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Patent Reformers: Don't Give Away Appropriations Power of Congress

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The patent reform legislation pending in Congress has a serious flaw: It delegates to the U.S. Patent and Trademark Office (USPTO) of the Department of Commerce the power to both hike the fees imposed on Americans who deal with the USPTO and then spend the revenue derived from those fees, without any further congressional exercise of the appropriations power. When the House of Representatives considers the patent reform bill, it should, in addition to addressing any other flaws in the bill, adopt an amendment to provide that the USPTO may spend the revenues it receives from fees "to the extent and in the amounts provided in advance in appropriations Acts" and not make the fees available to the USPTO to expend without fiscal year limitation.[1]

Elected Senators and Representatives, Not Appointed Officials, Should Have the Power to Decide on Agency Spending. In the system of checks and balances established in our Constitution by the separation of powers among the branches of government, the single strongest check in the hands of the Congress stems from a single short but powerful prohibition: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…."[2] Neither the juniormost clerk in a federal agency nor the President of the United States may spend a dollar from the Treasury for any purpose unless Congress has by law appropriated that dollar for that purpose. To reinforce the constitutional prohibition, Congress has by law required that everyone in government who receives funds for the government deposits them in the Treasury,[3] that funds appropriated from the Treasury must be applied only to the objects for which they are appropriated,[4] and that no one in government may spend for a purpose more than the amount Congress appropriated by law for that purpose.[5]

The constitutional provision and the fiscal laws give the Senators and Representatives elected by the people the ability to control how the government spends tax dollars and other funds received by the government. Sometimes, however, Congress decides by law to loosen its control of how a government agency obtains and spends money. For example, Congress may pass laws that allow an agency to hold money it receives outside the Treasury and spend it or that make permanent appropriations to allow the agency to deposit funds in the Treasury and then spend them without returning periodically to Congress for appropriations. When Congress turns an agency loose to raise money and then spend the money raised, the elected representatives of the American people lose a substantial measure of their ability to influence the activities of the agency.

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Under current law, the USPTO deposits all the fees it collects in an account in the U.S. Treasury and then "[t]o the extent and in the amounts provided in advance in appropriations Acts"—a crucial phrase—the USPTO may spend the fee money from that account to pay for USPTO operations.[6] The USPTO cannot spend the funds it takes in from fees unless Congress has by law appropriated those funds to the USPTO to spend.

Under Patent Reform Legislation, USPTO Spending Would No Longer Be Limited by Appropriations. The U.S. Patent and Trademark Office seeks to free itself from congressional appropriations control. As President Obama's proposed budget for fiscal year 2012 states, "[t]he Budget *proposes to give the U.S. Patent and Trademark Office (USPTO) full access to its fee collections* and strengthens USPTO's efforts to improve the speed and quality of patent examinations through a temporary fee surcharge that will better align application fees with processing costs."[7] The Director of the USPTO has emphasized that the agency wants to be able to spend the money it takes in without going to Congress regularly for an appropriation to spend the money:

> Fee collections at USPTO are running very strong as a result of the improving economic outlook, strong patent renewal rates, and our increased production. We're getting more done and collecting more fees in doing so. As you know, to enable these efforts, the President's FY 2011 *budget proposes that USPTO be permitted to spend all of the fees it collects, and proposes a 15 percent surcharge on patent fees. Unfortunately, despite our strong fee collection, as a result of the current continuing resolution, the USPTO has been forced to implement spending reductions.*[8]

Patent reform legislation would eliminate the requirement that the USPTO seek appropriations regularly from Congress.[9] As the Director of the

