

Nineteen Hundred and Twenty-two

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PRESENTS

ONE-DAY PATENT CLE SEMINAR

Thursday, November 16, 2017

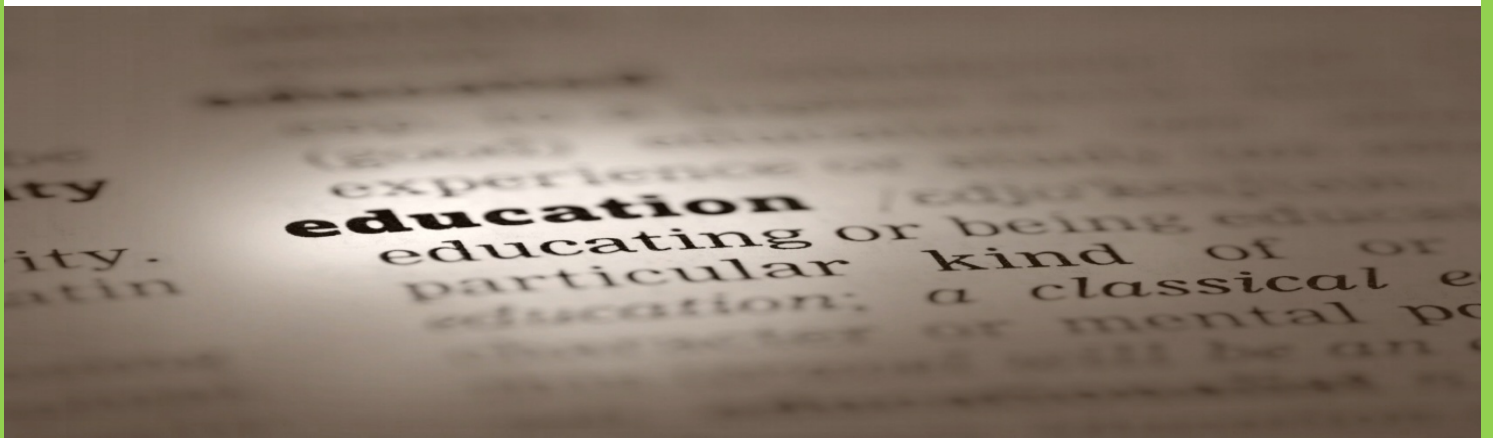
The Princeton Club, 15 West 43rd Street, New York, NY

COURSE MATERIALS

Hosted by **NYIPLA Programs Committee**

Co-Chairs **Michael Johnson and Jenny Lee**

Board Liaison **Colman Ragan**



AGENDA

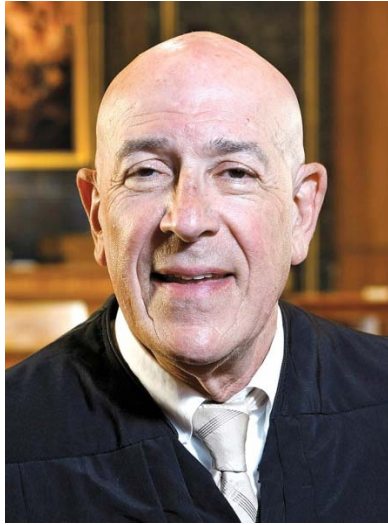
8:15AM – 9:00AM	<i>Registration and Continental Breakfast will be served</i>
9:00AM – 9:05AM	<i>Welcome Remarks by Annemarie Hassett, NYIPLA President, Engelberg Center on Innovation & Policy, NYU School of Law</i>
9:05AM – 10:25AM	Panel 1: TC Heartland: Returning to Life Under Section 1400(b) Venue <i>Moderator: Thomas Vetter, Of Counsel, Lucas & Mercanti LLP</i> Kenneth Adamo , Partner, Kirkland & Ellis LLP Jeffrey Lewis , Partner, Norton Rose Fulbright LLP Joshua Raskin , Shareholder, Greenberg Traurig LLP
10:25AM – 10:40AM	<i>Refreshment Break</i>
10:40AM – 12:00PM	Panel 2: Section 101 – Three Years of Uncertainty <i>Moderator: Jonathan Berschadsky, Partner, Merchant & Gould PC</i> Serena Farquharson-Torres , Senior Patent Counsel, Bristol-Myers Squibb Cindy Huang , Counsel – IP Law & Strategy, American Express Laura Sheridan , Patent Counsel, Google Inc.
12:00PM – 12:45PM	<i>Lunch</i>
12:45PM – 1:15PM	Keynote Speaker Honorable Stanley R. Chesler , Senior District Judge, United States District Court for District of New Jersey
1:15PM – 2:05PM	Interactive Ethics CLE: Shifting Between IP Lawyer and Lobbyist <i>Moderator: Colman Ragan, Associate General Counsel – U.S. IP Litigation, Teva Pharmaceutical Industries LTD</i> Dorothy Auth , Partner, Cadwalader Wickersham & Taft LLP Jeffrey Butler , Senior Counsel, Global IP/Lonza, Inc.
2:05PM – 3:00PM	Panel 3: Recent Updates to Ethical Duties of a Practitioner Before the USPTO <i>Moderator: Mark Bloomberg, Partner, Zuber Lawler & Del Duca LLP</i> William R. Covey , Deputy General Counsel and Director of the Office of Enrollment and Discipline, USPTO
3:00PM – 3:15PM	<i>Refreshment Break</i>
3:15PM – 4:05PM	Panel 4: Patent Rights: Public or Private; Whose Thoughts and Ideas Are They Anyway? <i>Moderator: Anthony Lo Cicero, Partner, Amster Rothstein & Ebenstein LLP</i> Robert Rando , Founder, The Rando Law Firm PC Melvin Garner , Partner, Leason Ellis LLP
4:05PM – 5:00PM	Panel 5: Licensing Strategies in View of Lexmark and Promega <i>Moderator: Diana Santos, Associate, Willkie Farr & Gallagher LLP</i> Eugene Chang , Partner, Willkie Farr & Gallagher LLP Robert Isackson , Partner, Venable LLP
5:00PM – 5:05PM	<i>Closing Remarks</i>

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Honorable Stanley R. Chesler

Senior District Judge

United States District Court for the District of New Jersey

Judge Chesler has served in the federal judiciary since 1987. He was appointed as a United States District Judge for the District of New Jersey in 2002. Prior to being appointed as a District Judge, he served as a United States Magistrate Judge for more than fifteen years.

Before his appointment to the bench, Judge Chesler served as a federal prosecutor and a state prosecutor. Between 1980 and 1987, he worked as an attorney with the U.S. Department of Justice Organized Crime Strike Force and as an Assistant U.S. Attorney. He was the Deputy Chief of the Newark Organized Crime Strike Force between 1984 and 1986. As a federal prosecutor, Judge Chesler specialized in the investigation and prosecution of complex labor racketeering cases. Judge Chesler was an Assistant District Attorney with the Bronx County (New York) District Attorney's Office from 1974 to 1980. As a state prosecutor, he acted at various times as Chief of the office's Investigations Bureau and the Chief of its Narcotics/Rackets Bureau.

Judge Chesler received his J.D. from St. John's University School of Law *magna cum laude* in 1974.



Thomas J. Vetter
Of Counsel
Lucas & Mercanti LLP

Thomas Vetter has more than 30 years of patent litigation and counseling experience working closely with domestic and foreign clients ranging from startups to Fortune 100 companies.

Tom's experience includes appellate practice before the Federal Circuit, Hatch-Waxman litigation, and extensive experience in contested Patent Office proceedings, including interferences. His counseling skills include advising clients on issues of patentability, freedom to operate, patent validity, and licensing. He also counsels clients on trademark and copyright issues.

Tom has experience with a broad range of technologies. Some examples are recombinant DNA, sustained release and other drugs, polymer products and processes, chemical products and chemical reaction processes, physical and chemical separation processes, reverse osmosis, transdermal drug delivery systems, specialty alloys, GPS based systems, and mechanical devices and systems.



Kenneth R. Adamo

Partner
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Ken Adamo is a partner in the Intellectual Property group in Kirkland's Chicago and New York offices. Ken has extensive trial experience as lead counsel in jury and nonjury cases before state and federal courts and before the United States International Trade Commission, as well as ex parte and PTAB experience in the U.S. Patent and Trademark Office. He has had substantial experience as lead counsel in arbitrations and other alternative dispute resolution proceedings, and actively practices before the U.S. Court of Appeals for the Federal Circuit, having appeared in 40 appeals to date.

Major representations in intellectual property litigation as lead counsel include U.S. federal court and ITC cases for Citibank, CMO-Innolux, CQG, IBM, JP Morgan Chase, MediaTek, Procter & Gamble, Otter Products, Samsung, TEL, Texas Instruments, TSMC, and Xilinx.



Joshua L. Raskin

Shareholder
GreenbergTraurig LLP

Joshua L. Raskin is a registered patent attorney who focuses his practice on intellectual property litigation with an emphasis on patent litigation. He has litigated numerous cases in federal courts across the country and has argued numerous times before the Courts of Appeals for the Federal and Second Circuits. He has represented clients at the trial and appellate stages in a broad range of industries, including electronics, liquid crystal display (LCD) panels, computer technology, mobile handsets, Internet Protocol Television and finance.

His experience is broad and varied having represented both defendants and plaintiffs. Prior to joining Greenberg Traurig, Josh was the head of the patent litigation practice at a prominent New York plaintiffs' firm where he oversaw numerous complex patent cases. Before that, Josh was a partner and co-head of the patent litigation practice at a national firm where he represented both plaintiffs and defendants in cases involving all areas of intellectual property, including patents, trademarks and copyrights.

Josh has been listed in Managing IP Magazine's World IP Handbook and Survey, "IP Stars," 2014-2017 and IAM magazine, "IAM Patent 1000," Litigation, 2014-2017.

Josh received his J.D. from Brooklyn Law School and his B.S.E. in Industrial Engineering from the University of Michigan.



Jeffrey I.D. Lewis

Partner

Norton Rose Fulbright LLP

Jeffrey I. D. Lewis is a partner at Norton Rose Fulbright, resident in the firm's New York office. A chemical engineer and registered patent attorney, Jeff concentrates on patent and trademark litigation, counseling and licensing, as well as other intellectual property and general litigation. He regularly represents plaintiffs as well as defendants both at trial and on appeal in a range of technology-related sectors with a focus on pharmaceuticals, chemicals, mechanical/medical-device, biotechnology and life sciences, and has represented pharmaceutical innovators in numerous Abbreviated New Drug Application (ANDA) patent litigations. Jeff has appeared in several dozen cases before the U.S. federal district courts, and has argued numerous appeals before the U.S. Court of Appeals for the Federal Circuit.

He is a past President of the American Intellectual Property Law Association (AIPLA) and the United States national group of the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI), as well as being a fellow of both AIPLA and the American Bar Foundation. He also is active in a number of other intellectual property bar associations. In addition to his work on behalf of clients, Jeff has appeared as Counsel of Record for amicus curiae in numerous cases before the Supreme Court of the United States, U.S. Court of Appeals for the Federal Circuit, and other courts.

Jeff frequently writes and speaks on intellectual property and litigation issues, and has been an adjunct professor at the Benjamin N. Cardozo School of Law at Yeshiva University. He received his J.D. from that school, cum laude, and his B.S.Ch.E. from the University of Connecticut. He also served as an Alexander Judicial Fellow to the Honorable Marion T. Bennett of the U.S. Court of Appeals for the Federal Circuit. Mr. Lewis consistently is recognized in Chambers USA: America's Leading Lawyers for Business in the area of Intellectual Property, listed as a "Litigation Star" for New York and a "National Star" for Intellectual Property in Euromoney Institutional Investor PLC's Benchmark: America's Leading Litigation Firms and Attorneys, cited in Who's Who Legal: Patents, and named in Super Lawyers in the area of Intellectual Property Litigation.

Pendent Venue After TC Heartland

When Venue is Improper Under 35 (U.S.C. § 1400(b), Can Pendent Venue Save the Day?

I. Venue Rules for Multiple Causes of Action

- a. **“The general rule** is that venue must be established as to each separate cause of action.”
 - i. *Beattie v. U.S.*, 756 F.2d 91, 100 (D.C. Cir. 1984), citing *Wright, Miller & Cooper* (abrogated on other grounds by, *Smith v. U.S.*, 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)); *see also Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, 138 F.Supp.2d 449, 462 (2000) (internal quotations omitted)
- b. **Pendent Venue: Exception to the General Rule**
 - i. **What is Pendent Venue?**
 1. “Under the doctrine of pendent venue, a federal court may in its discretion hear pendent claims which arise out of the **same nucleus of operative fact** as a properly venued federal claim, even if venue of the pendent claim otherwise would not lie.”
 - a. *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, 138 F.Supp.2d 449, 462 (S.D.N.Y. 2000) (internal quotations omitted)
 2. Analogous to supplemental jurisdiction:
 - a. Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the **district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy** under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
 - i. 28 U.S.C. § 1367
 3. “In making its decision [to apply pendent venue], a court must consider factors such as judicial economy, convenience to the parties and the court system, avoidance of piecemeal litigation and fairness to the litigants.”
 - a. *Hsin Ten*, 138 F.Supp.2d at 462 (internal quotations omitted)
 - ii. **When is Pendent Venue Applied for ...**
 1. Related State Claims?
 - a. When state law claim arises from the same nucleus of facts as a “properly venued” federal claim
 - i. *See, e.g., S.E.C. v. Johnson*, 650 F.3d 710, 713 (D.C. Cir. 2011).
 2. Related Federal Claims?
 - a. Courts use two different approaches for federal claims arising from the same nucleus of facts:
 - i. The more “specific” venue provision controls; or
 - ii. The venue provision applicable to the “primary” claim asserted controls
 - iii. *See, e.g., Cook v. UBS Fin. Services, Inc.*, 05 CIV. 8842 (SHS), 2006 WL 760284, at *5 (S.D.N.Y. Mar. 21, 2006); *Johnson v. General*

Dynamics Information Technology, Inc., 675 F. Supp. 2d 236, 242
(D.N.H. 2009)

II. Can Pendent Venue be Applied to Patent Claims that Would Otherwise be Improper Under Section 1400(b)?

a. Case examples

i. *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*

1. Facts

- a. **Plaintiff:** Hsin Ten Enterprise USA, Inc. (“Hsin Ten”)
 - i. NY corporation based in Farmingdale, New York
 - ii. Exclusive right to make, use and sell aerobic exercise equipment under two patents issued to a third party
 - iii. Owned the “The Chi Machine” trademark; sold a device associated with said mark
- b. **Defendant:** Clark Enterprises (“Clark”)
 - i. Kansas company whose sole place of business is Salina, Kansas
 - ii. Sold a competing aerobic exercise equipment (the “Exercise Machine”), which Clark allegedly calls “The Chi Exerciser 2000”
 - iii. Provided an interactive web page that allowed users to purchase the accused exercise equipment online, download an order form download an application to become an affiliate and ask a Clark representative questions online

2. Allegations against Clark

- a. Two claims of patent infringement (for each patent exclusively licensed by Hsin Ten)
- b. Trademark infringement based on “Chi” trademark
- c. Unfair competition under NY common law
- d. Deceptive acts and practices in violation of N.Y. Gen. Bus. §§ 349, 350
- e. *Hsin Ten*, 138 F.Supp.2d at 452-53

3. Venue Analysis

a. Trademark Claim: Venue was Proper

- i. Venue for trademark infringement claims is governed by the general federal venue statute:
 1. “A civil action wherein jurisdiction is not founded solely on diversity of citizenship may ... be brought only in (1) a judicial district where any defendant resides ... [or] (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.”
 - a. 28 U.S.C § 1391(b)
 2. 138 F.Supp.2d 449, 461 (S.D.N.Y. 2000)
 - ii. Due to the high level of interactivity permitted by Clark’s web site between Clark and New York residents, **venue was proper under § 1391(b)(2) for Hsin Ten’s trademark claim**
 1. *Id.*

b. State Law Claims: Not expressly stated by the Court, but venue appears to have been improper

- i. *Id.* at 461-62

c. Patent Claims: Venue was Improper

- i. Venue for patent infringement claims is governed by 28 U.S.C § 1400(b):
 1. “Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”
- ii. Since Clark neither resides in nor has a regular and established place of business in the Southern District of New York, **venue was improper under § 1400(b) for Hsin Ten’s patent claims**
 1. 138 F.Supp.2d at 461-62

4. Pendent Venue Analysis

a. State Law Claims: Pendent Venue is Appropriate

- i. “Here, the state law claims ... arise out of defendants’ use of the ‘Chi’ mark. These claims, therefore, arise out of the same nucleus of operative fact as the trademark infringement claim. Accordingly, the exercise of pendent venue of plaintiff’s state law claims is appropriate.”
 1. *Id.* at 462

b. Patent Claims: Pendent Venue is Appropriate

- i. The Court utilized the “second” approach for determining whether to apply pendent venue over related federal claims (i.e. using the venue provision applicable to the “primary” claim)
 1. *Id.*
- ii. The Court found that the trademark infringement claim was either the “primary” claim or of equal importance to the patent infringement claims because:
 1. “Hsin Ten [was] principally aggrieved by Clark’s use of plaintiff’s marks to promote the Exercise Machines.”
 2. Three of the five claims (i.e. the trademark, unfair competition and deceptive practices claims) concern the use of the “Chi” trademark
 3. *Id.* at 462-63
- iii. The Court further found that there was “**substantial overlap in the proof of the patent and trademark infringement claims.**”
 1. “To satisfy the eight-factor likelihood of confusion test of *Polaroid Corp. v. Polaroid Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.1961), plaintiff [may] introduce ... evidence that Clark willfully copied plaintiff’s designs and patents over which plaintiff has an exclusive license.”
 2. “Accordingly, the interests of judicial economy, fairness to the litigants, and avoidance of piecemeal litigation **compel the exercise of pendent venue over plaintiff’s patent infringement claim.**”
 3. *Id.* at 463
- iv. The Court acknowledged that “**most of the courts that have addressed this issue have refused to exercise pendent venue over a**

federal patent claim governed by section 1400(b),” but provided three reasons for departing from these “persuasive, but non-binding authorities.”

1. “*First*, no appellate court has held that pendent venue is *never* appropriate over a patent infringement claim.”
 - a. *Id.* at 463
2. “*Second*, a number of the cases rejecting pendent venue over patent claims are easily distinguished.”
 - a. In these cases, **the patent infringement claims were the primary claim** and the less important federal or state law claims were used to attempt to “ferryboat in” the patent claims.
 - b. *Id.*
3. “*Third*, at the time of these rulings the patent venue statute was highly restrictive with respect to the appropriate venue.”
 - a. Court reasoned that, prior to the 1988 amendment to the general venue statute (section 1391(c)), a patent infringement claim could only be brought in the district of the defendant’s state of incorporation
 - b. However, in 1990, the Federal Circuit in *VE Holding Corp.*, held that section 1400(b) was broadened in view of the amendment to section 1391(c)
 - c. All of the earlier district court decisions that rejected pendent venue over patent claims were either pre-1988 or did not consider the Federal Circuit’s holding in *VE Holding Corp.*
 - d. *Id.* at 464

ii. ***Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.***

1. **Facts**

- a. **Plaintiff:** Jenny Yoo Collections, Inc. (“Jenny Yoo”)
 - i. Designs and manufactures wedding apparel, including convertible dresses which include two front and two rear panels attached at the waist
 - ii. Owns two design patents which cover the “ornamental features” of the convertible dress, including the above panels “which blend naturally and seamlessly into the dress.”
- b. **Defendants Challenging Venue (“Defendants”):**
 - i. Watters Designs, Inc. and Wtoo Partners, L.P. (“Watters”)
 1. Texas companies whose principal places of business are in Texas
 - ii. Essence of Australia (“Essence”)
 1. Kansas corporation whose principal place of business is in Kansas
- c. 1:16-cv-2205-88 (VSB), slip op. at 1-5 (S.D.N.Y. Oct. 20, 2017)

2. **Allegations Against Defendants**

- a. Trade dress infringement under Section 43(a) of the Lanham Act and 15 U.S.C. § 1125(a)
- b. Common law trade dress infringement and unfair competition
- c. Infringement of both design patents
- d. Unfair business practices under NY GBL § 349

- e. Unjust Enrichment
- f. *Id.* at 11

3. Venue Analysis

a. Court Found that in View of *TC Heartland*, Venue is Improper in SDNY for Patent Claims

- i. Neither Defendant resides in SDNY
- ii. Neither Defendant has a place of business in SDNY
- iii. *Id.* at 15-16

b. *Hsin Ten* Court's Decision to Apply Pendent Venue Was Not Compelling in View of *TC Heartland*

- i. "However, in deciding to apply the pendent venue doctrine to a patent infringement claim in *Hsin*, the district court specifically noted that because of *VE Holding*, § 1400(b) was 'a much broader statute today than it was when most courts held that pendent venue cannot be exercised over a patent infringement claim.' *Id.* at 464. In light of the holding in *TC Heartland*, I do not find the *Hsin* court's determination compelling. Therefore, I refuse to apply the pendent venue doctrine to find that venue is proper over Plaintiff's patent infringement claim."
- ii. *Id.* at 16

iii. *Omega Patents, LLC v. Calamp Corp.*

1. Facts

- a. Omega Patents, LLC ("Plaintiff")
- b. Calamp Corporation ("Defendant")
- c. Plaintiff alleges that Defendant infringes the following patents:
 - i. U.S. Patent No. 6,346,876 ("the '876 Patent")
 - ii. U.S. Patent No. 6,737,989 ("the '989 Patent")
 - iii. U.S. Patent No. 6,756,885 ("the '885 Patent")
 - iv. U.S. Patent No. 7,671,727 ("the '727 Patent")
 - v. U.S. Patent No. 8,032,278 ("the '278 Patent")
- d. Plaintiff and Defendant entered into prior settlement agreement whereby Defendant consented to venue in the Middle District of Florida with respect to infringement claims for the '989 Patent
- e. 6:13-cv-1950-230-PGB-DCI, slip op. at 2 (M.D. Fl. Sep. 22, 2017)

2. Procedural History

- a. Defendant admitted that venue was proper with respect to the '989 Patent in its answer to the complaint
- b. Defendant filed counterclaims of non-infringement, invalidity and unenforceability as to all of the patents-in-suit, and conceded that "venue" was proper with respect to these counterclaims
- c. At trial, Plaintiff *dropped* the '989 Patent
- d. The jury returned a verdict in favor of Plaintiff on all four of the remaining patents-in-suit
- e. Subsequently, the Supreme Court issued its decision in *TC Heartland*, and Defendant moved to vacate the jury verdict and dismiss for lack of

venue, claiming that venue was no longer proper once Plaintiff dropped the '989 Patent

f. *Id.* at 2-3

3. Venue Analysis

a. Venue was consented to for '989 Patent

b. Pendent Venue was Proper for the Remaining Patents-in-Suit

i. The Complaint set forth a single count of infringement of the five patents-in-suit based on the sale of a single product

ii. Defendant acknowledged the common nucleus of facts in its claim construction brief:

1. "The patents-in-suit use several similar terms to describe a vehicle's data communications bus. All are intended to have the same meaning, and thus should be given the same construction."

