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

Mr. LEAHY. Madam President, what is the pending business?

PATENT REFORM ACT OF 2011—Continued

The PRESIDING OFFICER. The clerk will report the pending business.

The bill clerk read as follows:

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

Mr. LEAHY. Madam President, since this debate began, we have heard a lot about how the America Invents Act will help unleash the American inventive spirit. As a matter of personal pride, I point out that Vermonters have a long history of innovation and invention, and it is that creative spirit which has given rise to some interesting and even revolutionary inventions.

Few people may know that Vermont is issued the most patents per capita of any State in the country. Fewer still may know that the first-ever patent issued in the United States, which was a reward of $10 for a better way of weighing large objects, was issued in Vermont.

Charles Thaddeus Fairbanks of St. Johnsbury patented the scale platform in 1836, which revolutionized the way in which large objects were weighed. Charles Orvis, of Manchester, the founder of the well-known sporting goods retailer Orvis, patented the open fly fishing reel in 1874. Many other inventions originated from Vermont in the early years of America, including an electric motor, an internal combustion engine, and the paddle wheel steamship.

Today, that innovative Vermont spirit continues. Vermonters have been contributing to the American economy through innovation and invention every year.

Exploring new ways to modify existing products to limit the environmental impact is a quintessentially Vermont idea. Researchers at the University of Vermont have developed a technology that releases fewer toxins into the air than standard finishes. They do it by utilizing whey protein instead of petroleum. In the State of the Union Address, President Obama noted that advances in green technology will be a key driver of our economy in the 21st century. Vermont inventors have been and will continue to be out in front in this area.

Consumer technology will also be a driver of our 21st-century economy. Vermonters are active in producing the next generation of this technology as well. Viewers across the country were fascinated by the recent appearance of IBM’s Watson supercomputer on “Jeopardy.” Components used to power Watson were invented by IBM researchers in Vermont, and I am sure those Vermonters watched proudly as Watson defeated Jeopardy legend Ken Jennings and Brad Rutter, in the recent man-versus-machine matchup.

Modernizing the patent system will help to ensure Vermont inventors will still be able to compete, not just on a national stage but in the international marketplace. Much has changed since Samuel Hopkins received the first U.S. patent in 1790, but the need for a flexible and efficient patent system has remained constant. Inventors from Burlington to the Bay Area require the appropriate incentives to invest in the research required to create the next platform scale or the next Watson computer or the next lifesaving medical device.

Over the last 6 years, I have worked on meaningfully extensive patent reform legislation. During that time, I have kept in mind the tradition of great Vermont innovators such as Thaddeus Fairbanks and Charles Orvis. I was also pleased that we had key Republicans from Vermont working together to get this legislation before the Senate.

The next generation of Vermonters is as eager as the last to show America and the world what they can produce. Vermont is the smallest State in our Nation, but it is busting with creativity. The America Invents Act will ensure that the next Samuel Hopkins can flourish well into the 21st century.

Senator Grassley and I had a couple of matters we were going to take care of. I see a distinguished colleague seeking recognition. Before I yield the floor, might I ask my friend how much time he may need?

Mr. CORKER. If I may, Mr. Chairman, I will speak briefly. I apologize. The chairman has done such a wonderful job working this bill through. I came down earlier, but I wasn’t able to speak.

Mr. LEAHY. I yield so my colleague can speak, and then the Senator from Iowa will be back, and we can continue with our other business.

The PRESIDING OFFICER. The Senator from Tennessee.

FUNDING THE GOVERNMENT

Mr. CORKER. Madam President, as in many previous years, I rise to speak on another topic that is actually related to us being competitive.

I think everybody understands that we had another bipartisan event that just occurred recently where we kept government funded, if you will, for another couple of weeks beyond the deadline that was coming in the next day or so. I applaud the efforts of both sides to work together to make that happen.

Speaking of competitiveness, it is very difficult for a government to function having short-term CRs every 2 weeks. What I urge, while this work is going on, is that the House and the Senate, both sides of the aisle, work toward a longer term CR. I know we are working on reductions in spending which have to take place to keep our government in check and keep our country in the place it needs to be, but that work we need to fund the government for the rest of the year is actually the easy work we are going to be facing as it relates to spending.

Today, I saw where Vice President BIDEN has been asked by the White House and the President to lead on this issue. I take that as a good sign. I saw Secretary Geithner today. He is planning on engaging on this issue.

I urge that we do the work we need to do. We all know there are going to be painful and tough decisions coming. A lot of people have been arguing and debating against spending cuts and are talking about the havoc it is going to cause. But we need to make those cuts work and plan accordingly versus working on a 2-week CR.

I am just urging that we do the tough work we have to do. All of us know it will be painful. All of us know we are going to have to prioritize. All of us know there will be a number of constituencies around the country that will be less than happy. But for the good of our country, let’s go ahead and together, Democrats and Republicans, Independents and the administration, work together toward a solution.

I know the House sent over a continuing resolution bill that takes us through the rest of the year. We have seen that funded crisscross the aisle. I think many of us know there will be a number of constituencies around the country that might offer. It is my hope that something is being worked on. I think the American people in the functioning of this government—those who cause this government to function—will need to know what those cuts will be, where we are going.

Speaking on that note—and I will close with this—one of the things most frustrating to me as a Senator who came from the world of business is that we never know where we are going. We debate the current issues. We never plan for the future.

I hope that as a part of all we are doing this spring, this incredible opportunity we have today is to deal with the issue of spending, with the issue of deficits, it is my hope that as a part of this, what we will do is pass a global cap on spending, a comprehensive cap that takes us from where we are today into a place that has been a 40-year historic average. Senator McCASKILL and many others have joined me in something called the CAP Act. It is the type of responsible legislation we need to pass to get our country back where it needs to be.

We know we have a huge spending problem today. There are many explanations for that. But as a country, to
make ourselves competitive, as the Senator from Vermont talked about and I am sure the Senator from Iowa is getting ready to talk about, we also need to make sure we keep our fiscal house in order.

Let's face these tough issues and solve this problem for this year and move on to the longer term issues.

