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Unconstitutional Attack on U.S. Inventors

One of the most valuable individual rights guaranteed in the U.S. Constitution is the right of "inventors" to own "the exclusive right" to their "discoveries" for "limited times." This right was set forth in Article I, Section 8, years before the rights to freedom of speech and religion were added.

This right is recognized and reinforced by our system of granting patents to inventors so they will be able to protect their exclusive ownership for a limited number of years, after which the invention goes into the public domain. U.S. patents are awarded to the "first-to-invent" a new and useful product.

Our system perfectly implements the stated purpose of the constitutional provision "to promote the progress of science" because, as James Madison explained in Federalist No. 43, it serves both individual property rights and the public good. The U.S. patent system was unique when the Founding Fathers wrote it into the Constitution, and it still is unique in the world today.

Many important inventors have attested that they would not have had the incentive to labor for years creating their invention were it not that our system offers hope that its profits will enable them to achieve the American dream. Our patent system, which protects the property right of the inventor, is why the United States has produced most of the world's great inventions and dominates the world in innovation. For more than two centuries, America's unique patent system has been the mainspring of our economic success.

All other countries award patents under an alien system called "first-to-file," *i.e.*, the first person to file a paper with a government office. Foreign and powerful financial interests are now haranguing us to make us believe that the new dogma of globalism demands that we "harmonize" our patent system with the rest of the world by changing from first-to-invent to first-to-file.

A bill to do this (S.23) passed the Senate after a quickie hearing that did not include a single inventor, small business person, venture capital person, or constitutional authority. It's pushed without any publicity in the House as H.R.1249.

But harmonization makes no sense. Why would we abandon the proven best system that has worked successfully for more than two centuries and replace it with a proven inferior foreign system?

More important, this patent bill must be rejected because it is flat-out unconstitutional. The Constitution plainly states that the property right belongs to "inventors," not to someone handing a piece of paper to a government bureaucrat.

Seven scholarly law review articles have examined this issue and concluded that first-to-file is unconstitutional. No scholarly review proves otherwise.

We must not let Congress flout the Constitution by redefining the word "inventors" to be mean paper filers. The Constitution's framers, and the early Congresses (which included many men who had been members of the Constitutional Convention), were very clear that first-to-invent is the meaning of the word "inventors." First-to-invent is in conformity with tradition and history, as well as consistent with originalist, strict constructionist, and textualist views of the Constitution. More than two hundred years of statutes and jurisprudence confirm the first-to-invent standard.

The Patent Acts of 1790 and 1793 legislated that the patent must be awarded to "the first and true inventor." The Patent Act of 1836 used the language "original and true inventor" and "original and first inventor."

In *Evans v. Jordan* (1815), Chief Justice John Marshall wrote that the Constitution guarantees the "exclusive" right "to the inventor from the moment of invention." In *Shaw v. Cooper* (1833), the Supreme Court upheld the law that vested "the exclusive right in the inventor only."

The liberals are now circulating the un-American notion that we should utilize treaties and foreign laws to re-interpret our Constitution and statutes. They want Congress to use its Treaty power or its Commerce Clause power to override the inventors clause, overturn over 200 years of settled and successful law, and put us on the road to a borderless patent system.

First-to-file would elevate paperwork over true inventions, dilute the quality of patents because applications would be rushed to be filed, and cede sovereignty on the direction of our own patent system. First-to-file favors foreign inventors and big corporations that have the lawyers and resources to file

quickly and redundantly, while taking rights away from independent inventors and small businesses.

No matter what arguments of policy or efficiency are made by first-to-file supporters, we cannot let them violate or ignore the Constitution. The unconstitutional patent bill should be defeated.

Dangerous to U.S. Security

More and more dangerous effects of the proposed changes to U.S. patent law (S.23, H.R.1249) keep emerging, especially since the hearings failed to hear from any real inventors. The proposed bill is not only unconstitutional; it is also an attack on our national security and an offense against the rule of law.

