

and Republicans alike coming to the floor. I just wanted to wrap up with one last comment.

Senator Hatfield did not serve alone. He was accompanied through his extraordinary public service journey that we have heard discussed today on the Senate floor by a remarkable woman, Antoinette Hatfield. For those of us who knew Mrs. Hatfield, the only way we could sum her up would be to say: What a woman. Whip smart, boundless energy, persistent in a way that made it clear she was going to push hard for what was important, but always in a way that left you with a sense that she would be standing up for what was right and almost invariably with her husband standing up for our State.

My colleague in the Chair, the Presiding Officer, Senator MERKLEY, described his experiences with Senator Hatfield very eloquently. We have heard that from one Senator after another. But I thought it was appropriate this afternoon—as many Senators knew Mrs. Hatfield and, I think, share my views—and important to note that Senator Hatfield often said—and my colleague will recall it as well—he could not have made the contributions to Oregon without having at his side, having the good counsel, enjoying the affection of this wonderful woman, Antoinette Hatfield.

So as the Oregon delegation in the Senate wraps up these tributes, we simply want to acknowledge not just Senator Hatfield's contributions but the chance we have had to be with Mrs. Hatfield in work situations and personal situations, and we wish to express our gratitude for all she has done for decades now working with her husband, working with Oregonians to make Oregon a better place.

This afternoon, Antoinette Hatfield, as well as her late husband, has our undying gratitude.

Mr. President, with that, I yield the floor, and I note the absence of a quorum.

The PRESIDING OFFICER (Mr. MERKLEY). The clerk will call the roll. The legislative clerk proceeded to call the roll.

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 President, I ask that the order for the quorum call be rescinded.

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

#### LEAHY-SMITH AMERICA INVENTS ACT

Mr. REID. Mr. President, I ask unanimous consent that the remaining time postcloture be yielded back, and the motion to proceed to H.R. 1249, the America Invents Act, be agreed to; that there be debate only on the bill until 5 p.m., and at 5 p.m. the majority leader be recognized.

The PRESIDING OFFICER. Is there objection?

The Senator from Kentucky.

Mr. PAUL. I ask that the unanimous consent request be modified so once we

are on the bill I can offer an amendment related to the Secretary of the Treasury and that a vote on that issue be reported.

Mr. REID. Mr. President, I object to my friend's request. I ask that once we get on the bill that the Senator from Kentucky, Mr. PAUL, be recognized to speak for up to 10 minutes in order to explain the amendment that he had hoped to offer and will offer at some point in the future.

The PRESIDING OFFICER. Is there objection to the request as so modified?

Mr. REID. I modify my request to that effect.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The clerk will report the bill.

The legislative clerk read as follows:

A bill (H.R. 1249) to amend title 35, United States Code, to provide for patent reform.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. PAUL. Mr. President, they say the definition of insanity is doing the same thing over and over and expecting a different result. We now have been in 3 years of a policy that is not working. Joblessness is up and our debt has been downgraded. Our country is on a precipice, and yet we continue with the same people giving the same ideas that are not working. It is important to know how we got here.

We are in a great recession, the worst recession since the Great Depression. How did we get here? We got here through bad economic policy and bad monetary policy. This policy originated with Timothy Geithner when he was at the Federal Reserve in New York. It originated with Ben Bernanke, the head of the Federal Reserve.

What did we do? We reappointed these people to higher office. They say the definition of insanity is doing the same thing over and over and expecting a different result.

I would respectfully ask at this point we have a vote in the Senate. I think the American people have given a vote of no confidence to the Secretary of the Treasury. I think the American investors and worldwide investors have given a vote of no confidence to the debt ceiling deal and to what has been going on.

Over and over we are doing the same policy. We have now appointed as head of the Council of Economic Advisers someone who brought us Cash for Clunkers. We spent \$1 trillion—money we don't have—trying to stimulate the economy and unemployment is worse. Gas prices have doubled. Economic growth is anemic, if at all. We are in the process, perhaps, of sliding into another recession and something has to be different. We cannot keep doing the same thing over and over and expecting a different result.

For the first time in our history our debt has been downgraded. This came after a policy that came from the Secretary of the Treasury and from this administration. It came from a deal

the American people and the world public, world class of investors, judged and deemed to be inadequate.

This country needs a shakeup. We need new ideas. We need different propositions. The same propositions, the same tired, old proposals are not working. We are set during this administration to accumulate more debt than with all 43 previous Presidents combined. We are accumulating debt at \$40,000 a second. We are spending money at \$100,000 a second.

When a policy doesn't work, we need new policy leaders. There will not be a new President until 2012, but this President could choose new advisers because the advice he has been getting is not working. We are languishing. We are on the precipice of possibly going into another recession, and I would suggest at this point we need a new Secretary of the Treasury.

How did we get into this problem? We got into this problem because we had a housing boom. This came from bad monetary policy. It came from the Federal Reserve setting interest rates below the market rate, and that signal was transmitted out into the economy and we got a housing boom. Then we had a housing depression. We are still in the midst of a housing depression.

Where did that policy come from? That policy came from Secretary Geithner and Ben Bernanke.

What have we done? We have reappointed these people and reapproved their policies that got us into the problem in the first place. If we want our country to thrive again, we must diagnose the problem correctly before we try to fix it. Because they didn't understand how we got into this recession, they also passed a whole bunch of new regulations. The Dodd-Frank bill heaps all kinds of new regulations that make it harder to get a home loan.

In the midst of a housing depression, we have heaped all these new rules on community banks. You know what? In my State of Kentucky, not one bank failed. The problem is at the Federal Reserve. The problem is with the policy. The problem is with the people we still have running this country and advising the President.

What I am asking for today is a vote of no confidence on Timothy Geithner. I see no reason and no objective evidence that any of his policies are succeeding. I have come to the floor today to ask for this vote, and we will continue to try to get this vote. We have introduced a resolution in favor of voting a vote of no confidence on Timothy Geithner, and I hope this body will consider it.

I yield back the remainder of my time 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. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. DURBIN. Mr. President, I ask the Chair what is pending before the Senate at this moment.

The PRESIDING OFFICER. The bill H.R. 1249 is pending for debate only.

Mr. DURBIN. Mr. President, I yield the floor and 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. HARKIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

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

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

#### THE ECONOMY

Mr. HARKIN. Mr. President, on Monday, we observed but did not celebrate Labor Day. I say "observed and did not celebrate" because we are painfully aware that there are at least 29 million underemployed and unemployed Americans in our midst. Last Friday, the Department of Labor sent shock waves through the global economy by reporting that the U.S. economy created zero net jobs in August. A growing chorus of economists is warning against the dangers of making immediate draconian cuts to the Federal budget—something that, by its very nature, will drain demand, reduce growth, and destroy jobs.

Tragically, too many Members of Congress refuse to listen. Over the summer, they have insisted on a mindless march to immediate austerity—an approach that threatens to strangle the weak economy.

Inside the Washington bubble, some of our political leaders continue to insist that the biggest issue is the budget deficit. Outside the beltway, ordinary Americans are desperately concerned with a far more urgent deficit, the job deficit.

I am also concerned about a third deficit, the deficit of vision and leadership in Washington. I am disturbed by our failure to confront the current economic crisis with the boldness and vision that earlier generations of Americans summoned in times of national challenge.

Smart countries, in tough economic times, do not just turn a chainsaw on themselves. Instead of the current slash-and-burn approach, which is being sold through fear and fatalism, we need an approach that reflects the courage and determination of the American people. By all means, we must agree on necessary spending cuts and revenue increases, but we also must continue to invest in that which will spur economic growth, create jobs, and rebuild the middle class.

I cannot emphasize too strongly the importance of restoring the middle

class in America. I have given several floor speeches on this very subject. In the committee I am privileged to chair, the HELP Committee, we have had hearings on what has happened to the middle class. In fact, on September 1, our committee issued this report: "Saving the American Dream: The Past, Present, and Uncertain Future of America's Middle Class." I commend it to my colleagues.