I thank the Chair, and I thank the Senator from Vermont.

I yield the floor.

Mr. LEAHY. Madam President, I ask unanimous consent to set aside the pending amendment.

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

Mr. LEAHY. I ask unanimous consent to bring up and agree to amendment No. 132, the Cardin-Landrieu amendment.

The PRESIDING OFFICER. The clerk will report.

Mr. GRASSLEY. Mr. President, do we report it first and then object or do we object even to the reporting of it? I heard the Presiding Officer say report the amendment.

The PRESIDING OFFICER. The Senator can object to laying aside the pending amendment.

Mr. GRASSLEY. OK. I object on behalf of Senator Coburn of Oklahoma.

The PRESIDING OFFICER. Objection is heard.

Mr. LEAHY. Madam President, I ask unanimous consent that we revert to the pending amendment, which I believe was the Leahy amendment.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. WHITEHOUSE. Mr. President, I am here to speak about a report that was released by the Centers for Disease Control, which I think is instructive for the American health care system. We are currently in a process of change in how health care is delivered in our country and going to take years of hard work, of experimentation and, of learning. There are stakeholders on both the Federal and State level who are out there right now, working to implement models of care that increase the coordination and efficiency with which health care is delivered, improve the quality of care and lower the cost for the system.

This report, called “Vital Signs,” released this week by the Centers for Disease Control, illustrates how just one type of quality reform, reducing hospital-acquired infections, has already improved health outcomes and resulted in significant cost savings. Hospital-acquired infections are a tragic reality of our health care system. Nearly 1 in every 20 hospitalized patients in the United States is affected by a hospital-acquired infection. The most deadly of these infections occurs when a tube inserted into a patient’s vein is either not put in properly or not kept clean. Bloodstream infections resulting from these tubes—what are called central line infections—kill as many as 1 in 4 patients who become infected.

I suspect, if we sat all the Members of the Senate down, there would be very few of us who could not identify a friend, a loved one, a family member, somebody we knew who had been exposed to a hospital-acquired infection.

The deaths from hospital-acquired infections are not only numerous but tragic and particularly tragic because they are largely preventable. These are what should be considered a zero event. Studies have shown that when providers follow a strict checklist of very basic instructions, including things as simple as washing your hands with soap, cleaning a patient’s skin with antiseptic, and placing sterile drapes over the patient, those rates of hospital-acquired infection plummet.

The CDC’s “Vital Signs” report is further evidence of how effective these guidelines are at reducing and in some cases nearly eliminating central line bloodstream infections from intensive care units. The report’s findings show that from 2001 to 2009, State and Federal efforts to promote and adopt CDC guidelines and best practices for preventing infections contributed to a 58-percent decrease in the number of central line bloodstream infections among ICU patients—58 percent decrease in just 8 years, from 2001 to 2009.

A percentage is a fine thing, it is a statistic, but it does not have a lot of meat on its bones. What does this 58 percent mean? It represents up to 27,000 lives saved, 27,000 families who got the love and care they need. The Collaborative estimates from 2007 to June 2010, just over 7 years, the effectiveness of these interventions were quantified by saying we began this process in 2007 and the Collaborative reported, are eye-opening.

In my home State, I have very proudly watched the Rhode Island Intensive Care Unit Collaborative, a partnership of health care stakeholders led by an organization called the Rhode Island Quality Institute, take the lead in implementing similar quality reforms to reduce the rate of hospital-acquired infections in our intensive care units. Rhode Island is the only State in the country to have 100 percent of its adult intensive care units participating in a collaborative of this kind, and I commend it to you one day to see it.

It began years ago in Michigan with the Keystone Project and it spread across the country to the Pronovost principles, and in Rhode Island we have run with it. It has only been a few years, but the results are like those reported by the CDC, are eye-opening. I will quantify this by saying we began with very first-rate hospitals in Rhode Island. We are in that high-tech Northeast corridor. We are near the Boston medical centers, so we are starting from a very high base of care in Rhode Island hospitals. But even from that good base, the collaborative reported significant improvements in two types of deadly infections: central line bloodstream infections, and pneumonia, among patients on ventilators.

The collaborative estimates from 2007 to June 2010, just over 7 years, the effort had saved 73 intensive care unit lives—73 lives of intensive care unit patients—it eliminates the need for over 3,200 expensive hospital days, and it saved hospitals, patients, and insurers $11.5 million.

This evidence underscores the potential for similar types of delivery system reforms which work to improve the quality of care, lower the cost. An array of different strategies can lead to these savings, quality reforms such as this that avoid errors and adverse consequences; prevention programs that save lives and money by getting in there before the disease takes off; a robust health information infrastructure that allows for safer and better coordinated care between your primary health care provider, your specialists, your imaging place, the laboratory, the long-term care settings. It is not that hard.

The news is, we are not doing enough to reduce the occurrence of bloodstream infections in other health care settings. The report found that in 2009, approximately 60,000 central line bloodstream infections occurred in nonintensive care unit settings such as hospital wards or kidney dialysis clinics. This should not be acceptable to us, especially given the tools we know we have to prevent these infections from happening.

Simply put, we can do better. We can save more lives. We can improve the quality of care people receive and, in the process, save billions of dollars in our health care system. The CDC is already working to support partnerships between health care providers to more broadly implement these now-proven quality reforms. This is a good start.

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so more health care dollars actually go to health care instead of being burned up on bureaucracies and battles over who gets paid and all the rest that weighs down our health care system.

The President’s Council of Economic Advisers has said that up to 50 percent of health care costs, or about 5 percent of GDP, could be saved without compromising health outcomes. Five percent of GDP is around $700 billion. Mr. President, $700 billion a year saved through savings of win-win is a target worth fighting hard to achieve. I agree with the Council’s observation, but from my experience, I think we can achieve these savings not just without compromising health outcomes, I think we can achieve these savings while improving health outcomes.

Implementing these reforms and achieving these reforms will not be easy. It is not just flipping a switch, it is a journey and that journey will have turns and it will have obstacles. It is a process where expert reviewers have said, of learning, of experimentation, of adaptation. But we have been down paths such as that before with great success, and the evidence I presented today shows how well it can work in healthcare.

