. KLOBUCHAR. Mr. President, I know Senator BINGAMAN is here to speak.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. BINGAMAN. I appreciate the chance to speak as in morning business.

WORLD OIL SUPPLIES

Mr. President, I want to take a few minutes to discuss the increasing oil prices that we are observing each day and the evolving situation in the Middle East and North Africa.

From an oil market perspective, the turmoil in the Middle East changed course just over a week ago, and it changed course when Libya joined the group of countries that are witnessing historic popular uprisings. Libya is the first major energy exporter in the region to experience such an uprising.

At the moment, as much as 1 million barrels per day of Libya's total 1.8 million barrels per day of oil production is offline, with continued political turbulence threatening to take even more oil offline before order is restored.

It appears that international oil companies, which are responsible for over 40 percent of Libyan oil production, have removed their personnel from the country, and that has led to shutdowns of most fields operated by those international companies.

For the moment, it appears that the Libyan national oil companies themselves are mostly continuing to produce and export oil, although there might be some limited production losses in national oil company production as well.

There is reason to be concerned that the situation in Libya and throughout the region could become worse before it improves. I do not know that it is useful to try to predict the most likely outcome for what is occurring in the country, but the reality is that many of the potential scenarios that have been thought of are not good for the stability of world oil flows.

Fortunately, Saudi Arabia is widely believed to have enough spare oil production capacity to offset any losses in Libyan oil production. The Saudis have already publicly committed to compensating for any Libyan shortfall and very likely have already ramped up production to make good on that promise.

However, the additional Saudi crude oil will not be of the same quality as the lost Libyan barrels of oil, which are light sweet crude. About three-quarters of Libyan exports go to Western Europe, and the refineries in Western Europe generally cannot manage the heavier and sour crudes that come out of the Persian Gulf region. There will be some crude oil dislocation, as higher quality crudes are rerouted to Europe, and incremental Saudi barrels of oil head for refineries that are able to handle the lower grade oil they produce.

Between the lost production in Libya, the crude oil dislocation associated with additional Saudi production, and the prospect of further turmoil in the region, we are now unquestionably facing a physical oil supply disruption that is at risk of getting worse before it gets better.

For this reason, I believe it would be appropriate for the President to be ready to consider a release of oil from our Strategic Petroleum Reserve if the situation in Libya deteriorates further. Any additional oil market disturbance—such as turmoil spreading from Libya to Algeria, or from Bahrain to Saudi Arabia—would clearly put us into a situation where there would be a very strong argument in favor of a sale from the Strategic Petroleum Reserve.

While I do not think high oil prices alone are sufficient justification for tapping the Strategic Petroleum Reserve, I do believe the announcement of a Strategic Petroleum Reserve sale would help to moderate escalating prices.

My recommendation that we stand ready to release oil from the SPR is squarely in the traditional policy we have had in our government for SPR use, going back to the Reagan administration in the 1980s. In testimony before the Committee on Energy and Natural Resources on January 30, 1984, President Reagan's Secretary of Energy Donald Hodel stated that the administration's SPR policy in the event of an oil supply disruption was to ''go for an early and immediate drawdown.'' The SPR would be used to send a signal, a strong signal, to oil markets that the United States would not allow a physical oil shortage to develop.

The SPR policy carried out during the 1990–1991 Desert Storm operation offers an example of this ''early and in large volumes'' policy in action.

On January 16, 1991, President George H.W. Bush announced that the allied military attack against Iraq had begun. Simultaneously, he announced that the United States would begin releasing SPR stocks as part of an international effort to minimize world oil market disruptions. Less than 12 hours after President Bush's authorization, the Department of Energy released an SPR crude oil sales notice, and on January 28, 1991, 26 companies submitted offers.

Then-Secretary of Energy Watkins noted:

> We have sent an important message to the American people that their $20 billion investment in an emergency supply of crude oil has produced a system that can respond rapidly and effectively to the threat of an energy disruption.

According to an analysis posted on the Department of Energy's Web site during the George W. Bush administration:

> The rapid decision to release crude oil from government-controlled stocks in the United States and other OECD countries helped calm the global oil market, and prices began to moderate. . . . World oil markets remained remarkably calm throughout most of the war, due largely to the swift release of the Strategic Petroleum Reserve oil.

In recent years, the policy signals surrounding SPR use have not been as clear. Some SPR sales were criticized as efforts to manipulate oil prices. The SPR was then ignored during other oil supply disruptions—including simultaneous oil supply disruptions due to a

strike in Venezuela, political turmoil in Nigeria, and the initiation of the current war in Iraq.

I believe the Reagan administration set the correct course for SPR decisionmaking. The current administration would be well served in considering that example and should be ready, in my view, to make a decision to calm world oil markets should the threat to world oil supplies increase in the coming days and weeks.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GRASSLEY. 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. GRASSLEY. Mr. President, I ask unanimous consent to address the Senate as in morning business.

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

The Senator from Iowa is recognized.

Mr. GRASSLEY. I thank the Chair.

(The remarks of Mr. GRASSLEY pertaining to the introduction of S. 454 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

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

The PRESIDING OFFICER (Mrs. HAGAN). Without objection, it is so ordered.

AMENDMENT NO. 115

Mr. LEE. Madam President, I am on the floor to speak again in support of amendment No. 115, which I propose in connection with the patent reform bill, a bill I support and a bill I intend to vote for and a bill that is going to be used as a vehicle for this amendment that calls for the sense of the Senate on support for the need of a balanced budget amendment. I am grateful to have the support of my good friend, the former Governor of West Virginia, now the junior Senator from West Virginia, JOE MANCHIN, who is cosponsoring this amendment with me.

Here is what it does. It calls on us as Senators to come forward and vote on whether we think we should amend the Constitution and submit that to the States for ratification to restrict our power to engage in perpetual deficit spending.

We, as Members of Congress, are authorized, pursuant to article I, section 8, clause 2 to incur debt in the name of the United States. This power has been abused over time to such a degree that we are now almost $15 trillion in debt. By the end of the decade, we will have amassed annual interest payments that will be approaching $1 trillion. This threatens every government program under the Sun. Whether you most want to protect Social Security or national defense or any other government program, you should be concerned about this practice that will threaten the livelihood of so many Americans who depend on these programs one way or another, whether it is to fund their day-to-day existence or fund programs that provide for our safety and security as a nation.

We do have an increased reason to be optimistic about this for a few reasons. First, we have recent polling data showing Americans overwhelmingly support the idea of a balanced budget amendment. Secondly, a recent GAO report shows we could find at least $100 billion annually in wasteful government spending. This is the type of wasteful Washington spending we ought to have eliminated a long time ago, that we could eliminate and would be forced to eliminate if we, in fact, had a balanced budget amendment.

