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 his remarkable wife, 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 unending 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 President, I ask that the order for the quorum call be rescinded.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 the quorum from 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 growing, if anything, 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. We now have a vote of no confidence to the Secretary of the Treasury. I think the American people have given a vote of no confidence to the Secretary of the Treasury.

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 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 have failed 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.

We need a policy that provides us, 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. We are in a recession. We are in 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 are making all the new rules worse.

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.

Mr. DURBIN. Mr. President, I ask unanimous consent to proceed to the consideration of H.R. 1249.

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 lift 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 Middle Class: 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 the middle and reviving 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 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 $38,104. 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 a voice for workers and 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 cost of living—adjusting for inflation—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 alone. By taking back the lead, 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 400,000 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 laid the foundation for a 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 a poster from that time that was 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 we 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 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 air-planes and things—some of those things 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 economic powerhouse.

This kind of visionary thinking, by both Democratic Presidents and a Republican President, is by no means a relic 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 this, the private sector would 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 in the satellite system.

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 Government’s 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, has that benefited 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 1990 to 2003. Both private and public funds were committed to putting that system into place.

There can be no economic recovery, as former President Eisenhower and President Truman were followed by a Republican President, Franklin Roosevelt and President Truman were followed by a Republican President, created an industrial colossus the likes of which the world had never seen. Federal roles in promoting our economy—spawning scores of new industries and creating millions of high-value jobs—because the Federal Government

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 self-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

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.

I hope President Obama will be bold, as Presidents in the past have been. I
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 by 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 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 the 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 bills allowing the executive branch to 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 processes 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 PTO.

What I hope we do 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 modernizing the program and ensuring resources are being used wisely and appropriately, and to prevent federal agencies from over-staffing their authorities. 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, 16,543 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 the White House political appointees—without being held accountable to the American public through their elected Representatives in Congress.

Given these terrible effects, 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 future. Today, an America with a robust 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 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’s loss 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 like the Intensive Care Unit of the Human Genome Project in Providence, for example, is internationally known for its remarkable innovation. Rhode Island is home to the Knowledge District, a high-tech center of excellence.

Mr. LEAHY. I know the members of the Senate Appropriations Committee. I believe the members also support this legislation and I urge my colleagues to support it.

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 believe the members also support this legislation and I urge my colleagues to support it.

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 believe the members also support this legislation and I urge my colleagues to support it.

Sincerely,

HAROLD ROGERS, Chairman, House Committee on Appropriations.

PAUL RYAN, Chairman, House Committee on the Budget.
established intellectual property rights in their inventions. This damps 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 endlessly litigious actions that cast 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 next best inventive use. 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 First-Inventor-to-File system that 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 is fair and reasonable. One must take 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 to the finish with our 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 Senate 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 lawmakers 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, Judge, Stanford, CA, June 16, 2011. Dear Chairman Smith and Ranking Member Conyers: I am the Richard and Frances Mallory 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 under which reexaminations are made by the PTO in the first instance. As a constitutional matter, Congress is entitled to allocate the responsibility of determining whether and when issued patents are invalid to either a court or the PTO. Similarly, 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 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 is fair and reasonable. One must...
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 or Sciences," a standard explicitly embedded 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 Boart Bucyrus Int'l Inc. v. Herder Craft Boats, Inc., 489 U.S. 141, 146-47 (1989).

Patents are unquestionably property rights, recognized and protected by Congress. "[P]atents are . . . a matter that must be determined by positive law; its extent, duration, and validity is a matter that has been determined by legislative action." Thomas Jefferson (Memorial ed. 1904) at 335). As the Federal Circuit has observed, "[t]he reexamination process created in 1980 to provide an administrative reexamination of patents, something Congress is plainly entitled to do pursuant to its authority under the Patent Clause (Article I, Section 8) (the "Patent Clause") of the Constitution.