So I urge my colleagues, I urge the administration and State leaders to continue working together in all of these areas to make reforming our health care delivery system a priority. The health care delivery system and the good health of our constituents and the good health of our country’s fiscal all depend on it.

I will conclude by saying something I have said before, which is that I give great credit to the Obama administration for working in this area. I believe our health care reform bill put every possible pilot, experiment program, and model for testing these different types of delivery reform systems on the table. Expert reviewers have looked at it and said: I cannot think of a thing they did not try. Everything is in there. On top of that, the Obama administration has put first-rate people who really get this side of the equation, people such as Don Berwick and David Blumenthal, in charge. So a lot of very good things have lined up to take full advantage of these kinds of win-win savings.

The only thing that I think is missing is that the administration has not yet set a hard goal for itself to hit. It still talks about bending the health care cost curve. Well, fine, but that is still talking about bending the health care delivery system a priority. It is not what we yell about here, but it is out there right now saving lives and saving money. We need to encourage it and we need to expand it and the more the administration can put a hard goal out there for itself, the quicker we will get where we need to be, to the great benefit of ourselves as a country and our individual fellow American citizens.

I yield the floor.

The PRESIDING OFFICER. Mr. Whitehouse.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent to set aside the pending amendments and, on behalf of Senator Bingaman, call up amendment No. 142.

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

The clerk will report.

The assistant editor of the Daily Digest read as follows:

The Senator from Rhode Island [Mr. Whitehouse], for Mr. Bingaman, proposes an amendment numbered 142.

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

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

The amendment is as follows:

AMENDMENT NO. 142

(Purpose: To require the PTO to disclose the length of time between the commencement of each inter partes and post-grant review and the conclusion of that review)

On page 50, between lines 2 and 3, insert the following:

“(c) DATA ON LENGTH OF REVIEW.—The Patent and Trademark Office shall make available to the public data describing the length of time between the commencement of each inter partes and post-grant review and the conclusion of that review.”

On page 65, between lines 9 and 10, insert the following:

“(c) DATA ON LENGTH OF REVIEW.—The Patent and Trademark Office shall make available to the public data describing the length of time between the commencement of each post-grant review and the conclusion of that review.”

Mr. WHITEHOUSE. Mr. President, it is my understanding that this amendment is agreeable to both sides; therefore, I ask for its adoption.

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

The amendment (No. 142) was agreed to.

Mr. WHITEHOUSE. I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. SANDERS. Mr. President, as you well know, Congress is now engaged in a debate of huge consequence; that is, the budget. The budget of a nation, like the budget of a family, expresses who we are as a people and what our priorities are. Where you spend your money, how you invest your dollars tells you everything about what we believe in.

I am more than aware that this country faces a $1.6 trillion deficit and a $14 trillion national debt. And these are enormously important issues, but they are issues that have to be dealt with in a sensible way, and they are issues that have to be dealt with within a broader context.

I yield the floor.

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I am more than aware that this country faces a $1.6 trillion deficit and a $14 trillion national debt. And these are enormously important issues, but they are issues that have to be dealt with in a sensible way, and they are issues that have to be dealt with within a broader context.

How did we get into the deficit? Well, let me tick it off. And when we discuss how we got into the deficit situation, the irony here is that those people who are yelling loudest about the deficit, who are fighting hardest to make savage and Draconian cuts on basic programs, are precisely the people who led us into the recession we are in right now. Where we are today is my understanding that this amendment.

I voted against the war in Iraq for a number of reasons, one of them being that it was not paid for. Do you happen to recall that as we went into the war in Iraq—which will end up costing us about $3 trillion by the time we take care of our last veteran—do you recall much discussion about how that war was going to be paid for? In fact, do you remember one word of how that war was going to be paid for? I don’t remember that. I was in the middle of that debate. Mr. President, $3 trillion, and no one said: Oh, we cannot afford it.

When the crooks on Wall Street, through their illegal behavior, their reckless behavior, drove what was then a smaller Federal bailout? I don’t recall that discussion. Mr. President, $3 trillion, do you recall too many of the people who voted for that saying: Gee, we cannot afford to do it. It is going to be paid for out of the deficit. How are they going to provide Wall Street with an $800 billion bailout? I don’t recall that discussion.
When I was in the House a number of years ago, Congress passed an initiative from President Bush for a Medicare Part D prescription drug program. I believe seniors must have prescription drugs, but that legislation, which was written by the insurance companies and the drug companies, was not paid for.

When our Republican friends fought vigorously for tax breaks for billionnaires, no worry about the deficit. When we ball out Wall Street, no worry about the deficit. But suddenly when we provide childcare to low-income children who are in desperate need of help in the midst of a recession, suddenly everybody is concerned about the deficit. Frankly, I don't recall that discussion. It is working. President Obama has been very strong on this issue. Secretary of HHS Kathleen Sebelius has been very strong on this issue. It is working.

The irony. When we give people good quality primary health care, they won't be going into the hospital, it's going to the emergency room. The emergency room costs 10 times more than treatment at a community health center. When we open the doors for primary health care, people do not get very sick. They don't end up in the emergency room.

A few years ago, community health center program, 200,000 kids off Head Start. It is working. President Sebelius has been very strong on this issue. I believe seniors must have prescription drugs, but that legislation, which was written by the insurance companies and the drug companies, was not paid for.

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In the midst of a recession, what are we doing? We are providing $1.1 billion, a 20-percent cut from 2010, and throwing over 200,000 kids off Head Start. If you are a working mom who sends her kids to Head Start now, it feels pretty good that your kid is getting a good quality, early childhood education, getting nourishment. They watch these kids for health care problems. There is a study shows that when we invest in community health centers, we save the taxpayers money. We save Medicaid money and Medicare money because people have access to medical care when they need it. The Republican House wants to cut community health centers by $1.3 billion, denying 11 million Americans the opportunity to receive the health care they need.