By awarding patents to the first-to-file an application with the bureaucracy instead of to the first-to-invent, the proposed bill will deprive inventors of their constitutional property right set forth in Article I, Section 8. U.S. law has always awarded patents to real inventors, not to paper-pushers.

An important letter sent to House Speaker John Boehner (R-OH) from the 15-member Inventors Network of the Capital Area describes how the proposed patent bill "threatens all individual and corporate Research & Development in America, the backbone of our national defense and economic security." Here is how this racket will work.

The proposed patent bill will enable Chinese hackers to steal U.S. innovation secrets while they are still in development, then file an application with the U.S. Patent Office under first-to-file, and thereby **own** new U.S. technology instead of merely stealing it. Owning the patents will enable China legally to take away ownership rights and profits from Americans who actually invent new technologies.

Defense technologies would be a prime target of this threat. The first-to-file provision of the Patent Act would become the most effective weapon in China's arsenal and would threaten our national security in a new and ominously dangerous way.

National security expert Adam Segal testified before the House Foreign Affairs Subcommittee on Oversight and Investigations about the national security danger from Chinese cyber espionage, massive theft and piracy. Particularly dangerous is the Chinese policy called "indigenous innovation," which requires U.S. corporations to transfer their technology to China in order to get market access. He said, "it is clear that the United States must do more to defend itself."

Since 1870, U.S. law has provided a grace period of one year between the date the invention is disclosed and the date the patent application is submitted. This grace period gives an inventor a year to perfect his invention, to sort out better from inferior features, to raise capital, to gather partners, and to field test the invention before the deadline for filing a patent application.

This grace period is very important to independent inventors, small companies and startups. It permits them to delay the costs of filing until the invention is evaluated, a decision is made as to whether it is worth spending money on, and investment capital is raised.

Inventors don't usually give birth to their inventions like the Greek goddess Athena, who was born fully grown and fully armed out of Zeus's head. The Wright Brothers required many experiments as they tried wings with different angles before they were ready to patent heavier-than-air flight.

The proposed patent bill redefines the grace period in a way that is hostile to small inventors and small businesses because it states that any disclosure of the invention by anyone other than the inventor at any time, even within that first year, will bar the real inventor from getting a patent. Weakening the grace period thus poses an enormous risk to the most innovative sectors of our economy.

The value of first-to-invent plus grace period over first-to-file was explained by inventor Steve Perlman, CEO of Reardon, OnLive and MOVA. He experimented with 100 inventions over five years of development, but only six were actually used and filed for patents. He explained that a large part of invention is trying out a vast number of ideas, such as Edison with thousands of light bulb filaments and the Wright Brothers with many wing shapes. First-to-file means flooding the Patent Office with dead-end applications.

Another outrage of the proposed patent bill is the provision that subjects to expensive new litigation and retroactively attacks the patent on the check-clearing system which enables banks to return photo-images to their depositors rather than actual canceled checks. This new system saves the banks millions of dollars because they no longer have to truck the checks physically to other banks to be cleared.

This system was created by inventor Claudio Ballard, who received a patent for it, survived post-grant review, and won expensive court battles when he defended his patent against infringement by the banks. After all that, the new patent bill (ignoring the principle of *res judicata* — the thing is already decided) sets up an unprecedented procedure to overturn the patent office and court decisions, giving the banks another chance to invalidate Ballard's patent.

A 15-page letter to Congress from Prof. Richard A. Epstein, the nation's foremost authority on property rights, explains how the "stacked procedures of Section 18" in the bill are designed to let banks use Ballard's invention without paying him for it. Epstein, who wrote the book on *Takings* under the Fifth Amendment, says Ballard deserves just compensation for the use of his patent. The Congressional Budget Office estimated that this "taking" of property rights could end up costing the taxpayers $1 billion.

Altogether, the proposed bill, mischievously called "patent reform," is a bad, dangerous and dishonest bill that must be

defeated if we care about respecting the Constitution, inventors' property rights, and American leadership in innovation.

