

Leahy: Now Is The Time To Act On Patent Reform

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The Senate continues debate today on the America Invents Act, legislation authored by Senator Patrick Leahy (D-Vt.) to make the first significant reforms to the nation's patent system in nearly 60 years. The Senate Monday night voted overwhelmingly to move to conclude debate on the legislation.

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The America Invents Act
March 8, 2011**

American ingenuity and innovation have been a cornerstone of the American economy from the time Thomas Jefferson examined the first patent to today.

The Founders recognized the importance of promoting innovation. A number were themselves inventors. The Constitution explicitly grants Congress the power to “promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries.” The discoveries made by American inventors and research institutions, commercialized by American companies, and protected and promoted by American patent laws have made our system the envy of the world.

The America Invents Act will keep America in its longstanding position at the pinnacle of innovation. This bill will establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs, while making sure no party's access to court is denied.

The America Invents Act is the product of eight hearings over the last three Congresses, hundreds of meetings, and dozens of briefings. I, again, thank Secretary Locke and PTO Director Kappos for their involvement, wise counsel and support. I was heartened to see the Senate vote to invoke cloture to bring the debate on the bill to a close, by an overwhelming majority last night.

Last Congress, I introduced the Patent Reform Act of 2009, the precursor to the America Invents Act before us today, with Senators Hatch and others. Our bill was the subject of consideration and amendments over several thoughtful sessions of markups in the Senate Judiciary Committee in March and April 2009 and was favorably reported to the Senate almost two years ago.

At that time, Senator Kyl asked that I convene a meeting with the Director of the Patent and Trademark Office to discuss whether there were further changes that the Office needed in the legislation to improve the Office's efficiency. We held those discussions, along with countless other meetings and briefings with interested parties, in an effort to improve the legislation – again, on a bipartisan basis. In short, we have spent a lot of time making sure this is done right and in a bipartisan manner. Bolstering the American economic recovery and strengthening our efforts in global competition should not be matters of partisanship or political advantage.

The process that has brought us to where we are today – the discussions, debates, and deliberation – has not only resulted in legislation that will be a much needed boon to our economy, but represents a model for our legislative process. It shows what we can achieve when we put aside partisan rhetoric and, instead, negotiate and collaborate together in good faith.

I know I speak for Senator Kohl, Senator Whitehouse, Senator Klobuchar, Senator Gillibrand, Senator Coons and the other Democratic cosponsors of the bill when I thank the four senior Republican members of the Judiciary Committee, Senator Hatch, Senator Grassley, Senator Kyl and Senator Sessions for working with us. Innovation and economic development are not uniquely Democrat or Republican objectives, so we worked together to find the proper balance for America – for our economy, for our inventors, for our consumers. It is both a process and a result that should make us all proud.

The last time Congress significantly updated the patent system was more than half a century ago. In the intervening decades, our economy has changed dramatically. A patent system developed for a 1952 economy—before the Internet, before cell phones, before computers, before photocopiers, even before the IBM Selectric typewriter – needs to be reconsidered in light of 21st century realities, while staying true to the consistent constitutional imperative of encouraging innovation and invention. Our patent laws that were the envy of the world in the 20th century desperately need to be updated if we are to compete effectively and win the future. China and the European Union are improving their patent laws. We cannot remain complacent. If we are going to win the global competition by out-innovating the rest of the world, we need a patent system that works in the 21st century.

The array of voices heard in this debate – representing virtually all sectors of our economy and all interests in the patent system – have certainly not been uniform. The legislative process is one of compromise and accommodation where possible and so it has been during the six years we have been at work on this bill. Three major areas of concern emerged from this discussion and the America Invents Act addresses each of them.

First, there is significant concern about delays in the patent application process. The Patent and Trademark Office (PTO) currently has a backlog of more than 700,000 unexamined patent applications. There are several reasons for this, not the least of which is that the PTO is overwhelmed with patent applications and does not have the resources necessary to work through this backlog.

The Director of the PTO often says that the next great invention that will drive our economic growth is likely sitting in that backlog. Some estimate that each issued patent represents three to 10 jobs. We can ill-afford to keep so many job-creating patents backlogged at the PTO. The America Invents Act authorizes the PTO to set its fees and ensures that the PTO will have access to those fees. We want the PTO to work through its backlog and be current. In his white board presentation on the need for patent reform this week, Austan Goolsbee, the chair of the President's Council of Economic Advisers, illustrated this point by noting that when Alexander Graham Bell applied for a patent that led to the telephone, it was granted in a month. The patent in 1974 that led to the cell phone took less than three years. The average time this year for a patent to be processed is almost three years and several thousand take far longer.

I want to commend Austan Goolsbee, the chair of the President's Council of Economic Advisers, for his white board presentation this week on the importance of patent reform to help America win the global competition and create jobs. The creation of more than 220,000 jobs in the private sector last month, the creation of 1.5 million jobs over the last 12 months, and the unemployment rate finally being reduced to 8.9 percent are all signs that the efforts we have made over the last two years to stave off the worst recession since the Great Depression are paying off and the economic recovery is taking hold. The almost full percent point drop in the unemployment rate over the last three months is the largest decline in unemployment since 1983. Despite interruptions of economic activity in many parts of the country caused by winter weather over the last months and days, despite the extraordinary rise in oil prices, the Dow Jones industrial average has climbed back to over 12,000 from a low point of 6,500. Passage of the

America Invents Act should help bolster our economic recovery and keep us on the right path toward business development and job creation.