In my State—and I am sure all over the country—people who are applying for disability help, for Social Security are upset about how long the process takes. Our Republican friends want to make major cuts in the Social Security Administration, which means that half a million people are going to find delays in getting their claims processed.

Everybody in America knows that one of the great problems we face is the expense of college. We know hundreds of thousands of bright young people can't afford to go to college. We know that many people are graduating deeply in debt. One of the accomplishments we have managed to bring about in the last few years is to significantly expand the Pell grant program so low- and moderate-income families will find it easier to send their children to college. Our Republican friends in the House have decided, in their wisdom, that what they want to do is reduce by 17 percent Pell grants, which means that a college student would lose some or all of their Pell grants. Here we are, trying to compete with the rest of the world. We are falling, in many cases, further and further behind in terms of the percentage of our young people graduating college. The costs of college are soaring. The Republican solution is to cut the major program which makes it easier for working families to send their kids to college.

The Community Services Block Grant Program is the infrastructure by which we get emergency services, food, help to pay for emergency services for lower income people, housing needs, making sure people keep the electricity on. That would be decimated by the Republicans.

In the midst of a recession, what they want to do is to cut $2 billion from the Workforce Investment Act and other job training programs when we desperately need that job training to make sure our people can get the jobs that are out there and available. Often they don't have the skills to do that.

What the American people are saying in this poll, and I believe all over the country, is obvious. Given the choice of decimating programs that working families depend upon or asking the wealthiest people who have been receiving huge amounts of tax breaks to start paying their fair share, it "ain't" a tough answer. The answer the American people are saying is: We cannot move forward a balanced budget just by cutting, cutting, and cutting. A budget has two parts. The public understands that. It is the money we spend; it is the money that comes in. In the case of the U.S. Government, we have to address our budget deficit in both ways. We have to raise revenue. We do that primarily by asking the wealthiest to pay a little bit more in taxes. Yes, we do have to cut some programs. There is waste out there. There
March 3, 2011

S. 23 MEANS NEW IDEAS CREATING NEW PRODUCTS CREATING NEW MANUFACTURING JOBS

Provide a brief overview of the main arguments presented in the document. The document discusses the American Invents Act, which is intended to reform the patent system in a way that would make it more efficient and fair. The act aims to reduce the number of invalid patents that are issued and to streamline the patent application process. The Senate vote is expected on Monday at 5:30 p.m., and the next rollcall votes will be scheduled to continue on this topic.

The National Association of Manufacturers and the 21st Century Coalition for Patent Reform, an industry group that has been leading the advocate for the bill, have provided a detailed explanation of and case for the bill's shift from the current first-to-invent system to a first-to-file system of establishing patent priority. The coalition opposes the current system, which they believe results in an excessive number of invalid patents being issued and takes too long to resolve disputes.

Mr. President, I rise to support the Senate vote to start paying their fair share of taxes, is an important component of how we move forward toward a balanced budget. But if the President chooses not to participate or if the President chooses not to take that avenue, that does not mean to say that we in the Senate should not go forward. I believe the wealth responsible means it includes revenue and not only cuts. There are a whole lot of people in the country who are suffering.

On and on it goes. My point is, now is the moment when we have to do the right thing for working families. There is a lot of pain out there. A lot of people are hurting. This recession has taken a heavy toll. In the middle of these tough times, we don't stick a knife into the people and make it even worse. We have to move toward deficit reduction. I believe that. But I believe that thinking of the tax breaks for big oil and gas companies. ExxonMobil, the most profitable corporation in the history of the world, not only paid nothing in Federal income taxes in 2009, but they received a $156 million tax refund from the IRS, according to their own shareholders report. Maybe before we start cutting the Social Security Administration or Pell grants for college students, we might want to ask the most profitable corporation in America to start paying some Federal income tax.

Mr. KYL. Mr. President, I rise to submit some of the materials I have just read from the Senate's debate on the first-to-file provisions of the America Invents Act. These materials are produced by the National Association of Manufacturers and by the 21st Century Coalition for Patent Reform, an industry group that has been the leading advocate for the bill. They offer a detailed explanation of and case for the bill's shift from the current first-to-invent system to a first-to-file system of establishing patent priority.

The Senate has, along with our friends in the House, the responsibility of coming up with a budget. I certainly hope the President intends to play an active role. I hope the President is prepared to do the right thing and to understand that revenue, asking the wealthiest people to start paying their fair share of taxes, is one important component of how we move forward toward a balanced budget. But if the President chooses not to participate or if the President chooses not to take that avenue, that does not mean to say that we in the Senate should not go forward. I believe the wealthiest people are responsible. I think we need shared sacrifice. Some of the wealthiest people are suffering. I think we need shared sacrifice. I hope the President intends to work as hard as I can to come up with a deficit reduction program which is fair but responsible. Being responsible means it includes revenue and not only cuts. There are a whole lot of people in the country who are suffering.

We have to begin the process of ending tax breaks for big oil and gas companies. ExxonMobil, the most profitable corporation in the history of the world, not only paid nothing in Federal income taxes in 2009, but they received a $156 million tax refund from the IRS, according to their own shareholders report. Maybe before we start cutting the Social Security Administration or Pell grants for college students, we might want to ask the most profitable corporation in America to start paying some Federal income tax.

By moving the United States to a first-to-file system, the bill simplifies the process of acquiring rights. This essential provision will reduce legal costs, improve fairness, and support U.S. innovators seeking to market their products and services in a global marketplace.

Most of the arguments in opposition to the bill and FITF appear to be to decades-old contentions that have been fully and persuasively rebutted. As one example, the National Research Council of the National Academies assembled a group of leading patent professionals, economists and academics who spent four years intensely studying these issues and concluded in 2004 that the move to FITF represented a necessary change that would operate fairly, effectively and efficiently in the 21st century.

Without retaining S. 23's current FITF provisions, the bill would no longer provide meaningful patent reform. As an example, the new provisions on post-grant review of patents, an important safeguard for assuring patent quality, could no longer be made to work. Instead of a patent reform bill, what would remain of S. 23 would be essentially an empty shell.