It would also require us to address issues that will confront our children and grandchildren. As a proud and happy father of three, I can tell you, as difficult as the choices we will have to make may be, I am unwilling, as a father, to pass these problems on to my children and my grandchildren who are yet unborn. I am unwilling to pass along to them a system that mortgages the future of coming generations for the simple purpose of perpetuating government largess and wasteful Washington spending.

All this amendment does is call on Members of the Senate to come forward and say they support the idea. By voting in favor of this amendment, they do not have to embrace any particular balanced budget amendment proposal. But what they do say is that they want the wasteful Washington spending to stop, they want the perpetual deficit spending practice to stop, and they want us to stop the practice of mortgaging the future of coming generations. This is immoral, it is unwise, and it ought to be illegal. Soon it will be. With this amendment, we will set in motion a sequence of events that will lead to just that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. TOOMEY. Madam President, I rise this afternoon to express my very strong support for Senator LEE's amendment and the underlying constitutional amendment I hope this body will take up at some point soon. I commend Senator LEE for his leadership on this issue, for offering this amendment now.

I feel a tremendous sense of urgency. I do not think we have time to waste, time to wait, time to kick this can down the road anymore. We have done that too long.

The fact is, a balanced budget amendment to our Constitution would provide the kind of fiscal straitjacket this government clearly needs. If we operated the way many States did, if we operated the way all businesses did, if we operated the way families did and we lived within our means, then maybe this would not be necessary. But it has become obvious to anybody that we are not living within our means—not even close.

We are running a budget deficit this year of $1.6 trillion. That is 10 percent of the size of our entire economy—just this year alone. Last year, it was $1.5 trillion. If we do not do something very serious about this now—not soon, not in the next few years but now—if we do not do something about this now, this is already at unsustainable levels.

In 1988, the total debt as a percentage of our economy was about 40 percent. In 2008, the total debt as a percentage of our economy was about 40 percent. Today it is at about 63 percent, and by October it will be 72 percent. These numbers are staggering, and they are not sustainable. It is already costing us jobs because this huge level of debt and the ever-increasing debt from the ongoing deficits raise real doubts in the minds of investors and entrepreneurs and small business owners what kind of financial future is in store for us. The threat of serious inflation, high interest rates, even a financial disruption grows dramatically as we keep piling on this debt. This is not just speculation or theory. We have seen this with other countries that have gone down this road.

The good news is it is not quite too late; we can do this; we can get our spending under control. And I am absolutely convinced we can have tremendous prosperity and a tremendously robust recovery and the job creation we need if we follow some basic fundamental principles that have always led to prosperity wherever they have been tried.

There are several—I will not go through all of them—but one of the fundamental ones is a government that lives within its means. I would define ''means'' as keeping a budget that is balanced. This amendment today, of course, only expresses the will of the Senate that we ought to do this. I strongly hope all our colleagues will join Senator LEE in this very constructive amendment.

I yield the floor.

Mr. GRASSLEY. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

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

Mr. DURBIN. Madam President, I know personally the extraordinary efforts made by the chairman of the Senate Judiciary Committee to bring this patent reform bill to the floor. I have worked with him in the past, and it has not been an easy task. I know that many times he felt he was close to having the right bill at the right moment, and then it slipped away. But his determination and his capacity to bring people together has resulted in this moment where the bill is before us. And it

is important that it is, not just because of his hard work but because of what it means for this country.

I don't know whether it has formally been done, but this bill is being recharacterized as the America Invents Act instead of the Patent Reform Act because those few words tell a much bigger story. We are talking about the kind of innovation and research in America that will create successful companies and good American jobs, and that is why this bill is important.

It has been a long time—going back to our origins as a nation—since we recognized the right for those who invent things to have some proprietary personal interest in those inventions, and we set up the Patent and Trademark Office for that purpose. Unfortunately, that office of the Federal Government isn't keeping pace with the creativity of our country, and that is why Senator LEAHY has brought this bill to the floor.

This is bipartisan legislation. I commend him for his work on it, and I commend my Republican colleagues for joining him. Senators GRASSLEY, KYL, SESSIONS, and HATCH have also worked diligently on this.

This may not be the simplest area of the law. I can remember that when I was in law school here in town, there was one student—he was the only African-American student in my class, and that goes back to the days of Georgetown Law, Senator LEAHY, when there were few minorities and few women. He was African American. He wore a white shirt and tie to class every day.

I went up to him one day and said: So tell me your background.

He said: Well, I am an engineer, and I want to be a patent lawyer.

And I quickly moved to another table because I realized there wasn't anything we could talk about. I knew nothing about his world. But it is a specialized world, and one in which I am sure he was very successful. Patent law is something that is very hard to explain, and I think that is part of the reason this bill has taken some time to come here.

But economic growth is driven by innovation, and if you have a good idea for a new product in America, you can get a patent and turn that idea into a business. Millions of good American jobs are created this way. The list is endless.

Patents have been the source of great American stories. Joseph Glidden, a farmer from DeKalb, IL, patented barbed wire fence in 1874. It dramatically changed the way ranchers and cattlemen and others were able to do their business as they settled the frontier in America. I might add that the DeKalb High School nickname is ''The Barbs'' as a consequence of this one discovery. Glidden's invention made him a wealthy man, but his legacy included granting the land for what became Northern Illinois University in DeKalb. Ives McGaffey of Chicago invented and patented one of the first vacuum cleaners in 1869. Josephine Cochran of Shelbyville, IL, once said, ''If nobody else is going to invent a dishwashing machine, I'll do it myself.'' In 1886, she did it and got a patent for it. The company she created is now known as Whirlpool.

Our patent laws set the rules of the road for American innovation. By giving inventors exclusive rights over their inventions for a term of 20 years, patents provide great incentive for investment. Patents enable inventions to be shared with the public so new innovations can be based upon them.

It has been a long time since we have looked at our patent laws and really updated them. Just think about this, putting it into perspective. It has been over 50 years. And I commend Senator LEAHY for tackling this. It has not been easy. The pace and volume of innovation has quickened a great deal since we looked at this law over 50 years ago, and the Patent and Trademark Office has struggled to keep up.

Over the last few years, Congress has debated how best to modernize our patent law. It has been a tough issue. We have one set of patent laws governing the incredibly diverse range of inventions and industries. In trying to update our laws, we have to be careful not to make changes that benefit some industries but undermine innovation in others. The bill before us strikes the right balance. That is why I voted for it in Committee and support it. It is a product of years of bipartisan negotiation. It is a good compromise. It is consensus legislation passed out of the Judiciary Committee a few weeks ago with a unanimous 15-to-0 vote.

The bill is supported by the Obama administration and his Cabinet officers and a broad and diverse group of stakeholders, all the way from the American Bar Association, to the AFL-CIO, to the Biotechnology Industry Organization. The list is very long.

In my own home State, I went to the major manufacturing companies and said: You look at it because these inventions are your future. You have to be confident that what we do to the law is consistent with new inventions, new innovations, and new jobs not just at your company but at other places.