2. "[The patents-in-suit are] based on continuations-in-part ('CIPs') of earlier applications."

iii. **"It is beyond dispute that all of the patents-in-suit involve a common nucleus of fact such that pendent venue was proper over the patents-in-suit."**

iv. *Id.* at 6-7

c. Venue Was Proper at Time of Filing

i. "Venue must be determined based on the facts at the time of filing."

ii. Defendant consented to venue for the '989 Patent and never moved to sever the remaining patents-in-suit

iii. Due to the common nucleus of facts with respect to all of the patents-in-suit, pendent venue was proper at the time of filing

iv. **"Since venue is determined at the time of filing, it is irrelevant that Omega elected on the first day of trial not to pursue the '989 infringement claims."**

v. *Id.* at 3-6

d. Court Stated that *TC Heartland* is Inapplicable

i. "However, the holding in *TC Heartland* has no effect in the instant case, because venue was proper as to the '989 patent and as to the remaining patents-in-suit under the doctrine of pendent venue. **The Supreme Court in *TC Heartland* established how venue is to be determined in these actions in the absence of a stipulation to venue accompanied by pendent venue.**"

1. *Id.* at 7

e. Timing of Motion May Have Impacted the Decision

i. "Moreover, allowing a party to defeat venue after the litigation is commenced by, for example, moving their corporation out of the state invites gamesmanship."

1. *Id.* at 9

b. In view of the "restoration" of *Fourco* and the specific venue provisions of § 1400(b), pendent venue is unlikely to be applied to claims of patent infringement

- c. **However, as demonstrated in *Omega*, district courts may still attempt to use pendent venue to adjudicate multiple patent claims where venue is waived and/or venue is proper as to one patent, and the remaining patents share a common nucleus of facts**

***TC Heartland* And Pending Cases: Are Improper Venue Arguments Based on *TC Heartland* Waived?**

Kenneth R. Adamo and Brian A. Verbus¹
American Intellectual Property Law Association
November 2, 2017

I. Introduction and Executive Summary

The U.S. Supreme Court held in *Fourco* in 1957 that “28 U.S.C. § 1400(b) . . . is the sole and exclusive provision controlling venue in patent infringement actions,” and that a company “resides” for purposes of § 1400(b) only in its state of incorporation.² In 1988, Congress amended 28 U.S.C. § 1391(c)—the general venue statute—to state that venue is proper for corporate defendants anywhere that defendant is subject to personal jurisdiction. Congress did not amend § 1400(b) in 1988. Following this amendment to § 1391(c), the Federal Circuit looked at the issue again and held in *VE Holding* that § 1391(c)’s definition of “reside” applies to the use of “reside” in § 1400(b).³ District courts applied the Federal Circuit’s interpretation of § 1400(b) for more than 25 years following *VE Holding*.

Then, in 2017, the Supreme Court in *TC Heartland* rejected the Federal Circuit’s *VE Holding* decision and, consistent with *Fourco*, held that “a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.”⁴ After the Supreme Court’s decision in *TC Heartland*, numerous defendants in district courts across the nation moved to dismiss or transfer based on allegedly improper venue. Many of these defendants either did not

¹ This article reflects only the present considerations and views of the authors, which should not be attributed to Kirkland & Ellis LLP, or to any of its or their former or present clients.

² *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957).

³ *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575, 1584 (Fed. Cir. 1990).

⁴ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017).

contest venue at the outset of the case, or conceded that venue was proper. Because an improper venue defense is waived under Federal Rule of Civil Procedure 12 if not raised in the first responsive pleading,⁵ district courts had to determine whether *TC Heartland* constituted an “intervening change” in the law of venue that would permit defendants to overcome waiver. District courts have split on this issue, and the Federal Circuit has not resolved the split.

II. Background

The Supreme Court’s decision in *Fourco*, the Federal Circuit’s decision in *VE Holding*, and the Supreme Court’s decision in *TC Heartland* all address the scope of the patent venue statute, 28 U.S.C. § 1400(b). These cases are relevant to understanding district courts’ analyses of whether *TC Heartland* constitutes an intervening change in the law.

A. 28 U.S.C. § 1400(b)

Section 1400(b) provides: “Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”⁶ Section 1400(b) has not been amended since Congress enacted it in 1948.⁷

B. The Supreme Court’s Decision in Fourco

The Supreme Court in *Fourco* addressed the question of “whether 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U.S.C. § 1391(c),” the general venue provision.⁸ The Supreme

⁵ Fed. R. Civ. P. 12(h)(1), 12(b)(3).

⁶ 28 U.S.C. § 1400(b).

⁷ *Cf.* 28 U.S.C. § 1400(b) (1948).

⁸ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 222 (1957).

Court rejected the argument that § 1391(c) should be read to supplement § 1400(b).⁹ Finding that “§ 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute,” the Court held “that 28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c).”¹⁰ The Court then held that “resides” for purposes of § 1400(b) “mean[s] the state of incorporation only” for corporate defendants.¹¹

C. *Congress’s Amendment to § 1391(c) and the Federal Circuit’s Decision in VE Holding*

“In 1988 Congress adopted a new definition of ‘reside’ as it applies to venue for corporate defendants.”¹² The amendment to § 1391(c) provided that a corporate defendant “resides” for anywhere it is subject to personal jurisdiction.¹³ District courts began splitting on the issue of whether Congress intended this amendment to “reside” in § 1391(c) to apply to the use of “reside” in § 1400(b).¹⁴

The Federal Circuit addressed the issue in *VE Holding*. The *VE Holding* court acknowledged the Supreme Court’s holding in *Fourco* that § 1400(b) is the “exclusive” patent venue provision, but explained that, after the 1988 amendment, “Section 1391(c) as it was in *Fourco* is no longer.”¹⁵ The court thus treated the issue as one of “first impression,” *i.e.*, whether the 1988 amendment evinced intent by Congress for the definition of “reside” in § 1391(c) to apply

⁹ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957).

¹⁰ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957).

¹¹ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957).

¹² *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990).

¹³ 28 U.S.C. § 1391(c) (1988).

¹⁴ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990).

¹⁵ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990).

to § 1400(b).¹⁶ The court determined that Congress did intend for the broad definition of “reside” to apply to section 1400(b).¹⁷ The *VE Holding* court thus held that the “resides” inquiry in § 1400(b), “in light of the 1988 amendment to § 1391(c), is whether the defendant was subject to personal jurisdiction in the district of suit at the time the action was commenced.”¹⁸

The Supreme Court denied a petition for writ of *certiorari* in the *VE Holding* case.¹⁹

D. The Supreme Court’s Decision in TC Heartland

The Supreme Court did not consider the construction of § 1400(b) again until its May 2017 *TC Heartland* decision.²⁰ First, the Court reiterated that “[i]n *Fourco*, this Court definitively and unambiguously held that the word ‘reside[nce]’ in § 1400(b) has a particular meaning as applied to domestic corporations: It refers only to the State of incorporation.”²¹ Acknowledging that “Congress has not amended § 1400(b) since *Fourco*,” and that “neither party asks us to reconsider our holding in [*Fourco*],” the Court explained that the “only question we must answer is whether Congress changed the meaning of § 1400(b) when it amended § 1391.”²² The Court concluded that Congress did not change the meaning of § 1400(b) and did not ratify the Federal Circuit’s holding in *VE Holding*.²³

As it did in *Fourco*, the Supreme Court held in *TC Heartland* that “[a]s applied to domestic

¹⁶ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) (“The issue is, what, as a matter of first impression, should we conclude the Congress *now* intends by this new language in the venue act.”).

¹⁷ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1584 (Fed. Cir. 1990)

¹⁸ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1584 (Fed. Cir. 1990)

¹⁹ *Johnson Gas Appliance Co. v. VE Holding Corp.*, 111 S. Ct. 1315 (1991).

²⁰ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

²¹ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017).

²² *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017).

²³ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017).

corporations, ‘reside[nce]’ in § 1400(b) refers only to the State of incorporation.”²⁴

III. Waiver

When the Supreme Court issued its decision in *TC Heartland*, defendants in cases that had been pending for months, or even years, moved to dismiss or transfer suit based on improper venue under Federal Rule of Civil Procedure 12(b)(3). Several of these cases were on the eve of trial.²⁵ Many of these defendants either conceded that venue was proper in their Answer, or at minimum declined to challenge venue as improper at the outset of the case. District courts thus had to decide: (1) whether the defendant waived an improper venue defense; and (2) if so, whether *TC Heartland* was an “intervening change” in the law that permits the defendant to overcome that waiver. District courts have split on the “intervening change” issue.

A. *Defendants Who Failed To Raise Improper Venue Waived The Defense*

Federal Rule of Civil Procedure 12(b)(3) provides a defense for improper venue.²⁶ Federal Rule of Civil Procedure 12(h) provides that a party waives its improper venue defense by “failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”²⁷

By the plain language of the rules, a defendant that failed to challenge venue in its responsive pleading waived its Rule 12(b)(3) improper venue defense.

²⁴ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017).

²⁵ *E.g.*, *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, No. 2:15-cv-21, 2017 WL 2556679, at *5 (E.D. Va. June 7, 2017) (denying motion to dismiss and noting that “[t]rial will begin on June 12, 2017 as scheduled); *Chamberlain Grp., Inc. v. Techtronic Indus. Co., Ltd.*, No. 16 C 6097, 2017 WL 3205772, at *2 (N.D. Ill. June 28, 2017) (noting that “this litigation is in its final stages before trial”).

²⁶ Fed. R. Civ. P. 12(b)(3).

²⁷ Fed. R. Civ. P. 12(h)(1)(B).

B. *District Courts Are Split on Whether TC Heartland Constitutes an Intervening Change in the Law That Can Overcome Waiver*

Many Circuit Courts of Appeals recognize an exception to waiver when an intervening change in the law creates a defense that was not previously available.²⁸ When addressing *TC Heartland* and waiver, district courts universally analyzed *TC Heartland* to determine whether it constituted an intervening change in the law, even if the Circuit in which that court sits has not expressly recognized an intervening law exception.²⁹ Some district courts have determined that *TC Heartland* is not an intervening change in the law and thus that defendant waived its improper venue defense by failing to timely raise it. Other district courts determined that *TC Heartland* is an intervening change in the law and granted a defendant's otherwise-untimely motions to dismiss. The Federal Circuit has not yet resolved this split.

1. Cases Finding *TC Heartland* Is Not An Intervening Change in the Law

Several district courts have held that *TC Heartland* is not an intervening change in the law and consequently have refused to consider motions to dismiss for improper venue post-*TC*

²⁸ See, e.g., *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004) (recognizing waiver exception where “(i) at the time of the procedural default, a prior authoritative decision indicated that the defense was unavailable, and (ii) the defense became available thereafter by way of supervening authority”); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014) (finding no waiver of personal jurisdiction because Supreme Court’s *Daimler* decision was an intervening change in the law); *Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255, 263 (3d Cir. 2008) (noting an exception to waiver “is recognized when an intervening decision from a superior court changes the controlling law”); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999) (recognizing an exception to waiver “when there has been an intervening change in the law recognizing an issue that was not previously available.”).

²⁹ E.g., *Skyhawk Techs., LLC v. DECA Int’l Corp.*, No. 3:10-cv-708, 2017 WL 3132066, at *2 n.1 (S.D. Miss. July 21, 2017) (“Skyhawk contends the Fifth Circuit has not recognized an exception to waiver based on an intervening change in the law. The court need not consider this issue as it concludes there has been no intervening change in the law.”).

Heartland where the defendant did not timely raise a venue defense.³⁰ The *Cobalt Boats*³¹ case was the first such decision and is representative of the rationale underpinning this line of cases.

In *Cobalt Boats*, the Eastern District of Virginia considered Defendants’ argument that “VE Holding challenges were untenable” because “the passage of substantial time gave credibility to the Federal Circuit’s conclusion that Fourco was no longer good law.”³² The Defendant cited in support the Supreme Court’s denial of *certiorari* in the *VE Holding* case.³³ Although finding Defendant’s position “reasonabl[e]” and “rational,” the court rejected this argument, noting that “[a]s [the Supreme Court] has often stated, the ‘denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’”³⁴

The *Cobalt Boats* court determined that “[b]ased on the Supreme Court’s holding in TC Heartland, Fourco has continued to be binding law since it was decided in 1957, and thus, it has

³⁰ See, e.g., *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679 (E.D. Va. June 7, 2017); *Navico, Inc. v. Garmin Int’l, Inc.*, 2017 WL 2957882 (E.D. Tex. July 11, 2017); *iLife Techs., Inc. v. Nintendo of Am., Inc.*, 2017 WL 2778006 (N.D. Tex. June 27, 2017); *Chamberlain Grp., Inc. v. Techtronic Indus. Co.*, No. 1:16-cv-6097, Dkt. 407 (N.D. Ill. June 28, 2017); *Amax, Inc. v. ACCO Brands Corp.*, 2017 WL 2818986 (D. Mass. June 29, 2017); *Infogation Corp. v. HTC Corp.*, 2017 WL 2869717 (S.D. Cal. July 5, 2017); *Koninklijke Philips v. ASUSTeK Computer Inc.*, No. 1:15-cv-1125-GMS, Dkt. 215 (D. Del. July 19, 2017); *Reebok Int’l Ltd. v. TRB Acquisitions LLC*, 2017 WL 3016034 (D. Or. July 14, 2017); *Fox Factory, Inc. v. SRAM, LLC*, 3:16-cv-506, Dkt. 72 (N.D. Cal. July 18, 2017); *Skyhawk Techs., LLC v. DECA Int’l Corp.*, 2017 WL 3132066 (S.D. Miss. July 21, 2017); *Takeda Pharm. USA, Inc. v. Mylan Pharms. Inc.*, No. 1:16-cv-987, Dkt. 63 (D. Del. Aug. 3, 2017); *President & Fellows of Harvard College v. Micron Tech., Inc.*, No. 16-11249, 2017 WL 3749419 (D. Mass. Aug. 30, 2017).

³¹ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679 (E.D. Va. June 7, 2017).

³² *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

³³ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

³⁴ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017) (quoting *Teague v. Lane*, 489 U.S. 288, 296 (1989)).

been available to every defendant since 1957.”³⁵ As a result, the court found that reliance by defendants upon *VE Holding* could not overcome waiver. The court explained that “The twenty-seven (27) year viability of VE Holding is certainly surprising in light of the Supreme Court’s view on Fourco, but the circuit courts are only empowered to express the law of their circuit ‘[i]n the absence of a controlling decision by the Supreme Court...’”³⁶ The Eastern District of Virginia noted that “[t]he Supreme Court has never overruled Fourco” and that “the Federal Circuit cannot overrule binding Supreme Court precedent.”³⁷ Again, although the court acknowledged that Defendant’s position “that Fourco was no longer good law was reasonable,” the court concluded that it was nonetheless “wrong.”³⁸

Consequently, the *Cobalt Boats* court held that “TC Heartland does not qualify for the intervening law exception to waiver because it merely affirms the viability of Fourco.”³⁹

2. Cases Finding TC Heartland Is An Intervening Change in the Law

Several district courts have held that *TC Heartland* is an intervening change in the law and thus have considered defendants’ late-raised arguments that venue is improper under *TC Heartland*

³⁵ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

³⁶ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017) (quoting *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986)).

³⁷ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

³⁸ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

³⁹ *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, — F.3d —, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017).

on the merits.⁴⁰ The *Westech*⁴¹ case was the first such decision and is representative of the rationale underpinning this line of cases.

In *Westech* the Western District of Washington first considered the effect of the *TC Heartland* decision on patent venue law. The court explained that “*TC Heartland* affirmed the Supreme Court’s 1957 decision in [*Fourco*], and corrected the Federal Circuit’s 1990 decision in [*VE Holding*].”⁴²

Unlike the *Cobalt Boats* court and the decisions following *Cobalt Boats*, the Western District of Washington read *TC Heartland* as “abrogat[ing] approximately 27 years of patent law precedent.”⁴³ The court concluded that “*TC Heartland* changed the venue landscape,” referring to the case as a “sea change” in the law and suggesting that “[f]or the first time in 27 years, a defendant may argue credibly that venue is improper in a judicial district where it is subject to the court’s personal jurisdiction but where it is not incorporated and has no regular and established

⁴⁰ See, e.g., *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297 (W.D. Wash. June 21, 2017); *Hand Held Prods. Inc. v. Code Corp.*, 2:17-cv-167, Dkt. 63 (D.S.C. July 18, 2017); *CG Tech. Dev., LLC v. FanDuel, Inc.*, 2017 WL 3207233 (D. Nev. July 27, 2017); *Ironburg Inventions Ltd. v. Valve Corp.*, Civil Action File No. 1:15-CV-4219-TWT, 2017 WL 3307657 (N.D. Ga. Aug. 3, 2017); *Valspar Corp. v. PPG Indus., Inc.*, Case No. 16-cv-1429 (SRN/SER), 2017 WL 3382063 (D. Minn. Aug. 4, 2017); *Cutsforth, Inc. v. LEMM Liquidating Co., LLC*, Case No. 12-cv-1200 (SRN/LIB), 2017 WL 3381816 (D. Minn. Aug. 4, 2017); *Maxchief Invs., Ltd. v. Plastic Dev. Grp., LLC*, No. 3:16-cv-63, 2017 WL 3479504 (E.D. Tenn. Aug. 14, 2017); *Simpson Performance Prods., Inc. v. Mastercraft Safety, Inc.*, No. 5:16-cv-155, 2017 WL 3620001, at *5 (W.D.N.C. Aug. 23, 2017); *Smart Wearable Techs. Inc. v. Fitbit, Inc.*, No. 3:16-cv-77, 2017 WL 3725630 (W.D. Va. Aug. 29, 2017).

⁴¹ *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297 (W.D. Wash. June 21, 2017).

⁴² *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297, at *1 (W.D. Wash. June 21, 2017).

⁴³ *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297, at *2 (W.D. Wash. June 21, 2017).

place of business.”⁴⁴

The court held that “Defendants could not have reasonably anticipated this sea change, and so did not waive the defense of improper venue by omitting it from their initial pleading and motions.”⁴⁵

3. The Federal Circuit Has Not Yet Resolved The District Court Split

At least five defendants have petitioned for a writ of mandamus from the U.S. Court of Appeals for the Federal Circuit following a district court decision holding that the defendant waived a venue challenge.⁴⁶

The Federal Circuit has decided only four of these petitions for mandamus, and has denied each one.⁴⁷ In doing so, the Federal Circuit did not address whether *TC Heartland* constitutes an intervening change in the law. Instead, the court relied upon the exacting standard for obtaining a writ of mandamus, which requires the party seeking the writ to overcome the “heavy burden” of demonstrating that it “has no ‘adequate alternative’ means to obtain the desired relief, and that

⁴⁴ *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297, at *2 (W.D. Wash. June 21, 2017).

⁴⁵ *Westech Aerosol Corp. v. 3M Co.*, No. C17-5067, 2017 WL 2671297, at *2 (W.D. Wash. June 21, 2017).

⁴⁶ See *In re Sea Ray Boats, Inc.*, 695 F. App’x 543 (Fed. Cir. June 9, 2017); *In re Hughes Network Sys., LLC*, No. 2017-130, 2017 WL 3167522 (Fed. Cir. July 24, 2017); *In re Techtronic Indus. N. Am., Inc.*, No. 2017-125, 2017 WL 4685333 (Fed. Cir. July 25, 2017); *In re Nintendo of Am., Inc.*, No. 2017-127, 2017 WL 4581670 (Fed. Cir. July 26, 2017); *In re Yahoo Holdings, Inc.*, No. 2018-103 (Fed. Cir. Oct. 20, 2017).

⁴⁷ See *In re Sea Ray Boats, Inc.*, 695 F. App’x 543 (Fed. Cir. June 9, 2017); *In re Hughes Network Sys., LLC*, No. 2017-130, 2017 WL 3167522 (Fed. Cir. July 24, 2017); *In re Techtronic Indus. N. Am., Inc.*, No. 2017-125, 2017 WL 4685333 (Fed. Cir. July 25, 2017); *In re Nintendo of Am., Inc.*, No. 2017-127, 2017 WL 4581670 (Fed. Cir. July 26, 2017).

right to issuance of the writ is ‘clear and indisputable.’”⁴⁸ The court’s holding in *In re Nintendo of America Inc.* is representative: “We need not decide whether the Supreme Court’s decision in *TC Heartland* effected a change in the law, because even setting that question aside we conclude that the district court did not commit a clear abuse of discretion in denying [defendant’s] motion to dismiss or transfer.”⁴⁹

Although the court has not addressed the issue of whether *TC Heartland* constitutes an intervening change in the law, Judge Newman authored a dissent in *In re Sea Ray Boats, Inc.* to weigh in on the issue.⁵⁰ According to Judge Newman, “[t]here is little doubt that the Court’s decision in [*TC Heartland*] was a change in the law of venue.”⁵¹ She explained that the Federal Circuit “must ensure the [Supreme] Court’s decision in *TC Heartland* is properly applied to the facts of this case,” and that this determination was especially important because the case was set for trial the following week.⁵²

⁴⁸ E.g., *In re Nintendo of Am. Inc.*, 2017 WL 4581670, at *1 (Fed. Cir. July 26, 2017) (citing *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989); *Will v. Calvert Fire Ins.*, 437 U.S. 655, 666 (1978)).

