The Pending Patent Bill: Toward a More Expensive, Lawyerly and Complex Patent System

John F. Duffy
Armistead M. Dobie Professor of Law
University of Virginia School of Law

The Pending Patent Bill

- Thesis:

- In a time when many political leaders claim to be seeking governmental processes that are less costly and less complex …

- The pending patent bill shows the vitality of counter-forces that increase the cost and complexity of government.

The Patent Bill: Size Matters.

- The Bill is 150 pages long (in bill print style).
- By comparison:
  - Patent Act of 1952 – 24 pages (approx. 66 pages in modern bill print style).
  - Patent Act of 1870 – 20 pages.
  - Patent Act of 1836 – 9 pages.
  - Civil Rights Act of 1963 – 28 pages.
  - National Labor Relations Act of 1935 – 9 pages.
  - Clean Air Act of 1963 – 10 pages.

The Patent Bill: Cost Matters.

- Immediate 15% increase in all fees (including maintenance fees) under § 11(i).
  - For maintenance fees, the increase is a tax increase on a particular species of property.
  - Takes effect 10 days after enactment.
- Future fee increases are at the agency's discretion under § 10.
- Congress can keep fee increases for revenue.

The Patent Bill: Complexity Matters.

- Old procedures:
  - (i) examination; (ii) interferences; (iii) reissue and correction; (iv) ex parte re-examination; (v) inter partes re-examination;.
- New procedures:
  - (vi) inter partes review; (vii) post-grant review; (viii) derivation proceedings; (ix) supplemental examination; and (x) the "transitional post-grant review proceeding for review of the validity of covered business-method patents" (more on this one later).

The Patent Bill: Complexity Matters.

- **Do the new bureaucratic proceedings overlap?**
- **Yes; new section 315(d) provides:**
- ‘‘(d) MULTIPLE PROCEEDINGS.—Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of an inter partes review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed, including providing for stay, transfer, consolidation, or termination of any such matter or proceeding.”

The Patent Bill: Complexity Matters.

- Changes to First-to-File, but …
- Litigation about First-to-Invent will survive for two decades.
- The change makes determinations of priority easier for the sake of administrative convenience.
- The change increases the importance of lawyers in the system (as compared to inventors).

The Patent Bill: Complexity Matters.

- Doublespeak: Best mode requirement isn't (is) (isn't) eliminated:
- DOES NOT eliminate the requirement that patent applicants disclose their best modes, but …
- DOES eliminate the ability of infringement defendants to raise best mode problems as a defense, but …
- DOES NOT eliminate the ability of defendants to raise best mode problems as inequitable conduct.

The Patent Bill: Special Interests.

- Section 18: "Transitional post-grant review proceeding"
  - Special interest deal for banks: See "Banks Turn to Schumer on Patents" (http://www.nytimes.com/2011/06/15/business/15schumer.html).
- Section 24: The real "McCoy" for Detriot – a patent office named after a famous inventor – but it's a real McCoy of pork.

Patent Bill: Wasting Paper.

- **SEC. 30. SENSE OF CONGRESS.**
- It is the sense of Congress that the patent system should promote industries to continue to develop new technologies that spur growth and create jobs across the country which includes protecting the rights of small businesses and inventors from predatory behavior that could result in the cutting off of innovation.