1. The patent reform bills are S. 23, 112th Congress, reported by the Senate Judiciary Committee without a written report and passed by the Senate on March 8, 2011, and H.R. 1249, 112th Congress, reported by the Committee on the Judiciary of the House of Representatives on June 1, 2011, House Report 112-98, Part 1, and which was discharged from the Committee on the Budget of the House of Representatives on June 1, 2011.
2. U.S. Constitution, Article I, Sec. 9.
3. United States Code, Title 31, Section 3302 (commonly called the Miscellaneous Receipts Act).
4. United States Code, Title 31, Section 1301(a).
5. United States Code, Title 31, Section 1341(a) (commonly called the Anti-Deficiency Act).
6. United States Code, Title 35, Section 42.
7. Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2012*, p. 54, at *http://www.whitehouse.gov/omb/budget* (emphasis added).
8. Subcommittee on Intellectual Property, Competition, and the Internet, Committee on the Judiciary, House of Representatives, "How an Improved U.S. Patent and Trademark Office Can Create Jobs," 112th Congress, 1st Session, Serial No. 112-6, Testimony of David J. Kappos, Under Secretary of Commerce for Intellectual Property and Director of the USPTO, January 25, 2011, p. 5 (emphasis added). See also, Letter from Secretary of Commerce to Chairman of the House Judiciary Committee, May 31, 2011, p. 2, incorporated in Committee on the Judiciary, House of Representatives, Report No. 98, Part 1, 112th Congress, 1st session, to accompany H.R. 1249 (June 1, 2011), p. 86 ("We are pleased that H.R. 1249 includes fee-setting authority for the USPTO, an essential provision that will allow the agency to establish and adjust its fees—subject to oversight—to reflect changes in costs, demand, and workload and thereby ensure full cost recovery at no expense to America's taxpayers…. Fee-setting authority, coupled with the right to use all fees paid by patent applicants without fiscal year limitation, will permit the USPTO to engage in multi-year budget planning and achieve a stable funding model that supports future investments and improvements in operations.").
9. Section 20 of S. 23 and section 22 of H.R. 1249 free the USPTO from the need for a regular appropriation law from Congress to spend the revenue the USPTO takes in as fees. In particular, section 20(b)(1)(B) and 20(c)(1) of S. 23 and section 22(b)(1)(B) and 22(c)(1) of H.R. 1249 strike from section 42 of title 35, United States Code, the crucial phrase "[t]o the extent and in the amounts provided in advance in appropriations Acts" and instead make all fees collected by the USPTO available for the USPTO to expend without any fiscal year limitation and without any need for further appropriation by Congress.

Congressional Budget Office's estimate of May 26, 2011, stated, "[b]ecause PTO's spending would no longer be controlled by the availability of appropriated funds," the patent reform legislation "would make all of the agency's fee collections permanently available for spending."[10]

Efficiency in Government Is Important, but Democracy and Liberty Are More Important. Our elected Senators and Representatives in Congress should not abdicate their responsibility to control USPTO funding. They should not turn over to the Director of the USPTO the autonomous power both to raise and spend money, without any further legislation from Congress.[11] As James Madison said, "[t]his power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[12] Congress should not give up the most effective means it has to influence the activities of a government agency—a requirement for annual appropriations—to the USPTO, an organization of more than 9,000 employees that collects in fees from the American people about $2 billion a year.[13]

While efficiency in government is to be sought, it should not be sought at the expense of democracy. Had the Framers of the Constitution believed that government efficiency was foremost in the constellation of constitutional values, they could have vested the powers to tax and to spend in a President without the bother and rough-and-tumble of involving an elected legislature. But the Framers instead believed that liberty and democracy ranked higher than efficiency, and so the Constitution vests the power to tax and spend in elected Senators and Representatives. If, in this modern era, Congress concludes that the USPTO cannot perform its functions effectively in light of the relative disorder of the current congressional appropriations process, then the House and the Senate should improve their appropriations process, and not simply give up and delegate the congressional spending power to the U.S. Patent and Trademark Office.

Recommendation: Congress Should Keep and Exercise its Constitutional Power of Appropriation. As patent reform legislation continues to work its way through the legislative process, Congress should keep and exercise its appropriations power to decide on USPTO spending. Patent reform legislation should allow the U.S. Patent and Trademark Office to spend funds only "[t]o the extent and in the amounts provided in advance in appropriations Acts." In an era of federal government overspending and overborrowing, the last thing Congress should do is turn over to a federal agency the decision on how much the agency can spend.

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10. Enclosure to Letter of Director of Congressional Budget Office to Chairman of House Judiciary Committee with cost estimate for H.R. 1249 (May 26, 2011), incorporated in Committee on the Judiciary, House of Representatives, Report No. 98, Part 1, 112th Congress, 1st session, to accompany H.R. 1249 (June 1, 2011), p. 67.
11. Both section 9 of S. 23 and section 10 of H.R. 1249 authorize the USPTO to change the amounts of the fees it charges for services. Thus, the reform legislation would give the USPTO, without any further enactments by Congress, the ability to raise revenue by hiking fees and to spend the resulting revenue for USPTO operations.
12. James Madison, *Federalist* No. 58, in *The Federalist Papers*, at *http://avalon.law.yale.edu/18th_century/fed58.asp.*
13. U.S. Patent and Trademark Office, *Fiscal Year 2012 President's Budget*, February 14, 2011, p. 10, at *http://www.uspto.gov/about/stratplan/budget/fy12pbr.pdf*.