Thus, we could not continue our support for passage of S. 23 without the first-inventor-to-file provisions present in the bill. It too would have been position of the 21st Century Coalition for Patent Reform, Mar. 2, 2011
the disclosed work or, by publishing without later seeking patents, that they (as well as other members of the public) should remain free to continue to use what they have publicly disclosed. S. 23 would increase the protection for inventors once they make their inventions available to the public by cutting off the potential for any sort of interloping. S. 23 operates to solidify an inventor’s “grace period” that applies after the inventor has published or otherwise made available to the public his or her work. In brief, under S. 23, interloping in any form is prohibited—an inventor who elects to publish an invention will no longer need to have any concern that the publication will spur a competitor into a subsequent patent filing that could preclude the inventor from obtaining a patent or—even worse—from continuing to use his or her published work.

S. 23 better protects inventors than does current U.S. patent law. In addressing interloping—by making the one-year “grace period” bulletproof—today, inventors enjoy a one-year “grace period” fraught with some significant risk. The risk comes from the ability of a competitor who learns of the inventor’s work through the public disclosure of a new product or otherwise publicly disclosed an invention, foreign-based competitors were barred from obtaining patents on the disclosed product and any aspect of it, including trivial and obvious modifications of it. S. 23, if enacted, would put foreign-based entities back in the prior to 1995—one U.S. inventor publishes or makes any other type of public disclosure of a new product, the ability for a foreign-based competitor to obtain patent applications seeking to patent the disclosed product would be totally cut off.

Congress should act promptly to end the potential for interloping by foreign-based competitors once U.S.-based inventors have published on their work. With each passing year, the percentage of U.S. patent filings made by foreign-based entities increases. In 1966, 1 in 5 U.S. patents filed was by a foreign-based entity. That ratio became 1 in 4 in 1969, and 1 in 3 in 1974, before reaching 1 out of every 2 in 2008. Since 2008, the majority of patent filings in the United States came from foreign-based entities. Given the rapid growth in patent filings by Asian (especially Chinese) inventors, this trend may well accelerate in the decade ahead.

As foreign-based entities become more sophisticated in their use of the U.S. patent system, U.S. inventors are put at an ever-greater risk that patenting strategies by foreign-based entities will prevent U.S.-based inventors, either in electing to use the “grace period” or even when they file for a patent before making a public disclosure. How S. 23 operates to protect inventors once they make their work public. S. 23 puts an end to any use of “dates of invention” in order to determine whether a U.S. patent is valid or not. In addition, S. 23 strips out of the U.S. patent law any grounds for invalidating a U.S. patent based on any type of prior inventions undertaken by inventors themselves, such as secret “offers for sale” of their inventions before seeking patents. Finally, it further secures the benefits of the one-year “grace period” by preventing the contemporaneous work of an inventor’s co-workers or research partners from being cited as a basis for barring the inventor from obtaining a patent.

The consequence of placing this collection of inventor-friendly features into S. 23 is that, once a U.S. inventor publishes or otherwise makes available to the public his or her inventions, the potential for interloping is entirely removed and the ability of the publicly-disclosing inventor to patent the disclosed invention is preserved during a one-year “grace period.” The public disclosure by U.S. small business or other U.S.-based small entity, for example, is a bar to anyone else seeking a patent, not only on the publicly disclosed subject matter, but on any trivial or obvious variations of it. Similarly, once a U.S. company files a patent application (even a provisional one) that subsequently forms the basis for a published patent application or patent, the same protections apply. The potential for interloping that the inventor’s prior-disclosed work apply.

How can Congress accomplish all of this good for the country? Enact S. 23. Reverse the WTO’s impact, end interloping threats, and protect U.S. inventors.

NATIONAL ASSOCIATION OF MANUFACTURERS, March 2, 2011.

U.S. SENATE, Washington, DC.

DEAR SENATOR: The National Association of Manufacturers (NAM), the nation’s largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states, urges you to oppose amendment 133 offered by Sen. Dianne Feinstein (D-CA) to S. 23, The America Invents Act. 

The amendment would remove a key provision in S. 23. The America Invents Act is strongly supported by manufacturers, the creation of a “first-inventor-to-file” system.

The NAM supports transitioning the United States from a “first-to-invent” system to a “first-inventor-to-file” system. To eliminate unnecessary cost and complexity in the U.S. patent system. Manufacturers large and small operate in the global marketplace and the United States needs to move toward a system that will provide more patent protection around the world for our innovative member companies. The “first-to-file” provision currently included in S. 23 achieves this goal.

Thank you for your consideration and your support for the “first-to-file” system.

Sincerely,

DOROTHY COLEMAN

Mr. COBURN. Mr. President, I want to thank all of the cosponsors who joined in support of my amendment, particularly Sens. HATCH and GRASSLEY, who recognized the importance of this amendment for the proper functioning of the PTO and for the underlying legislation. Furthermore, I want to thank Chairman LEAHY and Ranking Member GRASSLEY for including my amendment in the managers’ amendment to the patent reform legislation.

Our Founding Fathers recognized the value that intellectual property provides to this country and sought to protect innovation as they did physical property. Article I, section 8 of our Constitution states “The Congress shall have 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.” It is necessary for the Federal Government to protect and enforce intellectual property rights domestically and internationally. Intellectual property is important to the productivity and competitiveness of our businesses and individual rights holders, and I believe a strong patent system is one crucial element in maintaining our
Congress has addressed issues related to patent and trademark office modernization. The amendment creates a lockbox—a new revolving fund at the Treasury—where user fees are paid to the PTO for a patent or a trademark go directly into the revolving fund for PTO to use to cover its operating expenses. Congress would not have the ability to take those fees and divert them to other general revenue purposes.