Nor is there any conflict between Section 6 and other parts of the Constitution such as 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 courts in re-examining the 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 established patents 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 a patent challenger did not carry the burden of establishing that a patent is invalid." 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 by the Federal Circuit. It need not be limited to an Article III court in the first instance. "A defectively examined patent is just as applicable to Section 6 of the America Invents Act as it is to the original reexamination 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 is denied, after that post-grant review is complete. A key distinction between the post-grant review procedures and the inter partes reexamination procedures is that the PTO 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 (where 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 the first principles of the Constitution and with the body of 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 of the country's history, it has 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 grant and those which are not.' Bonito Boats, 489 U.S. at 148 (quoting 13 Writings of Thomas Jefferson (1903) 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 forth 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 defects in the examination, and to determine if need be to remove patents that should never have been granted." Patent Corp., 758 F.3d at 684 (emphasis added). A determination that a patent has never 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 that have been recognized as constitutional by the Federal Circuit in decisions such as Patent Corp., 758 F.3d 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 reaffirm the constitutional validity of the PTO in re-examining the validity of patents, something Congress is plainly entitled to do pursuant to its authority under the Patent Clause (Article I, Section 8) of the Constitution.

The reexamination process created in 1980 constituted 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 Fifth Amendment's right to trial by jury, and as a violation of separation of powers. See Patent Corp., 758 F.3d 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 patent challenger, the PTO can 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 is denied, after that post-grant review is complete. A key distinction between the post-grant review procedures and the inter partes reexamination procedures is that the PTO 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 (where 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. As with current law, the inter partes reexamination procedure of Section 6 is limited to examining inter partes issues of patent validity and fail to recognize the body of precedent that has established patents as applied against the current legal regime.
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 case or controversy created when the PTO issues a rejection. The Supreme Court considered the same issue of validity as a prior district court proceeding.” In re Swannson, 540 F.3d 1368, 1379 (Fed. Cir. 2008) (citations omitted). Indeed, the PTO decision broadens the kinds of invalidity challenges that can be pursued during reexamination, that holding would apply to the America Invents Act as well. Pliant simply does not apply.

Relatedly, invalidation of a patent by the PTO (or by a court, for that matter), after it has been pronounced invalid in the 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 1351, 1363 (Fed. Cir. 2008). Nothing in Section 6 purports to alter the standards which the PTO applies to determine whether a patent is invalid. Rather, it would remain for a court to determine whether a patent may be upheld in court (where a patent may be acquitted under a beyond-a-reasonable-doubt standard, but could not be acquitted under a preponderance of the evidence standard). Congress’s decision, to make these new procedures to existing patents is not a takings violation affecting “takings” each time a reexamination takes place. The constitutional arguments that the PTO remains an option within the district court’s discretion.”). Although Section 18(c) provides that a list of patents is non-exhaustive and that the PTO can participate in the proceeding, 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., Mediclin, S.A. v. Rolabo, S.L., 353 F.3d 928, 936 (Fed. Cir. 2003) (1A) stay of proceedings in the district court pending the PTO’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 would benefit from the new procedures simply expand existing reexamination procedures to existing patents. Although the application of the 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 would benefit from the new procedures—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 Mallory Professor and Director of the Constitutional Law Center, a Senior Fellow of the Hoover Institution at Stanford University, and a Senior Fellow of the Hoover Institute 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 proposed changes to patent reexamination procedures in sections 6 and 18 of the America Invents Act. Since then, two distinguished constitutional law scholars and old friends Richard Epstein and Charles Cooper have written responses to my letter. I thought it would be helpful for me to address their responses here, 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. In distinguishing Professor Epstein and Mr. Cooper acknowledge, as they must, that their position is contra-dicted by In re Swanson, 540 F.3d 1368 (Fed. Cir. 2008), that in their analysis, whatever its abstract merits, is a departure from actual judicial precedent governing these questions.

Most fundamentally, the Epstein and Coo-per critiques refuse to accept the importance of the fact that judicial review of invalidity in the context of an infringement is conducted by the PTO under a different standard than administrative reexamination. When the PTO (and subsequently the Federal Circuit) reviews inva-lidity 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 necessarily involve a party, the motion to proceed is not necessary, and the use of 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 government procedures, on which sections 6 and 18 of the America Invents Act purport to change the substantive law regarding when a patent is valid by clear and convincing evidence. Against this backdrop, we may be confident that the amendments to the reexamination procedures provided by sections 6 and 18 will be judged to pass constitutional muster.