I am happy to say that those supporting it include the Illinois Tool Works, Caterpillar—the largest manufacturer in my State—Motorola, Monsanto, Abbott, IBM, and PepsiCo.

The bill will improve the ability of the Patent and Trademark Office to award high-quality patents. Right now, there is a backlog of over 700,000 patent applications, which they are struggling to clear. Think about that—700,000 inventions and ideas that are waiting to be legally recognized so that they can go forward in production. This bill will streamline the operations and adjust the user fees to make sure the agency clears the backlog.

The bill takes steps to improve submission of information to the PTO about pending patent applications. I would note that it keeps user fees low for small startups and individual investors.

In past years, there were some parts of the bill that generated controversy, including provisions relating to damages and venue in patent infringement lawsuits. The good efforts in this bill that have been negotiated have resulted in these provisions no longer being a subject of controversy.

I know we will have some amendments offered on the bill, and I expect we will have a good debate on them. At the end of the day, I expect we will have a strong bipartisan vote in passing this bill. Senator LEAHY is now trying to get this train into the station. There are a lot of people bringing cars here who want to hook on because they know this is an important bill and likely to pass.

There are some areas, I might add, which we did not discuss in committee and which I considered raising in an amendment on the floor but held back. One of them relates to the controversial issue of gene patenting, which I have been learning about recently. It is my considered opinion this is now working its way through the courts and to try to intervene on the floor here would be premature. The courts have to decide whether people can patent genes.

There was a recent story I saw on ''60 Minutes'' where a company known as Myriad had patented the gene for breast cancer. They have now created a test, incidentally, to determine whether a woman has this gene. The test is in the range of $4,000 to $5,000. The actual cost of the test should be much lower, and the obvious question the courts are deciding is, How can you claim ownership of a gene that occurs in nature in human bodies you didn't create? That is the question before the courts. We could have debated it here for a long time and maybe never resolved it, but depending on how the courts come out on the issue, we may visit it again.

I hope the House will take this bill up quickly. I know they want to look it over from their perspective, but we need to pass this. If we are talking about creating jobs in successful, thriving businesses in America, this bill needs to pass.

I thank Chairman LEAHY for his leadership and for his hard work on this issue. I am honored to serve with him on the Senate Judiciary Committee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I thank the distinguished senior Senator from Illinois, who has been an invaluable member of the Judiciary Committee all the time I have been there. This has been very helpful. I appreciate what he said. I found interesting the list of patents from his home State of Illinois, and I think each one of us can point to some of those with pride. If we are going to stay competitive with the rest of the world, we have to get this bill passed.

It has been more than 60 years since we updated our patent law. We are way behind the rest of the world. We have to be able to compete, so I thank the Senator.

FURTHER MODIFICATION TO AMENDMENT 121, AS MODIFIED

Madam President, I have cleared this with the Senator from Iowa. Notwithstanding the adoption of the Leahy-Grassley amendment No. 121, as modified, I ask unanimous consent the amendment be modified further with the changes that are at the desk.

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

The further modification is as follows:

On page 3 of the amendment, delete lines 8 through 17.

Mr. LEAHY. Madam President, we are down to very few things. I hate to put in another quorum call and then hear from Senators calling they want some time to speak about amendments. I know sometimes we follow the ''Dracula'' rule, being that we do not legislate until it is dark and Dracula comes out. Maybe, since the days are getting longer, we could do some things during daytime hours. I send out a call, a pleading call: If people want their amendments, come forward, let's have a vote up or down on them and be done with it.

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. VITTER. Madam President, I ask unanimous consent the order for the quorum call be rescinded.

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

AMENDMENT NO. 115

Mr. VITTER. Madam President, I rise in strong support of the Lee amendment, which is a sense of the Senate that this body and the House should pass a constitutional amendment requiring a balanced budget. Clearly, I think in the mind of every American, our top domestic challenge is to get hold of our fiscal situation to move us to a sustainable path, to tighten the belt of the Federal Government just like every American family has been doing for many years in this recession.

We are making a start, a real but modest start, in terms of this year's budget. I was happy the Senate followed the lead of the House and passed a 2-week CR today that has substantial cuts, the exact level of cuts as the House passed for the rest of the fiscal year. I support that important start in terms of this year's budget. Of course, we need to finish the job by passing a spending bill for the entire rest of the fiscal year with that level of cuts or more.

That is a start, but it is only a start. The other thing I think we need to do is create reform, a structure that demands that Congress stay on that path to a balanced budget until we get there. I believe the most important thing we can create to demand that is a straitjacket for Congress, if you will, a balanced budget constitutional amendment. Unfortunately, I think Congress, time and time again over years and decades, has proved we need to put Congress in that straitjacket if we are ever going to get to a sustainable fiscal situation, a balanced budget.

This is not some academic debate. This is about the future of our kids, our grandkids, and our immediate future because we could be put into economic chaos at any time because of our untenable fiscal situation. Forty cents of every $1 the Federal Government is spending is borrowed money—so much of that money borrowed from the Chinese. This is about whether we are going to remain the most free, most prosperous country in human history. This is about if we are going to remain our own masters or if we are going to have to look to the folks who are lending us all this money, including the Chinese, for consent in terms of how we map our future.

Is that the future we want to hand to our kids? It is certainly not the future I want to hand to my kids. That is what it is all about. Again, it is not far off in the distance. This is an immediate challenge.

This could lead to an immediate economic crisis unless we get ourselves on the path to a balanced budget quickly. Again, step 1 is cuts this year, a budget that is going back to 2008 levels, prestimulus, pre-Obama budget, this year. That is step 1.

But step 2 is some sort of important structural reform such as a balanced budget constitutional amendment that puts a straitjacket on Congress, that demands that we get there in a reasonable period of time.

The huge majority of States operate under exactly this type of constitutional amendment. The huge majority of municipalities, towns, cities, other jurisdictions, operate under this sort of constraint. It is hard sometimes. It demands tough choices. In times such as these, in a recession, it demands real cuts.

But guess what. Just like a family does sitting around their kitchen table making their family budget fit reality, States do that, cities do that, towns do that, and Congress should have to do that for the Federal Government. Congress should have to tighten its belt, like families do reacting to their budget reality sitting around the kitchen table.

I think it is perfectly clear we are not going to get there, unless and until we are made to through some sort of mechanism such as the balanced budget constitutional amendment.

Even beyond the deadline imposed by the expiration of the current or any other CR spending bill, we have another looming deadline, which is, whenever the United States Federal Government hits up on the current debt ceiling. That is going to happen sometime between late March and May is the projection.

I firmly believe it would be enormously irresponsible to address that issue until and unless we put ourselves on this road to reform, until and unless we pass something like a meaningful balanced budget constitutional amendment. So this sense of the Senate is meant as a first step. I applaud Senator LEE for putting it before us as that first step. Let's say yes. Let's say we are going to do it.