Restoring the middle class is essential to boosting demand and revitalizing our economy. It is the only way to restore long-term fiscal balance at the Federal level.

Economists across the political spectrum, from left to right, agree that a major cause of our current economic stagnation is a chronic lack of demand. For nearly three decades, workers' incomes have been stagnant. Simply put, they lack the purchasing power to drive America's consumer economy. Without adequate demand, businesses are reluctant to invest and hire.

Adjusted for inflation, average hourly earnings in 1970 were \$18.80 an hour or \$39,104 annually. Again, average hourly earnings in 1970 were \$39,104. However, by 2009, those inflation-adjusted average hourly earnings had actually declined to \$18.63 an hour or \$38,750 a year. Imagine that. From 1970 to 2009, average hourly earnings went down. One might say: So what.

This second chart will show what is happening to the middle class. This chart shows the rising cost of essentials. At the same time earnings have stagnated or gone down a little bit, the costs that make up the largest part of a family budget have skyrocketed. Here is the food budget, up 2 percent; gas, up 18 percent; rent and utilities, up 41 percent; health expenditures, up 50 percent; public colleges, up 80 percent; price of a home, up 97 percent; cost of a private college, up 113 percent. No wonder the middle class is finding it harder and harder to make ends meet.

However, at the same time, let's look at what is happening at the higher end of the income spectrum and see what happened to CEO compensation during this same period of time. Average hourly earnings have gone down, as I said. The value of the minimum wage—I will talk about that in a minute—has gone down 19 percent from 1970 to last year. But the median executive compensation has gone up 430 percent in the same time. Is there any surprise that people are upset around America, that middle-class families are kind of edgy today? Sure, they are edgy. How are they going to send their kids to college or buy a new home or get out from the ones that are already underwater, provide rent or buy gasoline for cars in rural areas where they have to drive to go to work, to school or to go to church?

How do we boost income and restore people's purchasing power? There are a number of ways we need to do this. I will suggest one to start with. We need

to restore a robust right to organize unions and bargain collectively. I say that unabashedly. It is no coincidence the decline of the middle class has coincided with the dramatic decline of union membership in the United States. Why? Because unions provide workers with the leverage to ensure that they share in their company's gains through wages and benefits and are not just providing company CEOs with even larger pay packages. That is just one step.

Another very practical step we can take to boost purchasing power and boost the economy is to increase the minimum wage. The minimum wage today is \$7.25. If we raised the minimum wage to make up for what it has lost to inflation over the last 40 years, it would be \$10.39 an hour. As we saw, the average CEO pay has gone up 430 percent, and the minimum wage—adjusted for inflation—should be \$10.39 an hour today. But it is only \$7.25. So the minimum wage has gone down, and the median executive compensation has gone up 430 percent. A raise in the minimum wage puts money in the pockets of low-income consumers who are likely to spend it at local businesses.

Most important, of course, we have to create more jobs—but not just any jobs, quality jobs with fair wages and real benefits that can support a family and help hard-working people build a brighter future. That is the way we will put demand back in the economy and get the economy moving again.

Tomorrow evening, the President will present to Congress his plan for boosting job creation and helping to lift the economy. I urge the President to point out that there are some things—big national undertakings—that the private sector simply is not capable of doing. At critical junctures, going back to the beginning of our Republic, the Federal Government has stepped up to the plate. Congresses and Presidents have to act decisively to spur economic growth, foster innovation, and help create jobs. We need that kind of bold action today.

The mantra I hear from my friends on the Republican side is that government can't create jobs. That is nonsense. Smart government can create jobs. Shortsighted government can destroy jobs. For example, the brief shutdown of the Federal Aviation Administration this summer put nearly 70,000 private sector construction employees out of work. Draconian cuts proposed by House Republicans to the new Transportation bill would destroy an estimated 490,000 highway construction jobs and nearly 100,000 transit-related jobs. That is dysfunctional government, making the problem even worse.

By contrast, across our history, an often visionary and bold Federal Government has funded and spearheaded initiatives that have expanded private commerce, given birth to countless inventions and new industries, and created tens of millions of jobs.

During the Presidency of Franklin Roosevelt, with the private sector paralyzed by the Great Depression, the Federal Government responded with an astonishing array of initiatives to restart the economy, restore opportunity, and create jobs. I still have on my wall in my office—and I will bet I am the only Senator on the floor today who can say this—the actual WPA form of my father when he worked for the Works Projects Administration. He got a job to help feed his family. Some of the things my father worked on in the WPA exist today—still used by the public, still used by kids going to high school. A lot of times people say: Well, that was all well and good, but that didn't stop the depression that was World War II. Well, what was World War II but massive government infusion into the economy?

By the end of the Second World War, wartime investments in plants and equipment and making tanks and airplanes and all kinds of things, which we then turned over to the private sector, created an industrial colossus the likes of which the world had never seen. Franklin Roosevelt and President Truman were followed by a Republican President, Dwight Eisenhower. President Eisenhower—I am sure a very proud Republican—was also determined to move America forward. He championed one of the greatest public works projects in American history—the construction of the Interstate Highway System. A 1996 study of that system concluded:

The interstate highway system is an engine that has driven 40 years of unprecedented prosperity and positioned the United States to remain the world's preeminent power into the 21st century.

This kind of visionary thinking, by both Democratic Presidents and a Republican President, is by no means a relick of the distant past. In more recent times, the Federal Government has funded and spearheaded scientific discovery and innovation that has had profound impacts on our economy—spawning scores of new industries and creating millions of high-value jobs. I will just mention a few.

Specifically, the Defense Advanced Research Projects Agency—called DARPA—invented the Internet, making possible everything from e-mail to social networking to the World Wide Web. Federal researchers at that same agency—DARPA, the Defense Advanced Research Projects Agency—invented the global positioning satellite system.

I can remember when I first came to the Congress as a House Member on the House Science and Technology Committee and we first started authorizing funding for the GPS system. A lot of people at that time said: Oh no, no. This is not the role for the Federal Government. Only the private sector can do it. But the private sector could not undertake that at that point in time. So the Federal Government put up the satellites and the private sector

took over, and now we have Garmin and TomTom and we have all kinds of things now for airplanes and cars and boats—all made by the private sector employing people in private-sector jobs—because the Federal Government put forth the money and the investment to put that system into place.

Need I mention NASA, and the number of technological breakthroughs over the years—everything from microchips to CAT scanner technology. And of course any discussion of the Federal role in promoting our economy would not be complete without mentioning the National Institutes of Health. More than 80 Nobel prizes have been awarded for NIH-supported research.

One might say: Well, how has that benefitted us? Recently, the Battelle Memorial Institute, a nongovernment research institute, reported on the Federal Government's \$3.8 billion investment in the Human Genome Project from 1988 to 2003. Battelle estimates this Federal investment of \$3.8 billion in taxpayer money has produced a staggering \$796 billion in economic output. In 2010 alone, this “genomic revolution” generated \$67 billion in U.S. economic output and supported 310,000 jobs.

These are the kinds of investments that are some of the best ways to reduce budget deficits. They will help many of the 29 million unemployed and underemployed get jobs and become taxpayers again. With the private-sector engine again threatening to stall out, there is a critical role for the Federal Government in creating demand and preventing a slide back into recession.

The most obvious way forward—with support across the political spectrum, including the U.S. Chamber of Commerce—is to dramatically ramp up Federal investments in infrastructure in order to boost U.S. competitiveness. The American Society of Civil Engineers estimates that America faces a \$2.2 trillion—trillion dollars—infrastructure backlog. Bringing this U.S. infrastructure into the 21st century would create millions of private-sector jobs—especially in the hard-hit construction industry—while modernizing the arteries and veins of commerce.

As someone once recently said: Think about it this way: We are still driving on Eisenhower's highways and going to Roosevelt's schools. It is time to do it for the next century.