I do not think everyone in this body understands what it means for the PTO to be a wholly fee-supported agency. PTO does not receive any taxpayer funds. PTO receives fees through the payment for patent and trademark applications—fees paid by small inventors, companies and universities to protect their ideas and technology. While those that pay these fees expect efficiency and quality from the PTO, they do not receive it. Because of the current PTO funding structure, where PTO user fees are deposited into the Treasury, PTO is then required to ask for annual appropriations—Congress, who only has authority over taxpayer funds, maintains control over the user-funded PTO. When PTO’s fee income is greater than what Congress provides via appropriations, we spend the “excess” on other general revenue purposes. As a result, those that pay to use the patent system are not receiving the quality service they deserve.

It is more than mere coincidence that the two major problems at the PTO, (1) the growing number of unexamined patent applications or “backlog,” and (2) the increased time it takes to have a patent application examined or “pendency,” are the result of a “lack of connection between the monies flowing into the agency and those available for expenditure.” In fact, the latest data from the PTO shows that the patent processing backlog is almost 26 months. That is, it takes 26 months for the patent examiner to even pick up the application to take his “first action.” Total overall pendency—from filing to final action—is approximately 35 months. The PTO also states the total number of patent applications pending is over 1.16 million, with over 718,000 of those waiting for a patent examiner to take his first action. One of the primary reasons for these incredibly long waiting periods is a lack of resources at the PTO. PTO needs a permanent end to fee diversion. It has had a debilitating impact on the [PTO]

It is disturbing to me, and should be to all Members, that many of the same practices that this 1997 report notes as those that suffer from lack of consistent PTO funding still occur today—14 years later.

Yet Congress continued to grapple with PTO’s funding problem into the early 2000’s. In 2003, the House noted in its report on the Trademark Fee Modernization Act that “by denying PTO the ability to spend fee revenue in the same fiscal year in which it collects the revenue, an equivalent amount may be appropriated to something other than the PTO’s budget cap. Although the money is technically available to PTO for the following year, it has already been spent.” In 2007, I offered a different version of my current amendment to patent reform legislation considered by the Judiciary Committee. My amendment passed without opposition. Last year, I offered this amendment in the Judiciary Committee, and it was tabbed by a vote of 10-9. Yet, in 2008, this body adopted by unanimous consent an amendment that closed the gap to the fiscal year 2009 budget resolution that condemns the diversion of funds from the PTO. Clearly, for more than a decade, both houses of Congress have recognized that many of the efficiency and operational problems at the PTO could be remedied by giving the PTO authority over its own fee collections. However, we have yet to take the responsibility to relinquish the control over these fees to the PTO. In fact, in the current arrangement, Congress cannot resist the temptation to take what is not ours and divert it to nonpatent related functions. This is especially tempting during bad economic times, which we have witnessed over the past two years. Such an arrangement flies in the face of logic, common sense budgeting and overwhelming support from the entire patent industry for providing the PTO with a consistent source of funding. Ending fee diversion has been the only areas of 100 percent agreement within an industry that has often been divided on other issues in this bill. My amendment is supported by: PTO; Intellectual Property Owners Association, IPO; American Intellectual Property Law Association, AIPLA; International Trademark Association, INTA; The 21st Century Coalition; Coalition for Patent Fairness, CPA; Innovation Bar Association, ABABA; U.S. Chamber of Commerce; Wisconsin Alumni Research Foundation, WARF; BIA; Intellectual Ventures; National Treasury Employees Union, NTEU; Intel, and IBM. Congress cannot effectively manage the changes made in this legislation without permanent access to its user fees. I agree that there are aspects of the patent system that need to be updated and modernized to better serve those that use the PTO, and this bill makes reforms to the current patent system. In fact, one of those changes involves giving the PTO fee setting authority. Section 9 of the bill states that the PTO shall have authority to set or adjust any fees established or changed by the office. However, the fee amounts are set to recover the estimated cost to the PTO for its activities. This is a great provision to put in the bill, but it is only one side of the funding story. In fact, providing the fee setting law is at odds with the way Congress currently funds the PTO. If I were the PTO director, why would I take advantage of this provision by increasing fees to a point where I think they were not needed, or even costs, when I know that Congress has the ability to take whatever it wants of those increased fees and spend it on something other than what I budgeted those fees to cover?

In fact, PTO Director Kappos has specifically commented on fee diversion at the PTO. During his confirmation hearing in 2009, Director Kappos stated in his testimony that the PTO faces many challenges and one of the most immediate is “the need for a stable and sustainable funding model.” In his private meeting with me prior to his hearing, he discussed his experience as a high-level manager, officer and counsel at IBM. He acknowledged that, despite the vast knowledge and experience that he brings to the PTO, he could not run PTO efficiently without access to sustainable funding.

In March 2010, Director Kappos appeared before the House CJS Appropriations Subcommittee and told the PTO was likely to collect at least $146 million more than its 2010 appropriation. He was right, and in July 2010, the PTO had to ask for more funds from Congress in separate legislation, but it was only given $129 million. As a result, the PTO ended up collecting at least $53 million above that amount, which it could not access.

In April 2010, Director Kappos made similar comments at a meeting in Reno, NV. When discussing the pending Senate legislation, Director Kappos stated, “I am going to make USPTO much better whether we get new legislation or not . . . There is more than
one way to solve our problems. Lack of funding is a real issue. It's very hard to cut down on a huge backlog with a lack of funding. Lack of funding hits you at every corner at the USPTO. Just do the math... We'll all be dead and gone by the time we get rid of this backlog of appeals at the current rate. It is so overwhelming and it all comes down to the resources you need. It comes down to money.

In January 2011, Director Kappos appeared at a House Judiciary Committee PTO hearing. He stated, "There is uncertainty about funding constrained our ability to hire or allow examiners to work overtime on pending applications during the last year."

It baffles me that these comments have not been heeded by Congress. Director Kappos believes much progress can be made without legislation as long as there is a sustainable funding model.

Similar words appear in the House Report on the 2003 Patent and Trademark Fee Modernization Act: “While the agency has demonstrated a commitment to embrace top-to-bottom reform consistent with congressional mandates, it is equally clear that PTO requires additional revenue to implement these changes.” Yet, our PTO director, who has incredible plans for this agency, cannot accomplish those due to revenue shortfalls that have plagued the agency for decades—a problem Congress has the ability to permanently fix.