Now that the globalists have transferred millions of good American jobs to Asians willing to work for as little as 30 cents an hour with no benefits, all we have left to maintain and restore our economic wellbeing is our innovation superiority. The United States is the world leader in inventing useful and important products and processes, while other countries build their economies by copying our innovations.

Other countries are free to imitate our system, but foreign countries haven't copied our system. Instead, they want to copy our inventions, and they devise all sorts of tactics to cheat us. Their code word is harmonization; we are hammered with the agitprop that globalization requires us to harmonize our laws with the rest of the world (which does not include obligating foreigners to respect U.S. patents). It's a betrayal of American inventors to harmonize down to inferior foreign practices; let them harmonize up to our proven best system.

Who Will Answer the Jobs Question?

Public opinion polls show that all Republican presidential hopefuls are clustered in single- or teen-digit approval ratings. It should be no mystery why no one is breaking out of the pack: no one has answered the number-one political question. Why did millions of good blue-collar jobs go overseas and what is your plan to restore them? Who and what is responsible for this national disaster?

We now have a combination of 10% unemployment, much more chronic underemployment, and heavy government and personal debt incurred to prepare for jobs that do not exist. Middle-class voters have been badly hurt both by job losses and by stagnation in living standards.

The jobs picture for men in their prime working years (between ages 25 and 54) is even bleaker. Only 80% of those men have a job (compared to 95% in the 1960s). Even that statistic doesn't measure the millions of men of that age who are now working for one half, or one quarter, or even one-tenth of the wage of the job they lost. Obama brags that the economy added 268,000 new jobs in April, but 62,000 of those were hired by McDonald's because Obama gave that chain a waiver from ObamaCare.

Underemployment has been described by examples in the *Wall Street Journal*. They include the man who lost his $150,000-a-year job as a money manager and is now making cappuccinos at a Starbucks for $8.85 an hour, and the former manufacturing manager with two master's degrees who is now working as a janitor at $9 an hour after he was turned down for 1,000 other jobs.

Are we losing, or have we already lost, the American middle class, which is the socio-economic factor that long distinguished us from other nations? Whatever happened to the jobs that enabled middle-class men to support a fulltime homemaker taking care of their own children?

Blue-collar men without a college degree are the largest demographic bloc in the workforce, and this huge voting constituency is up for grabs in 2012. Their top priority is not the debt, the deficit or government spending; it is restoring jobs that can support their families. But Republican presidential and congressional candidates are failing to offer solutions.

The opportunity is ripe for Republicans because Obama continues to pander to his constituencies who receive government handouts for their living expenses. He even caved into the feminists' tantrum demanding that he give the majority of Stimulus jobs to women, not to the men who had lost their jobs.

Then he appointed General Electric's CEO Jeffrey Immelt as his jobs czar (director of the Council on Jobs and Competitiveness). As CEO, Immelt reduced the value of GE's stock by half, closed GE's U.S. plants, laid off the workers (including all those who made Edison light bulbs), and by 2010 had 54% of GE's employees overseas.

During the 1990s, U.S. multinationals added workers everywhere on a two-to-one ratio of American to overseas jobs. However, U.S. Commerce Department data show that in the 2000s, U.S. multinationals cut their American work forces by 2.9 million while creating 2.4 million jobs overseas, many of them for high-skilled employees. In the recession year of 2009, multinationals cut 5.3% of their workers in the U.S. and only 1.5% of their jobs overseas. Reporters say company executives are very squeamish about revealing or talking about how many of their workers are overseas.

The U.S. Chamber of Commerce pointed out that 26% of its member companies say they are hurt by China's "indigenous innovation" policies. The Chamber's survey also found that more than half of U.S. companies say that non-Chinese enterprises simply cannot get the same licenses that are given to Chinese companies.

Even the American Chamber of Commerce in China, a big supporter of free trade, is now complaining that China is violating free-trade pledges by limiting market access and shielding its industries from competition. Beijing demands that foreign companies hand over U.S. technology, openly brags that China favors Chinese companies when buying computers and other technology, and orders banks and other companies to limit their use of foreign security products.