⁴⁹ *In re Nintendo of Am. Inc.*, 2017 WL 4581670, at *2 (Fed. Cir. July 26, 2017); accord *In re Techtronic Indus. N. Am., Inc.*, 2017 WL 4685333 (Fed. Cir. July 25, 2017) (noting that “[a] party seeking a writ [of mandamus] bears the heavy burden of demonstrating to the court that it has no ‘adequate alternative’ means to obtain the desired relief,” and noting that the petition is denied “without prejudice to [defendant] raising its venue arguments on appeal after issuance of a final judgment in the case”); *In re Huges Network Sys., LLC*, 2017 WL 3167522, at *1 (Fed. Cir. July 24, 2017) (“Without necessarily agreeing with the district court’s conclusion that the Supreme Court’s decision in *TC Heartland* did not effect a change in the law, we nonetheless find that the district court did not clearly abuse its discretion in finding that Hughes waived its right to move to transfer for improper venue.”); *In re Sea Ray Boats, Inc.*, 695 F. App’x 543, 544 (Fed. Cir. June 9, 2017) (noting that a writ of mandamus is an “exceptional” remedy, and denying the petition for mandamus).

⁵⁰ *In re Sea Ray Boats, Inc.*, 695 F. App’x 543, 544 (Fed. Cir. 2017) (Newman, J., dissenting).

⁵¹ *In re Sea Ray Boats, Inc.*, 695 F. App’x 543, 544 (Fed. Cir. 2017) (Newman, J., dissenting).

⁵² *In re Sea Ray Boats, Inc.*, 695 F. App’x 543, 544 (Fed. Cir. 2017) (Newman, J., dissenting).

The Federal Circuit has another opportunity to address the issue in a petition for mandamus filed in *In re Yahoo Holdings, Inc.* The court ordered briefing on the petition on October 26, 2017.⁵³ As of the date of this paper, a decision from the court is still pending.

IV. Conclusion

Defendants whose cases were pending at the time of the *TC Heartland* decision have faced much uncertainty when raising challenges to venue based on *TC Heartland*. District courts are split on whether a *TC Heartland*-based argument is available to defendants who failed to challenge venue in the first responsive pleading. The Federal Circuit has not yet weighed in on whether *TC Heartland* constitutes an intervening change in the law. Practitioners should monitor the proceedings in *In re Yahoo Holdings, Inc.* to see whether the Federal Circuit resolves the dispute.

⁵³ *In re Yahoo Holdings, Inc.*, No. 2018-103, Dkt. 8 (Fed. Cir. Oct. 26, 2017).

The HEART of *TC Heartland*: Going to the Defendant’s Home?

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American Intellectual Property Law Association
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(Draft as of August 25, 2017; this is a fast moving area of law at the moment)

“Venue” refers to the neighborhood where an injury is declared to have been done, while “jurisdiction” refers to the authority of the court to decide a dispute; in other words venue goes to the convenience of the parties while jurisdiction to the power of the court to adjudicate a matter.² While the concepts of venue and jurisdiction often are conflated, the two are very different.³

Despite these theoretical differences, Congress merged the two concepts for the statute governing venue in general civil litigation, such that for those purposes venue and personal jurisdiction have been coextensive for many years. This caused most patent practitioners, and even the Federal Circuit, to understand that the general venue statute provisions of 28 U.S.C. § 1391 (entitled “Venue generally”) inform the application of the more specific venue statute for patents, copyrights, mask works and designs (28 U.S.C. § 1400). Earlier this year *TC Heartland*⁴ significantly changed that understanding.

I. Introduction

The Supreme Court has admonished that the venue requirement is “specific and unambiguous,” and therefore it is “not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.”⁵ Accordingly, any venue analysis must start with the applicable statutes.

The general venue statute – 28 U.S.C. § 1391(b)(1) – provides that a case can be brought in any judicial district where a defendant “resides.” Specifically, it states that:

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² *Iselin v. La Coste*, 147 F.2d 791, 795 (5th Cir. 1945) (“Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction. The venue has relation to the convenience of the litigants and may be waived or laid by consent of the parties.”) (citing *Neirbo Co. v. The Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)).

³ See, e.g., *id.*; see also, *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1052 n. 13 (10th Cir. 2006) (“Venue is sometimes confused with jurisdiction. However, the two concepts are quite different.”) (quoting 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3801 (2d ed. 1986)).

⁴ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (U.S. 2017).

⁵ *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961).

[A]n entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.⁶

In other words, venue under § 1391 for domestic corporations and LLCs is proper in any jurisdiction where the defendant is subject to personal jurisdiction.

The patent venue statute – 28 U.S.C. § 1400 – is written differently. It provides that an action for patent infringement may be brought either:

[1] “in the judicial district where the defendant resides” (“the Resides Prong”), or

[2] “where the defendant has committed acts of infringement and has a regular and established place of business” (“the Regular and Established Prong”).⁷

Unlike the general venue provision, however, the patent-specific provision does not include any explicit guidance for determining where an entity “resides.”

Nearly 30 years ago, the Court of Appeals for the Federal Circuit held in the *VE Holding* case that the definition of “resides” in the general venue statute (as it then existed) applies to the Resides Prong of the patent venue statute.⁸ As a result, the Resides Prong was broadly construed as saying that venue was appropriate in *any* district where the defendant was subject to personal jurisdiction. This meant that the Regular and Established Prong was hardly invoked, because the Resides Prong was easily met.

The recent Supreme Court decision in *TC Heartland*, however, overruled *VE Holding*. It narrowed the interpretation of the Resides Prong, holding that personal jurisdiction was not the test for venue in patent cases. The Court’s decision, in turn, breathed new life into the Regular and Established Prong.⁹ In fact, the Regular and Established Prong is now likely the easier way to establish venue in many patent cases. Given the dominance of the Resides Prong for the past three decades, however, there is scarce modern case law on the Regular and Established Prong.

In this article, we briefly discuss the history of patent venue (Part II). We then investigate the scope of the Regular and Established Prong (Part III). Finally, we provide our comments on where this area of law is headed (Part IV), and conclude (Part V).

⁶ 28 U.S.C. § 1391(c)(2) (emphasis added).

⁷ 28 U.S.C. §1400(b).

⁸ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990).

⁹ *TC Heartland*, 137 S. Ct. at 1521.

II. Brief History of Patent Venue

A. Precursors to the Modern Patent Venue Statute

At the nation's founding, there was no patent-specific venue statute. As a general matter, the Judiciary Act of 1789 allowed a civil plaintiff to file in a federal district court if the defendant was "an inhabitant" of that district or could be "found" for service of process there.¹⁰

In 1887, Congress narrowed that statute, removing the ability to sue wherever a defendant could be found.¹¹ Instead, venue only was proper where the defendant was an inhabitant, or, in diversity cases, where either the plaintiff or defendant was an inhabitant.¹² The Supreme Court's 1893 decision in *In re Hohorst*,¹³ however, suggested in *dicta* that the 1887 act did not apply to patent actions, leading to a disagreement among lower courts over which statute applied.

In 1897, to resolve the disagreement among the courts, Congress passed a patent-specific venue statute (the predecessor to 28 U.S.C. § 1400(b)).¹⁴ The 1897 statute set out that venue was appropriate for patent infringement cases in any district where the defendant was an "inhabitant," or maintained a "regular and established place of business" and committed an act of infringement. At that time, it was understood that a corporation "inhabits" only its state of incorporation.¹⁵

B. Enactment and Construction of § 1400(b)

In 1948, Congress enacted the modern patent venue statute, § 1400(b), which closely tracked the 1897 statute, but changed the word "inhabits" to "resides."¹⁶ This led to a disagreement among lower courts about whether this use of "resides" incorporated the more general § 1391(c) definition of corporate residence. The Supreme Court resolved this disagreement in 1957, holding in *Fourco Glass Co. v. Transmirra Prods. Corp.*¹⁷ that the general definition of "resides" from § 1391 does not apply to patent venue. Rather, for the purposes of § 1400(b), an individual "resides" in his or her state of domicile, while a corporation "resides" in its state of incorporation.

In 1988, thirty years after the *Fourco* decision, Congress amended the general venue provision of § 1391(c). That amendment provided that "*for the purposes of venue under this chapter a defendant that is a corporation shall be deemed to reside in any judicial district in*

¹⁰ Act of Sept. 24, 1789, § 11, 1 Stat. 79; see *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).

¹¹ See Act of Mar. 3, 1887, § 1, 24 Stat. 552.

¹² See *id.*

¹³ *In re Hohorst*, 150 U.S. 653, 661-662 (1893).

¹⁴ Act of Mar. 3, 1897, ch. 395, 29 Stat. 695; see *Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972) (noting that the statute "placed patent infringement cases in a class by themselves, outside the scope of general venue legislation").

¹⁵ See *TC Heartland*, 137 S. Ct. at 1518 (citing *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449-450, 12 S. Ct. 935, 36 L. Ed. 768 (1892)).

¹⁶ See Act of June 25, 1948, 62 Stat. 936; 28 U.S.C. § 1400(b) (1952 ed.).

¹⁷ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226, (1957).

which it is subject to personal jurisdiction at the time the action is commenced.”¹⁸ The prefatory language raised the obvious question of whether the definition of “resides” in the general venue statute also applied to the patent venue statute, since both appeared in Chapter 87 of Title 28.

C. *VE Holding* (1990) to *TC Heartland* (2017)

That question was resolved, or so patent practitioners generally thought, in 1990 when the Federal Circuit decided the *VE Holding* case.¹⁹ The Federal Circuit held that the prefatory language of § 1391(c) — “for purposes of venue under this chapter” — was classic language of incorporation such that it also applied to § 1400 since it was part of the same chapter. Therefore, the general venue definition of “resides” applied to patent infringement suits.

With this decision, patent defendants suddenly were exposed to jurisdiction in “any judicial district” in which personal jurisdiction was proper. In essence, the venue analysis merged into the personal jurisdiction analysis for corporate defendants and venue provided no separate, procedural hurdle. For corporations doing business across the United States, venue was now proper in nearly every judicial district, leading to a perceived rise in forum shopping. By 2016, for instance, the Eastern District of Texas presided over roughly one-third of the nation’s patent cases. Critics pointed to *VE Holding*, in particular, as one of the reasons that the Eastern District developed into a destination for patent infringement litigation.

The venue rule announced in *VE Holding* remained undisturbed until earlier this year when the Supreme Court issued its decision in *TC Heartland*. Holding that the Federal Circuit erred in *VE Holding*, the Supreme Court reaffirmed the *Fourco* rule that “resides” for corporate defendants means state of incorporation.²⁰ With this rejuvenated restriction on the Resides Prong, the time is ripe to dust off old case law regarding the Regular and Established Prong.

III. Scope of the Regular and Established Prong

In a post-*TC Heartland* world, a plaintiff seeking to sue a corporate defendant outside of its state of incorporation must look to the Regular and Established prong of § 1400(b) to establish venue, and show that the defendant: A) has a “regular and established place of

¹⁸ 28 U.S.C. § 1391(c) (1988 ed.) (emphasis added).

¹⁹ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

²⁰ Recent decisions have differed on whether *TC Heartland* is a change of law or merely a restatement of *Fourco*. The former view would allow parties to raise improper venue as a defense in cases that were filed before the *TC Heartland* decision issues. If, however, *TC Heartland* is not a change in the law, the failure to raise a venue objection at the outset of a case would constitute a waiver of the defense. As of the writing of this article, there is no clear resolution of this issue. Compare, e.g., *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, Civ. No. 2:15cv21, 2017 U.S. Dist. LEXIS 90728, at *8 (E.D. Va. June 7, 2017) (“Based on the Supreme Court’s holding in *TC Heartland*, *Fourco* has continued to be binding law since it was decided in 1957, and thus, it has been available to every defendant since 1957. Accordingly, the Court FINDS that *TC Heartland* does not qualify for the intervening law exception to waiver because it merely affirms the viability of *Fourco*”), with, e.g., *Westech Aerosol Corp. v. 3M Co.*, Civ. No. C17-5067-RBL, 2017 U.S. Dist. LEXIS 95768, at *4 (W.D. Wash. June 21, 2017) (“Defendants could not have reasonably anticipated this sea change, and so did not waive the defense of improper venue by omitting it from their initial pleading and motions.”).

business” in the district, and B) committed “acts of infringement” there.²¹ We discuss each element in turn.

A. The “Regular and Established Place of Business” Element

“Regular and established place of business” is not defined in the patent venue statute,²² and, unfortunately, there is little recent precedent on how to construe this phrase. The only relevant Supreme Court case on this issue is the 1915 *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.* decision, which considered the Regular and Established Prong of the 1897 statute.²³ In a terse opinion, the Court held that venue was improper in New York for a suit against a Missouri company that employed a sales agent in New York.²⁴ The decision, however, did little to provide a standard for evaluating the question.²⁵ The Federal Circuit’s 1985 decision in *In re Cordis* – the court’s only relevant decision on the question – arguably held that a “regular and established place of business” need not be a “fixed, physical location.”²⁶ The *Cordis* decision, however, was issued in response to a petition for mandamus, as opposed to a full merits appeal, and, as a result, the standard of review was different.²⁷ Courts have thus questioned the precedential value of the decision.²⁸

Accordingly, because there is little general guidance when it comes to the “regular and established place of business” element, we examine the scope of this phrase categorically. First, we note that a corporation’s headquarters will generally constitute a “regular and established place of business.” Second, we explain that maintenance of a physical business location in a forum is likely sufficient. Third, we describe a split in authority regarding whether, in the absence of a physical location, the mere presence of employees in the forum is sufficient to support venue. Fourth, we detail why the sale of products through a third party located in a forum is generally insufficient to establish venue. Finally, we discuss why making a website available to customers in a forum is likely insufficient to create justiciable venue.

1. Headquarters or principal place of business

In most cases, a corporate defendant’s headquarters or principal place of business will qualify as an obvious “regular and established place of business” where the corporation may be sued. For example, in the recent case of *Jarratt v. Amazon.com, Inc.* (Aug. 10, 2017), the Western District of Arkansas found venue to be proper over Amazon.com in the Western District

²¹ See *General Radio Co. v. Superior Elec. Co.*, 293 F.2d 949, 951 (1st Cir. 1961) (“Both [elements] must be met to confer venue; if either is lacking venue fails.”).

²² See 28 U.S.C. § 1400(b).

²³ *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U.S. 723, 724-25 (1915).

²⁴ *Id.*

²⁵ See *id.*

²⁶ *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985).

²⁷ *Id.* (“if a rational and substantial legal argument can be made in support of the rule in question” then *mandamus* should be denied, despite the fact that, “on normal appeal, a court might find reversible error”).

²⁸ See, e.g., *Johnston v. IVAC Corp.*, 681 F. Supp. 959, 964 (D. Mass. 1987) (*Cordis* “supports only that a ‘rational and substantial’ legal argument can be made to uphold the district court’s finding.”); see also *Herbert v. Diagnostic Prods. Corp.*, 1986 U.S. Dist. LEXIS 24411 (S.D.N.Y. June 10, 1986) (same).

of Washington.²⁹ The court reasoned that Amazon.com’s principal place of business and its corporate headquarters were located there, so it “inarguably” had a regular and established place of business there.³⁰ Other cases agree that venue is proper in the jurisdiction where a defendant maintains its headquarters or principal place of business.³¹

2. Physical location (e.g., store or office) in the forum

If a defendant maintains a fixed, physical location where it does business, a court will most likely find it is a “regular and established place of business.” However, this is not a *per se* rule. For example, there is some authority for the proposition that a location must also have permanence.³² Moreover, the defendant must exercise control over the location to support venue.³³ Even where a physical location is permanent and under the defendant’s control, there may still be situations where the location is insufficient for venue purposes, as illustrated by the facts underlying the Supreme Court’s *W.S. Tyler* decision.

In *Tyler*, the defendant corporation was based in St. Louis, but employed a sales representative in New York.³⁴ In addition to working for Defendant Ludlow-Saylor, the sales representative was also an employee of another corporation and the rent for his sales office was

²⁹ *Jarratt v. Amazon.com, Inc.*, Civ. No. 5:16-CV-05302, 2017 U.S. Dist. LEXIS 126931, at *3 (W.D. Ark. Aug. 10, 2017) (“Amazon’s principal place of business is its corporate headquarters in the Western District of Washington, so it inarguably has a regular and established place of business in that district.”).

³⁰ *Id.*

³¹ See, e.g., *Blackbird Tech LLC v. TuffStuff Fitness Int’l, Inc.*, Civ. No. 16-733-GMS, 2017 U.S. Dist. LEXIS 63752, at *4 (D. Del. Apr. 27, 2017) (“Venue, therefore, would have been proper in the Central District of California, because TuffStuff’s headquarters and principal place of business are located in that District.”); *Mitel Networks Corp. v. Facebook, Inc.*, 943 F. Supp. 2d 463, 468 (D. Del. May 1, 2013) (“Venue, therefore, would have been proper in the Northern District of California, because Facebook’s headquarters and principal place of business are located in that District.”); *Intendis, Inc. v. River’s Edge Pharms., LLC*, Civ. No. 2011 U.S. Dist. LEXIS 130305, 2011 U.S. Dist. LEXIS 130305, at *6 (D.N.J. Nov. 10, 2011) (“As Defendant has its principal place of business in Suwanee, Georgia, the case certainly could have been brought in the Northern District of Georgia.”); *Levinson v. Regal Ware, Inc.*, Civ. No. 89-1298 (MTB), 1989 U.S. Dist. LEXIS 17455, at *2 n. 2 (D.N.J. Oct. 5, 1989) (in granting a motion to transfer venue to the Eastern District of Washington, noting that the defendant had its principal place of business and was “physically situated” there.); *Nobell, Inc. v. Sharper Image Corp.*, Civ. No. C89-1133-DLJ, 1989 U.S. Dist. LEXIS 16453, at *5 (N.D. Cal. Aug. 2, 1989) (in granting joinder of defendant Nu Vations, noting that venue is proper because Nu Vations has a principal place of business and thus maintains a “regular place of business” in the Northern District of California); *Ballard Med. Prods. v. Concord Labs, Inc.*, 700 F. Supp. 796, at 799 (D. Del. 1988) (“Concord’s corporate headquarters is located in New Hampshire. ... [Thus,] Concord has a “regular and established place of business” in New Hampshire within the meaning of the statute because of its level of activity in New Hampshire.”); *Amp Inc. v. Essex Wire Corp.*, 223 F. Supp. 154, 156 (N.D. Ill. 1963) (“[T]here is no question that the defendant has a regular and established place of business in this judicial district, for its corporate headquarters are located here.”).

³² See *Phillips v. Baker*, 121 F.2d 752, 756 (9th Cir. 1941) (holding that a “regular and established place of business” must be a permanent place, so movable box cars do not establish venue).

³³ *Ball Corp. v. Weirton Steel Corp.*, Civ. No. No. 86 C 5425, 1986 WL 13761, at *1 (N.D. Ill. Nov. 28, 1986) (“It must appear that a defendant is regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district over which it exercised some measure of control.”); *Stewart-Warner Corp. v. Hunter Eng’g Co.*, 163 U.S.P.Q. 326, 330 (N.D. Ill. 1969) (same); *Coleco Indus., Inc. v. Kranscro Mfg., Inc.*, 247 F. Supp. 571, 574 (S.D.N.Y. 1965) (same); *Clearasite Headwear Inc. v. Parmaount Cap Mfg., Co.*, 204 F. Supp. 4, 6 (S.D.N.Y. 1962) (same); *Mastantaouno v. Jacobsen Mfg. Co.*, 184 F. Supp. 178, 180 (S.D.N.Y. 1960) (same); see also *Warner-Lambert Co. v. C.B. Fleet Co.*, 583 F. Supp. 519, 523 (D.N.J. 1984) (“[C]ourts look to whether the defendant maintains, controls and pays for a permanent physical location.”).

³⁴ 236 U.S. at 725.

divided between the two corporations.³⁵ Ludlow-Saylor paid the representative a small salary, commissions on sales, and traveling expenses. The representative was responsible for soliciting orders and forwarding them to the appropriate corporation for execution. But only a single infringing sale had been generated by the representative.³⁶ The trial court held that the plaintiff had shown neither the requisite “regular and established place of business” nor the requisite “act of infringement” in New York.³⁷ The Supreme Court affirmed, reasoning that the circumstances involved only one sale and that the sale was consummated in St. Louis, not New York.³⁸ The decision in *Tyler*, however, is unclear in a number of respects. It is unclear whether the Supreme Court merely affirmed the district court on the grounds that there was no “act of infringement” in New York, or also affirmed the finding that there was no “regular and established place of business” in the state. Even if the court affirmed the finding of no “regular and established place of business,” it is unclear which facts the Court deemed significant. Subsequent cases have said that a dispositive fact in *Tyler* is that the sales representative had no authority to accept orders,³⁹ and that similar sales offices that only serve for solicitation of orders do not constitute a “regular and established place of business” even if wholly owned.⁴⁰ Another line of cases — perhaps keying on the fact that only one sale was shown to have been generated from the sales office in *Tyler* — go so far as to hold that, to be a “regular and established place of business,” the corporation must be “engaged in carrying on in a continuous manner a *substantial part* of its ordinary business.”⁴¹

However, no recent cases appear to have followed the lines of authority applying *Tyler*. Consider, for instance, the 1986 case of *San Shoe Trading Corp.*,⁴² where the district court held that a showroom in the venue was sufficient to support venue even though no one at the showroom had the authority to complete sales, which were consummated by the home office in another district. More recently, the Eastern District of Texas held in *Raytheon Co v. Cray, Inc.* that the “physical presence in the district . . . [such as] a retail store, warehouse, or other facility in the district weighs strongly in favor of finding a regular and established place of business.”⁴³

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., *General Radio*, 293 F.2d at 951 (“It is evident from the opinion in the *Tyler Co.* case that this is the fact the Court considered determinative.”); *Omi Int'l Corp. v. MacDermid, Inc.*, 648 F. Supp. 1012, 1016 (M.D.N.C. 1986) (“[T]he determinative factor [in *Tyler*] is that the local salesman's only duty was to solicit orders and forward them, without consummating the sales himself”).