There can be no economic recovery, no return to fiscal balance without the recovery of the middle class. And there will not be a middle class unless and until we come to grips with the need for Federal investment in education, innovation, research, and infrastructure. It means restoring a level playing field with fair taxation, vibrant unions, a strong ladder of opportunity to give every American access to the middle class.

I hope President Obama will be bold, as Presidents in the past have been. I

hope he will put forward a very bold, visionary, challenging—challenging—proposal tomorrow night, to challenge us to the better side of our human nature and to recapture again what we have done in the past. In that way, we can rebuild the middle class and put America back to work. I believe that is the only way we will be able to do that.

Mr. HARKIN. Mr. President, with that, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. LEAHY. Mr. President, I ask unanimous consent the period for debate only on H.R. 1249 be extended to 6:30 p.m. and that at 6:30 p.m. the majority leader be recognized.

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

Mr. LEAHY. Mr. President, I have worked on efforts to prevent the diversion of fees collected by the U.S. Patent and Trademark Office for years. When the distinguished Senator from Oklahoma, Mr. COBURN, took on the issue, I urged him to work with me, to withhold the amendment during the Judiciary Committee's consideration of the bill, and I would work with him to include improvements on the Senate floor.

I did. I kept my word. In fact, I included language he drafted in the managers' amendment and worked hard to pass it despite the misgivings of several Senators on both sides of the aisle.

However, when our bill went over to the House of Representatives, they preserved the principle against fee diversion but changed the language. The language of the bill is that which the House devised and voted to include as worked out by the House Republican leadership to satisfy House rules. The provisions Senator COBURN had drafted—and I understand may offer with his amendment—apparently violate House rule 21, which prohibits authorizing legislation from converting discretionary spending into mandatory spending. So instead of a revolving fund, the House established a reserve fund.

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

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

up a revolving fund that allowed the PTO to spend all money it collects without appropriations legislation or congressional oversight. But instead of a revolving fund the House formulation against fee diversion establishes a separate account for the funds and directs they be used for the U.S. Patent and Trademark Office.

The House forged a compromise with its appropriators to reduce any incentive to divert fees from the PTO and to provide the PTO with access to all fees that it collects while keeping the PTO within the normal appropriations process with the oversight that process includes. The America Invents Act thus creates a new Patent and Trademark fee reserve fund into which all fees collected by PTO in excess of that amount appropriated in a fiscal year are to be deposited. Fees in the reserve fund may only be used for operations of the PTO. In effect, they are doing what we have asked but staying within the House rules.

In fact, in addition, the House appropriators agreed to carry language in their appropriations bills that would guarantee that fees collected by the PTO in excess of the appropriated amounts would remain available to the PTO until expended and could be accessed by the PTO through reprogramming procedures without the need for subsequent legislation.

This may sound kind of convoluted, but what a number of people, including Senator COBURN, wanted to do was to make sure the fees went to PTO. I happen to agree with that. What the House did has the effect of making sure the fees go to the PTO.

What I hope we not do now is try to offer amendments that may change that and in effect kill the bill. Through the creation of the reserve fund, as well as the commitment by House appropriators, H.R. 1249 makes important improvements in ensuring that user fees collected by the PTO for services are used by the PTO for those services.

So while I oppose fee diversion, I also oppose the Coburn amendment, and I will tell you why. After 6 years of work getting this bill here, this may kill the bill over a formality: the difference between a revolving fund and a reserve fund. One would be hard-pressed to know what the difference is except it would kill the bill. It would require the House to consider the whole bill again. They spent days and weeks in heavy debate working out their compromise in good faith. It was worked out by the House Republican leadership. There is no reason to think that having done that, they are going to reconsider and allow the original Coburn language to violate the rules and avoid oversight.

In fact, I ask that a letter from Congressmen ROGERS and RYAN to Chairman SMITH be printed in the RECORD.

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

CONGRESS OF THE UNITED STATES,  
Washington, DC, June 6, 2011.

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

CHAIRMAN SMITH: It is our understanding that H.R. 1249, the America Invents Act, is likely to be considered on the House floor in the upcoming weeks.

As you know, section 22 of H.R. 1249 would strike the current appropriations account language for the Patent Trademark Office (PTO), replace it with a "United States Patent and Trademark Office Public Enterprise Fund," and permit the PTO to collect and spend authorized fees—all without requiring action or approval from Congress.

We strongly oppose this proposed shift of billions in discretionary funding and fee collections to mandatory spending. Putting PTO funding on auto-pilot is a move in exactly the wrong direction, given the new Republican majority's commitment to restraining spending, improving accountability and transparency, and reducing the nation's unparalleled deficits and debt.

Placing PTO spending on mandatory auto-pilot as outlined in H.R. 1249 would also hand the Congressional "power of the purse"—bestowed in the Constitution—to the Obama White House, and essentially eliminate the ability of Congress to perform substantive oversight of the PTO. We strongly oppose undermining these critical efforts, particularly when House Republicans have pledged to strengthen oversight of federal agencies to ensure resources are being used wisely and appropriately, and to prevent federal agencies from over-stepping their authority.

Oversight of the PTO belongs with the Congress, and should not be abdicated to the Executive Branch of government. Patent applications are filed by U.S. citizens and companies from all 50 states and territories, ranging from as many as 66,191 from California, 16,545 from Texas, 15,258 from New York, 8,128 from Ohio, 3,577 from Virginia, and 600 from Nebraska in 2010. Virtually every Member of Congress represents constituents who have a stake in the oversight of PTO—and often businesses and livelihoods depend on actions the agency undertakes. It would be both irresponsible and unwise to allow the PTO to operate solely under the authority of bureaucrats and White House political appointees—without being held accountable to the American public through their elected Representatives in Congress.

Given these concerns, we ask that section 22 be deleted or otherwise be modified prior to floor consideration in order to strengthen oversight of this important agency, and to ensure American citizens are getting the most from every dollar.

Sincerely,

HAROLD ROGERS,  
Chairman, House Committee on Appropriations.

PAUL RYAN,  
Chairman, House Committee on the Budget.

Mr. LEAHY. I know the members of the Senate Appropriations Committee. I know them. I trust Senator INOUE, someone awarded the Congressional Medal of Honor for his bravery and valor in World War II. I trust the senior Senator from Mississippi and the senior Senator from Alabama with whom I have served for many years. They will follow the law. They will abide by the Supreme Court. I was disturbed to read a comment that this amendment is being brought forward

out of distrust of these Senators. These are Senators I have served with for decades. They can and should be trusted. We should not kill this bill over this amendment. Instead, we should reject the amendment and pass the bill.

(Mr. BENNET assumed the Chair.)

Mr. WHITEHOUSE. Mr. President, I rise today to speak in favor of H.R. 1249, the Leahy-Smith America Invents Act. This is a vital piece of job-creating legislation and I urge my colleagues to support it.

Before I turn to the merits of the bill, let me start by applauding the long, hard work of Chairman LEAHY. He has led the effort on this legislation for many years, patiently working towards a bill that would win broad support from the many interested stakeholders while achieving the crucial goals of spurring innovation, generating jobs, and securing America's place as the world leader in the intellectual property economy. It has been a pleasure to work with him on this important issue. I likewise applaud the hard work of colleagues on both sides of the aisle who have sought to support continued American leadership in technology, medicine, and countless other fields.

Our patent system unfortunately has become a drag on that leadership, largely because it has gone 60 years without improvements. It is long past time to repair that system and thereby energize our innovation economy and create jobs.

Our Nation long has led the world in hard work and ingenuity. My home State of Rhode Island, for example, has a long and proud history of industry and innovation, from the birth of the American industrial revolution to the high-tech entrepreneurs leading our State forward today. An area has developed in Providence, for example, that is rightfully known by the nickname "the Knowledge District" for its remarkable innovation. Rhode Island likewise is the home of remarkable research universities, individual inventors, and businesses of all sizes that have contributed giant leaps forward in the fields of technology, medicine, and mechanical science.