Then, of course, most important, let's do it. Let's do it now. The clock is ticking. Let's do it now, well before we reach any crisis point such as coming up on the debt limit I spoke about.

Let's act responsibly, which means acting now. Let's take up the Nation's important business, which is spending and debt. Let's avoid the economic calamity that is threatened if we stay on the current path, which is completely, utterly unsustainable. It is not just me saying that, it is everybody knowing it, including Ben Bernanke, Chairman of the Federal Reserve Board. He testified before us at the Banking Committee yesterday and said exactly the same thing.

Ben Bernanke is not some ideologue. He is not some tea party conservative. But he said yesterday, very clearly, three important things. First of all, the greatest medium and long-term challenge we face as a country is our fiscal posture. Secondly, the fiscal path we are on is completely and utterly unsustainable. Third, while that is a long-term challenge, it poses short-term, immediate consequences.

If we do not get on a sustainable path now, immediately in the short term, we could have immediate short-term consequences, even economic crisis. Let's avoid that. Let's do right by our children. Let's tighten our belt, as American families have been for several years in this recession, and let's demand that we keep on that path with a balanced budget constitutional amendment.

I yield the floor.

The PRESIDING OFFICER (Mr. WHITEHOUSE.) The Senator from Vermont.

Mr. LEAHY. I ask unanimous consent that an article written for The Hill by the distinguished Secretary of Commerce Gary Locke, dated March 2 of this year, be printed in the RECORD.

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

(See exhibit 1.)

Mr. LEAHY. Mr. President, it is interesting, I do not want to embarrass the person whom I wanted to speak about at all, but I was interested in listening to my dear friend, Senator DURBIN, speak about his time at Georgetown Law School. Both he and I graduated from the Georgetown Law School. He talked about a classmate of his who was in patent law, and he realized this was a complex subject, one that is not the sort of law that he, Senator DURBIN, was going to go into, any more than I would have.

But I also think of another graduate of Georgetown Law Center who was an engineer, had a degree in engineering, studied patent law, and became one of the most distinguished patent lawyers, litigators in this country, and is now a member of the Federal circuit court of appeals and that is Judge Richard Linn.

It was interesting hearing the Senator from Illinois, himself one of the finest lawyers in this body. My wife Marcella and I had the honor of being out in Chicago with Judge Linn and his wife Patty for a meeting of the Richard Linn American Inn of Court in Chicago. He serves with great distinction. In fact, a major part of this legislation reflects an opinion he wrote.

But I digress. I ask unanimous consent the Senate resume consideration of the Lee amendment No. 115, with the time until 5:15 equally divided between the two leaders or their designees; that upon the use or yielding back of time, the Senate proceed to vote in relation to the Lee amendment No. 115; that the Lee amendment be subject to a 60-vote threshold; that upon disposition of the Lee amendment, the Senate resume consideration of the Menendez amendment No. 124; that Senator MENENDEZ be recognized to modify his amendment with the changes at the desk and the amendment, as modified, be agreed to; that the motions to reconsider be considered made and laid upon the table, with no intervening action or debate; and there be no amendments in order to the amendments prior to the vote.

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

Mr. LEAHY. I thank the superb staff for writing that out because I am not quite sure I could have done that on my own.

I had hoped as we began debate on this important bill to modernize America's patent system that the Senate would focus specifically on this measure designed to help create jobs, energize the economy and encourage innovation.

I had hoped that we would consider relevant amendments, and pass the bill. The America Invents Act is a key part of any jobs agenda. We can help unleash innovation and promote American invention, all without adding a penny to the deficit.

This is commonsense, bipartisan legislation. I said at the outset that I hoped the Senate would come together to pass this needed legislation and do so in the finest tradition of the Senate. I thank the Republican manager of the bill and the assistant Republican leader for their support and efforts on this bill.

Unfortunately, we have become bogged down with nongermane, nonrelevant, extraneous discussions and amendments.

Earlier this week, Senators who were focused on our legislative effort and responsibilities joined in tabling an amendment that has nothing to do with the subject matter of the America Invents Act.

Extraneous amendments that have nothing to do with the important issues of reforming our out-of-date patent system so that American innovators can win the global competition for the future have no place on this important bill. They should not be slowing its consideration and passage.

If America is to win the global economic competition, we need the improvements in our patent system that this bill can bring.

We must now dispose of another such amendment so that we may proceed to final passage of the America Invents Act and help inventors, American businesses and our economic recovery.

I take proposals to amend the Constitution of the United States seriously. I take seriously my oath as a Senator to support and defend the Constitution and to bear true faith and allegiance to it.

Over the years I have become more and more skeptical of recent efforts to amend the design that established the fundamental liberties and protections for all Americans. I believe the Founders did a pretty good job designing our fundamental charter.

I likewise take seriously the standard set in article V of the Constitution that the Congress propose amendments only when a supermajority of the Congress deem it ''necessary.'' While there have been hundreds of constitutional amendments proposed during my service in the Senate, and a number voted upon during the last 20 years, I have been steadfast in my defense of the Constitution.

The matter of a so-called balanced budget amendment to the Constitution is not new to the Senate. Indeed, I believe the first matter Senator HATCH moved through the Judiciary Committee when he chaired it and I served as the ranking member was his proposed constitutional amendment to balance the budget.

I strongly opposed it, but I cooperated with him in his effort to have the committee consider it promptly and vote.

I wish others would show the managers of this bill that courtesy and cooperation and not seek to use this bill as a vehicle for messages on other matters.

The Judiciary Committee has considered so-called balanced budget amendments to the Constitution at least nine times over the last 20 years. The Senate has been called upon to debate those amendments several times, as well, in 1982, 1986, 1992, 1994, 1995 and 1997. Despite the persistent and extraordinary efforts of the senior Senator from Utah, they have not been adopted by the Congress.

The only time the Senate agreed to the proposed constitutional amendment was in 1982. On that occasion, the House of Representatives thought the better of it. On the subsequent five occasions, as Senators came to understand how the proposed amendment undercut the Constitution, it was defeated.

Now another Senator has adopted this cause.

He has proposed a different, even more complicated proposed constitutional amendment. That will require study in order to be understood. It will require working with the chairman of the Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights.

While the new Senator from Utah is a member of the Judiciary Committee and a member of the Constitution subcommittee, he has not consulted with me about his proposal, nor, as far as I know, with the chairman of the subcommittee, the senior Senator from Illinois.

Instead, he preemptively seeks to raise the matter on this important bill, which is designed to create jobs, encourage American innovation and strengthen our economy.

For the last 20 years, the so-called balanced budget amendment has been a favorite slogan for some. For some others of us, we have done the hard work to actually produce a balanced budget and, indeed, a surplus.