⁴⁰ *General Radio*, 293 F.2d at 951-52; *MagiCorp v. Kinetic Presentations, Inc.*, 718 F. Supp. 334, 341 (D.N.J. 1989); *Maw v. Northern Pump Co.*, 27 F. Supp. 808, 809 (D.N.Y. 1939); see also *Brevel Prods. Corp. v. H & B American Corp.*, 202 F. Supp. 824, 828 (S.D.N.Y. Feb. 28, 1962) (stating the rule that “mere maintenance of an office in a district is not sufficient for patent venue jurisdiction,” but not applying it); *Endrezze v. Dorr Co.*, 97 F.2d 46, 47 (9th Cir. 1938) (holding that sales office that merely solicited sales committed no acts of infringement in the district for venue purposes).

⁴¹ *Wilson v. McKinney Mfg. Co.*, 59 F.2d 332, 334 (9th Cir. 1932) (emphasis added)(quoting *Zimmers v. Dodge Bros.*, 21 F.2d 152, 156 (N.D. Ill. 1927)); see also *Ruddies v. Auburn Spark Plug Co.*, 261 F. Supp. 648, 654 (S.D.N.Y. Nov. 9, 1966) (“Merely doing business in this district is not enough. Something more is required. It must appear that a defendant is regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district over which it exercises some measure of control.”); see also n. 32, *supra*.

⁴² *San Shoe Trading Corp. v. Converse Inc.*, 649 F. Supp. 341, 345-46 (S.D.N.Y. 1986).

⁴³ *Raytheon Co. v. Cray, Inc.*, No. CV 2:15-CV-01554-JRG, 2017 U.S. Dist. LEXIS 100887, at *32 (E.D. Tex. June 29, 2017).

Similarly, in *Prowire LLC v. Apple, Inc.*, the District of Delaware held that defendant Apple’s single retail store in the district was a “regular and established place of business.”⁴⁴ This was despite the fact that the store was merely one of 270 stores nationwide, it accounted for less than 1% of Apple’s U.S. employees, and it sold less than 1% of Apple’s accused devices.⁴⁵ *Prowire* is, thus, hard to reconcile with the older line of cases requiring a “substantial part” of business to be carried on at the “regular and established place of business.”

In sum, under the modern authority of *Raytheon* and *Prowire*, courts are likely to find venue to be proper where the defendant maintains a physical business location, regardless of the comparative volume of business conducted there. Under older case law, however, there seems to be a lack of clarity on this issue.

3. Employees and inventory located in the forum

In the absence of a physical location, the mere presence of employees in a forum often is deemed insufficient to constitute a “regular and established place of business.” However, some courts have looked at the totality of circumstances and found venue proper despite the lack of a physical location.

Most courts would agree that, in the case of a travelling salesman who does not live in the forum, there is no “regular and established place of business.”⁴⁶ Similarly, mere attendance at a trade show in the forum is not enough to satisfy the venue rule.⁴⁷

A closer question arises when the employee operates permanently out of his own home within the forum. A long line of older cases refused to find venue in this context.⁴⁸ Other courts, however, have seemingly glossed over the requirement of a physical place of business based upon the “practicalities and necessities of the business community.”⁴⁹ And so having one or

⁴⁴ *Prowire LLC v. Apple, Inc.*, Civ. No. 1:17-cv-00223-MAK, 2017, U.S. Dist. LEXIS 126640 at *14 (D. Del. Aug. 9, 2017).

⁴⁵ *Prowire*, Civ. No. 1:17-cv-00223-MAK, at Dkt. 14, p. 9.

⁴⁶ See, e.g., *Mida Mfg. Co. v. Femic, Inc.*, 539 F. Supp. 159, 162 (E.D. Pa. 1982) (finding no venue where defendants solicited a certain amount of business in the district, but had no employees there); *Ipcos Hospital Supply Corp. v. Les Fils D'Auguste Maillefer S.A.*, 446 F. Supp. 206, 208 (S.D.N.Y. 1978) (“[T]he mere presence of sales representatives in the district does not create a ‘regular and established place of business’ for venue purposes in a patent case.”).

⁴⁷ *Percept Techs. v. FOVE, Inc.*, No. 2:15-cv-02387-RFB-CWH, 2017 U.S. Dist. LEXIS 125772, at *3 (D. Nev. Aug. 8, 2017) (“Plaintiff argues that based on Defendant’s attendances at [trade shows] . . . venue is proper in the District of Nevada. The Court disagrees that, under the patent venue statute, the alleged conduct is sufficient to make venue in Nevada appropriate. . . . [Defendant] does not have a ‘regular and established place of business’ in Nevada.”); see also *Knapp-Monarch Co. v. Casco Prods. Corp.*, 342 F.2d 622, 625 (7th Cir. 1965) (holding that presence at a trade show was merely temporary and attendee did not exercise control over the trade show premises); *Kinetic Instrs., Inc. v. Lares*, 802 F. Supp. 976, 987 (S.D.N.Y. 1962) (holding that mere presence of a sales representative at a trade show is insufficient).

⁴⁸ See, e.g., *American Cyanamid Co. v. NOPCO Chem. Co.*, 388 F.2d 818, 820 (4th Cir. 1968) (“The statute clearly requires that venue be laid where ‘the defendant has a regular and established place of business,’ not where the defendant’s employee owns a home in which he carries on some of the work that he does for the defendant”); *University of Illinois Foundation v. Channel Master Corp.*, 382 F.2d 514, 516 (7th Cir. 1967) (“We hold that we cannot by any stretch of the imagination characterize [a sales representative’s] family bedroom or even his entire home as ‘a regular and established place of business’ of [defendant] in the Northern District of Illinois.”).

⁴⁹ *Shelter-Lite, Inc. v. Reeves Bros., Inc.*, 356 F. Supp. 189, 195 (N.D. Ohio Mar. 19, 1973) (“In this Court’s opinion, an unyielding rule that a regular and established place of business cannot arise by virtue of a salesman operating out of his residence is at odds with the practicalities and necessities of the business community.”); see also *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412, 1424 (E.D. Wis. 1983) (following *Shelter-Lite*); *CPG Prods. Corp. v. Mego Corp.*, Civ. No. C-1-79-582, 1980

more employees in the district with regular business activities but no physical location, for instance, has met the venue test according to some district courts.⁵⁰

The Federal Circuit arguably resolved these competing lines of authority in its 1985 *Cordis* decision. *Cordis*, a Florida corporation, was sued in the District of Minnesota,⁵¹ where it employed two sales representatives, paid a salary plus commission, and provided them with a company car and secretarial service.⁵² The sales representatives maintained offices at their own homes, for which they claimed income tax deductions, but most of their work was done at customer locations such as in hospitals where they could take orders for the allegedly infringing products (pacemakers) and give product demonstrations.⁵³ *Cordis* was not registered to do business in Minnesota, did not have a bank account there, and neither owned nor leased any real property within the state.⁵⁴ The District of Minnesota found venue proper under the Regular and Established Prong, and *Cordis* petitioned the Federal Circuit for a writ of mandamus ordering the district court to dismiss for lack of venue.⁵⁵ *Cordis* argued that case law required a “fixed physical presence,” and that it had no offices in Minnesota.⁵⁶ The Federal Circuit denied the petition, reasoning that cases cited by the petitioner required only a “permanent and continuous presence” in a district, as opposed to a “fixed physical presence.”⁵⁷ Because the *Cordis* decision was decided on petition for *mandamus*, however, some have argued that the decision does not foreclose a reading of § 1400(b) to require a fixed, physical presence to show a “regular and established place of business.”

Today, courts remain split on whether the mere presence of employees in a forum suffices to show a “regular and established place of business.” A majority of decisions after *TC Heartland* have found that the mere presence of employees in a judicial district is insufficient for venue.⁵⁸ On the other hand, some earlier decisions – as well as the post-*TC Heartland* decision *Raytheon* – reach the opposite result. An August 21, 2017 decision from the Western District of North Carolina, for instance, determined that “field technicians who actively engage with

U.S. Dist. LEXIS 17061, at *10 (S.D. Ohio Aug. 21, 1980) (same); *Instrumentation Specialties Co. v. Water Associates, Inc.*, Civ. No. 76 C 4340, 1977 U.S. Dist. LEXIS 13508, at *15 (N.D. Ill. Oct. 12, 1977) (same).

⁵⁰ See, e.g., *Shelter-Lite*, 356 F. Supp. at 195 (holding that a single employee operating from his residence within the district was sufficient for venue); *CPG Prods.*, 1980 U.S. Dist. LEXIS 17061 at *10 (same); see also *Brunswick*, 575 F. Supp. at 1424 (several employees in the district deemed sufficient); *Instrumentation Specialties*, 1977 U.S. Dist. LEXIS 13508 at *15 (same).

⁵¹ *In re Cordis Corp.*, 769 F.2d 733, 734 (Fed. Cir. 1985).

⁵² *Id.* at 735.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 735-36.

⁵⁶ *Id.* at 736.

⁵⁷ *Id.* at 737.

⁵⁸ See, e.g., *Westech Aerosol Corp. v. 3M Co.*, Civ. No. C17-5067-RBL, 2017 U.S. Dist. LEXIS 124485, at *7 (W.D. Wash. Aug. 7, 2017) (dismissing complaint with leave to amend to allege venue, noting that the “mere presence of sales reps” is insufficient); *Optolum, Inc. v. Cree, Inc.*, Civ. No. 16-03828-PHX-DLR, 2017 U.S. Dist. LEXIS 114717, at *17 (D. Ariz. July 24, 2017) (presence of a sales manager and an engineer in the forum deemed insufficient); *Hand Held Prods. v. Code Corp.*, Civ. No. 2:17-167-RMG, 2017 U.S. Dist. LEXIS 112932, at *11-12 (D.S.C. July 18, 2017) (single employee in the forum insufficient).

customers” are sufficient to show that the defendant has a “regular and established place of business” in the district for purposes of § 1400(b).⁵⁹

The *Raytheon* case needs to be addressed, however. In that decision, Judge Gilstrap outlined a test for determining whether a company has a “regular and established place of business” in the “modern era” based upon the totality of circumstances: i) a defendant’s physical presence in the judicial district; ii) a defendant’s representations about its presence in the district; iii) the benefits the defendant received from the district, including the sale of infringing products; and iv) a defendant’s “targeted interactions” with the district, such as localized customer support, ongoing contractual relationships, and targeted marketing efforts.⁶⁰ This test seemingly ties-in with some of the earlier decisions on the subject, looking at the “practicalities and necessities of the business community.”⁶¹ The decision is currently the subject of a mandamus petition to the Federal Circuit.⁶² Thus, if the Federal Circuit grants the *mandamus* petition, litigants soon may get some needed clarity in this area. If, however, the court denies *mandamus*, the decision will suffer from the same attacks as *In re Cordis* with respect to its precedential value.⁶³

Another factor that can raise the issue of venue is inventory. For instance, in *Huey Co.* the district court relied, in part, on the presence of inventory for fill orders for multiple locations, in and out of the district, to find venue proper.⁶⁴ While the presence of inventory alone likely is insufficient to establish venue, the existence of inventory in the forum has been relevant in a number of cases.⁶⁵

4. Sales through a third party located in the forum

Many courts have held that a corporation does not have a “regular and established place of business” in a forum merely because it sells products through third parties there. Thus, venue is generally lacking where a corporate defendant merely sells through a third party distributor. For example, in *Optolum, Inc. v. Cree, Inc.*, the District of Arizona held that venue was not

⁵⁹ *InVue Security Prods. Inc. v. Mobile Tech, Inc.*, 3-15-cv-00610 (W.D. N.C. Aug. 21, 2017) (Order, Judge Max O. Cogburn, Jr., Dkt. 65) (granting transfer to a more convenient forum, but holding venue was proper under the second prong of 28 U.S.C § 1400(b)).

⁶⁰ *Raytheon Co.*, 2017 U.S. Dist. LEXIS 100887, at *32-37.

⁶¹ *See supra*, n. 48.

⁶² *In re Cray Inc.*, No. 17-129 (Fed. Cir. filed Jul. 17, 2017).

⁶³ Mandamus is not appropriate “if a rational and substantial legal argument can be made in support of the rule in question,” despite the fact that, “on normal appeal, a court might find reversible error.” *In re Cordis*, 769 F.2d at 737. Thus, a number of district courts have observed that *Cordis* “supports only that a ‘rational and substantial’ legal argument can be made to uphold the district court’s finding” of proper venue. *See n. 27, supra*.

⁶⁴ *Huey Co. v. Plan Hold Corp.*, No. No. 79-C-5069, 1980 WL 30314 at *2 (N.D. Ill. Sep. 12, 1980) (holding that defendant’s warehouse in the district that made regular shipments of the accused products constituted a regular and established place of business); *see also Clopay Corp. v. Newell Co.*, 527 F. Supp. 733, 740 (D. Del. 1981).

⁶⁵ *See, e.g., Cordis*, 769 F.2d at 735 (venue proper where sales representatives kept products at their home offices); *Federal Elect. Prods. Co. v. Frank Adam Elect. Co.*, 100 F. Supp. 8, 11 (S.D. N.Y. 1951) (venue proper when inventory kept in district to expedite nearby shipments); *see also Fabrege, Inc. Schick Elec., Inc.*, 312 F. Supp. 559, 562 (D. Del. 1970) (venue lacking when inventory kept in district only to resupply retailers in case of emergency); *Surgical Laser Tech. Inc. v. Cooper Lasersonics, Inc.*, No. 87 C 10651, 1988 WL 40961 (N.D. Ill. Apr. 26, 1988) (venue lacking, in part, because defendant kept no inventory in Illinois).

proper over the defendant, although it sold its products throughout the state through a third party distributor (Home Depot).⁶⁶

Similarly, courts have held that sales through affiliated entities in a forum are insufficient.⁶⁷ For example, in *Blue Spike, LLC v. Nook Digital, LLC*, the Eastern District of Texas held that defendant Nook Digital was not subject to venue in the forum merely because its corporate parent, Barnes & Noble, Inc., sold its accused products (Nook devices) there.⁶⁸ The court observed that it “must consider whether venue is proper with respect to each defendant,” and “so long as a formal separation of the entities is preserved, the courts ordinarily will not treat the place of business of one corporation as the place of business of the other.”⁶⁹

Finally, courts have held that sales through an independent sales representative or independent contractor in a district, even on an exclusive basis, does not give rise to a “regular and established place of business.”⁷⁰ Where courts have found venue, they have typically concluded that the representative is an employee, and not an independent contractor.⁷¹ Thus, venue often turns on whether there is an employee authorized to complete the sale, such as the Supreme Court considered in *W.S. Tyler*.⁷²

The foregoing cases appear to define a general rule that sales through a third party in a forum are insufficient to establish venue there. On the other hand, two of the factors of the recent *Raytheon* decision seem to apply to sales by third-party distributors: benefits the defendant received from the district and targeted interactions with the district. As noted above, however, the *Raytheon* decision is the subject of a mandamus petition.

⁶⁶ *Optolum, Inc. v. Cree, Inc.*, 2017 U.S. Dist. LEXIS 114717, at *16-18 (D. Ariz. July 24, 2017); see also *Hand Held Prods. v. Code Corp.*, 2017 U.S. Dist. LEXIS 112932 (D.S.C. July 18, 2017) (holding that sales made through a third party distributor are irrelevant).

⁶⁷ See, e.g., *Blue Spike, LLC v. Nook Dig., LLC*, 2017 U.S. Dist. LEXIS 120400, at *9-11 (E.D. Tex. July 28, 2017) (discussed above); see also *Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 461 (S.D.N.Y. 2000) (holding that stores owned by affiliates are insufficient to establish venue under § 1400(b)).

⁶⁸ *Blue Spike*, 2017 U.S. Dist. LEXIS 120400, at *9-11.

⁶⁹ *Id.* at *9-10.

⁷⁰ See, e.g., *Kabb, Inc. v. Sutera*, Civ. A. No. 91-3551, 1992 U.S. Dist. LEXIS 13685, 1992 WL 245546, at *2 (E.D. La. Sept. 4, 1992) (“It is well settled that the mere presence of independent sales representatives does not constitute a ‘regular and established place of business’ for purposes of Section 1400(b).”).

⁷¹ See *supra*, n. 49; but see *Sherman Paper Prods. Corp. v. Sorg Paper Co.*, 161 F. Supp. 44, 45 (E.D. Mich. 1958) (Defendant stresses the fact that the Protect-O-Pac Sales and Engineering Co. was not its employee but an independent distributor. ... The nature of the employment relationship between it and its agent is not a significant difference upon which to base or deny venue.”).

⁷² 236 U.S. at 725; compare *Gen. Radio Co. v. Superior Elect. Co.*, 293 F.2d 949, 951-52 (1st Cir. 1961) (venue lacking where sales representatives merely solicited, but did not consummate, sales), and *Brevel Prods. Corp. v. H&B Amer. Corp.*, 202 F. Supp. 824, 829 (S.D. N.Y. 1962) (same), with *Hemstreet v. Caere Corp.*, 16 U.S.P.Q. 1199, 1203-04 (N.D. Ill. 1990) (venue proper where, *inter alia*, salesman had authority to negotiate sales), and *Werner Mach. Co. v. Nat’l Coop, Inc.*, 289 F. Supp. 962, 964 (E.D. Wisc. 1968) (same); but see *Hako Minuteman, Inc. v. Advance Mach. Co.*, 729 F. Supp. 65, 66 (N.D. Ill. 1990) (venue proper even though employees merely solicited sales); *London v. Carson Pirie Scott & Co.*, 4 U.S.P.Q.2d 1148, 1153 (N.D. Ill. 1987) (same).

5. Website accessible to customers in the district

There is very little case law on the applicability of the Regular and Established Prong to the Internet. The Federal Circuit decided *VE Holding*, which rendered the Regular and Established Prong temporarily vestigial in 1990, while the World Wide Web was not publicly available until at least 1991.⁷³

The few cases addressing online activities suggest that those activities do not show a “regular and established place of business” in a forum. In the recent case of *Glasser v. Barboza*, the court held that Cinelinx Media, a sole proprietorship based Texas, was not subject to venue in the Eastern District of Virginia.⁷⁴ Although Cinelinx sold its product online through Amazon.com, the court held that sales via the internet “is not sufficient to create a regular and established place of business for the purposes” of § 1400(b) in the district.⁷⁵ Similarly, in *Logantree LP v. Garmin Int'l, Inc.*, the Western District of Texas held that defendants’ website, which allowed viewers to access a list of its San Antonio and Austin distributors, did not subject it to venue in the forum.⁷⁶ Older cases also recognized that the mere sale of products in a forum does not give rise to a “regular and established place of business.”⁷⁷

On the other hand, where a company sells products online to customers in a forum, at least two factors of the Eastern District of Texas’s decision in *Raytheon* appear to be met: benefits the defendant received from the district and targeted interactions with the district. Thus, *Raytheon* may again supply precedent to hold companies subject to venue for online activities – at least in the Eastern District of Texas – when the reasoning of other cases might find there to be no venue.

B. Requirement that “Acts of Infringement” Occur in the Judicial District

Even if a defendant has a “regular and established place of business” in a judicial district, venue will only be proper in that district if the defendant has also “committed acts of infringement” there. “Acts of infringement” are defined in the Patent Act and include making, using, offering to sell, selling, and importing a patented invention.⁷⁸ “Acts of infringement” for the purposes of establishing venue also include inducing others to infringe under § 271(b) and contributing to their infringement under § 271(c).⁷⁹

⁷³ See *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 58 (D.D.C. 1999) (noting that the World Wide Web was introduced to the public in 1991).

⁷⁴ *Glasser v. Barboza et al.*, 1-17-cv-00322 (E.D. Va. Aug. 11, 2017) (Order, Judge Claude M. Hilton, Dkt. 38).

⁷⁵ *Id.*

⁷⁶ *Logantree LP v. Garmin Int'l, Inc.*, Civ. No. SA-17-CA-0098-FB, 2017 U.S. Dist. LEXIS 99925, at *4 (W.D. Tex. June 22, 2017).

⁷⁷ See, e.g., *Knapp-Monarch Co. v. Casco Prods. Corp.*, 342 F.2d 622, 625 (7th Cir. 1965).

⁷⁸ 35 U.S.C. § 271(a).

⁷⁹ *Leach v. Penich & Ford, Ltd., Inc.*, No. 65-cv-792, 1965 WL 7783, at *1 (S.D.N.Y. Oct. 7, 1965); *Warner-Lambert Co. v. C.B. Fleet Co., Inc.*, 583 F. Supp. 519, 521 (D.N.J. 1984) (holding that “solicitation of orders for an infringing product within a district meets the test for inducement of infringement and constitutes an act of infringement for purposes of the patent venue statute”); *Gunter & Cooke, Inc. v. Southern Elec. Service Co.*, 256 F. Supp. 639, 648 (M.D.N.C. 1966) (holding that there is “substantial authority” for the proposition that “acts of infringement” include inducement and contributory infringement).

1. No need to prove actual infringement to establish venue

Despite the language of § 1400(b), a plaintiff need not prove that the defendant actually committed an act of infringement in the judicial district in order to establish venue. As courts have noted, requiring such a showing “would mean that the merits of the action would have to be reached on a pre-trial procedural motion.”⁸⁰ Instead, “the test used to determine whether an act of infringement occurred within the district is less strict than that used when the case is tried on the merits.”⁸¹ In particular, “an *allegation* that a defendant has committed one of those acts in the district is sufficient to satisfy this requirement of the venue statute.”⁸² As one court explained, “it should be assumed, for the purposes of the venue question, that the devices in question do, as a matter of law, infringe the plaintiff’s patents. The relevant inquiry, then, is whether the acts constituting the infringement were committed in the judicial district of the forum.”⁸³

2. When the location of the sale is the issue

Determining whether the “acts of infringement” were committed in the judicial district may not always be a straight-forward inquiry. The potential complications are evident in the jurisprudence attempting to determine the location of the “sale” of a patented article.

Several courts have held that a sale must be “consummated” in the judicial district to establish venue.⁸⁴ Under this approach, merely ordering a product in the judicial district may be insufficient to create venue if the order is processed by a manufacturer outside of the district who then ships the product directly to the customer.⁸⁵ The “consummated sale” approach is derived from Article 2 of the Uniform Commercial Code (“U.C.C.”), which provides that a “‘sale’ is the passing of title from the seller to the buyer for a price.”⁸⁶ The U.C.C. provides that title to goods passes at the “time and place at which the seller completes his performance with reference to the physical delivery of the goods.”⁸⁷ Whether a seller has completed physical delivery, in turn, depends on the shipment terms, *e.g.*, whether the goods were shipped “free on board” (“F.O.B.”) the place of shipment or F.O.B. the place of destination.⁸⁸

⁸⁰ *Leach*, 1965 WL 7783, at *1.