Innovators like these in Rhode Island, and across America, are the drivers of our future economic well-being. My conversations with these Rhode Islanders, however, have made clear to me that the current patent system is making it unnecessarily difficult for them to innovate. Innovators who can solve the most complicated problems of medicine, mechanics, or technology are losing out because of basic problems in our patent system. We need to fix these problems now. Fail to do so and we will pay the price in jobs and international competitiveness.

I have heard two complaints over and over back home in Rhode Island. The first relates to delays in the issuance of patents. Enormous backlogs persist at the Patent and Trademark Office. As a result, our innovators have no certainty whether they have successfully

established intellectual property rights in their inventions. This dampens and frustrates innovation.

The America Invents Act takes on the backlog in a number of different ways. It allows the Patent and Trademark Office discretion to set its own fees and includes a provision that will discourage fee diversion. While I would have preferred to have seen Senator COBURN's anti-fee-diversion amendment accepted by the House, I am confident that these provisions, coupled with exceptions that will ensure low fees for small businesses, will enable the Patent and Trademark Office to better manage its resources and reduce examination times.

My conversations with Rhode Island inventors also identified a second clear problem in our patent system: the threat of protracted litigation. Unfortunately, numerous poor quality patents have issued in recent years, resulting in seemingly endless litigation that casts a cloud over patent ownership. Administrative processes that should serve as an alternative to litigation also have broken down, resulting in further delay, cost, and confusion.

The America Invents Act will address these problems by ensuring that higher quality patents issue in the future. This will produce less litigation and create greater incentives for innovators to commit the effort and resources to create the next big idea. Similarly, the bill will improve administrative processes so that disputes over patents can be resolved quickly and cheaply without patents being tied up for years in expensive litigation. The bill also moves America to the simple First-Inventor-to-File system which will eliminate needless uncertainty and litigation over patent ownership, and it eliminates so-called "tax patents."

In all, the Leahy-Smith America Invents Act is an important and much-needed reform of our patent system. True, every intellectual property stakeholder did not get everything they wanted in this version of the patent bill. I am sure every participant in this process would like a few things added to the bill and a few things taken out. That is inevitable in a bill that has been crafted in a true spirit of compromise. The result is a bill that may not please everyone in all respects but that satisfies its core responsibility to remove existing burdens on American innovation and allow the growth of high quality, high technology jobs in our country. It is extremely important in this time of economic hardship that we put people to work. That is exactly what this bill will do and I believe we should pass it immediately. We should not amend it further in a manner that will risk the bill's ultimate defeat. This is a long journey and we are at the finish; let's get this bill done for American inventors and workers. Let's see this much-needed piece of patent reform passed into law.

I once again urge my colleagues to vote to pass this important piece of legislation into law.

Mr. KYL. Mr. President, I rise today to submit for the RECORD two letters addressed to the chairman and ranking member of the House Judiciary Committee. The letters were written by Judge Michael McConnell, a former member of the U.S. Court of Appeals for the Tenth Circuit and the current director of the Constitutional Law Center at Stanford Law School. Judge McConnell's letters examine the constitutionality of section 18 of the America Invents Act, a section of the bill that authorizes a temporary program for administrative review of business-method patents. The letters thoroughly refute the arguments being presented by some opponents of section 18 that the provision either constitutes a taking or runs afoul of the rule of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 1995. Because these letters have circulated widely among members and staff and have played a substantial role in the debate about section 18, I think that it is appropriate that they be published in the RECORD.

I ask unanimous consent that the following materials be printed in the RECORD.

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

MICHAEL W. MCCONNELL,  
*Stanford, CA, June 16, 2011.*

DEAR CHAIRMAN SMITH AND RANKING MEMBER CONYERS: I am the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow of the Hoover Institution at Stanford University, where I teach and write in the field of constitutional law. I previously served as a judge on the United States Court of Appeals for the Tenth Circuit. Congress is now considering legislation (the "America Invents Act") that would expand the grounds on which patents may be reexamined by the Patent and Trademark Office ("PTO"), after their initial issuance. I write to address the constitutionality of those sections: Section 6 (Post-grant Review Proceedings) and Section 18 (Transitional Program for Covered Business Method Patents) of the America Invents Act. Based on my review, these sections of the proposed Act are constitutional as drafted.

As you are aware, for the past thirty years, this nation's patent laws have included procedures for reexamination of already-issued patents. In two leading cases, parties challenged the constitutionality of reexamination of patents in court, raising all the theories now propounded in opposition to sections 6 and 18 of the proposed America Invents Act—takings, due process, retroactivity, and separation of powers. The court of appeals carefully considered and rejected those challenges, upholding the reexamination process in all respects. Sections 6 and 18 of the proposed Act merely expand the grounds on which reexamination is available under current law, but do not change substantive patent law at all, nor the fundamental procedure of reexamination in any constitutionally significant way. We may therefore state with confidence that the proposed legislation is supported by settled precedent.

Moreover, the proposed measure conforms to the purposes of the Patent Clause of the

Constitution, Article I, Section 8, Clause 8, which grants Congress authority to "promote the Progress of Science and the useful Arts." By means of this provision, the Framers sought to balance the goal of encouraging innovation against the dangers and economic loss of monopoly. The reexamination process serves to preserve that balance by adopting a procedure by which the PTO can identify patents that were issued in error. Challenges to the reexamination process proceed on the theory that a patent is a vested right, which once granted may not be taken away, at least not by the agency that granted it. This is a fundamental misconception. If a party is issued a patent that does not comply with the patent laws—and the patent is therefore invalid—it is not a "taking" for either a court or the PTO to determine that the patent is invalid. Just as it is not a taking to determine that a person occupying land has a defective title to it, it is not a taking to determine that a patent holder never had a right to a patent in the first place.

Unlike many other familiar forms of property, the validity of a patent is never determined once and for all; members of the public with competing or adverse interests have long had a continuing right to demonstrate, through reexamination before the PTO, that a patent was invalidly issued. And a party threatened with a patent infringement action has always had the right to seek to demonstrate that the patent is invalid, regardless of whether the same issue has been previously litigated in a different case. In other words, there is no such thing as "adverse possession" in patent law. The only change wrought by the proposed Act is to expand the grounds under which such reexaminations are made by the PTO in the first instance. As a constitutional matter, Congress is entitled to allocate the responsibility of determining whether a patent was properly granted to the courts or to the expert agency, in its discretion. As long as interested parties have the ultimate right to challenge the agency's decisions in court, the administrative nature of the proceeding has no constitutional significance. Moreover, I see nothing in sections 6 and 18 of the proposed Act that would alter or interfere with existing principles of res judicata or collateral estoppel in the context of a final judgment, much less allow the PTO to disturb the final judgment of a court.

I offer no view on the merits or policy of the Act, but offer my judgment that it is entirely consistent with the Constitution for Congress to bring to bear the experience and expertise of the PTO in providing for more robust review of issued patents.

#### I. BACKGROUND PRINCIPLES

I begin with the basic background principles. The Framers of the United States Constitution were well aware of the dangers of monopoly, and sought to ensure that patents could be granted only when they served an overriding public interest. An invalidly issued patent does not properly reward innovation, but instead impedes commerce, hence "the public good." The Federalist, No. 43 (Madison), at 268 [1788] (C. Rossiter ed., 1961). The Framers were also painfully aware of the propensity of governmental agencies and bureaucracies to err. They would not, therefore, have been surprised by efforts to ensure that patent rights may be exercised only when the underlying patent claim is valid and the patent was properly issued. That is why, from the beginning, patents have never been regarded as a fully and irrevocably vested right. As the Supreme Court has explained, the Patent Clause of the Constitution "is both a grant of power and a limitation," and Congress' actions

must be directed to striking the balance between encouraging innovation and stifling competition through the grant of patents that do not promote “the Progress of . . . useful Arts. This is the standard expressed in the Constitution and it may not be ignored.” *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (internal citations and quotation marks omitted); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146-47 (1989).