Sincerely,

MICHAEL W. MCCONNELL.

Mr. KYL. I yield the floor and sug-gest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Di-gest proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. BE-GGECCH) Without objection, it is so or-dered.

Mr. REID. Mr. President, I ask unanimous consent that on Thursday, Sept-ember 8, when the Senate resumes consideration of the America Invents Act, the following amendments be the first motion— ordered in order: Coburn No. 599; Sessions No. 600, Cant-well 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 Sen-ate proceed to votes in relation to the following amendments: Sessions No. 600; Cantwell No. 595; Coburn No. 599; that no other amend-ments or points of order be in order to any of the amendments or the bill prior to the votes; finally, that following dis-cussion, 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 begin-ning about 4 p.m. Senators should also expect an additional vote fol-lowing 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 dis-approval of the President’s exercise of authority to increase the debt limit.

If we proceed to the debt limit; that is S. 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 busi-ness, at least as far as votes. Friday we will have some other things to be filing, different motions and things, but the general body would not have to worry about that.

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 ‘clear and convincing evidence’ stan-dard in litiga-tion.” But under the clear-and-convincing evidence standard used for reviewing the PTO’s work in court, an improperly issued patent will not be corrected in the face of the “clear and convincing evidence” that the patent should not have issued. Thus, there are many mis-takes that can be corrected only by the PTO—the burden lies on the party to have timely filed the reexamination. Mr. Cooper 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 instance. The distinction is one without constitutional significance: there is no constitutional basis for confining reexamination to only one of possible cor-rectable defects in the original issuance of a patent.

Professor Epstein asserts that I am incor-rect in a major way, at the very least, in 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 hap-pened in Translogic Technology, Inc. v. Hitachi, Ltd., 250 F. App’x 988 (Fed. Cir. 2007), and In re Translogic Technology, Inc., 504 F.3d 1349 (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 of the infringer. Yet that is the law today. Sec-tions 6 and 18 do nothing more than expand the type of invalidity challenges that may be considered by the PTO. Mr. Cooper’s analy-sis is not really a critique of sections 6 and 18; it is a critique of patent law as it has ex-isted 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 pre-ponderance of the evidence standard, does not mean that the first court is incorrect, or the second’s reasoning is correct.

At bottom, 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 avail-ability of one of the preexisting procedural vehicles (reexamination) for assessing validity. Matters of a technical nature, such as this, are especially appropriate to adminis-trative as opposed to judicial redetermina-tion. Courts have consistently rejected the notion that a court has a right to have a patent validity reviewed only in an Arti-cle III court. And courts have rejected the argument that the PTO cannot reconsider its own decision to issue a patent merely be-cause a court has found in a particular pro-ceeding that an accused infringer failed to carry its burden of proving the patent in-valid by clear and convincing evidence.
### 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, 2012 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 for 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 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 addition, section 106(c) 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 marking 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:


(in millions of dollars)