⁸¹ *Stiegele v. Jacques Kreisler Mfg. Corp.*, 213 F. Supp. 494, 496 (S.D.N.Y. 1962).

⁸² *Raytheon*, 2017 U.S. Dist. LEXIS 100887, *4 (emphasis added).

⁸³ *Fastener Corp. v. Spotnails, Inc.*, 291 F. Supp. 974, 976-77 (N.D. Ill. 1968).

⁸⁴ *See, e.g., Self v. Fisher Controls Co., Inc.*, 566 F.2d 62 (9th Cir. 1977); *Picker Int’l, Inc. v. Varian Assocs., Inc.*, 661 F. Supp. 347 (N.D. Ohio 1987).

⁸⁵ *Picker*, 661 F. Supp. at 349.

⁸⁶ Uniform Commercial Code, § 2-106.

⁸⁷ *Id.* at § 2-401

⁸⁸ *Id.* at § 2-319; *see also Penntube Plastics Co. v. Fluorotex, Inc.*, 336 F. Supp. 698, 704 (D.S.C. 1971) (“a sale ‘F.O.B. Wilmington’ is a sale within the District of Delaware”).

Other courts have refused to follow the “technicalities of sales law” in determining the location of a sale for the purposes of venue under § 1400(b).⁸⁹ These courts instead consider the “degree of conduct” within the judicial district.⁹⁰ For example, “two demonstrations of the accused device, added to the systematic and continuous solicitation of orders within the district, constitute, for venue purposes, a sufficient degree of selling to amount to ‘infringing sales.’”⁹¹ This “degree of conduct” test often resembles a personal jurisdiction analysis, rather than a determination of the location of a sale.⁹²

Because the majority of the cases addressing the “acts of infringement” element pre-date the Internet (and certainly came before the Internet became a hub of retail commerce), there is little express guidance on the location of online sales. Several cases have addressed the location of sales where products are ordered for shipment from an out-of-state manufacturer. The results of those cases, however, are inconsistent. In several cases, courts held that the sales took place in the jurisdiction where the products were delivered, while courts in other cases held that ordering a product and receiving delivery in a judicial district was not sufficient to establish a sale in that location.⁹³

3. Application to method claims

The “acts of infringement” element may have particular application where a defendant is accused of infringing only method claims of a patent. It is axiomatic that to infringe a patented method, a defendant must perform each and every step of the method.⁹⁴ Not surprisingly, courts have held that a defendant must practice a patented method within the judicial district in order to commit “acts of infringement” with respect to a method claim in the forum.⁹⁵ Notably, it is not

⁸⁹ See, e.g., *Union Asbestos & Rubber Co. v. Evans Prods. Co.*, 328 F.2d 949, 952 (7th Cir. 1964). Note, however, that the Federal Circuit has considered the U.C.C. test to determine if infringement has occurred as a substantive matter: “[W]e have made clear that our reference to the U.C.C. is a guide only and have explained that, at least in the context of the term ‘sale’ under 35 U.S.C. § 102(b), passage of title is not of ‘talismanic’ significance [for finding infringement], we have found the presence or absence of passage of title to be a significant indicator of whether a sale has occurred in the patent law context.” *Milo & Gabby LLC v. Amazon.Com, Inc.*, 2016-1290 (Fed. Cir. May 23, 2017) (nonprecedential) at *14, citing *Medicines Co. v. Hospira, Inc.*, 827 F.3d 1363, 1375–76 (Fed. Cir. 2016); see *North American Philips Corp. v. American Vending Sales, Inc.*, 35 F.3d 1576, 1579–80 (Fed. Cir. 1994); cf. *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1382 (Fed. Cir. 1998) (considering the plain meaning of “sale” when considering the use of the term in 19 U.S.C. § 1337).

⁹⁰ *Union Asbestos*, 328 F.2d at 952.

⁹¹ *Id.*; see also *AMP Inc. v. Burndy of Midwest, Inc.*, 340 F. Supp. 21, 24 (N.D. Ill. 1971) (“acceptance and approval” of sales in judicial district is sufficient regardless of the “aged restrictive requirement of a completed sale”).

⁹² See, e.g., *Briggs v. Farm Corp.*, 272 F. Supp. 185, 185-86 (N.D. Ill. 1967) (“The sales promotion and solicitation efforts of Farm’s eight salesmen and the occasionally physical delivery of accused filters to customers are sufficient to constitute ‘infringing sales’ and an act of infringement within the meaning of § 1400(b).”).

⁹³ See, e.g., *Picker*, 661 F. Supp. at 349; *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U.S. 723 (1915) (hold that sale did not occur in New York even though the order for the goods was placed in New York with the defendant’s sales representative and the defendant shipped the goods to New York; sale occurred in Missouri, where the defendant received the order).

⁹⁴ E.g., *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007) (“Direct infringement requires a party to perform or use each and every step or element of a claimed method or product.”).

⁹⁵ See, e.g., *Schroeder v. Owens-Corning Fiberglas Corp.*, 326 F. Supp. 594, 596 (C.D. Cal. 1971) (“Venue for the cause of action for infringement of said Method Patent is improper in this Judicial District under 28 U.S.C. § 1400(b) since the Defendant does not reside within this Judicial District and the Defendant has not committed acts of infringement of said Method Patent within this Judicial District.”); *Lyon v. General Motors Corp.*, 200 F. Supp. 89, 90 (N.D. Ill. 1961) (“[Defendant] has manufactured no wheel covers by the patent method, here, within the period alleged in the complaint. Therefore, no actionable infringement occurred here.”).

sufficient for venue purposes to sell a product in the judicial district that was produced by practicing a patented method outside of the district.⁹⁶ If the plaintiff alleges infringement of *both* apparatus and method claims, however, venue will be proper in the location where the apparatus is sold, even if the patented method is practiced in another jurisdiction.⁹⁷

IV. Comment

In the 30 years following the Federal Circuit’s *VE Holding* decision, forum shopping became an established aspect of patent infringement litigation. As a result, a handful of district courts – such as those in the Eastern District of Texas, the District of Delaware, and the Northern District of California – became popular destinations for patent owners seeking to enforce their rights. But it is worth pausing for a moment to consider those consequences since they often are raised during venue-related discussions.

Commentators have highlighted many of the negative consequences of forum shopping in patent litigation, including the perception that certain jurisdictions were more “friendly” to patent owner plaintiffs. Less ink has been spilled discussing the arguably positive consequences of forum shopping. For example, forum shopping allowed several district courts to develop true expertise in handling patent cases. Those courts also assisted in ushering in the era of local “patent rules” that made patent litigation more efficient. Moreover, allowing patent owners to sue multiple defendants in a single court resulted in additional efficiencies for both the courts and the parties.⁹⁸

Following *TC Heartland*, it remains unclear how liberally courts will approach venue in patent cases. Thus, while the Resides Prong of § 1400(b) now provides for venue only in an entity’s state of incorporation, the contours of the Regular and Established Prong remain fluid. At least one court – the venerable Eastern District of Texas in its recent *Raytheon* decision – proposed a totality of the circumstances test for identifying a “regular and established place of business.” The *Raytheon* test, which does not require a “place” of business and instead weighs a defendant’s contacts with the forum, is strikingly similar to tests that courts apply to determine personal jurisdiction. As such, if courts more broadly adopt the *Raytheon* test, the *TC Heartland* case will have had little, if any, practical effect on the scope of permissible venue; forum shopping will continue, along with the negative and positive attributes of that practice.

Interestingly, while the *Raytheon* decision liberally construed the venue requirements of § 1400(b), there is some general Supreme Court authority that would seem to support the opposite approach. Remember the Supreme Court admonition: the venue requirement is “specific and unambiguous” and therefore “not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.”⁹⁹

⁹⁶ *Id.*

⁹⁷ *General Foods Corp. v. Carnation Co.*, 411 F.2d 528 (7th Cir. 1969) (holding venue proper where “the action ... is on a single patent with a product and process claims” and the products were sold in the judicial district, even though the process was practiced outside of the district).

⁹⁸ In many ways, some might argue that having districts that developed familiarity with patent cases was an inspiration for the Patent Pilot Program. See Pub. L. No. 111-349.

⁹⁹ *Schnell*, 365 U.S. at 264.

V. Conclusion

We suspect that courts will take the admonition in *Schnell* to heart and generally reject the liberal reading of “regular and established place of business” advocated in *Raytheon*. Even so, there is a legitimate debate to be had over the proper construction of § 1400 – which is not quite as “specific and unambiguous” as would be desired. In holding this debate, courts will perhaps return to “first principles” of venue, examining why venue requirements exist.

As noted above, jurisdiction is a concept related to the power of courts to exercise judicial authority, but venue “relates to the convenience of litigants.”¹⁰⁰ “This basic difference between the court’s power and the litigant’s convenience is historic in the federal courts.”¹⁰¹ As the Federal Circuit has stated, venue “serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial court that is either remote from the defendant’s residence or from the place where the acts underlying the controversy occurred.”¹⁰² As the impact of *TC Heartland* continues to evolve, it will be instructive to see how jurisdiction and venue are treated – separate or equal.

¹⁰⁰ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

¹⁰¹ *Id.*

¹⁰² *VE Holding*, 917 F.2d at 1576.

Waiver of Rule 12 Defenses

- **Fed. R. Civ. P. 12(h)(1) Venue Defense Waived:**
 - (A) if omitted from a motion in the circumstances described in subdivision (g), or
 - (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course

Waiver and Intervening Change: *Cobalt Boats* Case Line

Cobalt Boats, LLC v. Sea Ray Boats, Inc., — F.3d —, 2017 WL 2556679 (E.D. Va. June 7, 2017)

The Supreme Court has never overruled Fourco, and the Federal Circuit cannot overrule binding Supreme Court precedent.

Based on the Supreme Court's holding in TC Heartland, Fourco has continued to be binding law since it was decided in 1957, and thus, it has been available to every defendant since 1957.

Accordingly, the Court FINDS that TC Heartland does not qualify for the intervening law exception to waiver because it merely affirms the viability of Fourco.

Judge Newman Disagrees

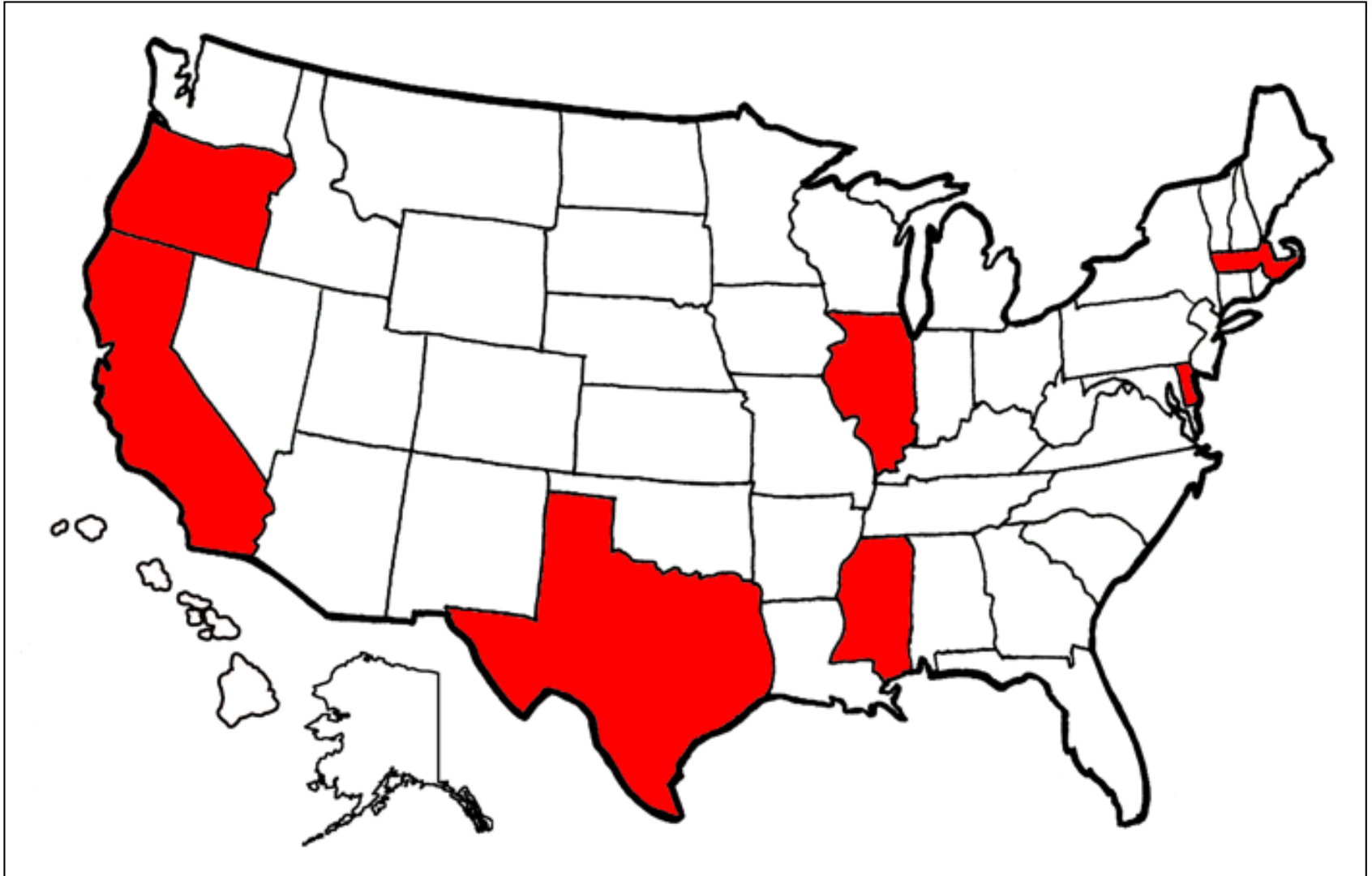
In re Sea Ray Boats, Inc., 2017 WL 2577399 (Fed. Cir. June 9, 2017) (deciding mandamus petition, Newman, J., Dissenting)

- “There is little doubt” that *TC Heartland* “was a change in the law of venue”
- “This court must ensure the Court’s decision in *TC Heartland* is properly applied to the facts of this case.”

Courts Following *Cobalt Boats*

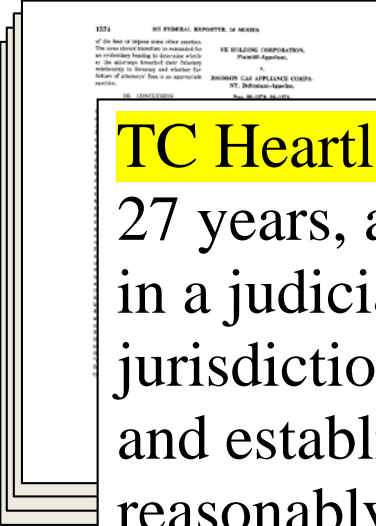
1. *Navico, Inc. v. Garmin Int'l, Inc.*, 2017 WL 2957882 (E.D. Tex. July 11, 2017)
2. *iLife Techs., Inc. v. Nintendo of Am., Inc.*, 2017 WL 2778006 (N.D. Tex. June 27, 2017)
3. *Chamberlain Grp., Inc. v. Techtronic Indus. Co.*, No. 1:16-cv-6097, Dkt. 407 (N.D. Ill. June 28, 2017)
4. *Amax, Inc. v. ACCO Brands Corp.*, 2017 WL 2818986 (D. Mass. June 29, 2017)
5. *Infogation Corp. v. HTC Corp.*, 2017 WL 2869717 (S.D. Cal. July 5, 2017)
6. *Koninklijke Philips v. ASUSTeK Computer Inc.*, No. 1:15-cv-1125-GMS, Dkt. 215 (D. Del. July 19, 2017)
7. *Reebok Int'l Ltd. v. TRB Acquisitions LLC*, 2017 WL 3016034 (D. Or. July 14, 2017)
8. *Fox Factory, Inc. v. SRAM, LLC*, 3:16-cv-506, Dkt. 72 (N.D. Cal. July 18, 2017)
9. *Skyhawk Techs., LLC v. DECA Int'l Corp.*, 2017 WL 3132066 (S.D. Miss. July 21, 2017)
10. *Takeda Pharm. USA, Inc. v. Mylan Pharms. Inc.*, No. 1:16-cv-987, Dkt. 63 (D. Del. Aug. 3, 2017)
11. *President & Fellows of Harvard College v. Micron Tech., Inc.*, No. 16-11249, 2017 WL 3749419 (D. Mass. Aug. 30, 2017)

Courts holding *TC Heartland* Is Not An “Intervening Change”



No Waiver: *Westech* Case Line

Westech Aerosol Corp. v. 3M Co., 2017 WL 2671297 (W.D. Wash. June 21, 2017)

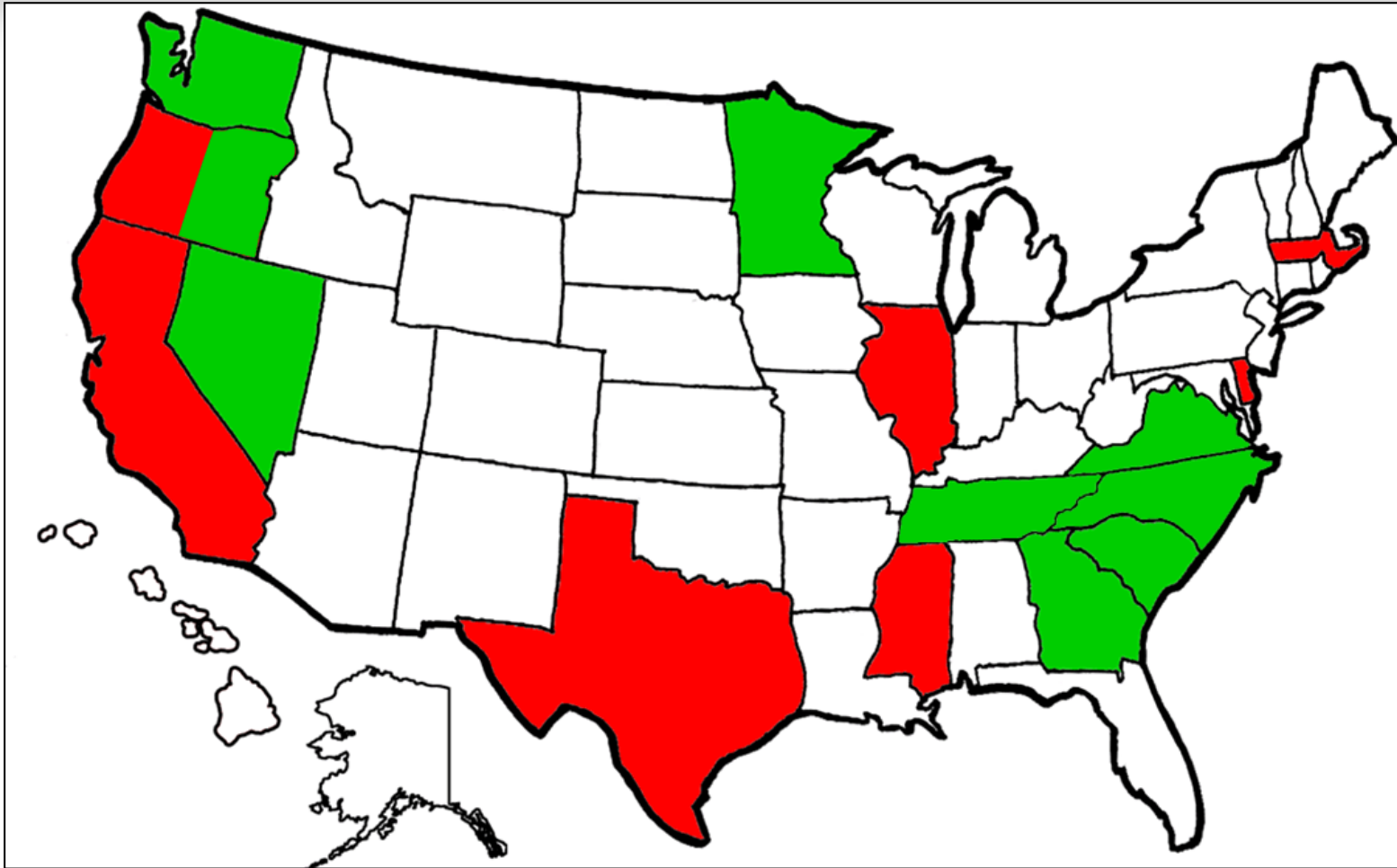


TC Heartland changed the venue landscape. For the first time in 27 years, a defendant may argue credibly that venue is improper in a judicial district where it is subject to a court's personal jurisdiction but where it is not incorporated and has no regular and established place of business. Defendants could not have reasonably anticipated this sea change, and so did not waive the defense of improper venue by omitting it from their initial pleading and motions.