The Chinese government is subsidizing local Chinese busi-

nesses in technology, energy and aviation in order to establish Chinese dominance in those fields. The U.S. Chamber says that China's "blueprint for technology theft" forces non-Chinese firms to hand over their ideas, patents, trade secrets, and know-how as the price of doing business in China.

Why is anybody surprised? China has a Communist government and is aggressively protectionist.

The American Chamber of Commerce in China's annual White Paper reported that China clearly supports domestic companies at the expense of non-Chinese companies by regulations on "indigenous innovation, licensing, standards, government procurement, competition law, and IP enforcement." These regulations, combined with forbidding non-Chinese access to major industries, show that China, despite World Trade Organization membership, has no intention of allowing free and open markets.

Last December, U.S. trade negotiators (who are always outwitted by the Chinese) thought they were getting a promise that Chinese local governments would not be required to buy locally developed technology products and that China would stop using stolen software. There is no evidence that China complied; U.S. negotiators failed again.

The question that should be asked of all candidates is: Do you support the globalism and free-trade policies that require Americans to compete for jobs with Chinese who work for only 40 cents, or even $2, an hour?

Republicans Have No Answers, Yet

Republicans have offered two job plans: "The House Republican Plan for America's Job Creators" and the "Senate Republican Jobs Plan." A lot of this is just the same-old, same-old: reduce the corporate tax rate from 35% to 25%, scrap a few regulations, and drill-baby-drill. That's OK, but it's not a plan to create several million well-paying blue-collar jobs or to elect Republicans in 2012. Both plans are somewhere between pathetic and counterproductive, and both include proposals that are actually job killers.

The House plan urges passage of the unconstitutional patent bill described on pages 1 and 2 of this Report. That bill will destroy American innovation, which is the key to our economic prosperity.

The House plan also sets forth a scheme to hire more foreigners from all over the world by educating them at our universities and then changing our visa systems so they can continue residence here and take the good jobs instead of American graduates. The House plan impudently assumes that "the best and brightest" come from foreign countries.

The Senate plan urges Congress to hurry up and ratify KORUS (Korean-U.S. Free Trade Agreement). KORUS is another bad NAFTA-style trade agreement that will import more cheap Asian products and export more U.S. jobs. It comes out of the economic school that believes in the pseudo-religion of globalism, *i.e.*, forcing Americans to compete with Asians who work for less than one-third (often as little as one-twentieth) of the wages that Americans expect for similar work.

Here's what trade with South Korea means. In 2007, South Korea sold 615,000 vehicles in the U.S., while the U.S. sold only 7,000 American vehicles in South Korea. In 2010, South Korea's auto sales in the U.S. totaled $7.41 billion, while U.S. auto sales in Korea totaled only $536 million. Any plan that depends on trade agreements like KORUS is a recipe for losing more U.S. jobs and increasing our trade deficit. The Economic Policy Institute predicts that KORUS will cost us 159,000 American jobs and increase our annual trade deficit by $16.7 billion.

The alleged elimination of tariffs is a racket that allows the Koreans to subsidize their exports to the U.S. while taxing all imports from the United States. South Korea simply replaces its tariff with a value-added tax (VAT), which gives Korean manufacturers a 10% rebate on all goods they export, and imposes a 10% tax on all U.S. goods allowed to be sold in Korea.

South Korea already enjoys plenty of free trade with the United States anyway, so there's no need for KORUS. Have you been into any electronics store and seen the hundreds of products made by Samsung, Daewoo and LG? Americans last month bought almost as many cars from Korea as from Chrysler.

Twice last year (in July and November) the U.S. sent a battle group of U.S. Navy warships, including our nuclear-powered supercarrier, the U.S.S. George Washington, to protect South Korea against North Korea. We ought to charge South Korea for that extraordinary expense.

The so-called jobs plan includes other unwelcome ideas such as giving so-called Fast Track authority to Barack Obama so he will have the power to negotiate future trade agreements. That will simply add momentum to Obama's goal of "spreading our wealth" around the rest of the world.

We ask again: Who will answer the Jobs question?

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