<table>
<thead>
<tr>
<th>Committee</th>
<th>Direct spending legislation</th>
<th>Entitlements funded in annual appropriations acts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Budget authority</td>
<td>Outlays</td>
</tr>
<tr>
<td>Appropriations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General Purpose Discretionary</td>
<td>1,313,143</td>
<td>1,391,056</td>
</tr>
<tr>
<td>Memo:</td>
<td>1,305,043</td>
<td>6,023</td>
</tr>
<tr>
<td>on-budget</td>
<td>1,305,043</td>
<td>6,023</td>
</tr>
<tr>
<td>off-budget</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Mandatory</td>
<td>1,305,043</td>
<td>6,023</td>
</tr>
<tr>
<td>Total</td>
<td>1,313,143</td>
<td>1,391,056</td>
</tr>
<tr>
<td>Agriculture, Nutrition, and Forestry</td>
<td>10,776,555</td>
<td>116,980</td>
</tr>
<tr>
<td>Armed Services</td>
<td>134,783</td>
<td>107</td>
</tr>
<tr>
<td>Banking, Housing, and Urban Affairs</td>
<td>1,337</td>
<td>0</td>
</tr>
<tr>
<td>Commerce, Science, and Transportation</td>
<td>14,441</td>
<td>1,401</td>
</tr>
<tr>
<td>Energy and Natural Resources</td>
<td>1,287,860</td>
<td>446</td>
</tr>
<tr>
<td>Environment and Public Works</td>
<td>44,472</td>
<td>0</td>
</tr>
<tr>
<td>Finance</td>
<td>1,481,842</td>
<td>545,640</td>
</tr>
<tr>
<td>Foreign Relations</td>
<td>35,904</td>
<td>159</td>
</tr>
<tr>
<td>Homeland Security and Governmental Affairs</td>
<td>95,763</td>
<td>10,032</td>
</tr>
<tr>
<td>Judiciary</td>
<td>11,808</td>
<td>685</td>
</tr>
<tr>
<td>Health, Education, Labor, and Pensions</td>
<td>5,773</td>
<td>729</td>
</tr>
<tr>
<td>Rule and Administration</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Intelligence</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Veterans’ Affairs</td>
<td>2,773</td>
<td>790,099</td>
</tr>
<tr>
<td>Small Business</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Unassigned to Committee</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>3,076,930</td>
<td>3,167,997</td>
</tr>
</tbody>
</table>

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.


(in millions of dollars)

<table>
<thead>
<tr>
<th>Committee</th>
<th>Direct spending legislation</th>
<th>Entitlements funded in annual appropriations acts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Budget authority</td>
<td>Outlays</td>
</tr>
<tr>
<td>Appropriations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General Purpose Discretionary</td>
<td>1,043,000</td>
<td>1,202,000</td>
</tr>
<tr>
<td>Memo:</td>
<td>1,036,165</td>
<td>6,155</td>
</tr>
<tr>
<td>on-budget</td>
<td>1,036,165</td>
<td>6,155</td>
</tr>
<tr>
<td>off-budget</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Mandatory</td>
<td>1,043,000</td>
<td>1,202,000</td>
</tr>
<tr>
<td>Total</td>
<td>1,043,000</td>
<td>1,202,000</td>
</tr>
<tr>
<td>Agriculture, Nutrition, and Forestry</td>
<td>13,326</td>
<td>116,916</td>
</tr>
<tr>
<td>Armed Services</td>
<td>143,163</td>
<td>107</td>
</tr>
<tr>
<td>Banking, Housing, and Urban Affairs</td>
<td>30,904</td>
<td>0</td>
</tr>
<tr>
<td>Commerce, Science, and Transportation</td>
<td>14,840</td>
<td>1,440</td>
</tr>
<tr>
<td>Energy and Natural Resources</td>
<td>4,913</td>
<td>456</td>
</tr>
<tr>
<td>Environment and Public Works</td>
<td>44,501</td>
<td>0</td>
</tr>
<tr>
<td>Finance</td>
<td>1,351,338</td>
<td>536,273</td>
</tr>
<tr>
<td>Foreign Relations</td>
<td>35,904</td>
<td>159</td>
</tr>
<tr>
<td>Homeland Security and Governmental Affairs</td>
<td>95,763</td>
<td>10,032</td>
</tr>
<tr>
<td>Judiciary</td>
<td>11,808</td>
<td>685</td>
</tr>
<tr>
<td>Health, Education, Labor, and Pensions</td>
<td>5,773</td>
<td>729</td>
</tr>
<tr>
<td>Rule and Administration</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Intelligence</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Veterans’ Affairs</td>
<td>2,773</td>
<td>790,099</td>
</tr>
<tr>
<td>Small Business</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Unassigned to Committee</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>2,854,985</td>
<td>2,987,419</td>
</tr>
</tbody>
</table>