Westech Case Line Finding No Waiver

1. *Hand Held Prods. Inc. v. Code Corp.*, 2:17-cv-167, Dkt. 63 (D.S.C. July 18, 2017)
2. *CG Tech. Dev., LLC v. FanDuel, Inc.*, 2017 WL 3207233 (D. Nev. July 27, 2017)
3. *Ironburg Inventions Ltd. v. Valve Corp.*, Civil Action File No. 1:15-CV-4219-TWT, 2017 WL 3307657 (N.D. Ga. Aug. 3, 2017)
4. *Valspar Corp. v. PPG Indus., Inc.*, Case No. 16-cv-1429 (SRN/SER), 2017 WL 3382063 (D. Minn. Aug. 4, 2017)
5. *Cutsforth, Inc. v. LEMM Liquidating Co., LLC*, Case No. 12-cv-1200 (SRN/LIB), 2017 WL 3381816 (D. Minn. Aug. 4, 2017)
6. *Maxchief Invs., Ltd. v. Plastic Dev. Grp., LLC*, No. 3:16-cv-63, 2017 WL 3479504 (E.D. Tenn. Aug. 14, 2017)
7. *Simpson Performance Prods., Inc. v. Mastercraft Safety, Inc.*, No. 5:16-cv-155, 2017 WL 3620001, at *5 (W.D.N.C. Aug. 23, 2017)
8. *Smart Wearable Techs. Inc. v. Fitbit, Inc.*, No. 3:16-cv-77, 2017 WL 3725630 (W.D. Va. Aug. 29, 2017)

“Intervening Change” Map



Red = Found waiver, *TC Heartland* is not an “intervening change” in the law

Green = No waiver, *TC Heartland* is an “intervening change” in the law

Federal Circuit Response to Mandamus Petitions

In re Sea Ray Boats, Inc., 2017 WL 2577399 (Fed. Cir. June 9, 2017)

In re Hughes Network Sys., LLC, 2017 WL 3167522 (Fed. Cir. July 24, 2017)

In re Techtronic Indus. N. Am., Inc., No. 17-125, Dkt. 25 (Fed. Cir. July 25, 2017)

In re Nintendo of Am., Inc., No. 17-127, Dkt. 30 (Fed. Cir. July 26, 2017)

Federal Circuit Response to Mandamus Petitions

In re Hughes Network Sys., LLC, 2017 WL 3167522 (Fed. Cir. July 24, 2017)

Without necessarily agreeing with the district court's conclusion that the Supreme Court's decision in *TC Heartland* did not effect a change in the law, we nonetheless find that the district court did not clearly abuse its discretion in finding that Hughes waived its right to move to transfer for improper venue. Our ruling is based largely on the fact that Hughes filed its motion only after the *TC Heartland* case was decided by the Supreme Court and less than two months before trial.

But see: *In re Techtronic Indus. N. Am., Inc.*, No. 17-125, Dkt. 25 (Fed. Cir. July 25, 2017) (“The petition for writ of mandamus is denied *without prejudice to Techtronic raising its venue arguments on appeal after issuance of a final judgment* in the case.”)



Pendent Venue After *TC Heartland*

When Venue is Improper Under 35 U.S.C. § 1400(b), Can Pendent Venue Save the Day?

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Venue Rules for Multiple Causes of Action

- > “The general rule is that venue must be established as to each separate cause of action.”
 - *Beattie v. U.S.*, 756 F.2d 91, 100 (D.C. Cir. 1984), citing *Wright, Miller & Cooper* (abrogated on other grounds by *Smith v. U.S.*, 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)); see also *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, 138 F.Supp.2d 449, 462 (2000) (internal quotations omitted)

Pendent Venue: An Exception to the General Rule

- > “Under the doctrine of **pendent venue**, a federal court may in its discretion hear pendent claims which arise out of the **same nucleus of operative fact** as a properly venued federal claim, even if venue of the pendent claim otherwise would not lie.”
 - *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, 138 F.Supp.2d 449, 462 (S.D.N.Y. 2000) (internal quotations omitted)

Pendent Venue: General Considerations

In making its decision, a court must consider factors such as “judicial economy, convenience to the parties and the court system, avoidance of piecemeal litigation and fairness to the litigants.” *Id.* (citing *Rodriguez v. Chandler*, 641 F.Supp. 1292, 1302 (S.D.N.Y.1986)).



Hsin Ten Enterprise USA, Inc. v. Clark Enterprises, 138 F.Supp.2d 449, 462 (S.D.N.Y. 2000) (internal quotations omitted)

When is Pendent Venue Applied for Related Federal Claims?

- > Courts typically use one of two different approaches for federal claims arising from the same nucleus of facts:
 1. The more “specific” venue provision controls; or
 2. The venue provision applicable to the “primary” claim asserted controls.

See, e.g., Cook v. UBS Fin. Services, Inc., 05 CIV. 8842 (SHS), 2006 WL 760284, at *5 (S.D.N.Y. Mar. 21, 2006); *Johnson v. General Dynamics Information Technology, Inc.*, 675 F. Supp. 2d 236, 242 (D.N.H. 2009)

Can Pendent Venue be Applied to Patent Claims that Would Otherwise be Improper Under Section 1400(b)?

Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > **Plaintiff:** Hsin Ten Enterprise USA, Inc.
 - > NY corporation based in Farmingdale, New York
- > **Defendant:** Clark Enterprises
 - > Kansas company whose sole place of business is Salina, Kansas

138 F.Supp.2d 449, 452-53, 461 (S.D.N.Y. 2000)

Hsin Ten's Chi Machine



<http://www.chimachine4u.com/chimachinepatents.html>

GT GreenbergTraurig

Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

> **Allegations against Clark:**

- > Design patent infringement
- > Trademark infringement based on “Chi” trademark
- > Unfair competition under NY common law
- > Deceptive acts and practices in violation of N.Y. Gen. Bus. §§ 349, 350

138 F.Supp.2d 449, 452-53 (S.D.N.Y. 2000)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

> The Court first determined whether venue was proper for the federal trademark infringement claims:

- > Venue governed by the general federal venue statute, 28 U.S.C § 1391(b).
- > Due to the high level of interactivity permitted by Clark’s web site between Clark and New York residents, **venue was proper under § 1391(b)(2) for Hsin Ten’s trademark claim.**

138 F.Supp.2d 449, 461 (S.D.N.Y. 2000)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > The Court then determined whether venue was proper for the patent infringement claims:
 - > Since Clark neither (a) resided in nor (b) committed any acts of infringement or had a regular and established place of business in the Southern District of New York, **venue was improper under § 1400(b) for Hsin Ten's patent claims.**

138 F.Supp.2d 449, 461-62 (S.D.N.Y. 2000)

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 GreenbergTraurig

Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > However, the Court then considered whether the use of pendent venue was appropriate for the patent claims

138 F.Supp.2d 449, 462-64 (S.D.N.Y. 2000)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > **The Court found the exercise of pendent venue over the patent claims to be appropriate:**
 - > The Court first determined that there was “substantial overlap in the proof of the patent and trademark infringement claims” and, thus, a common nucleus of facts.
 - > The Court then acknowledged the two different approaches for federal claims arising from the same nucleus of facts:
 1. The more “specific” venue provision controls; or
 2. The venue provision applicable to the “primary” claim asserted controls.
 - > The Court utilized the second approach and found that the trademark infringement claim was either the “primary” claim or of equal importance to the patent infringement claims and, thus, pendent venue over the patent claims was proper.

138 F.Supp.2d 449, 462-63 (S.D.N.Y. 2000)

Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > In reaching its conclusion, the Court acknowledged that “most of the courts that have addressed this issue have **refused** to exercise pendent venue over a federal patent claim governed by section 1400(b).”
- > However, the Court provided three reasons for departing from these “persuasive, but non-binding authorities.”

138 F.Supp.2d 449, 463 (S.D.N.Y. 2000)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

> “*First*, no appellate court has held that pendent venue is *never* appropriate over a patent infringement claim.”

138 F.Supp.2d 449, 463 (S.D.N.Y. 2000) (emphasis in original)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

> “*Second*, a number of the cases rejecting pendent venue over patent claims are easily distinguished.”

- In these cases, the patent infringement claims were the primary claim and the less important federal or state law claims were used to attempt to “ferryboat in” the patent claims.

138 F.Supp.2d 449, 463 (S.D.N.Y. 2000) (emphasis in original)

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Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > “*Third*, at the time of these rulings [which were decided prior to *VE Holding*] the patent venue statute was highly restrictive with respect to the appropriate venue.”
- > However, since *VE Holding*, “[t]he restrictive view of section 1400(b) is no longer an appropriate reading of the patent venue statute.”

138 F.Supp.2d 449, 463-464 (S.D.N.Y. 2000) (emphasis in original)

Hsin Ten Enterprise USA, Inc. v. Clark Enterprises

- > Thus, the *Hsin Ten* Court’s **primary basis** for departing from the prior decisions in that district and for finding that pendent venue could be exercised over a patent infringement claim was its belief that **the Federal Circuit had expanded the scope of patent venue in *VE Holding*.**

138 F.Supp.2d 449, 463 (S.D.N.Y. 2000) (emphasis in original)

*Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.***> Plaintiff: Jenny Yoo Collections, Inc.**

- Designs and manufactures wedding apparel, including convertible dresses which include two front and two rear panels attached at the waist
- Owns two design patents which cover the “ornamental features” of the convertible dress, including the above panels “which blend naturally and seamlessly into the dress.”

1:16-cv-2205-88 (VSB), slip op. at 2-5 (S.D.N.Y. Oct. 20, 2017)

Jenny Yoo “convertible dress”

“Aidan” convertible dress (Style #1282)



1:16-cv-2205-39 (VSB), Amended Complaint at 9 (S.D.N.Y. Aug. 26, 2016)

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Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.

> **Defendants:**

- Watters Designs, Inc. and Wtoo Partners, L.P.
 - Texas companies whose principal places of business are in Texas
- Essence of Australia
 - Kansas corporation whose principal place of business is in Kansas

1:16-cv-2205-88 (VSB), slip op. at 1, 5 (S.D.N.Y. Oct. 20, 2017)

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Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.

> **Allegations Against Defendants**

- Trade dress infringement under Section 43(a) of the Lanham Act and 15 U.S.C. § 1125(a)
- Common law trade dress infringement and unfair competition
- Infringement of both design patents
- Unfair business practices under NY GBL § 349
- Unjust Enrichment

1:16-cv-2205-88 (VSB), slip op. at 11 (S.D.N.Y. Oct. 20, 2017)

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Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.

- > **Without any analysis as to whether there was a common nucleus of fact or which of the two approaches to apply, the Court found that, in view of *TC Heartland*, venue was improper in SDNY:**
 - Neither Defendant resided in SDNY
 - Neither Defendant had a place of business in SDNY

1:16-cv-2205-88 (VSB), slip op. at 15-16 (S.D.N.Y. Oct. 20, 2017)

Jenny Yoo Collections, Inc. v. Watters Designs, Inc. et al.

- > **Hsin Ten's Decision to Apply Pendent Venue Was Not Compelling in View of *TC Heartland***
 - “However, in deciding to apply the pendent venue doctrine to a patent infringement claim in *Hsin*, the district court specifically noted that because of *VE Holding*, § 1400(b) was ‘a much broader statute today’ than it was when most courts held that pendent venue cannot be exercised over a patent infringement claim.’ *Id.* at 464. In light of the holding in *TC Heartland*, I do not find the *Hsin* court’s determination compelling. Therefore, I refuse to apply the pendent venue doctrine to find that venue is proper over Plaintiff’s patent infringement claim.”

1:16-cv-2205-88 (VSB), slip op. at 16 (S.D.N.Y. Oct. 20, 2017)

Omega Patents, LLC v. Calamp Corp.> **Facts:**

- Plaintiff alleged that Defendant infringed the following patents:
 - U.S. Patent No. 6,346,876
 - U.S. Patent No. 6,737,989
 - U.S. Patent No. 6,756,885
 - U.S. Patent No. 7,671,727
 - U.S. Patent No. 8,032,278
- Plaintiff and Defendant entered into prior settlement agreement whereby Defendant consented to venue in the Middle District of Florida with respect to infringement claims for the '989 Patent

6:13-cv-1950-230-PGB-DCI, slip op. at 2 (M.D. Fl. Sep. 22, 2017)

Omega Patents, LLC v. Calamp Corp.> **Procedural History:**

- Defendant admitted that venue was proper with respect to the '989 Patent in its answer to the complaint
- Defendant filed counterclaims of non-infringement, invalidity and unenforceability as to all of the patents-in-suit, and conceded that “venue” was proper with respect to these counterclaims
- Just prior to trial, Plaintiff *dropped* the '989 Patent
- The jury returned a verdict in favor of Plaintiff on all four of the remaining patents-in-suit
- Subsequently, the Supreme Court issued its decision in *TC Heartland*, and Defendant moved to vacate the jury verdict and dismiss for lack of venue, claiming that venue was no longer proper once Plaintiff dropped the '989 Patent

6:13-cv-1950-230-PGB-DCI, slip op. at 2-3 (M.D. Fl. Sep. 22, 2017)

Omega Patents, LLC v. Calamp Corp.

> **The Court Found Venue to be Proper**

- “Venue must be determined based on the facts at the time of filing.”
- Defendant consented to venue for the ’989 Patent
- Due to the common nucleus of facts with respect to all of the patents-in-suit, pendent venue was proper at the time of filing

6:13-cv-1950-230-PGB-DCI, slip op. at 3-6 (M.D. Fl. Sep. 22, 2017)

Omega Patents, LLC v. Calamp Corp.

> ***TC Heartland* was Inapplicable**

- “However, the holding in *TC Heartland* has no effect in the instant case, because venue was proper as to the ’989 patent and as to the remaining patents-in-suit under the doctrine of pendent venue. [The Supreme Court in *TC Heartland* established how venue is to be determined in these actions in the absence of a stipulation to venue accompanied by pendent venue.](#)”

6:13-cv-1950-230-PGB-DCI, slip op. at 7 (M.D. Fl. Sep. 22, 2017)

*Omega Patents, LLC v. Calamp Corp.***> Timing of Motion May Have Impacted the Decision**

- “Moreover, allowing a party to defeat venue after the litigation is commenced by, for example, moving their corporation out of the state invites gamesmanship.”

6:13-cv-1950-230-PGB-DCI, slip op. at 9 (M.D. Fl. Sep. 22, 2017)

Is Pendent Venue Applicable for Patent Claims?

- > While most courts that have considered the issue have found pendent venue to not apply to the patent claims under the facts of those cases, assuming there is a common nucleus of fact, and the court believes judicial economy will be served, the court can exercise its discretion and apply the doctrine.
- > As we have seen (e.g., in Jenny Yoo and Omega), a court need not give any reason for choosing whether to apply the doctrine after concluding there to be a common nucleus of fact.

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NYIPLA (The New York Intellectual Property Law Association)

ONE-DAY PATENT CLE SEMINAR

The Princeton Club
15 West 43rd Street
New York, New York 10036

November 16, 2017

Panel 1 *TC Heartland*: Returning to Life Under Section 1400(b) Venue

Regular and Established Place of Business (of Defendant)

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28 U.S.C. § 1400(b): Patent venue

(b) Any civil action for patent infringement may be brought in the judicial district. . . where the defendant has committed acts of infringement and **has a regular and established place of business.**

Federal Circuit's *Cray* Decision

In re Cray Inc., ___ F.3d ___, 2017 WL 4201535 (Fed Cir. Sept. 21, 2017)

Holding: “The district court misinterpreted the scope and effect of our precedent in determining that Cray maintained “a regular and established place of business” in the Eastern District of Texas. . . .The district court’s four-factor test is not sufficiently tethered” to the statutory language.

Relevant Facts

- Cray did not rent/own property in E.D. Tex.
- Cray allowed 2 employees to “work remotely from their respective homes” in E.D. Tex.
- Employees were reimbursed for phone, and listed home phone in client correspondence
- Employees did not maintain Cray products/literature in their homes

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Federal Circuit's *Cray* Decision (cont'd)

In re Cray Inc., ___ F.3d ___, 2017 WL 4201535 (Fed Cir. Sept. 21, 2017)

Key Takeaways

- “Federal Circuit law . . . governs our analysis of what § 1400(b) requires.”
- There are “three general requirements relevant to the inquiry:
 - 1) there must be a **physical place** in the district;
 - 2) it must be a **regular and established place of business**;
 - 3) it must be the place **of the defendant**.

If any statutory requirement is not satisfied, venue is improper.”

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Federal Circuit's *Cray* Decision (cont'd)

In re Cray Inc., ___F.3d ___, 2017 WL 4201535 (Fed. Cir. Sept, 21, 2017)

Key Takeaways Continued. . .

- Physical "Place" Required: "**The district court erred as a matter of law** in holding that 'a fixed physical location in the district is **not** a prerequisite to proper venue. . . . The statute requires a 'place.'"
- Place must be "regular": A business **may be** "regular," for example, if it operates in a "steady[,], uniform[,], orderly[, and] methodical" manner. . . . Sporadic activity **cannot** create venue."
- Home Offices: "If an employee can move his or her home out of the district [at will]," that **cuts against** "regular" and "established"
- Defendant's Representations are relevant: Look at "whether the defendant lists the alleged place of business on a website, or in a telephone or other directory."

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Federal Circuit's *Cray* Decision

In re Cray Inc. ___, F.3d ___, 2017 WL 42 01535 (Fed Cir. Sept. 21, 2017)

Holding: "The facts presented cannot support a finding that Mr. Harless's home was a regular and established *place of business of Cray*. . . . The fact that Cray allowed its employees to work from the Eastern District of Texas is insufficient."

Application to Relevant Facts

- Cray does not rent/own portions of Harless's home
- Harless's employment is not conditions on living in E.D. Texas
- Social media presence was relevant to *employee's* location, not *Cray's*
- **Contrasted, Cordis**: "Cordis's business specifically depended on employees being physically present at places in the district."

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Cray on Cordis

“Notably, **the [Cordis] court did not**, in its opinion, **evaluate venue in light of the statutory language of § 1400(b)**. The court simply determined that, under the facts presented, a writ was not justified.

* * *

We recognize that the world has changed since 1985 when the *Cordis* decision was issued. In this new era, not all corporations operate under a **brick-and-mortar** model. Business can be conducted **virtually**. Employees increasingly **telecommute**. Products may not as a rule be **warehoused** by retailers, and the just-in-time delivery paradigm has eliminated the need for storing some **inventory**. But, **notwithstanding these changes, in** the wake of the Supreme Court’s holding in *TC Heartland*, effectively reviving Section 1400(b) as the focus of venue in patent cases, **we must focus on the full and unchanged language of the statute, as Cordis did not consider itself obliged to do.**”

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Pre In re Cray: Maintenance and Repair Services

Cellular Dynamics Int’l, Inc. v. Lonza Walkersville, Inc., 2017 WL 4046348 (W.D. Wisc. Sep. 12, 2017)

“I find that defendant does not have a sufficient “permanent and continuous” corporate “presence” in this district. ... Most significantly, Lonza Walkersville has **no** permanent or continuous **physical presence** in Wisconsin, **not** real estate, **not** people, **not** inventory.”

- Lonza’s sales reps visit Wisconsin, but none live there and none store inventory in Wisconsin.
- Lonza offers on-site maintenance and repair, but that is not relevant “[a]bsent any evidence that defendant maintains a location in this district where it houses inventory or service employees”

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Pre In re Cray: Even Minimal Physical Presence May Be Dispositive

Prowire LLC v. Apple Inc., Civil Action No. 1:17-cv-223, 2017 WL 3444689 (D. Del. Aug. 9, 2017)

Apple does not dispute Prowire's allegation it has a retail store in Delaware. **It argues one retail store is not enough to establish a 'permanent and continuous presence.'** **We disagree:** Apple's retail store is a permanent and continuous presence where it sells the alleged infringing technology to consumers on a daily basis.

But not CEO's private residence/vacation home. *Prolacta Bioscience Inc. v. Ni-Q, LLC*, Civil Action No. 2:17-cv-04071 Dkt. 32 (C.D. Cal. Aug. 7, 2017) ("mere presence of high-level employee of corporate defendant" insufficient; distinguished *Cordis*)

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Pre In re Cray: Permanent Sales Reps vs. "Occasional" Business

Free-Flow Packaging Int'l, Inc. v. Automated Packaging Sys., Inc., Civil Action No. 17-cv-1803, Dkt. 88 (N.D. Cal. Aug. 29, 2017)

- Auto employs 4 sales people who "occasionally conduct business in this district [about 25% of their time spent in the district]"
- Employees lack authority to contract on behalf of Automated
- 1-3 live in the district, but are responsible for regions that cover many districts (and Canada)
- One employee kept various work materials in a storage locker in the district

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Pre In re Cray: Permanent Sales Reps vs. “Occasional” Business (cont’d)

Free-Flow Packaging Int’l, Inc. v. Automated Packaging Sys., Inc.,
(cont’d)

Holding: distinguishing *Cordis*, venue improper

- “[T]he Court finds it significant that each of the employees who worked in the District covered a large area in which the District was just one portion.”
- “[A]lthough between one and three employees lived in this District and, thus, worked in this District when they worked from home, the location of their residence appears to one of convenience and choice for the employees, as opposed to a requirement by Automated or the location of their workplace.”

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business

- In *InVue Security Products Inc. v. Mobile Tech.*, Civil Action No. 3-15-cv-00610 (W.D. N. Car. Aug. 21, 2017), the court found that the defendant **had** a “regular and established place of business” in the district because it does “business through a permanent and continuous presence in the district.” **The court found that although the defendant did not have any property in the district, it did employ six hourly part-time field technicians. These technicians “do not solicit orders, enter into contracts, or make sales, but instead service existing accounts,” including “on-site customer services related to Mobile Tech’s allegedly infringing products, as well as on-site training and education, emergency call response 24/7, and an inventory of replacement parts and specialized tools.”** The court also noted that these field technicians “actively engage with customers in the district” and that “the company is registered to do business in the state.” The court, however, granted the motion to transfer to a more convenient venue under § 1404(a).

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business (cont'd)

- In *Percept Technologies v. Fove, Inc.*, Civil Action No. 2-15-cv-02387 (D. Nev. August 8, 2017) (Order, Dkt. 52), defendant did not have any offices, employees, or land in Nevada; **only conduct in Nevada included demonstrating a prototype of its virtual reality product at the Consumer Electronics Trade Show (CES) in Las Vegas and selling one allegedly infringing product to a Nevada resident**; conduct was **not** enough to have a “regular and established place of business” in Nevada. Fried Frank, “August 10, 2017 – *TC Heartland* Weekly Update.”
- In *Kranos IP Corp. v. Riddell, Inc.*, Civil Action No. 2:17-cv-443-JRG (E.D. Tex. Aug. 28, 2017), the Eastern District of Texas denied the defendant’s motion to dismiss for improper venue. **The court held that defendant’s activities in the district, including employing two full-time sales representatives there, created a regular and established place of business.** Defendant employs at least two regular and established place of business full-time direct sales representatives who are based in his District and who work exclusively for [defendant]. These two representatives work from their personal residences ... [Defendant’s] direct sales representatives receive the infringing helmets in this District, keep samples in this District, and display and show these samples in this District. They also give sales presentations for [defendant] in this District and provide promotional materials about the infringing products. **[Plaintiff] further alleges that [defendant] has sales showrooms in his District for the purpose of displaying samples of the infringing helmets ...** [Defendant] views its local sales representatives as in intended point of interaction between the public and [defendant] in each region.”