Patents are unquestionably property rights. *Consolidated Fruit Jar Co. v. Wright*, 94 U.S. 92, 96 (1876). However, unlike many property rights, the right to exclude under a patent “is a right that can only be conferred by the government.” *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985). A patent is not a natural right, but solely a product of positive law; its extent, duration, and validity is a matter that must be determined by the legislative branch. In contrast with purely private rights, “the grant of a valid patent is primarily a public concern.” *Id.* In assessing the validity of a patent, the “threshold question usually is whether the PTO, under the authority assigned to it by Congress, properly granted the patent.” *Id.* As the Supreme Court recently reaffirmed, the statutory presumption of validity found in 35 U.S.C. § 282, is a reflection of the presumption of administrative correctness by the PTO. *Microsoft Corp. v. i4i Ltd. P’ship*, — U.S. —, No. 10–290, slip op. 16–17 (2011).

Patents are issued after a limited, ex parte process in which the public has no opportunity to participate. The PTO largely only has before it the information provided by the inventor’s attorney. As a result, as courts have recognized, the PTO may not have all of the material information at the time it issues a patent. Therefore, although patents are presumed valid, “if the PTO did not have all material facts before it, its considered judgment may lose significant force.” *i4i*, slip op at 17.

The validity of a patent is not a matter that is ever fully and finally settled. Rather, it remains “ever-present,” *Patlex Corp.*, 758 F.2d at 600, because any defendant may assert an invalidity defense in patent litigation—even if the same issue has been previously litigated by another defendant. Prior to 1980, the only means by which a party could challenge the validity of a patent was through litigation in court. In 1980, however, Congress created an administrative reexamination procedure, designed to weed out patents that are invalid because they did not meet the requirements for patentability set forth in the Patent Act. See Public Law No. 96–517. Under these procedures, “[a]ny person at any time may file a request for reexamination by the [PTO] of any claim of a patent on the basis of any prior art” that was published. 35 U.S.C. § 302 (emphasis added).

Since 1980, therefore, the validity of a patent may be challenged several ways: A party who is sued for patent infringement may assert a defense of invalidity, which must be proven by the higher standard of clear and convincing evidence (in deference to the presumed correctness of the PTO’s decision), or a patent’s validity can be reviewed through a reexamination proceeding. Upon reexamination, the PTO may confirm any patentable claim or cancel any unpatentable claim. Reexamination thus provides an opportunity for the PTO to review and correct its own work based on fuller information. As the Federal Circuit has described, “[t]he innate function of the reexamination process is to increase the reliability of the PTO’s action in issuing a patent by reexamination of patents thought ‘doubtful.’” *In re Etter*, 756 F.2d 852, 857 (Fed. Cir. 1985).

The reexamination process created in 1980 endured constitutional challenges similar to what opponents of the America Invents Act

are marshalling today: the 1980 reexamination procedure was challenged by patent holders as an unconstitutional taking, as a violation of due process, as a violation of the Seventh Amendment right to a jury trial, and as a violation of separation of powers. See *Patlex Corp.*, 758 F.2d 598–599; *Joy Technologies v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992). Each of these challenges was soundly rejected by the United States Court of Appeals for the Federal Circuit.

Thus, to be clear, under current law, at the instance of a party, the PTO may reexamine a patent that has been issued, and the validity of which has been unsuccessfully challenged in litigation. With this in mind, I first address the constitutionality of Sections 6 and 18 of the America Invents Act.

## II. SECTION 6 OF THE AMERICA INVENTS ACT IS CONSTITUTIONAL

Section 6 of the America Invents Act amends the Patent Act to create a post-grant review procedure available for a limited time (one year, in the current America Invents Act legislation) after the date a patent is granted. Section 6 also amends existing inter partes reexamination procedures to make them available after the period of time for post-grant review has passed or, if post-grant review has been initiated, after that post-grant review is complete. A key distinction between the post-grant review procedures and the inter partes reexamination procedures is the grounds and evidence that can be considered for invalidating a patent: as with current law, the inter partes reexamination procedure of Section 6 is limited to considering (1) whether a patent is invalid for failing to meet the Patent Act’s requirements of novelty and non-obviousness (2) based on patents or printed publications.

Section 6 is in harmony with the first principles of the Constitution and with the body of legal precedent addressing the existing reexamination procedures. The Patent Clause of the Constitution empowers Congress to “promote the Progress of Science and useful Arts” by granting patents to inventors, but it correspondingly limits Congress’ authority to grant patents that do not advance “the Progress of Science and useful Arts.” The Supreme Court has recognized that from the beginning our Founders have sought to strike that constitutional balance: “Thus, from the outset, federal patent law has been about the difficult business of ‘drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.’” *Bonito Boats*, 489 U.S. at 148 (quoting 13 Writings of Thomas Jefferson (Memorial ed. 1904) at 335). One manner in which Congress has fulfilled this mandate to strike the proper balance is through the existing reexamination procedures, which provide a mechanism for removing patents that should never have been granted by the PTO because they did not meet the requirements for a valid patent set by Congress in the Patent Act. As the Federal Circuit has observed, “[t]he reexamination statute’s purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted.” *Patlex Corp.*, 758 F.2d at 604 (emphasis added). A determination that a patent should never have been granted is no more a “taking” than is a determination that a putative landowner suffers a defect in title.

Accordingly, the revised inter partes reexamination procedures and the post-grant review procedures of Section 6 are hardly novel but rather are based on longstanding procedures established by Congress and repeatedly recognized as constitutional by the Federal Circuit in decisions such as *Patlex Corp.*, 758

F.2d 594, 607 (Fed. Cir. 1985) (emphasis added), *Joy Technologies*, 959 F.2d 226, 228–29 (Fed. Cir. 1992), and *In re Swanson*, 540 F.3d 1368, 1379 (Fed. Cir. 2008). As such, Section 6 does little more than expand the grounds for reexamination of patents, something Congress is plainly entitled to do pursuant to its authority under the Patent Clause (Article I, Section 8, Clause 8) of the Constitution.

Nor is there any conflict between Section 6 and other parts of the Constitution such as Article III and the Seventh Amendment. The gist of the arguments suggesting a conflict is that the PTO would be permitted to “overrule” final judicial determinations made by an Article III court and/or jury of a patent’s validity. But these arguments fail to understand the nature of judicial review of patent validity and fail to recognize the body of precedent that has rejected these arguments as applied against the current legal regime.

To begin, what exactly happens when issues of patent validity are litigated in district courts should be placed in proper context. As the Federal Circuit has explained, “Courts do not find patents ‘valid,’ only that the patent challenger did not carry the burden of establishing invalidity in the particular case before the court under 35 U.S.C. 282.” *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1429 n.3 (Fed. Cir. 1988) (emphasis original and internal quotation marks omitted). For this reason, “a prior holding of validity is not necessarily inconsistent with a subsequent holding of invalidity and is not binding on subsequent litigation or PTO reexaminations.” *In re Swanson*, 540 F.3d 1368, 1377 (Fed. Cir. 2008) (internal citations and quotation marks omitted). In other words, a district court decision that a patent is “not invalid” merely means that the challenger did not carry his burden; it does not mean that the patent is valid.

The existing reexamination procedures and the new post-grant review procedures proposed in the America Invents Act vest authority to determine validity upon reexamination in the agency entrusted by Congress with making the validity decision in the first instance—the PTO. It is entirely proper that this corrective action be taken by the PTO, with review 67 the Federal Circuit. It need not be limited to an Article III court in the first instance. “A defectively examined and therefore erroneously granted patent must yield to the reasonable Congressional purpose of facilitating the correction of governmental mistakes. This Congressional purpose is presumptively correct, and we find it carries no insult to the Seventh Amendment and Article III.” *Patlex Corp.*, 758 F.2d at 604. In other words, under a well-settled body of case law, “the Constitution does not require that [courts] strike down statutes, otherwise having a reasonable legislative purpose, that invest administrative agencies with regulatory functions.” *Id.* at 604,305. That holding is just as applicable to Section 6 of the America Invents Act as it is to the original reexamination procedures adopted in 1980.