According to an article in *The New York Times* just a couple of weeks ago, patent applications last year amounted to 2,000 a day. There are currently 1.2 million patent applications in the pipeline. Among them could be the next medical miracle, the next energy breakthrough, the next leap in computing ability, or the next killer app. We should be doing all we can to help PTO Director Kappos and the dedicated women and men of the PTO to modernize and reform. It is crazy that it takes two years for an inventor to get an initial ruling on his or her patent application, and another year or more to receive a patent. As *The New York Times* reporter Edward Wyatt notes: “The delays and inefficiencies are more than a nuisance for inventors [P]atent delays cost jobs, slow the economy and threaten the ability of American companies to compete with foreign businesses.”

Second, there is a concern about the quality of patents that have issued. Just as high quality patents are the key to innovation, low quality patents are a drag on the economy because they provide monopoly rents over products or processes that were not inventive.

Patent examiners are facing a difficult task given the explosion in the number of applications and the increasing complexity of those applications. When Congress last overhauled the patent system in 1952, the PTO received approximately 60,000 patent applications; in 2009, it received more than 480,000.

The America Invents Act will improve the quality of patents issued by the PTO in several ways. At the outset, our legislation makes the common sense change that third parties who see a patent application and know that it is not novel and nonobvious, can assist the PTO examiners by providing relevant information and explaining its relevance.

The bill will also create a new post-grant review process for patents that recently issued to improve the quality of patents in the system, as recommended by the National Academy of Sciences, and it will streamline the current “inter partes” system so that it will be a more efficient alternative to litigation.

The third concern is that as business competition has gone global, and patent applicants are increasingly filing applications in the United States and other countries for protection of their inventions, our system puts American inventors and businesses at a disadvantage. The filing

system in the United States differs from that in other patent-issuing jurisdictions, which have “first-inventor-to-file” systems. The difference causes confusion and inefficiencies for American companies and innovators. The inefficiencies exist both in the application process and in determining what counts as “prior art” in litigation. I would like to place in the Record at this time an editorial from today’s *New York Times*, which calls the transition to first-inventor-to-file “simpler and cheaper” and says it “should benefit the little guy.”

The America Invents Act transitions to a first-inventor-to-file process, as recommended by the administration, while retaining the important grace period that will protect universities and small inventors, in particular. We debated this change at some length in connection with the Feinstein amendment. That amendment was rejected by the Senate by a vote of 87 to 13. The Senate has come down firmly and decisively in favor of modernizing and harmonizing the American patent system with the rest of the world.

When we began the patent reform debate six years ago, there was also a significant concern that the costs and uncertainty associated with patent litigation had been escalating, which was resulting in a drag on innovation. Damage awards had been inconsistent and not always related to the value of the invention. This disconnect and uncertainty was a problem that also led to unreasonable posturing during licensing negotiations.

Fortunately, the courts have made great strides in addressing this issue, and there is general consensus that legislation need not and, in fact, should not affect the law of damages as a result. The Senate has before it bipartisan legislation that can lead to long-needed improvements in our patent laws and system. This is a measure that can help facilitate invention, innovation and job creation, and do so in the private sector. This can help everyone from startups and small businesses to our largest, cutting edge companies.

The America Invents Act promotes innovation, and will improve our economy, by addressing the impediments to innovation. As the President challenges Americans to win the future, Congress cannot afford to sit idly by while innovation – the engine of our economy – is impeded by outdated laws. Our legislation leverages the ingenuity of our businesses, our universities, and our independent inventors, and creates a system in which that ingenuity can improve our economy. It will create jobs, improve products and reduce costs for American companies and American consumers.

I began working on patent reform years ago, along with Chairman Smith in the House, because of my belief that we needed a more efficient and streamlined system. For many years, patent law interested only a niche audience, and developments were reported only in trade publications. Now they are discussed everywhere from the front page of *The Wall Street Journal* to *The New York Times*, and all three branches of Government have taken an active role.

The America Invents Act is about economic development. It is about jobs; it is about innovation; it is about consumers. All benefit under a patent system that reduces unnecessary costs, removes inefficiencies, and holds true to the vision of our Founders that Congress should establish a national policy that promotes the progress of science and the useful arts.

When Thomas Jefferson examined that first patent in 1790 – a patent that went to a Vermonter – no one could have predicted how the American economy would develop and what changes would be needed for the law to keep pace, but the purpose then remains the purpose today: promoting progress.

If we are to maintain our position at the forefront of the world's economy, if we are to continue to lead the globe in innovation and production, if we are to continue to enjoy the fruits of the most creative citizens, then we must have a patent system that produces high quality patents, that limits counterproductive litigation over those patents, and that makes the entire system more streamlined and efficient.

Now is the time to bolster our role as the world leader in innovation. Now is the time to create jobs at home. Now is the time for Congress to act on patent reform. I urge all Senators to support the American Invents Act.