Congress has not ended its diversion of fees from the PTO.

On a regular basis, from 1992 to 2004, the amount Congress “allowed” the PTO to keep via appropriations was less than the fees PTO collected. At the height of this problem in 1998, Congress withheld $200 million from the PTO and diverted it to other general revenue purposes. As recently as 2004, Congress diverted $200 million from the PTO. In 2007, it was $12 million, and in 2010, it was $33 million. In total, since 1992, Congress has diverted more than $800 million that the PTO will never be able to recover.

Now, beyond the concern that appropriators have with relinquishing control over PTO funding, some might say that the practice of fee diversion has ended in recent years, making this amendment unnecessary. Under public pressure from various sectors of the American innovation industry, in 2005 and 2006 and 2008 and 2009, it is true Congress gave PTO all of the funds it estimated in its budget request. So, some argue that no permanent solution to PTO fee diversion is necessary because of Congress’s proven restraint.

However, it is not entirely true that all fee diversion has ended. First, it is inaccurate to say there has been no fee diversion since 2004. According to the PTO, $72 million was diverted in 2007, and $9 million in 2010—a type of diversion slightly different from the past. From 1992-2004, PTO provided an estimate of its fees, but appropriators diverted funds by appropriating to the PTO less than its estimate and applying the difference to other purposes. In 2007 and 2010, PTO provided its estimate and, it is true, appropriators provided an amount equal to that estimate. Appropriators thus took what appropriators gave them, and those fees were diverted to other purposes rather than being returned to the PTO the following year. Without access to those funds, PTO lost $12 million in 2007 and $53 million 2010, for a total of $65 million.

Second, Congress has engaged in “soft diversion” of PTO funds through earmarking PTO fees. From 2005-2010, appropriators directed PTO to spend its user fees on specific, earmarked items in appropriations bills totaling over $29 million. Such items included: $20 million for “initiatives to protect U.S. intellectual property overseas;” $1.75 million for the National Intellectual Property Law Enforcement Coordination Center; $1.2 million for the PTO to participate in a cooperative with a nonprofit to conduct policy studies on the activities of the UN and other international organizations, as well as conferences. While we all agree it is necessary to protect intellectual property rights abroad, PTO should be able to have discretion to decide how much of its budget should be directed for those purposes.

Third, the PTO faces a huge backlog of unexamined patents, as well as an enormous patent pending problem for those applications already being processed. Fee diversion from the PTO has exacerbated these waiting periods through a congressional Fonz-scheme. Even if we were to accept that fee diversion stopped in 2005, CBO states that approximately $750 million was diverted from 1992-2007. With the addition of the $33 million diverted last year, the PTO has lost over $800 million due to fee diversion. Thus, PTO has been constantly trying to recover from years of a “starvation funding diet.”

So, when the PTO presents a budget of what it needs to process applications in the next 1-year period, that money is actually going towards processing applications sitting in the backlog. As a result, Congress is really not providing PTO with what it needs for the year in which it receives appropriation. Rather, it is giving short-shrift to the current year’s needs because PTO must apply its fees not to the inventor who submitted his application this year, but to those who paid and submitted applications years ago.

Lack of funding is exacerbated under a continuing resolution. In fact, PTO’s lack of access to its user fees is further amplified in a year with a continuing resolution, such as this fiscal year. Under this CR, the PTO can only spend at the level given to it by the Appropriations Committee in 2010, which is approximately $1.5 million per day less than the President’s fiscal year 2011 budget request.

PTO already has to wait on year-to-year funding that may not materialize, and under a CR the problem is worse since PTO cannot get access to their fees until the CR is lifted. In January, the PTO Director noted at the House Appropriations Committee that “our spending authority under the continuing funding resolutions and the lack of a surcharge assessment through early March, however, represent foregone revenue of approximately $115 million as compared to what was proposed in the President’s fiscal year 2011 budget request.”

Thus, under the House-proposed CR, without a specific provision inserted to allow the PTO to collect all of the fees it collects, PTO will not be able to access its future fee collections. My amendment would solve this problem of constantly using time and resources at both the PTO and Congress to ensure the PTO will be reimbursed the things it deserves and does not suffer from Congress’s inability to properly fund the government.

As the above problems show, even without direct diversion, PTO still faces the possibility of fees diverted by other means. Thus, while I recognize that some effort has been made by Congress, it is no consolation to me or to the PTO Director that, in recent years, appropriators have “restrained” themselves and provided the PTO with all of the fees that it collected. “But, such recent restraint does not guard against future diversion.”

In 2007, the American Intellectual Property Law Association sent a letter to House Speaker NANCY PELOSI, “there is nothing to prevent the devastating practice of fee diversion from recurring . . . While everyone wishes for a more rapid recovery by the Office, it must be remembered that the current situation is the result of a 12 year starvation funding diet. It will take permanent, continued full funding of the USPTO . . . to overcome these challenges.”

An amendment to permanently end fee diversion is the only effective remedy. The only true solution to the problem of PTO fee diversion that will give solace to those in the patent community and to the PTO Director is a permanent end to fee diversion so the PTO can effectively and efficiently budget for its future operational needs. The President’s fiscal year 2012 Budget also supports a sustainable funding model for the PTO: “Another immediate priority is to implement a sustainable funding model that will allow the agency to manage fluctuations in filings and revenues while sustaining operations on a multi-year basis. The PTO’s sustainable funding model includes: (1) ensuring access to fee collections to support the agency’s objectives; and (2) instituting an interim patent fee increase . . .”

In fact, as I stated earlier, in 2006, this body approved, by unanimous consent, an amendment to the 2009 budget resolution by Senator HATCH that condemns the diversion of funds from the
PTO. My amendment is in the same vein—if we will vote to condemn fee diversion, we should also vote to remedy the problem.

I believe we cannot have true patent reform without ending fee diversion and allowing the PTO with a permanent, consistent source of funding, which is why I believe very strongly that this amendment should be adopted. As my colleague Senator HATCH so effectually stated in Judiciary Committee markup this year, “fee diversion is nothing less than a tax on innovation.”