Nor does it matter, for constitutional purposes, that the PTO may reconsider the validity of patents’ that are, or have been, adjudicated by district courts. In *In re Swanson*, 540 F.3d 1368 (Fed. Cir. 2008), the Federal Circuit specifically considered and rejected the argument that *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), prohibited reexamination of a patent by the PTO after that patent had survived an invalidity challenge in court. See *Swanson*, 540 F.3d at 1378,79 (“[The patentee] argues that this reading of the statute—allowing an executive agency to find patent claims invalid after an Article III court has upheld their validity—violates the constitutionally mandated separation of powers, and therefore must be avoided. We disagree.”). As the Federal Circuit held, “the

court's final judgment and the examiner's rejection are not duplicative—They are differing proceedings with different evidentiary standards for validity. Accordingly, there is no Article III issue created when a reexamination considers the same issue of validity as a prior district court proceeding." *In re Swanson*, 540 F.3d 1368, 1379 (Fed. Cir. 2008) (citation omitted). Because Section 6 merely broadens the kinds of invalidity challenges that can be pursued during reexamination, that holding would apply to the America Invents Act as well. *Plaut* simply does not apply.

Relatedly, invalidation of a patent by the PTO (or by a court, for that matter), after it has been adjudicated "not invalid" in one particular case, does not purport to undo a court's judgment in an earlier case. The PTO has no authority to disturb a final judgment of a court, and nothing in the proposed Act would change that. Rather, it would remain within the discretion of the district court to determine whether relief from a final judgment was appropriate under Rule 60(b) based on changed circumstances. See *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1363 (Fed. Cir. 2008). Nothing in Section 6 purports to alter the standards under which a court determines whether to grant relief from a final judgment. Accordingly, there is no constitutional problem under *Plaut*.

### III. SECTION 18 OF THE AMERICA INVENTS ACT IS CONSTITUTIONAL

Section 18 of the America Invents Act is equally constitutional. As an initial matter, it is important to recognize that Section 18 does nothing more than apply the more robust post-grant review provisions of Section 6 to existing business-method patents. By any measure, this is not a "taking" within the meaning of the constitution (unless for the past thirty years patent law has been effecting "takings" each time a reexamination takes place). The constitutional arguments that have been marshaled against Section 18—that it applies "retroactively" to existing patents, that it would change the rules of the game, or that it would upset settled property rights—were rejected by the Federal Circuit in *Patlex Corp.* and again in *Joy Technologies*. These are the precedents that would govern any future challenge to Section 18.

I understand that critics of Section 18 are arguing that it improperly singles out business-method patents and that it creates a "second bite at the apple." I find both sets of arguments to be unpersuasive as a constitutional matter. First, Congress is well within its authority to determine that a particular subset of patents warrant closer administrative review than other patents due to their history and development. Business-method patents are relatively novel creatures, and far removed from what the Founders would have envisioned when they sought to "promote the Progress of Science and the useful Arts." Prior to the 1990s, business-method patents were largely unheard of. The surge in the issuance of such patents followed the 1998 decision of the Federal Circuit in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), which has been widely viewed as having opened the door to business-method patenting. The increase in business method patents does not appear to be abating. According to the PTO, the number of business-method patent applications that issued as patents jumped from 494 in 2002 to 3649 in 2010. See <http://www.uspto.gov/patents/resources/methods/applicationfiling.jsp> (last visited June 14, 2011). In the intervening 13 years since *State Street*, the PTO and the courts have struggled to determine when such patents should issue. The Supreme

Court's decision last Term in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), offered some clarification, reaffirming the basic minima required to be patent-eligible subject matter under 35 U.S.C. §101. Nonetheless, in light of the continuing confusion over such patents, and the paucity of traditional published prior art at the time such patents were issued, it is entirely rational—and thus constitutionally appropriate—for Congress to make the judgment that it wants to provide a mechanism for ensuring that adequate vigor went into the PTO's decision to issue a business-method patent, and that such further review helps to ensure that this category of patents is subject to the same quality of review as other patents were. See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 397 (Kennedy, J., concurring) (noting the "suspect validity of some" business-method patents). Given Congress's general authority to allow administrative reexamination, as well as judicial challenge, to an already-issued patent, there can be no valid objection to Congress's decision to focus these reexaminations on a class of patents that, because of their novelty, were especially prone to improvident grant.

Second, providing a more robust reexamination procedure does not create a second bite at the apple. By their nature, patents are continuously subject to challenge, whether in court or before the PTO. As noted above, patents are initially issued after an entirely *ex parte* process in which no one else is allowed to participate. To the extent a patent's validity has been challenged in court, the challenge is only reviewed for *clear and convincing evidence* that the PTO erred in granting the patent. That does not answer the question of whether or not the PTO made a mistake—only reexamination provides a vehicle for answering that question. To the extent this is a second bite, it is at a different apple. Section 18 does not create any more opportunities for challenge than there are under existing law. It simply allows reexamination on a broader array of theories than allowed today.

Moreover, just as a criminal defendant can be acquitted under a beyond-a-reasonable-doubt standard, but found civilly liable under a preponderance standard, there is also nothing unusual about the fact that a patent may be upheld in court (where a thumb is decidedly on the scale of the patentee), but subsequently rejected as invalid by the PTO during reexamination. That is exactly what happened in *Translogic Technology, Inc. v. Hitachi, Ltd.*, 250 F. App'x 988 (Fed. Cir. 2007), and *In re Translogic Tech., Inc.*, 504 F.3d 1249 (Fed. Cir. 2007). In the *Translogic* cases, the district court found the asserted patent to be infringed and not invalid. While the case was pending, the PTO reexamined the patent in an *inter partes* proceeding and found the patent was improperly issued and, thus, invalid. The Federal Circuit affirmed, and thus found that the judgment of infringement in the case against *Hitachi* had to be vacated. The only material difference between the law today and the procedures contemplated in Section 18, is that Section 18 allows a broader array of invalidity arguments to be presented to the PTO. Moreover, nothing in Section 18 purports to alter how principles of *res judicata* and collateral estoppel would apply to a final judgment after all appeals are resolved, or to change the standard for a district court to determine whether relief should be granted under Rule 60(b). Thus, as discussed above, the procedures in Section 18 and Section 6 do not present any of the constitutional concerns identified in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

Nor is there anything constitutionally suspect about limiting the review of existing

business-method patents to those that have actually been asserted in court (or threatened to be asserted, such that a declaratory judgment action could be brought). Rather, such a decision serves to limit the burden on the PTO and to focus the use of limited resources on reexamining patents that, if improperly issued, are more detrimental to the economy. It is like limiting challenges to land claims to competing users of the land. Again, I see nothing in section 18 that purports to alter or interfere with application of existing principles of *res judicata* or collateral estoppel in the context of a final judgment, or to alter the standard for obtaining relief from a final judgment.

Finally, Section 18(c) provides that a party that initiates a PTO reexamination may also seek a stay of ongoing litigation pending reexamination from the court where ongoing litigation is pending. It is the court, not the PTO, that decides whether or not to grant a stay. That is consistent with existing law. See, e.g., *Medichem, S.A. v. Rolabo, S.L.*, 353 F.3d 928, 936 (Fed. Cir. 2003) (IA] stay of proceedings in the district court pending the outcome of the parallel proceedings in the PTO remains an option within the district court's discretion."'). Although Section 18(c) provides a list of factors for a district court should consider, these factors are quite balanced and provide the district court with ample discretion. Indeed, these are the factors currently used by district courts in deciding whether to grant a stay pending reexamination. See, e.g., *Akeena Solar Inc. v. Zep Solar Inc.*, 2010 WL 1526388, \*1 (N.D. Cal. 2010); *Broadcast Innovation, L.L.C. v. Charter Communications, Inc.*, 2006 WL 1897165, \*4 (D. Colo. 2006); *Mots Fr ove Co.*, 2005 WL 3465664, \*1 (D.N.J. 2005); *Tap Pharm. Prods. Inc. v. Atrix Labs., Inc.*, 70 U.S.P.Q. 2d 1319, 1320 (N.D. Ill. 2004). Moreover, Section 18(c) provides for immediate appellate review of a decision to grant or deny a stay, ensuring that this discretion is not abused.