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business (cont'd)

- In *Billing Network Patent Inc. v. Modernizing Network*, Civil Action No. 1-17-cv-05636 (N.D. Ill. Nov. 6, 2017), Motion to Dismiss – Improper Venue (court granted defendant’s motion to dismiss plaintiff’s patent infringement action for improper venue because defendant did **not** have a regular and established place of business in the forum based on its five work-at-home employees in the district: “While these employees’ homes are certainly physical places in the District and are in some sense connected to Defendant’s business, **none of them are a place ‘of the defendant,’ ... Defendant does not own or lease these five employees’ homes or contributed to their rent or mortgage payments. Nor does it require them to reside at particular locations or even to reside in this District. Defendant also does not publicly advertise or list the employees’ homes as a place where it conducts business ... Listing an employee’s home address on a workers’ compensation policy does not show ‘possession or control’ by the employee over the employee’s home, nor does it hold out the employee’s home to the public as the employer’s place of business.”**)
- Medcom Network Systems, LLC v. Medforce, Inc.*, Civil Action No. 2-17-cv-11527 (E.D. Mich. Sept. 20, 2017), Motion to Dismiss, Improper Venue (court granted defendant’s motion to dismiss: plaintiff’s patent infringement action for improper venue: **“Importantly, [defendant] neither owns nor leases any property in this district. Only five of its employees work in this district, one of whom is on leave, and three of whom have offices in Minnesota.** One of its Michigan phone numbers is not answered and the other is routed to Tennessee. Further, because [plaintiff] has not alleged facts showing what proportion of [defendant’s] business occurs in this district, it fails to show that [defendant] regularly carries on a substantial part of its business on a permanent basis in this district. **Undoubtedly [defendant] carries on some business here, but that business cannot be called regular and established.”**)

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business (cont'd)

- In *Regents of the University of Minnesota v. Gilead Sciences, Inc.*, 16-cv-2915 (D. Minn. Oct. 20, 2017), the court held that Defendant Gilead Sciences did **not** have a “regular and established place of business” for purposes of venue under 28 U.S.C. § 1400(b). **While Gilead had twelve employees who lived and worked in the district, the court held that Gilead failed to satisfy any element of the Federal Circuit’s *In re Cray* three-part test for establishing a “regular and established place of business.”** For example, the homes of Gilead’s employees were not sufficiently “regular and established” because the employees were not contractually bound to live or work in the district. Moreover, the homes were not a place of business “of the defendant” because the employees worked primarily on-site at facilities of Gilead’s customers. **Finally, Gilead did not own or rent any physical “place of business” in the district.**

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business (cont'd)

Fried Frank, October 30, 2017 – *TC Heartland* Weekly Update.

Judge Nelson, in *Regents of Univ. of Minn. v. Gilead Sciences, Inc.*, went into great detail in her “regular and established place of business” analysis:

[Defendant] does not have a physical place in this District. None of [its] employees work from a stand-alone business office in Minnesota, but instead, work in the field, visiting healthcare providers ... **[N]one of [defendant’s] employees in Minnesota store products for sale in their homes, or anywhere in Minnesota, nor do their homes function as distribution centers. And while some employees keep a limited quantity of [defendant] literature in their homes, given the negligible quantity, this relatively limited practice does not sufficiently support a finding that these homes constitute [defendant’s] physical place in Minnesota** ... [N]one of [defendant’s] Minnesota employees receives any administrative or secretarial support, whether in Minnesota or elsewhere.” (page 11)

While [defendant] may have employed a sales force of approximately a dozen people over at least a two-year period, **the physical location of that sales force is not permanently fixed** ... While the Court agrees that [defendant’s] employees service customers in Minnesota, whether through visits to healthcare providers or clinical trial facilities, **this servicing occurs at the customer’s physical place, not [defendant’s]** ... [T]his does not sufficiently support a finding of a regular and established place of business in Minnesota.” (page 14)

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Presence, Number of Employees, Status, Number of Sites re Regular and Established Place of Business (cont'd)

The forum was also not the “place of the defendant”:

“The Court is not persuaded that these relatively small storage lockers, containing a limited quantity of pharmaceutical products, constitute a sufficiently regular and established physical foothold of [defendant] in Minnesota. Nor is the Court persuaded by the fact that [defendant] provides computers, printers, and iPads to its Minnesota employees and pays their phone, internet and cell phone bills ... [Plaintiff] also cites [defendant’s] ‘control’ over dozens of clinical trials in Minnesota as evidence that [defendant] exercises ownership or control over a place in Minnesota. **While [defendant] may indeed closely control the protocol of these studies, and the presence of its drugs, there is no evidence that [defendant] owns or controls the physical space in which the trials are held ...** [Defendant] does not require Minnesota-based employees to live in the state for purposes of serving its Minnesota customers ... [Defendant] does not hold out its employees’ homes as the company’s places of business.” (page 17)

Emphasis added.

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“Regular and Established” in the Internet Age

Glasser v. Barboza, No. 1:17-cv-322, Dkt. 38 (E.D. Va. Aug. 11, 2017)

[T]he fact that Defendant Cinelinx Media **has made its product available online through Amazon.com is not sufficient** to create a regular and established place of business for purposes of the patent venue statute

See also Nike, Inc. v. Skechers U.S.A., Inc., 2017 WL 3389022 (D. Or. June 30, 2017)

- **“[I]nformation on direct internet sales is unlikely to** lead to relevant evidence on . . . ‘regular and established place of business.’”

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“Regular and Established” in the Internet Age

Bristol-Myers Squibb Co. v. Mylan Pharms. Inc., 2017 WL 3980155 (Sep. 11, 2017) (Stark, C.J.)

“**A website**, which by its very nature can generally be accessed anywhere at anytime by anyone, **cannot alone constitute the type of continuous and permanent presence in the district required by § 1400(b). To hold otherwise** would essentially turn any cell phone, laptop, or computer into a regular and established place of business for any company with a website from which a consumer can access information or purchase products online.”

- *In re Cray*:
“The statute thus **cannot be read** to refer **merely to a virtual space or to electronic communications** from one person to another” (*11)
- *LoganTree v. Garmin Int’l* 2017 U.S. Dist LEXIS 99925 (W.D. Tex. 2017) at *4
 - Defendant’s **website** listed San Antonio and Austin distributors
 - Not “regular and established place of business”

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Internet/Web Effects, Regular and Established Place of Business

Generally, internet presence per se will not satisfy a *TC Heartland/In re Cray* § 1400(b) place of business analysis. E.g., **An interactive website** satisfies general venue for trademark infringement allegations, but **not for patent infringement allegations**, because “**a physical location** within the district over which is exercises some measure of control” **is needed**. *Hsin Ten Enterprise USA v. Clark Enterprises*, 138 F. Supp. 2d 449, 460-61 (S.D.N.Y. 2000).

- *LoganTree v. Garmin International, Inc.*, Civil Action No. 5-17-cv-00098 (W.D. Tex. June 22, 2017), Motion to Dismiss, Improper Venue, (“The fact that [defendants] are authorized to do business in Texas is not controlling and will not establish the [§ 1400(b)] requirement.’ **Nor does defendants’ website allowing viewers to access a list of San Antonio/Austin distributors provide venue under the patent infringement statute.** Finally, the fact that defendants sell their activity trackers to distributors in Texas Western will not establish venue. . . . Therefore, the kind and degree of defendants’ contacts **do not support a** finding that defendants have a permanent and continuous presence which shows a regular and established place of business in the Western District of Texas.” (page 3)).

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Internet/Web Effects, Regular and Established Place of Business (cont'd)

- *Glasser v. Barboza et al.*, Civil Action No. 1-17-cv-00322 (E.D. Va. Aug. 11, 2017), Dkt. 38 (Four of the defendants are individuals residing in Texas who operate Defendant Cinelinx Media, a sole proprietorship also based in Texas. Cinelinx Media **“has made its product available online through Amazon.com [but that] is not sufficient to create a regular and established place of business for the purposes”** of meeting the venue test under the second prong of 28 U.S.C. § 1400(b).

Fried Frank, “Online Sales Do Not Create a ‘Regular and Established Place of Business’; *TC Heartland* Applies to Unincorporated Entities,” <https://www.lexology.com/library> (Aug. 15, 2017).

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Internet/Web Effects, Regular and Established Place of Business (cont'd)

- *Talsk Research, Inc. v. Evernote Corporation*, Civil Action No. 1-16-cv-02167 (N.D. Ill. Sept. 26, 2017), Motion to Transfer for Improper Venue (28 U.S.C. § 1406(a)) (“Plaintiff argues that Defendant has a regular and established place of business in this District based primarily on the activities of seven residents who have signed up to participate in the ‘[Defendant] Community Program.’ **The individuals in question received ‘Community Member’ status after a short online training course. They are not [defendant] employees.** . . . While Defendant provides certain financial incentives in the form of bonuses to Community Members who recommend its products, they receive no salary from Defendant. . . . Defendant has no fixed physical presence in this District, and **relying on customer use of Defendant’s software within the district as a substitute for a fixed physical location would not be proper.** Nor does Defendant have the necessary control over its Community Members for the Court to consider their physical presence in the District the equivalent of Defendant’s presence.” (page 6)
- *Lites Out, LLC v. OutdoorLink, Inc.*, Civil Action No. 4-17-cv-00192 (E.D. Tex. Nov. 2, 2017), *Sua Sponte* Motion to Transfer for Improper Venue (28 U.S.C. § 1406(a)) (court *sua sponte* transferred plaintiff’s patent infringement action for improper venue after reviewing defendant’s motion to dismiss **because its control of billboards in the forum** did not constitute a physical place in the forum. **OutdoorLink provides digital monitoring services for billboards. It sells surveillance computers to billboard owners which it installs itself, and then maintains through independent contractors. It monitors over two thousand billboards in EDTex:** “[Defendant] services its [products] in this District with employees and independent contractors but these personnel do not reside in this District. One independent contractor . . . lives in Texas, but in another district, and spends most of the year outside of the state. **Indeed, [defendant] virtually monitors and controls many billboards in this District through [its products]. Such activity, however, falls within the virtual spaces and electronic communications from one person to another that cannot be ‘a physical place’ of business for patent venue purposes.**” (page 8)

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Internet/Web Effects, Regular and Established Place of Business (cont'd)

- *American GNC Corp. v. ZTE Corp.*, Civ. No. 4:17-cv-620-ALM-KPJ (E.D. Tex. Oct. 4, 2017) (magistrate judge recommended denial of the defendant's motion to dismiss for improper venue; *affirmed* (E.D. Tex. Nov. 7, 2017); report and recommendation found that that **a call center in Plano, Texas operated by a third party, iQor, should be considered a regular and established place of business of ZTE**. The court reasoned, among other things, that **iQor has more than sixty customer service representatives dedicated to ZTE USA, that ZTE USA has at least two full-time supervisor employees on site, and that ZTE's website seamlessly integrates with the support center**; thus, the court was "not persuaded by ZTE USA's argument that the call center is not a regular and established place of business simply because ZTE USA has chosen to delegate its call center operations to a third party." **while the magistrate judge's opinion did not cite or discuss the *In re Cray* decision, Judge Mazzant's affirmance found *Cray* factually distinguishable, in that the location at issue in *Cray* was an employee's home. In *Cray*, the Federal Circuit did not consider the issue of whether a business location established in partnership with the third-party-as was the case here-qualified as a regular and established place of business. The Court found that the call center was in fact a "physical place" from which the defendant "actually engaged in business."**)

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"Regular and Established" in the Internet Age**What about now, post-*In re Cray*, in the Internet/Web age?**

- Is defendant's **server presence** in district sufficient; is defendant **renting cloud services which are provided through a third-party server farm in the district** sufficient?
- Is defendant's **warehouse presence** for goods shipped in response to web-based orders sufficient? **Suppose warehouse provided by Amazon.com as part of its cloud services? Fulfillment center?**
- What about **direct capability of server** in district, e.g. would it be capable of accepting orders? Active, in fact?

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28 U.S.C. § 1400(b): Patent venue

(b) Any civil action for patent infringement may be brought in the judicial district...**where the defendant has committed acts of infringement** and has a regular and established place of business.

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Committed Acts of Infringement

The traditional two approaches to “acts of infringement”:

Similarly, courts have taken two different approaches under the “acts of infringement” requirement. **The Federal Circuit, however, has not adopted either approach for this requirement. A line of cases from the Seventh Circuit** asserts that the “acts of infringement” requirement is satisfied by continuous sales solicitation activity, coupled with demonstrations of the alleged infringing device in the forum.¹⁴² **Other courts** construe the statute narrowly and require the defendant to actually consummate a sale in the forum.¹⁴³ The relevant time frame for this analysis is the time at which the cause of action accrues.

¹⁴²See, e.g., *Union Asbestos & Rubber Co. v. Evans Prods. Co.*, 328 F.2d 949 (7th Cir. 1965) (the defendant’s demonstration of the operation of the alleged infringed device on two occasions, coupled with continuous solicitation of orders, was a sufficient degree of selling for venue purposes); *William Sklaroff Design Assocs. v. Meicor Mfg.*, 224 U.S.P.Q. 769 (N.D. Ill. 1984) (the continuous solicitation of orders, coupled with the physical presence of the product within the district, was a sufficient degree of selling for venue purposes).

¹⁴³See, e.g., *Lairam Corp. v. Remond, Inc.*, 226 U.S.P.Q. 971 (D. Md. 1985) (The court based its holding on the idea that the patent venue statute is specific and unambiguous, and should not be liberally construed); see also *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U.S. 723 (1915) (adopting the narrow construction). The Seventh Circuit found that the Supreme Court’s language in *W.S. Tyler* was *dicta*. See *Union Asbestos & Rubber Co.*, 328 F.2d at 951.

Sampson, “Corporate Venue in Patent Infringement Cases”, *De Paul Law Review*, Vol. 40, No. 1, Fall 1990 at p. 223.

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Committed acts of infringement (cont'd)

What about now, in the Internet/Web age?

- Is **district presence of active server** capable of taking orders of infringing goods sufficient? Must “**proof**” of **orders taken be averred** in a complaint?
- What if that **server is “dumb/passive” – may provide information but not take an order?** Isn't that “offering for sale”, an act of infringement without more?
- Wouldn't **use of software** that infringes in district, **through server located there**, be sufficient?

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Pleading “. . . where . . . committed acts of infringement” occurred

- Plaintiff need not **prove** defendant infringed at time of filing of Complaint
 - **Must merely allege/plead acts in district**, otherwise:

“. . . would mean that the merits of the action would have to be reached on a pre-trial procedural motion”

Leach, 1965 WL 7783, at *1

“. . . the test used to determine whether an act of infringement occurred within the district is less strict than that used when the case is tried on the merits”

Stiegele v. Jacques Kreisler Mfg. Corp., 213 F. Supp. 494, 496 (S.D.N.Y. 1962)

“. . . it should be assumed, for the purposes of the venue question, that the devices in question do, as a matter of law, infringe the plaintiff's patents . . . The relevant inquiry, then, is whether the acts constituting the infringement were committed in the judicial district of the forum.”

Fastener Corp. v. Spotmails, Inc., 291 F. Supp. 974, 976 (N.D. Ill. 1968)

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No Nexus Required Between Regular and Established Place of Business and Act(s) of Infringement

As long as the alleged act of infringement is in the district, no connection with the regular and established place of business is necessary. *Gaddis v. Calgon*, 449 F.2d 1318, 1320 (5th Cir. 1971) (“The particular division [of a corporation] charged with the infringements [need not have] a regular and established place of business in the district,” *Ferguson v. Ford Motor*, 77 F. Supp. 425, 436 (S.D.N.Y. 1948) (“The regular and established place of business need not be the business connected with the alleged patent infringement.”)), *Laitram Corp. v. Rexnord, Inc.*, 226 USPQ 971 (D. Md. 1985); *Bourns, Inc. v. Allen-Bradley Co.*, No. 70 Civ. 1992, 1971 WL 17177, at *2 (N.D. Ill. Apr. 5, 1971) (“Nothing in the language of Section 1400(b) justifies the conclusion that a defendant’s place of business in the district must have some connection with the accused device.”).

But see Edlin, “Physical Place of Business Required for Patent Venue Under *In re Cray*,” Lexology, <https://www.lexology/library> (October 4, 2017):

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No Nexus Required Between Regular and Established Place of Business and Act(s) of Infringement (cont’d)

“The Federal Circuit has yet to address whether there must be a relationship between the acts of infringement and the place of business in the district — i.e. is it necessary for the acts of infringement to arise from the regular and established place of business, for venue to be proper there? The lower court in *Cray* noted this outstanding question, but did not address it as the issue was not disputed. See *Raytheon Co. v. Cray, Inc.* No. CV 2:15-CV-01554-JRG, 2017 WL 2813896 (E.D. Tex. June 29, 2017) at *7. **In fact, district courts have come out both ways on this issue.** Compare *Bourns, Inc. v. Allen-Bradley Co.*, 1971 WL 17177, at *2 (N.D. Ill. Apr. 5, 1971) (“The statute requires only that the defendant have committed acts of infringement in the district and have a regular and established place of business there; there is no requirement that the two factors be related.”) with *Scaramucci v. FMC Corp.*, 258 F. Supp. 598, 602 (W.D. Okla. 1966) (“[T]here must be some reasonable or significant relationship between the accused item and any regular and established place of business of the accused in the judicial district.”). The majority opinion appears to be that no relationship is required. See *Gaddis v. Calgon Corp.*, 449 F.2d 1318, 1320 (5th Cir. 1971); *Shelton v. Schwartz*, 131 F.2d 805, 808-09 (7th Cir. 1942). **“This leaves room for an argument that venue is improper even where there is some physical presence if the acts of infringement are committed outside the district.”**

29

Declaratory judgment actions

- Law remains unchanged after *TC Heartland*.
- Section 1400(b) applies to “[a]ny civil action for patent infringement,” which a declaratory judgment action’s not.
- DJ actions still governed by the general venue statute, 28 U.S.C. § 1391, with venue appropriate wherever a corporate defendant is subject to personal jurisdiction.
 - See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F. 2d 1574, 1583 (Fed. Cir. 1990) (noting that it “has long been held that” patent declaratory judgment actions are governed by § 1391, not § 1400(b)).

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§1400(b) Venue Questions for Foreign Corporate Defendants

- *Brunette Machine Works Ltd. v. Kockum Industries Inc.*, 406 U.S. 706 (1972), held that a foreign corporation can be sued for patent infringement in any judicial district: § 1391(d) [reflects the] long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”
- *TC Heartland*, ftn 2: **Court declines to address implications of decision on foreign corporations, nor “express any opinion on this Court’s holding” in *Brunette*.**

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§ 1400(b) Venue Questions for Foreign Corporate Defendants (cont'd)

Re et al., “*TC Heartland* Complicates Venue for Foreign Defendants,” Law 360, <https://www.law360.com/articles/935949> (June 29, 2017), considered the issue of foreign corporate exposure to § 1400(b), an issue explicitly not addressed in *TC Heartland*. They concluded that:

The House Judiciary Committee report shows that the intent of § 1391(c)(1) was to “permit permanent resident aliens domiciled in the United States to raise a venue defense.” This legislative intent shows that § 1391(c)(1) is a venue restriction, even as applied to foreign defendants. **Thus, *Brunette’s* rationale [under old § 1391(d)] no longer seems to apply. No longer can one say that the venue statute merely recognizes the long-established rule that suits against foreign defendants are wholly outside the operation of all the federal venue laws, general and special. No longer is it accurate that all foreign defendants do not have a venue defense.** When it amended § 1391, Congress created a venue defense for at least some foreign defendants. **As a result, litigants will surely argue that *Brunette* is no longer good law and that § 1400 stands on its own, even with regard to foreign defendants.**

Foreign defendants will also rely on the legislative history accompanying the 2011 amendments. That history supports the independence of the specialized venue statutes from the general venue statute. . . Thus, patent cases such as *Fourco* and *Brunette* are not mentioned in the House report.

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§ 1400(b) Venue Questions for Foreign Corporate Defendants (cont'd)

Under both § 1391(c)(1) and § 1400, a natural person residing in the United States can be sued only where they are domiciled. Thus, for natural persons residing in the United States, it makes no difference which statute applies because the outcome is the same. But that is not the case for a foreign defendant residing outside the United States. **If the general venue statute were to apply, § 1391(c)(3) would mean that a foreign patent defendant could be sued anywhere in the United States. If the patent venue statute were to apply, § 1400 would mean that a foreign defendant could be sued only where it has a regular established place of business and infringing acts. If it has no such place of business, under § 1400(b) venue would not be proper in any district.** Foreign defendants will surely argue that § 1400(b) controls whenever they are sued where they have no regular and established place of business.