Rather than defile the Constitution, we have worked and voted to create a balanced budget and a budget surplus. In 1993, without a single Republican vote to help us, Democrats in the Congress passed a budget that led to a balanced budget and, indeed, to a budget surplus of billions of dollars by the end of the Clinton administration.

That surplus was squandered by the next administration on tax breaks for the wealthy and an unnecessary war that cost trillions but went unpaid for. Those misjudgments were compounded by financial fraud and greed that led to the worst economic recession since the Great Depression. That is what we have been seeking to dig out from under since 2008.

At this time, I ask unanimous consent to have printed in the RECORD a letter received from American Federation of State, County and Municipal Employees, AFSCME, in opposition to the Lee amendment.

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

AFSCME,
Washington, DC, March 2, 2011.

DEAR SENATOR: On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees, I am writing to urge you to oppose Senator Lee's amendment to S. 23, providing that it is the sense of the Senate that Congress should pass and the states should agree to an amendment to the Constitution requiring a Federal balanced budget.

A constitutional balanced budget amendment is a simplistic answer to a complicated issue and would serve only to further weaken our economy and move us away from fiscal responsibility at a time of much economic uncertainty. It would require large, indiscriminate spending cuts during economic downturns, precisely the opposite of what is needed to stabilize the economy and avert recessions.

The immediate result of a balanced budget amendment would be devastating cuts in education, homeland security, public safety, health care and research, transportation and other vital services. Any cuts made to accommodate a mandated balanced budget would fall most heavily on domestic discretionary programs, but ultimately, there would be no way to achieve a balanced budget without cuts in Social Security and other entitlement programs as well. A balanced budget amendment would likely disproportionately affect unemployed and low-income Americans.

There are also serious concerns about the implementation of such an amendment and how it would involve the courts in matters more appropriately resolved by the legislative and executive branches of government. Budgetary decisions should be made by officials elected by the people, not by unelected court officials with no economic or budget expertise.

I urge you to oppose the Lee amendment and to oppose any effort to adopt an amendment to the Constitution requiring a balanced budget.

Sincerely,

CHARLES M. LOVELESS,
Director of Legislation.

Mr. LEAHY. We have stabilized the economic freefall and begun to revive the economy.

Everyone knows that economic growth is the path toward budget balance. Economic growth and winning the future through American innovation is what the bipartisan American Invents Act is all about.

Accordingly, for all these reasons as well as the reasons for which I opposed the efforts to amend the Constitution in 1982, 1986, 1992, 1994, 1995 and 1997, I oppose amendment No. 115.

EXHIBIT 1

[From the Hill, Mar. 2, 2011]

DELIVERING INNOVATION AND JOBS THROUGH PATENT REFORM

(By Commerce Secretary, Gary Locke)

Today, there are more than 700,000 unexamined patent applications log-jammed at the U.S. Patent and Trademark Office (USPTO).Many of them represent inventions that will come to market and launch new businesses and create new, high-paying jobs.

But without a patent, securing the funds needed to get a business or innovation off the ground is nearly impossible, for both small and large inventors alike.

Patent reform legislation the Senate is considering this week can change that.

And it can build on the progress USPTO Director David Kappos has already made in reducing the time it takes to process the average patent—currently nearly 3 years.

New programs have been introduced to fast-track promising technologies, reforms have been made to help examiners more quickly process applications, and the Patent Office recently announced a plan to give inventors more control over when their patent is examined.

The result? The backlog of patents is decreasing for the first time in years, even as new applications have actually increased 7 percent.

But if the USPTO is to speed the movement of job-creating ideas to the marketplace, it will take more than internal, administrative reforms alone. That's where the patent reform legislation comes in.

Here's what it promises to do: First, it allows the USPTO to set its own fees—a major part of ensuring that the agency has reliable funding. This will enable the USPTO to hire more examiners and bring its IT system into the 21st century so it can process applications more quickly and produce better patents that are less likely to be subject to a court challenge.

Second, it decreases the likelihood of expensive litigation because it creates a less costly, in-house administrative alternative to review patent validity claims.

Also, the pending legislation would add certainty to court damages awards, helping to avoid excessive awards in minor infringement cases, a phenomenon that essentially serves as a tax on innovation and an impediment to business development.

Finally, patent reform adopts the ''first-inventor-to-file'' standard as opposed to the current ''first-to-invent'' standard. First inventor to file is used by the rest of the world, and would be good for U.S. businesses, providing a more transparent and cost-effective process that puts them on a level playing field with their competitors around the world.

There is some concern among some small, independent inventors, who feel like the current system is better for them, but it's our strong opinion that the opposite is true.

Here's why: The cost of proving that one was first to invent is prohibitive and requires detailed and complex documentation of the invention process. In cases where there's a dispute about who the actual inventor is, it typically costs at least $400,000 in legal fees, and even more if the case is appealed. By comparison, establishing a filing date through a provisional application and establishing priority of invention costs just $110. The 125,000 provisional applications currently filed each year prove that early filing dates protect the rights of small inventors.

In the past seven years, of almost 3 million applications filed, only 2 patents were granted to small entities that were the second inventor to file but were able to prove they were first to invent. Of those 25, only one patent was granted to an individual inventor who was the second to file. Thus, in the last seven years, only one independent inventor in nearly 3 million patent filings would have gotten a different outcome under the ''first-inventor-to-file'' system.

Many proposals in this legislation have been debated for a decade, but we now have core provisions with broad support that will undoubtedly add more certainty around the validity of patents; enable greater work sharing between the USPTO and other countries; and help the agency continue with operational changes needed to accelerate innovation, support entrepreneurship and business development, and drive job creation and economic prosperity.

And thanks to the leadership of Senate and House Judiciary Committee Chairmen, Patrick Leahy1 and Lamar Smith, getting this bipartisan jobs legislation passed is a top priority.

There's a clear case for it. As President Obama said in his State of the Union address, ''The first step in winning the future is encouraging American innovation.''

Reforming our patent system is a critical part of that first step.

Speeding the transformation of an idea into a market-making product will drive the jobs and industries of the future and strengthen America's economic competitiveness.

The PRESIDING OFFICER. Under the previous order, all time has now expired.

The question is on agreeing to the Lee amendment No. 115.

Mr. LEAHY. Mr. President, even though I oppose this amendment and would simply allow it to go for a voice vote because the proponent of the amendment is not even on the floor, I will, to protect his right and notwithstanding his not following the normal policy, ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the amendment.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from North Dakota (Mr. CONRAD), and the Senator from Louisiana (Ms. LANDRIEU) are necessarily absent.

I further announce that, if present and voting, the Senator from Louisiana (Ms. LANDRIEU) would vote ''no.''

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

The result was announced—yeas 58, nays 40, as follows:

[Rollcall Vote No. 30 Leg.]