In sum, there is nothing novel or unprecedented, much less unconstitutional, about the procedures proposed in sections 6 and 18 of the America Invents Act. The proposed procedures simply expand existing reexamination procedures to a broader array of invalidity issues. And under settled case law, the application of these new reexamination procedures to existing patents is not a taking or otherwise a violation of the Constitution. Congress's decision, to make these new reexamination procedures available only to a subset of existing patents—a category of patents that Congress could rationally believe were more suspect than other patents—represents a constitutionally proper decision on how to expend limited resources.

Sincerely,

MICHAEL W. MCCONNELL.

MICHAEL W. MCCONNELL,

Stanford, CA, June 23, 2011.

DEAR CHAIRMAN SMITH AND RANKING MEMBER CONYERS: I am the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow of the Hoover Institution at Stanford University, where I teach and write in the field of constitutional law. I previously served as a judge on the United States Court of Appeals for the Tenth Circuit. On June 16, I wrote to you regarding several constitutional issues that have arisen regarding proposed changes to patent reexamination procedures in sections 6 and 18 of the America Invents Act. Since then, two distinguished constitutional authorities, my old friends Richard Epstein and Charles Cooper have written responses to my letter. I thought it would be helpful for me to address those two responses directly and to explain why I remain convinced my original analysis was correct.

Both responses give far too broad a reading to *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and give short shrift to binding precedent of the U.S. Court of Appeals for the Federal Circuit that directly addresses the very kinds of constitutional objections that are being made with respect to sections 6 and 18 of the America Invents Act. Indeed Professor Epstein and Mr. Cooper acknowledge, as they must, that their position is contradicted by *In re Swanson*, 540 F.3d 1368 (Fed. Cir. 2008). This shows that their analysis, whatever its abstract merits, is a departure from actual judicial precedent governing these questions.

Most fundamentally, the Epstein and Cooper critiques refuse to accept the importance of the fact that judicial review of invalidity in the context of a patent infringement suit applies a different standard than administrative reexamination. When the PTO (and subsequently the Federal Circuit) reviews invalidity in the context of a reexamination, a court is not “rehearing” the same issue, much less “reopening” a final judgment (as Professor Epstein erroneously posits), nor does it somehow render an earlier decision that an accused infringer had failed to carry its burden of proving invalidity by clear and convincing evidence an “advisory opinion” (as suggested by Mr. Cooper). Indeed, this fundamental point was critical to the holding in *Swanson*. See 540 F.3d at 1377 (“[A] prior holding of validity is not necessarily inconsistent with a subsequent holding of invalidity and is not binding on subsequent litigation or PTO reexaminations”). *Plaut* does not need to be “overcome”—it is simply inapplicable.

Professor Epstein attempts to distinguish the well-developed body of case law upholding the constitutionality of reexamination procedures, on which sections 6 and 18 of the proposed act are based, by highlighting factual differences in those cases that are, in my view, simply irrelevant to the constitutional analysis. For example, he contends *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985), is different because there was no final judgment at the time the reexamination had begun. However, the Federal Circuit ascribed no significance to that fact—and with good reason. The case rests on the necessarily provisional and correctable nature of patents, not on whether they had previously gone unchallenged in court. A prior judicial decision that a patent was not invalid would mean only that the initial PTO decision was not bereft of substantial support in the evidence—not that it was correct for all time, under a de novo standard. The court rejected the notion that there was a “right to judgment by an Article III court on those issues” of invalidity. *Id.* at 600. The court reasoned that “[t]he reexamination statute’s purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted.” *Id.* at 604. That holding and reasoning would apply equally whether or not the reexamination was commenced before entry of a final judgment.

Likewise, Professor Epstein attempts to distinguish *Joy Technologies v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992), by saying it arose in the context of a settlement. But regardless of the context in which it arose, the court there considered and rejected the same constitutional objections being raised by the objectors to sections 6 and 18 in the context of reexamination. The attempt to distinguish *Ethicon, Inc. v. Quigg*, 849 F.2d 1422 (Fed. Cir. 1988), is also unavailing. That case cogently explains the distinction between a court considering a challenge to validity under the clear and convincing standard, and reexamination by the PTO under the preponderance standard.

In addressing *Swanson*, Professor Epstein suggests that it is “strange” to “think that the PTO will help purge the legal system of weak patents when it allows itself to use a weaker standard than those involved in litigation.” But under the clear-and-convincing evidence standard used for reviewing the PTO’s work in court, an improperly issued patent will often survive even in the face of significant evidence that the patent should not have issued. Thus, there are many mistakes that can be corrected only by the PTO—the agency that erroneously issued the patent in the first place. Professor Epstein further suggests that *Swanson* is of “dubious validity.” However, I am not aware of any subsequent court decision calling *Swanson*’s holding into question. That Professor Epstein disagrees with *Swanson* shows only that his analysis is contrary to precedent, not that the precedent is “dubious.” He also contends that the reexamination procedures in *Swanson* are distinguishable because they were limited to new prior art. However, he ignores the higher-threshold gatekeeping function required under sections 6 and 18 of the proposed Act to obtain reexamination in the first place. In any event, the distinction is one without constitutional significance: there is no constitutional basis for confining reexamination to only one of possible correctable defects in the original issuance of a patent.

Professor Epstein asserts that I am incorrect in stating that under current law, at the instance of a party, the PTO may reexamine a patent that has issued, and the validity of which has been unsuccessfully challenged in litigation. Yet, that is essentially what happened in *Translogic Technology, Inc. v. Hitachi, Ltd.*, 250 F. App’x 988 (Fed. Cir. 2007), and *In re Translogic Technology, Inc.*, 504 F.3d 1249 (Fed. Cir. 2007)—cases that he simply does not address.

Mr. Cooper barely addresses the above-mentioned precedent at all, except to assert that the unanimous decision of the U.S. Court of Appeals for the Federal Circuit in *In re Swanson* is inconsistent with his reading of *Plaut*. In so doing, Mr. Cooper suggests that there is something unseemly about the fact that a patent could be found “not invalid” in a proceeding against an infringer, but then subsequently found invalid by the PTO through reexamination at the behest of the infringer. Yet that is the law today. Sections 6 and 18 do nothing more than expand the types of invalidity challenges that may be considered by the PTO. Mr. Cooper’s analysis is not really a critique of sections 6 and 18; it is a critique of patent law as it has existed for thirty years. By analogy, the fact that a party may be acquitted by one court under a reasonable doubt standard, but found civilly liable by another court under a preponderance standard does not render either decision “advisory.” So too here. Finally, the passage Mr. Cooper cites from *Plaut* is simply inapplicable. The standard of patentability is not being changed, and the use of a clear-and-convincing standard of review in court is merely an acknowledgement of the presumption of administrative correctness, which is inapplicable when the PTO reviews its own work.

At bottom, nothing in sections 6 and 18 of the proposed Act purports to change the substantive law regarding when a patent is validly issued. They merely broaden the availability of one of the preexisting procedural vehicles (reexamination) for assessing validity. Matters of a technical nature, such as this, are especially appropriate to administrative as opposed to judicial redetermination. Courts have consistently rejected the notion that there is a property right in having patent validity reviewed only in an Article III court. And courts have rejected the

argument that the PTO cannot reconsider its own decision to issue a patent merely because a court has found in a particular proceeding that an accused infringer failed to carry its burden of proving the patent invalid by clear and convincing evidence. Against this backdrop, we may be confident that the amendments to the reexamination procedure provided by sections 6 and 18 will be judged to pass constitutional muster.

Sincerely,

MICHAEL W. MCCONNELL.