Finally, I would like to point out that nothing in this amendment allows the PTO to escape congressional oversight or accountability. You have all heard me talk about the need for more transparency in all areas of our government, and this is no exception. Enacting this amendment will not put the PTO on “auto-pilot” or reduce oversight of PTO operations. In fact, the amendment requires extensive transparency and accountability from the PTO, giving Congress plenty of opportunities to conduct vigorous oversight. My amendment provides four different methods by which Congress will hold PTO accountable: (1) an annual report, (2) an annual spending plan to be submitted to the Appropriations Committee of both Houses, (3) an independent audit, and (4) an annual budget to be submitted to the President each year during the budget cycle. Furthermore, nothing in this amendment changes the current jurisdiction of any congressional committee. Appropriations or Judiciary, to call PTO before it to demand information, answers and accountability. In fact, it has the potential to yield more information to Congress via the four reporting requirements than provided by other agencies.

This amendment is not about authors versus appropriators, but rather it is about giving the PTO and its very capable and experienced director the opportunity to improve the agency and provided top-notch service to PTO applicants. It is also about making oversight of the PTO a priority for all committees of jurisdiction. It is about stimulating our economy because when the PTO is fully funded, patents are actually granted, which creates jobs in new companies and in the development and marketing of innovative new products. It is about fulfilling our responsibility to ensure efficiency, accountability and transparency in our government so that we reduce our deficit and provide our grandchildren relief from the immense financial burden they currently bear.

The only true reform of the patent system in this country, more than any legislation, it is necessary for the PTO to be able to permanently and consistently access the user fees—not taxpayer funds—it collects. Therefore, I urge my colleagues to support this amendment.

Mr. BAUCUS. Mr. President, I want to take a few minutes to explain in detail the tax strategy patent provision in the pending patent reform legislation that was drafted jointly by Judiciary Committee Ranking Member CHUCK GRASSLEY and me. As chairman of the Senate Finance Committee, I am concerned that the number of patents that have been sought and issued for tax strategies for reducing, avoiding, or deferring a taxpayer’s tax liability. Section 14 of S. 23 would prevent the granting of patents on these tax strategies so that the Internal Revenue Code can be applied uniformly while balancing the critical need to protect intellectual property.

Let me explain. Our Federal tax system relies on the voluntary compliance of millions of taxpayers. In order for the system to work, the rules must be applied in a fair and uniform manner. To that end, everyone has the right to arrange financial affairs so as to pay the minimum amount legally required under the Internal Revenue Code. Patents issued or tax strategies take away this right and undermine the integrity and fairness of the tax system. These patents have been on ideas as simple as funding a certain type of tax-favored trust with a specific type of arrangement to reduce the taxes. The mere fact that any computations provided top-notch service to PTO applicants. It is also about making oversight of the PTO a priority for all committees of jurisdiction. It is about stimulating our economy because when the PTO is fully funded, patents are actually granted, which creates jobs in new companies and in the development and marketing of innovative new products. It is about fulfilling our responsibility to ensure efficiency, accountability and transparency in our government so that we reduce our deficit and provide our grandchildren relief from the immense financial burden they currently bear.

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Let me explain. Our Federal tax system relies on the voluntary compliance of millions of taxpayers. In order for the system to work, the rules must be applied in a fair and uniform manner. To that end, everyone has the right to arrange financial affairs so as to pay the minimum amount legally required under the Internal Revenue Code. Patents issued or tax strategies take away this right and undermine the integrity and fairness of the tax system. These patents have been on ideas as simple as funding a certain type of tax-favored trust with a specific type of arrangement to reduce the taxes. The mere fact that any computations provided top-notch service to PTO applicants. It is also about making oversight of the PTO a priority for all committees of jurisdiction. It is about stimulating our economy because when the PTO is fully funded, patents are actually granted, which creates jobs in new companies and in the development and marketing of innovative new products. It is about fulfilling our responsibility to ensure efficiency, accountability and transparency in our government so that we reduce our deficit and provide our grandchildren relief from the immense financial burden they currently bear.

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The PRESIDING OFFICER (Mr. REID). The assistant legislative clerk presented the memorial of Senator Inouye, A. H. (Harry) Sin. The memorial read as follows:

MEMORIAL OF SENATOR INOUEY

WHEREAS, Senator Daniel Inouye, a citizen of the highest integrity, a man of honor and courage, a faithful and trusted member of this Senate who served in the United States Armed Forces in World War II; and

WHEREAS, Senator Inouye was the recipient of the Medal of Honor for his valor and service in the Korean War; and

WHEREAS, Senator Inouye was one of the United States' first African American members of the Armed Forces and the first African American to receive the Medal of Honor; and

WHEREAS, Senator Inouye represented Hawaii for 24 years, and served with distinction as Director of the Veterans Administration; and

WHEREAS, Senator Inouye was a leader in this Senate and a champion of the disabled; and

WHEREAS, Senator Inouye was known for his integrity, passion, and personal courage in the battle for American values; and

WHEREAS, Senator Inouye was a 34-time member of the Select Committee on Veterans' Affairs; and

WHEREAS, Senator Inouye was a dedicated advocate for veterans affairs and an unyielding defender of the rights of veterans and their families; and

WHEREAS, Senator Inouye was a co-founder and co-chair of the Joint Congressional Committee on the Vietnam War; and

WHEREAS, Senator Inouye was a leader in the fight for equality and civil rights; and

WHEREAS, Senator Inouye was a tireless advocate for economic and social justice; and

WHEREAS, Senator Inouye was a role model for all who serve in public office; and

WHEREAS, Senator Inouye was a man who understood the importance of service to our country; and

WHEREAS, Senator Inouye was known for his dedication to the people of Hawaii and his commitment to the principles of fairness and justice; and

WHEREAS, Senator Inouye was a man who exemplified the American Dream; and

WHEREAS, Senator Inouye was a hero to all who knew him; and

NOW, THEREFORE, be it

Resolved, That the Senate observes a 2-minute moment of silence in honor of the life and service of Senator Daniel Inouye.