YEAS—58

Alexander	Ensign	McConnell
Ayotte	Enzi	Moran
Barrasso	Graham	Murkowski
Begich	Grassley	Nelson (NE)
Bennet	Hatch	Nelson (FL)
Blunt	Hoeven	Paul
Boozman	Hutchison	Portman
Brown (MA)	Inhofe	Risch
Brown (OH)	Isakson	Roberts
Burr	Johanns	Rubio
Carper	Johnson (WI)	Sessions
Chambliss	Kirk	Shelby
Coats	Kohl	Snowe
Coburn	Kyl	Thune
Cochran	Lee	Toomey
Collins	Lieberman	Udall (CO)
Corker	Lugar	Vitter
Cornyn	Manchin	Wicker
Crapo	McCain	
DeMint	McCaskill	

NAYS—40

Akaka	Harkin	Reid
Baucus	Inouye	Rockefeller
Bingaman	Johnson (SD)	Sanders
Blumenthal	Kerry	Schumer
Boxer	Klobuchar	Shaheen
Cantwell	Lautenberg	Stabenow
Cardin	Leahy	Tester
Casey	Levin	Udall (NM)
Coons	Menendez	Warner
Durbin	Merkley	Webb
Feinstein	Mikulski	Whitehouse
Franken	Murray	Wyden
Gillibrand	Pryor	
Hagan	Reed	

NOT VOTING—2

Conrad	Landrieu

The PRESIDING OFFICER. On this vote, the yeas are 58, the nays are 40. Under the previous order requiring 60 votes for the adoption of this amendment, the amendment is rejected.

Under the previous order, the Senator from New Jersey is recognized.

AMENDMENT NO. 124, AS MODIFIED

Mr. MENENDEZ. Mr. President, pursuant to the previous order, I ask that my amendment be modified with the changes that are at the desk.

The PRESIDING OFFICER. Under the previous order, the amendment is so modified.

The amendment, as modified, is as follows:

On page 104, strike line 23, and insert the following:

SEC. 18. PRIORITY EXAMINATION FOR TECHNOLOGIES IMPORTANT TO AMERICAN COMPETITIVENESS.

Section 2(b)(2) of title 35, United States Code, is amended—

(1) in subparagraph (E), by striking ''; and'' and inserting a semicolon;

(2) in subparagraph (F), by striking the semicolon and inserting ''; and''; and

(3) by adding at the end the following:

''(G) may, subject to any conditions prescribed by the Director and at the request of the patent applicant, provide for prioritization of examination of applications for products, processes, or technologies that are important to the national economy or national competitiveness without recovering the aggregate extra cost of providing such prioritization, notwithstanding section 41 or any other provision of law;''.

SEC. 19. EFFECTIVE DATE.

Mr. MENENDEZ. Mr. President, this modified amendment, cosponsored by Senator BENNET, would allow the Patent Office Director to prioritize patents that are important to the national economy or national competitiveness. The amendment will ensure that patents that are vital to our national interests do not languish in any backlog at the Patent Office and that they ultimately promote the national economy and national competitiveness.

My understanding is that by previous agreement the amendment, as modified, is agreed to.

The PRESIDING OFFICER. That is correct. Under the previous order, the amendment, as modified, is agreed to.

Mr. MENENDEZ. Thank you, Mr. President.

With that, 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.

The PRESIDING OFFICER. The Senator from Colorado.

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

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

Without objection, the motions to reconsider on the two previous amendments are laid upon the table.

Ms. MIKULSKI. Mr. President, I rise to explain my vote against the managers' amendment to S. 23, the America Invents Act.

I agree wholeheartedly with the chairman of the Judiciary Committee that we must enable our inventors to out innovate and produce the products and jobs of the future.

However, a provision in the managers' amendment would take the Patent and Trademark Office, PTO, off-budget. I cannot support this provision for three reasons.

First, the provision is unnecessary. Proponents argue that it will prevent the diversion of PTO's fees. However, since fiscal year 2005, the Appropriations Committee has rejected the practice of diverting PTO fees for other purposes and instead has consistently recommended that PTO retain every dollar it collects from inventors. In fact, the Appropriations Committee has on several occasions approved bills to allow PTO to spend up to $100 million in excess of PTO's appropriation if fee revenue is higher than the appropriations level.

Second, the amendment would reduce oversight. Rather than being subject to the annual appropriations process, this agency—with a budget of more than $2 billion—would be on autopilot. The underlying bill seeks to reduce the backlog of pending patent applications. Currently, it takes PTO nearly 3 years to process a patent application. The backlog of applications stands at over 700,000. Some progress has been made in this area, thanks to the annual oversight provided in appropriations bills which has succeeded in forcing management reforms that have slowed the growth of PTO's backlog.

The amendment requires PTO to submit annual budget requests and spending plans to Congress. However, this approach eliminates the requirement for an annual legislative vehicle to closely examine and approve expenditures of taxpayer dollars and fee revenue. Instead the amendment would restrict accountability for an agency that struggles to keep up. While our inventors are standing in line for patents, their ideas can be stolen to fuel another country's economy. I am very encouraged by Director Kappos' new leadership at PTO, but much more progress and greater management oversight are still necessary to give American inventors the protections they deserve.

Finally, the amendment may hamper PTO operations in the future. PTO has adequate fee revenue now, but that has not always been the case. As recently as fiscal year 2009, PTO experienced a revenue shortfall due to lower than expected fee collections. To keep PTO's operations whole and to help tackle the patent backlog, we gave PTO a direct appropriation to bridge their financial gap when fees weren't enough. In fact, PTO fee collections have fallen short of appropriations levels by more than $250 million since fiscal year 2005. Unfortunately, should such a gap occur in future years, the Appropriations Committee would not be poised to step in if PTO's fee collections are not adequate to cover operations.

Again, I applaud the Judiciary Committee, under Chairman LEAHY's leadership, for pushing PTO to continue its progress as part of our Nation's innovation engine. Unfortunately, this amendment will only send PTO drifting on autopilot with little congressional accountability.

AMENDMENT NO. 133

Mr. REID. Mr. President, I support Senator Feinstein's amendment to restore the grace period under current law and eliminate the so-called first-inventor-to-file provisions of the legislation. This is the No. 1 outstanding issue of concern my constituents have raised with me, particularly small and independent inventors. It is a technical and complex issue, one about which experts in patent law have strong disagreements. But I think the bill would be much better without these provisions.

For shorthand, a lot of people talk about this issue as first-inventor-to-file versus ''first-to-invent.'' But, in my view, this terminology just confuses the issue. My constituents are most concerned about the loss of the unconditional 1-year grace period under current law. Both a first-to-invent and a first-inventor-to-file system could have the grace period; there is no inherent inconsistency. I am not sure why the two issues have been merged. Frankly, people who talk about priority fights and interferences are completely missing the point. The concerns are all about the grace period.