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

The PRESIDING OFFICER. The clerk will call the roll.

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

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

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

Mr. REID. Mr. President, I ask unanimous consent that on Thursday, September 8, when the Senate resumes consideration of the America Invents Act, the following amendments be the only first-degree amendments in order: Coburn No. 599, Sessions No. 600, Cantwell No. 595; that there be 5 hours of debate on the amendments divided in the following manner: 75 minutes for Senator COBURN or his designee; 1 hour for Senator SESSIONS or his designee; 45 minutes for Senator CANTWELL or her designee; 1 hour for Senator GRASSLEY or his designee; and 1 hour for Senator LEAHY or his designee; that upon the use or yielding back of time, the Senate proceed to votes in relation to the amendments in the following order: Sessions No. 600; Cantwell No. 595; Coburn No. 599; that no other amendments or points of order be in order to any of the amendments or the bill prior to the votes; finally, that following disposition of the amendments, the Senate proceed to vote on passage of the bill, as amended, if amended.

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

Mr. REID. Mr. President, with this agreement, there will be up to four rollcall votes tomorrow afternoon beginning about 4 p.m. Senators should also expect an additional vote following the President’s speech to the joint session. This vote will be on a motion to proceed to S.J. Res. 25, which is a joint resolution of disapproval of the President’s exercise of authority to increase the debt limit.

If we proceed to the debt limit; that is, S.J. Res. 25, that means we will be in session for a long time on Friday—enough to dispose of that. If we do not move, the motion to proceed is not made successfully, then we would finish that matter and the week’s business, at least as far as votes. Friday we have some other items we need to be filing, different motions and things, but the general body would not have to worry about that.

MORNING BUSINESS

COMMITTEE ALLOCATIONS, BUDGET AGGREGATES, AND PAY-AS-YOU-GO SCORECARD

Mr. CONRAD. Mr. President, section 106 of the Budget Control Act of 2011 provides for budget enforcement in the Senate for the remainder of the current year, 2011, for the upcoming budget year, 2012, and, if necessary, for fiscal year 2013.

Section 106(b)(1) requires the chairman of the Budget Committee to file: (1) allocations for fiscal years 2011 and 2012 for the Committee on Appropriations; (2) allocations for fiscal years 2011, 2012, 2013 through 2016, and 2012 through 2021 for committees other than the Committee on Appropriations; (3) aggregate spending levels for fiscal years 2011 and 2012; (4) aggregate revenue levels for fiscal years 2011, 2012,

2012 through 2016, and 2012 through 2021; and (5) aggregate outlay and revenue levels for fiscal years 2011, 2012, 2012 through 2016, and 2012 through 2021 for Social Security.

In the case of the Committee on Appropriations, the allocations for 2011 and 2012 shall be set consistent with the discretionary spending limits set forth in the Budget Control Act. In the case of allocations for committees other than the Committee on Appropriations and the revenue and Social Security aggregates, the levels shall be set consistent with the Congressional Budget Office's March 2011 baseline adjusted to account for the budgetary effects of legislation enacted prior to and including the Budget Control Act but not included in the March 2011 baseline. In the case of the spending aggregates for 2011 and 2012, the levels shall be set consistent with the Congressional Budget Office's March 2011 base-

line adjusted to account for the budgetary effects of legislation enacted prior to and including the Budget Control Act but not included in the March 2011 baseline and the discretionary spending limits set forth in the Budget Control Act.

In addition, section 106(c)(1) requires the chairman of the Budget Committee to reset the Senate pay-as-you-go scorecard to zero for all fiscal years and to notify the Senate of this action.

I ask unanimous consent that the following tables detailing the new committee allocations, budgetary and Social Security aggregates, and pay-as-you-go scorecard that I am making pursuant to section 106 of the Budget Control Act of 2011 be printed in the RECORD.

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

SENATE COMMITTEE BUDGET AUTHORITY AND OUTLAY ALLOCATIONS PURSUANT TO SECTIONS 106(b)(1)(A) AND 106(b)(1)(B) OF THE BUDGET CONTROL ACT OF 2011 AND SECTION 302 OF THE CONGRESSIONAL BUDGET ACT OF 1974, BUDGET YEAR 2011

[in millions of dollars]

Committee	Direct spending legislation		Entitlements funded in annual appropriations acts	
	Budget authority	Outlays	Budget authority	Outlays
Appropriations:				
General Purpose Discretionary .....	1,211,141	1,391,055		
Memo:				
on-budget .....	1,205,096	1,385,032		
off-budget .....	6,045	6,023		
Mandatory .....	760,339	745,168		
Total .....	1,971,480	2,136,223		
Agriculture, Nutrition, and Forestry .....	17,123	15,419	116,980	101,878
Armed Services .....	138,783	142,549	107	106
Banking, Housing, and Urban Affairs .....	849	-13,714	0	0
Commerce, Science, and Transportation .....	14,441	9,883	1,401	1,376
Energy and Natural Resources .....	3,876	3,885	446	446
Environment and Public Works .....	44,872	3,557	0	0
Finance .....	1,481,842	1,478,151	545,640	545,944
Foreign Relations .....	35,904	25,673	159	159
Homeland Security and Governmental Affairs .....	95,763	92,229	10,032	10,032
Judiciary .....	11,987	10,652	675	685
Health, Education, Labor, and Pensions .....	-10,039	-12,323	14,190	14,020
Rules and Administration .....	47	45	26	25
Intelligence .....	0	0	292	292
Veterans' Affairs .....	2,452	2,595	70,284	70,099
Indian Affairs .....	2,773	782	0	0
Small Business .....	4,722	4,722	0	0
Unassigned to Committee .....	-739,945	-732,331	107	106
<b>Total .....</b>	<b>3,076,930</b>	<b>3,167,997</b>	<b>760,339</b>	<b>745,168</b>

Note: In the absence of a discretionary spending limit for Fiscal Year 2011 in the Budget Control Act, the 302 allocation to the Committee on Appropriations for 2011 is set consistent with the already enacted level.

SENATE COMMITTEE BUDGET AUTHORITY AND OUTLAY ALLOCATIONS PURSUANT TO SECTIONS 106(b)(1)(A) AND 106(b)(1)(B) OF THE BUDGET CONTROL ACT OF 2011 AND SECTION 302 OF THE CONGRESSIONAL BUDGET ACT OF 1974 BUDGET YEAR 2012

[In millions of dollars]

Committee	Direct spending legislation		Entitlements funded in annual appropriations acts	
	Budget authority	Outlays	Budget authority	Outlays
Appropriations:				
General Purpose Discretionary .....	1,043,000	1,262,000		
Memo:				
on-budget .....	1,036,835	1,255,845		
off-budget .....	6,165	6,155		
Mandatory .....	750,166	737,515		
Total .....	1,793,166	1,999,515		
Agriculture, Nutrition, and Forestry .....	13,326	14,478	116,916	104,805
Armed Services .....	143,163	139,124	107	109
Banking, Housing, and Urban Affairs .....	37,057	28,793	0	0
Commerce, Science, and Transportation .....	14,840	9,815	1,440	1,402
Energy and Natural Resources .....	4,913	5,052	456	456
Environment and Public Works .....	44,501	3,191	0	0
Finance .....	1,351,138	1,344,534	536,327	536,271
Foreign Relations .....	33,593	27,088	159	159
Homeland Security and Governmental Affairs .....	98,428	94,857	10,034	10,034
Judiciary .....	15,414	11,152	705	717
Health, Education, Labor, and Pensions .....	6,825	11,786	14,924	14,711
Rules and Administration .....	47	220	26	26
Intelligence .....	0	0	514	514
Veterans Affairs .....	1,021	1,182	68,448	68,201
Indian Affairs .....	758	1,097	0	0
Small Business .....	0	0	0	0
Unassigned to Committee .....	-703,805	-704,465	110	110
<b>Total .....</b>	<b>2,854,385</b>	<b>2,987,419</b>	<b>750,166</b>	<b>737,515</b>