My constituents tell me that the current law grace period is crucial to small and independent inventors, for numerous reasons. First, it comports with the reality of the inventive process. An idea goes through many trials, errors, and iterations before it becomes a patent-worthy invention. Small inventors in Nevada tell me that sometimes they may have conceived an idea as an improvement to the apple; and it turns out to be a new type of orange. The grace period allows inventors the time to refine their inventions, test them, talk issues through with others, all without worry of losing their rights if these activities result in an accidental disclosure or the development of new ''prior art.''

Second, the grace period comports with the reality of small entity financing through friends, family, possible patent licensees, and venture capitalists. The grace period allows small inventors to have conversations about their invention and to line up funding, before going to the considerable expense of filing a patent application.

In fact, in many ways, the 1-year grace period helps improve patent quality—inventors find out which ideas can attract capital, and focus their efforts on those ideas, dropping along the way other ideas and inventions that don't attract similar interest and may not therefore be commercially meaningful.

These inventors therefore believe that the effective elimination of the grace period in the law is therefore a serious blow. They tell me that now they will have to try to file many more applications, earlier in the process. They tell me that the balm of ''cheap provisionals'' is snake oil, because a provisional still has to meet certain legal standards, meaning that you still have to spend a lot for patent counsel, which is the biggest single expense of filing an application. Because they can't afford to file that many applications, regular or provisional, they will have to give up on some inventions altogether. If that is so, it wouldn't just be bad for them, it would be bad for the creation of innovation in America.

They also are concerned that it will be harder to get VC funding because they will have filed applications on inventions that weren't quite the right ones. The added risk about whether they can ensure that the provisional application will be adequate to provide protection to this slightly modified but commercially more meaningful invention will be enough to scare off already difficult to obtain venture capital funding.

The legislation doesn't turn a blind eye to these problems. It provides a type of grace period, triggered by inventor disclosures. Will this new, significantly more scaled back grace period work? Maybe. I don't know. I can tell you that the independent inventors in Nevada swear by a code of secrecy and nondisclosure until they are far enough along to get patent protection. It would require a sea change in culture to be able to benefit from this very limited inventor's disclosure-triggered grace period.

Further, there are legitimate questions about how this new disclosure provision would work—for instance, what happens when an invention that is disclosed leads to other, different ideas and disclosures that update the state of the art before the application has been filed? How is an inventor going to be able to prove that changes in an ''ecosystem of technology'' were necessarily derived from her disclosure?

I would also note that I appreciate that PTO Director Kappos has been doing great work in terms of reaching out to small inventors, trying to make things cheaper and more efficient for them; trying to demystify the PTO for them. If any PTO Director could make this work, I feel confident he is the one who can do it.

But, you know what, if it ain't broke, don't fix it. Our current system has helped make America the most innovative country in the world; I will venture to say the most innovative society in world history. Our innovation system is the envy of the world. We don't need to harmonize with them; they are trying to figure out how we do it. This is one area where nothing is broken, and I am very worried about unintended consequence, especially when a lot of the folks arguing about this issue are not even talking about the thing that matters—the grace period.

Accordingly, I support the Feinstein amendment. And I encourage my colleagues to support it too. I am not making this argument as the Senate majority leader, but as the Senator from Nevada—if the current grace period isn't broke, then we absolutely shouldn't fix it with something that my constituents tell me, with alarm, may make it harder for them to patent their innovations.

Mr. ISAKSON. Mr. President, I ask unanimous consent to be recognized as in morning business.

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

RISK RETENTION

Mr. ISAKSON. Mr. President, I come at the end of a long day for all of us to talk about a subject that is off the subject from the bill on the floor but is one of tremendous importance to the United States and the recovery of our economy.

I want to also point out for the record—and hopefully also for the right people—that we are at a critical point in terms of housing in America, with Dodd-Frank having been passed and newly promulgated rules. It is essential that we don't make the mistakes that led us to the last collapse that caused the tragedy in the housing market in 2007, 2008, and 2009.

In the Dodd-Frank bill, there was an amendment called the qualified residential mortgage, which was offered by Senators LANDRIEU, HAGAN, and myself to ensure that the risk retention provisions of Dodd-Frank would not apply to a well-underwritten, well-qualified loan. Risk retention, as the Chair remembers, is the 5-percent retention requirement of any lender who made a residential mortgage that was not qualified, but they were not specific in their definition of what a qualified mortgage would be. So we took the point to take the historical underwriting standards that have proven to work so well in this country and write them into the Dodd-Frank bill, which were that a mortgage that may be exempted from a risk retention would have to have 20 percent down, and if there was more than 80 percent loan to value, that amount above 80 percent would have to be covered by private mortgage insurance. We required third-party verification of bank deposits, third-party verification of employment, third-party verification of an individual's ability to make the payments and service the debt, credit records, and all the underwriting standards. As the Chair remembers, what got us into so much trouble from 2000 to 2007 is that we made subprime loans, used stated income, didn't do debt checks or anything else we should have done. We made bad mortgages.

My point is this. There is a committee that has been formed—made up of very distinguished Americans—that is promulgating the rules to carry out the intent of Dodd-Frank. That committee includes Sean Donovan from HUD; Ben Bernanke; Edward DeMarco, Acting Director of the Federal Housing Finance Agency; John Walsh, Acting Comptroller of the Currency; Mary Shapiro, head of the SEC; and Sheila Bair, head of FDIC. That is a very august group. They are in the process of promulgating rules to carry out the intent of Dodd-Frank. The rumors coming out of those negotiations—and I say rumors because I cannot verify it because I am not there. But I know the articles I have read in the papers in the last couple of days send a troubling signal to me.

Just for a few minutes, I wish to make the points that I think are so critical.

No. 1, it is my understanding they are considering memorializing 80 percent as the maximum amount of loan to value for a loan that would fall as a qualified residential mortgage and do not address private mortgage insurance for coverage above 80 percent.

Without getting technical, what that would mean is the only qualified residential mortgage that could be made and not require risk retention would have to have a minimum of a 20-percent downpayment. In the olden days of standard lending in the eighties, seventies, and sixties, when you borrowed more than 80 percent but not over 95 percent, you had private mortgage insurance to insure the top 30 percent of the loan made so the investors had the insurance of knowing, if there was a default, the top portion of that loan, which was the most in terms of loan to value, would be insured and would be paid.

If it is, in fact, correct that this committee is going to recommend a qualified residential mortgage require a 20-percent downpayment and not make provisions for PMI, we will be making a serious mistake because two things will happen. One, very few people will be able to get a home loan in the entry-level market or even in the move-up market because a 20-percent downpayment is significant. Second, by not utilizing PMI, we will be turning our back on 50 years of history in America, where PMI has been used to satisfactorily insure risk and insure qualified lending.

We must remember what happened in terms of the collapse of Freddie Mac and Fannie Mae. What happened was Congress directed they buy a certain percentage of their portfolio in what were called affordable loans, which became subprime securities, which became 13 percent of their portfolio, which brought them down when subprime securities collapsed. If we all of a sudden, through fiat, decide to pass regulations to define a qualified residential mortgage that is so prohibitive we run everybody to FHA, which is exempt, then we will be putting a burden on FHA that is unsustainable and create a situation of another collapse or another inability of the United States to meet housing needs through the private sector and through well underwritten loans.

My reason for coming to the floor tonight is, hopefully, to send a message, before the decisions are made, to be thoughtful in determining what the parameters will be on a qualified residential mortgage. Yes, I do think an 80-percent or less loan should be qualified and avoid risk retention. But a well-paid, well-verified, well-credit-evaluated individual who borrows more than 80 percent but less than 75 should be able to do so and be excluded from the risk retention as long as they have private mortgage insurance covering that top 30 percent of the debt created by that loan.

If you do that, you protect the equity provisions, you protect the investor,

you make the qualified loan, you do not put the country at risk, but most important of all, you do not force everybody to FHA. That is what we are about to do because FHA is, by definition under Dodd-Frank, exempt from risk retention. All other loans are not, except those that will fall under the QRM, qualified residential mortgage. It would be a disaster for the recovery of American housing to force Americans to only one source of money to finance their home and put so much stress on the Federal Housing Administration that it collapses under the burden.

We need to be pragmatic when we look at issues facing housing. We need to be practical in taking Dodd-Frank and making it work for the American people. We need to recognize the value of private mortgage insurance, the value of good, solid underwriting and not put a risk retention in that is so high that we take most American mortgage lenders out of the business, isolated only for a few who dictate and write the parameters they want to write for housing. We are at a critical time in our recovery. Housing has hit the bottom, and it has bounced along the bottom, but it is showing some signs of coming back. Now would be the worst time to send a signal that mortgage money is going to be harder to get, the banks are going to have to hold 5 percent risk retention on even the best of loans and, worst of all, it would give the American people only one alternative for lending; that is, the Federal Housing Administration which, in and of itself, is already under a burden and stressed.

I appreciate the time tonight to bring this message to the floor that as we write the rules to promulgate the intent of the Dodd-Frank bill in terms of residential housing and finance, we be sure we do so in such a way that we meet the demands of a vibrant marketplace rather than restricting it, putting a burden on FHA, and protracting what has already been a long and difficult housing recession.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that we proceed to a period of morning business with Senators allowed to speak for up to 10 minutes each.

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

TEXAS INDEPENDENCE DAY AND THE LETTER FROM COLONEL WILLIAM BARRET TRAVIS

Mrs. HUTCHISON. Mr. President, I rise to read the letter from COL William Barret Travis from the Alamo, something I have done every year since Senator Phil Gramm retired. He read the letter on Texas Independence Day every year after Senator Tower left office. So we have a tradition every Texas Independence Day of a Texas Senator reading the very moving speech from William Barret Travis.

Today is the 175th anniversary of our independence from Mexico.

This past Sunday, I had the honor of participating in the Washington-on-the-Brazos' 175th anniversary celebration of the Texas Declaration of Independence signing. It was a special occasion that brought together almost all the 59 signers' descendants. Thousands of proud Texans came to commemorate this most pivotal event in Texas's legacy of freedom and patriotism.

My great-great-grandfather, Charles S. Taylor, was willing to sign the document that declared Texas free from Mexico. I am humbled to occupy the Senate seat from Texas that was first held by Thomas Jefferson Rusk, who was another signer of the Texas Declaration of Independence.

Those 59 brave men did not just come in and sign a paper. They took great risk. They put their lives, their treasures, and the lives of their families on the line to do this. One hundred seventy-five years later, sometimes you do not think of how hard it was for them to declare this separation from Mexico and know that there was going to be a war fought over it because the Mexican Army was in San Antonio at the Alamo, getting ready to take the Alamo from William Barret Travis and the roughly 180 men who were there who were trying to defend that fortress.

The accounts of the revolution have been some of our most dramatic stories of patriotism in both Texas and America.

We remember the sacrifice of William Barret Travis, Davy Crockett, Jim Bowie, and the others who died bravely defending the Alamo against Santa Anna and his thousands of trained Mexican troops.

They were outnumbered by more than 10 to 1. For 13 days of glory, the Alamo defenders bought critical time for GEN Sam Houston, knowing they would probably never leave the mission alive.

The late Senator John Tower started the tradition of reading a stirring account by Alamo commander William Barret Travis, and Senator Gramm and now I have continued that tradition.

From within the walls of the Alamo, under siege by Santa Anna's Mexican Army of 6,000 trained soldiers, Colonel Travis wrote this letter to the people of Texas and all Americans:

Fellow Citizens and Compatriots: I am besieged with a thousand or more of the Mexicans under Santa Anna. I have sustained a continual Bombardment and cannonade for 24 hours and have not lost a man. The enemy has demanded surrender at discretion, otherwise, the garrison is to be put to the sword, if the fort is taken. I have answered the demand with a cannon shot, and our flag still waves proudly over the wall. I shall never surrender our retreat.

Then I call on you in the name of Liberty, of patriotism, of everything dear to the American character, to come to our aid with all dispatch. The enemy is receiving reinforcements daily and will no doubt increase to three or four thousand in four or five days. If this call is neglected I am determined to sustain myself as long as possible and die like a soldier who never forgets what is due his honor and that of his country—Victory or Death.

—William Barrett Travis, Lt. Col. Commander.

Steadfast to the end and independent to the core, that is the essence of Texas.

Had Colonel Travis and his men not laid down their lives in the Battle of the Alamo, Sam Houston's victory at San Jacinto just 2 months later would never have been possible. Texas's freedom might not have been won.

It is important that every generation of Texas pause to remember the patriots of the Texas revolution: each soldier who gave his life at the Alamo, Goliad, and San Jacinto; the 59 men who met at Washington-on-the-Brazos, putting their lives in danger by signing that Declaration of Independence and becoming heroes for a cause; and the bravery of the women who gave up an easier life in the East to join the struggle to make Texas the marvelous place it is today.

My great-great-grandmother was one of those brave women. She took her four children in what was called the Runaway Scrape, trying to flee eastward from Nacogdoches, where they lived, to try to escape the advancing Mexican Army and the Indian raids that were happening all over east Texas.

My great-great-grandmother lost all four of her living children during that sad and hard time for Texas. But that was not the last chapter in the revolution. She came back to Nacogdoches, met my great-great-grandfather, who was there signing the Texas Declaration of Independence, and had nine more children.

So the women also were heroes and heroines of this time.

It is my honor to memorialize the Texas legacy of freedom and patriotism in this way.

I ask unanimous consent that my speech at the Washington-on-the-Brazos celebration this past weekend be printed in the RECORD.

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

WASHINGTON-ON-THE-BRAZOS CELEBRATION REMARKS

(Delivered February 27, 2011 at Washington-on-the-Brazos Historic Site)

Thank you so much. What a great representative Lois Kolkhorst is for this area