If Congress did not intend foreign defendants to have such protections from suit, Congress should promptly amend § 1400 to specify that foreign entities may be sued in any judicial district for patent infringement. Alternatively, Congress could eliminate § 1400 altogether, making § 1391 govern all patent cases, as some commentators have suggested. **Until then, the courts are going to be charged with the task of reconciling *TC Heartland*, *Brunette* and the 2011 amendments to the general venue statute.**

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Refusal to Base “Regular and Established” Place of Business (of Defendant) on In-State Operations of Corporate Agent/Affiliates

- *Sovereign IP, LLC, v AT&T, Inc., AT&T Services, Inc.*, No. 2:17-cv-00293-RWS-RSP (E.D. Tex. Oct. 31, 2017) (court determined that venue was improper with respect to AT&T, Inc. because the company does not have a “regular and established place of business” in the Eastern District of Texas; the court refused to treat AT&T, Inc. and AT&T Services, Inc. as a “single entity” for purposes of venue, **noting that so long as a subsidiary and its corporate parent maintain “formal corporate separateness,” a “subsidiary’s presence in a venue cannot be imputed to the parent.”** (Slip op. at 2, citing *Canon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 334-35 (1925).) While the court granted AT&T Inc.’s motion to dismiss, the court refused to dismiss AT&T Services, Inc. The court noted that AT&T Services Inc. based its venue challenge on the assertion that Sovereign had not adequately alleged acts of infringement in the district. **The court explained, however, that the burden of establishing improper venue lies with the defendant. As such, the defendant must present “affidavits, declarations, or other evidence” showing venue is improper. By contrast, it is not sufficient for a defendant, as AT&T Services did here, to merely point to alleged deficiencies in the complaint.)**
- *Newpark Mats & Integrated Services LLC v. Equipotential Matting, LLC, et al.*, No. 4:17-cv-00304-brw (E.D. Ark. Oct. 26, 2017) (court held that having an agent with a place of business in the Eastern District of Arkansas was insufficient to establish venue. The defendant – Equipotential Matting, LLC (“EPZ”) – had a contract to purchase a component of the allegedly infringing product from an Arkansas Company – Swain Distribution Co. (“Swain”). Swain also had the right to sell EPZ’s allegedly infringing product in Arkansas after EPZ completed assembly of the product. Citing *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017), the court first noted that a “regular and established place of business” under 28 U.S.C § 1400(a), Congress specifically permitted venue for copyright and trademark suits “in the district in which the defendant or his agent resides or may be found.” 28 U.S.C. 1400(a) (emphasis added). **Given that Congress did not include similar language in § 1400(b), the court concluded that patent-infringement suits cannot be brought based on where a defendant’s agent has a place of business.)**

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Refusal to Base “Regular and Established” Place of Business (of Defendant) on In-State Operations of Corporate Agent/Affiliates (cont’d)

- *Post Consumer Brands, LLC v. General Mills, Inc., et al.*, No. 4:17-cv-2471-SNLJ (E.D. Mo. Oct. 27, 2017) court transferred the case to the District of Minnesota because General Mills did not have a “regular and established place of business” in Missouri, **specifically holding that a Missouri plant owned by an affiliate of General Mills belonged to a separate corporate entity and therefore could not be imputed to General Mills, the court was unmoved by several facts highlighted by the plaintiff**, including that (i) the Missouri plant is the largest plant in the nation producing General Mills products; (ii) the sign on the plant reads “General Mills,” not “General Mills Operations LLC” (the name of the subsidiary that runs the plant); (iii) the plant is listed on documents found on government websites as an address of “General Mills, Inc.”; and (iv) General Mills lists the plant as one of its “principal production facilities” in its Form 10-K. Rather, the court reasoned that as long as General Mills, Inc. and General Mills Operations, LLC preserved their formal corporate separation, the facilities of the subsidiary could not be imputed to the patent.)
- *Patent Holder LLC, v. Lone Wolf Distributors, Inc., et al.*, No. 17-cv-23060 (S.D. Fla. Oct. 31, 2017) (court transferred venue to the District of Idaho because the defendant, Lone Wolf Distributors, did not have a “regular and established place of business” in Florida. Citing *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017), the court rejected the plaintiff’s argument that deriving revenue from sales in the district was sufficient for venue. **The court also held that including a link on a website seeking distributors for the State of Florida was insufficient to create venue. Finally, the court denied the plaintiff’s request for venue-specific discovery.** The court cited *Symbology Innovations, LLC v. Lego Sys.*, No. 2:17-0086-Civ, 2017 WL 432481, at *12 (E.D. Va. Sept. 28, 2017) for the principle that **allowing a plaintiff to file suit without evidence of proper venue and then demand discovery on venue would undermine the purpose of venue rules** – to prevent defendants from having to litigate in an inconvenient forum.)

Fried Frank, “November 6, 2017 – TC Heartland Weekly Update”; Lexology, <https://www.lexology.com/library> (Nov. 6, 2017)

See, e.g., *Minnesota Mining & Manufacturing v. Eco Chem*, 757 F.2d 1256, 1264-65 (Fed. Cir. 1985) (piercing the corporate veil).

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Open Issues

- While *Cray* announced a test for the “regular and established place of business” prong of § 1400(b), the case turned on the “of the defendant” element. The other two elements are arguably less well-defined. *Dicta* suggests that “virtual spaces” or mere “electronic communications” are insufficient to satisfy the “physical place” requirement. *Cray*, 2017 WL 4201535 at 6. **But in the modern economy, there is much daylight between a “virtual space” (no venue) and a “formal office or store” (venue). Likewise, *Cray* does not fully define “regular and established.” The Federal Circuit’s primary guidance is that “a five year continuous presence” suffices while a “semiannual [product] display” at a trade show does not. *Id.***
- More fundamentally, *Cray* ignored two questions that the trial court had resolved: whether infringement allegations, alone, satisfy § 1400(b) and what, if any, must be the relationship between the alleged infringement and the defendant’s place of business. **Neither contention is uncontroversial, and the trial court responded affirmatively to the first and negatively to the second. Transfer Order at 4-7. Also left for further resolution is the extent to which courts will permit “venue discovery” on infringement issues before transfer motions are fully resolved.** *Cf. Uniloc USA v. Apple*, No. 12-cv-00258-JRG, 2017 WL 3382806 at 1 (E.D. Tex. July 21, 2017) (granting venue-related discovery where movant demonstrates “good cause”).

Tucker, “The New Patent Venue Regime,” Law.com, <http://www.law.com/sites/almstaff/2017/11/03/the-new-patent-venue-regime/> (Nov. 3, 2017).

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§1400(b): What is the “act of infringement” in ANDA cases?

- Under § 1400(b), venue is proper where “the defendant **has committed acts of infringement** and has a regular and established place of business”
- In non-ANDA cases “acts of infringement” are those identified in § 271 (e.g., making, using, selling)
- But under § 271(e)(1), making, using or selling a product is “not an act of infringement” if the acts are related to submission of an Abbreviated New Drug Application
- For Hatch-Waxman cases, **submission** of the ANDA “shall be an act of infringement”
- **Raises two questions under § 1400(b)**
 - Is submission of the ANDA the “act of infringement” for purposes of determining venue in Hatch-Waxman cases?
 - If so, where does the submission of the application occur?

37

Hatch-Waxman Venue Issues

- Bristol-Myers Squibb Co. et al. v. Mylan*, Civil Action No. 17-cv-0379 (D. Del. Sept. 11, 2017) (Stark, C.J.), Motion to Dismiss – Improper Venue (court denied without prejudice defendant’s motion to dismiss plaintiffs’ ANDA infringement action but **rejected defendant’s argument that venue was improper because it had not committed an act of infringement in the forum**: “[A]n applicant’s **submission of an ANDA, in conjunction with other acts the ANDA applicant non-speculatively intends to take if its ANDA receives final FDA approval, plus steps already taken by the applicant indicating its intent to market the ANDA product in this District, must all be considered** for venue purposes, and can be sufficient to demonstrate that the ANDA-filing Defendant ‘has committed’ ‘acts of infringement’ in this District.” (page 25) (court denied without prejudice defendant’s motion to dismiss plaintiff’s ANDA infringement action for improper venue **pending discovery on whether defendant had a regular and established place of business in the forum**: “[Defendant] **is part of [a] family of companies** which have a nationwide and global footprint. . . . **Within the [company] family, [defendant] appears to serve the role of securing regulatory approval for many of [their] generic products. . . . [I]t appears that a key to [defendant’s] success in the generic drug business is its constant involvement in Hatch-Waxman litigation.** Historically, the largest number of Hatch-Waxman cases each year are filed in the District of Delaware. . . . **[Defendant], as a frequent ANDA filer,** appears in front of this Court with regularity for the purpose of getting its generic drugs on the market, and **when that litigation concludes in a way that is favorable for [defendant], those generic drugs are distributed to and used by Delaware residents through a distribution network that has been established for that purpose. In the Court’s view, this business reality is a pertinent consideration in assessing whether [defendant] has a regular and established place of business in Delaware.** . . . While [defendant] has been unable to this point to identify a ‘fixed physical presence in the sense of a formal office or store’ that [defendant] maintains in Delaware, **this is not required.** . . . **[N]o relationship between a defendant’s acts of infringement and its regular and established place of business is necessary to satisfy § 1400(b).**” (page 36)

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Hatch-Waxman Venue Issues (cont’d)

- Boston Scientific Corp. et al. v. Cook Group, Inc.*, Civil Action No. 1-15-cv-00980 (D. Del. Sept. 11, 2017)(Stark, C.J.), Motion to Transfer for Improper Venue (28 U.S.C. § 1406(a) (court **granted** defendants’ alternative motion to transfer for improper venue **because defendants did not have a regular and established place of business in the forum through its sales contacts**: “[W]hile no **fixed space** in the sense of a formal office or store is necessary, some **physical presence is nevertheless required.** . . . [Defendant] **has a few contacts** with Delaware, none of which, even when considered in the aggregate, amounts to a regular and established place of business. **[Its] contacts with Delaware consist of:** (1) sales of medical devices throughout the United States, including in the District of Delaware; (2) sales representatives who ‘occasionally call on physicians and hospitals (or their respective buyers) in Delaware’ but do not live in Delaware; and (3) one sales representative who lived in Delaware [for 19 months], but had no responsibility for sales in Delaware and is no longer employed by [defendant]. . . . **At most, [defendant] is ‘doing business’ in Delaware, but. . . this is not equivalent to having a regular and established place of business here.**” (page 26)).

39

When is venue-related discovery permissible?

- **Most courts are treating venue-related discovery as akin to jurisdiction discovery**
- **Discovery only appropriate if plaintiff makes threshold showing that venue may be proper**
 - Generalized/cursory allegations that venue is proper are **insufficient** (*Telebrands Corp. v. Illinois Industrial Tool, Inc.*, No. 17-cv-3411 (D.N.J. Sept. 18, 2017); *Telebrands Corp. v. Seasonal Specialties, LLC*, Civil Action No. 17-3390 (D. N.J. Sept. 6, 2017))
 - Plaintiff **must “state a non-frivolous basis for venue and do so with particularity”** (*Boston Scientific Corp. v. Cook Group Inc.*, 15-cv-980 (D. Del. Sept. 11, 2017))
 - Plaintiff **must “offer[] a basis to believe discovery will yield information supporting venue”** (*Symbology Innovations, LLC v. Lego Systems, Inc.*, 17-cv-0086 (E.D. Va. Sept. 28, 2017); *BillingNetwork Patent, Inc. v. Modernizing Medicine, Inc.*, Civil Action No. 1-17-cv-05636 (N.D. Ill. Nov. 6, 2017))
 - See *XR Communications, LLC d/b/a Vivato Technologies v. Ruckus*, Civil Action No. 2-17-cv-02961 (C.D. Cal. Oct. 24, 2017), Motion for Expedited Discovery (“Plaintiff should consider the Federal Circuit’s decision in *In re Cray* in conducting its additional venue discovery Plaintiff should consider the relevance of employees merely “visit[ing], us[ing], or work[ing]” in an office to a venue determination “[T]he Court agrees that all of Plaintiff’s additional discovery must be narrowly tailored. For instance, seeking discovery on all ‘activities’ conducted by [two sets of third parties] on particular dates is unlikely to provide helpful insight here, and additionally becomes unduly burdensome on Defendant. At a minimum, the relevant ‘activities’ in this venue context are activities related to ‘[defendant’s] business,’ such as sale and marketing of [defendant’s] products.” (page 2)); *Precision Fabrics Group, Inc. v. Tietex International, Ltd.*, Civil Action No. 1-13-cv-00645 (M.D. N. Car. Sept. 19, 2017), Motion for Expedited Discovery; *Nike v. Skechers USA, Inc.*, Civil Action No. 16-cv-00007 (District of Oregon July 5, 2017)
- **Other courts have (seemingly) been more lenient in granting venue-related discovery**
 - Discovery appropriate to see if there is any basis for venue (*RegenLab USA LLC v. Estar Techs. Ltd.*, No. 16-cv-08771 (S.D.N.Y. Aug. 17, 2017), at 4)
 - *But cf. Telebrands Corp., supra* (court **denied plaintiff’s motion for discovery before ruling** on defendant’s motion to transfer for improper venue: “[Plaintiff] merely asks for discovery on the issue. Such a request in response is insufficient to counter a motion made under Section 1400(b). Perhaps such discovery might demonstrate that this Court would ordinarily have personal jurisdiction over [defendant], but this will do nothing to counter [defendant’s] unequivocal assertions that venue is improper here under Section 1400(b) due to its lack of a regular and established place of business within New Jersey.” (page 3))

Which Party Bears the Burden of Establishing Venue?

Sovereign IP, LLC v. Apple, Inc., 2:17-cv-207-RWS-RSP (E.D. Tex.) (July 25, 2017)

“[T]he burden of establishing improper venue lies with the defendant”

The Valspar Corp. v. PPG Industries, 0:16-cv-1429 (D. Minn. 2017)

“Once a defendant has raised an objection to venue, the burden is on the plaintiff to demonstrate that venue is properly laid.”

Bristol-Myers Squibb Co. v. Mylan Pharm. Inc., 2017 WL 3980155 (D. Del. Sep. 11, 2017)

Defendant “bears the burden to show that it does not satisfy the requirements of the second prong of § 1400(b)”

Regents of the Univ. of Minn. v. Gilead Sciences, Inc., Civil Action No. 16-cv-2915, *10 (D. Minn. Oct. 20, 2017)

“... the plaintiff bears the burden of establishing venue.”

Burden depends on law of circuit.

Financial institutions
 Energy
 Infrastructure, mining and commodities
 Transport
 Technology and innovation
 Life sciences and healthcare

 NORTON ROSE FULBRIGHT

TC Heartland: Returning to Life under Section 1400

Jeffrey I. D. Lewis
 November 16, 2017

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Venue – versus – Jurisdiction

- “Venue” = where an injury is declared to have been done
 - convenience of the parties
- “Jurisdiction” = court authority to decide dispute
 - power of the court to adjudicate a matter

“**Venue** is sometimes **confused** with **jurisdiction**.
 However, the two **concepts are quite different.**”

Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1052 n. 13 (10th Cir. 2006)
 (quoting *15 Charles Alan Wright et al., Federal Practice & Procedure* § 3801 (2d ed. 1986)).

“Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction. The **venue has relation to the convenience of the litigants** and may be waived or laid by consent of the parties.”

Iselin v. La Coste, 147 F.2d 791, 795 (5th Cir. 1945) (citing *Neirbo Co. v. The Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)).

2 |

 NORTON ROSE FULBRIGHT

Brief History – Venue 1776-1893

- Judiciary Act of 1789 [first venue statute]
 - civil plaintiff could file in a federal district court
 - if defendant “an inhabitant” of that district, or
 - could be “found” for service of process there

Act of Sept. 24, 1789, § 11, 1 Stat. 79; see *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).
- 1887 Amendment
 - removed ability to sue wherever defendant “found”
 - Venue only proper
 - where the defendant was an inhabitant, or
 - in diversity cases, where plaintiff or defendant was an inhabitant

See Act of Mar. 3, 1887, § 1, 24 Stat. 552.
- Supreme Court 1893 *dicta*:
 - 1887 act did not apply to patent actions
 - Led to lower court disagreement over which statute applied

In re Hohorst, 150 U.S. 653, 661-662 (1893).

3 |



Brief History – Venue 1897-1948

- 1897 – first Patent Venue Statute

Act of Mar. 3, 1897, ch. 395, 29 Stat. 695; see *Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972) (noting that the statute “placed patent infringement cases in a class by themselves, outside the scope of general venue legislation”).

 - Resolve disagreement over *Hohorst*
 - “... not be conferred by ‘[i]solated cases of infringement’ but ‘only where a permanent agency is established.’”

Cray, at *9, quoting 29 Cong. Reg. 1900 (1897) (Rep. Lacey)
 - Two tests for venue:
 - [1] where the defendant was an “inhabitant,” or
 - [2] [i] maintained a “regular and established place of business,” and
[ii] committed an act of infringement

“inhabits” =
state of
incorporation

See *TC Heartland*,
137 S. Ct. at 1518
(citation omitted).

4 |



Brief History – 1948-1957

- 1948 – modern patent venue statute

See Act of June 25, 1948, 62 Stat. 936; 28 U.S.C. § 1400(b) (1952 ed.).

- Changed “inhabits” to “resides”
- Disagreement does “resides” bring in general venue of § 1391(c)

§ 1391(c):

“A corporation may be sued in any judicial district in which it is incorporated or ... is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”

- *Fourco Glass Co. v. Transmirra Prods. Corp.* (S. Ct. 1957):
 - § 1391(c) does **not** apply to patent venue
 - For § 1400(b)
 - individual “resides” where domiciled
 - corporation “resides” in state of incorporation

353 U.S. 222, 226 (1957)

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Brief History – 1988 Amendment

- Supreme Court:
 - venue requirement is “specific and unambiguous”
 - “not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.”

Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260, 264 (1961)

- General venue provision (1988) of § 1391(c):

“... for the purposes of venue under this chapter a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”

- Patent venue statute, § 1400

 Chapter 87, Title 28

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Statutes – ca. 2016

- General venue statute [28 U.S.C. § 1391] **resides for chapter:**

Corporation (and incorporated entity) resides where subject to the court's personal jurisdiction for civil action

- Patent venue statute [28 U.S.C. § 1400]:

- [1] Resides Prong:
"in the judicial district where the defendant resides" **or**
- [2] Regular & Established Prong:
[i] where defendant committed acts of infringement, and
[ii] has a regular and established place of business"

No § 1400 definition for "resides"

VE Holding (1990):

- o *Fourco* decided in 1957
- o 1988 Congress amended § 1391
- o "resides" now defined in § 1391
- *Fourco* no longer applies
- Apply § 1391 definition

VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1583 (Fed. Cir. 1990)

Cert. denied in VE Holding
Congress amended § 1391 again

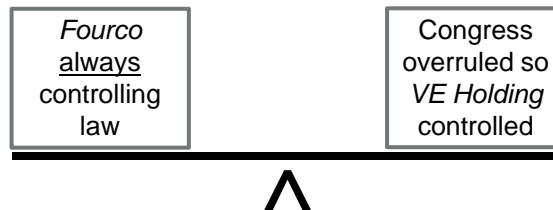
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Enter into the *TC Heartland*

TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017)

- Overruled *VE Holding*
 - Corporate residence = place of incorporation
 - Personal jurisdiction not test for patent venue
 - *Fourco* still good law and controlling
 - **Leaves open:**



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Venue Objections – Fed. R. Civ. P. 12

R. 12(b)

“... a party **may assert the following defenses by motion**: ...

(3) improper venue; ...

A **motion** asserting any of these defenses **must be made before pleading** if a responsive pleading is allowed.”

* * *

R. 12 (h)(1)

“A party **waives any defense** listed [above] by:

(A) omitting it from a [prior] motion ... or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”

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Waiver

- Failure to plead/move
 - General objection?
 - Specific objection?
- Actively litigating
- Exception to Waiver:
 - Intervening Law (not just restating)

QUESTION: *TC Heartland* cert. status at time?

- *Philips*:
 - Withdrew venue objection after *TC Heartland* Fed. Cir. Decision, but before *certiorari* granted
- *In re Yahoo* (Petition for Mandamus)
 - Answer: “Yahoo admits that venue exists in this district ... However, Yahoo reserves the right to challenge venue based upon ... the Supreme Court’s upcoming decision in *TC Heartland*”

“Waiver, however, is an equitable doctrine. Equity is reasonable.”

Hand Held Prods. Inc. v. The Code Corp.,
2:17-167-RMG (D. S.C. July 18, 2017) (citations omitted)

Koninklijke Philips N.V. v. AsusTek Computer Inc., 15-1125-GMS (D. Del. July 19, 2017)

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Was *Fourco* Always Controlling? “Yes”

“*TC Heartland* makes it very clear we’re not making any change in law. Back as far as 1947 or somewhere in the 1940s, the Supreme Court in *Stonite* decided precisely what the court reaffirmed in *Fourco*. And in *TC Heartland* the Supreme Court very clearly says all we’re doing is applying the law as it has existed at least as far back as *Stonite*. ...

“Your argument really requires an assertion that a Circuit Court can overrule a Supreme Court decision which has been undisturbed for well over 60 years. That’s essentially what your argument is.”

AlmondNet, Inc. et al v. Yahoo! Inc., 1:16-cv-01557-ILG-SMG at *4 (S.D. N.Y. Tr. Sept. 1, 2017)

Was *Fourco* Always Controlling? “No”

- *OptoLum, Inc. v. Cree, Inc.*

“Many of the district courts finding waiver of the venue defense have premised their rulings on the notion that circuit courts have no authority to ‘overrule’ the Supreme Court, and therefore *Fourco* has always governed venue in patent cases despite *VE Holding*. **But these cases fail to explain why ... courts throughout the country consistently applied *VE Holding* in patent litigation for nearly 30 years.**”

* * *

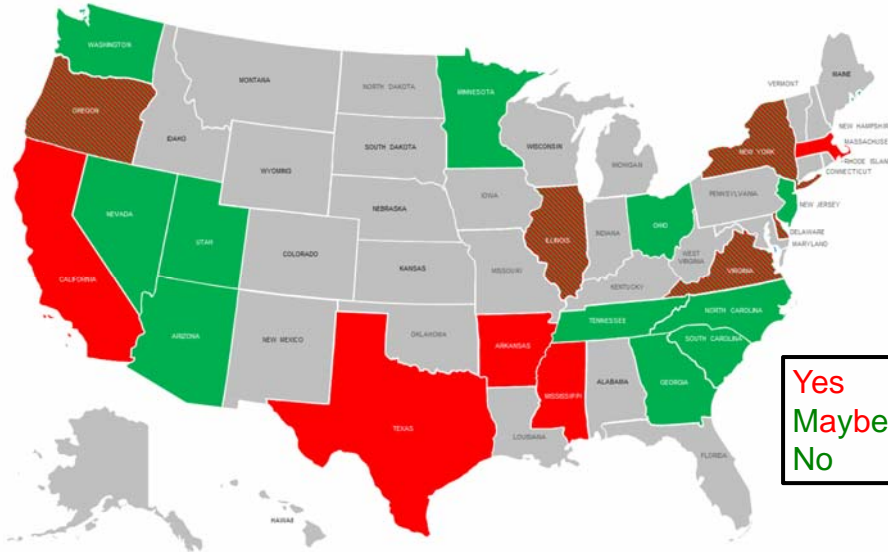
“*VE Holding* did not purport to ‘overrule’ *Fourco*, but instead determined whether Congress intended to do so when it amended § 1391(c).”

CV-16-03828-PHX-DLR (D. Az. July 24, 2017)

Was Fourco Always Controlling? “No” (2)

- Cutsforth, Inc. v. LEMM Liquidating Co., LLC*
 “TC Heartland did not hold that **VE Holding had misconstrued Fourco**, but rather that it had misconstrued the effect of **intervening Congressional amendments...**” 12-cv-1200-SRN (D. Minn. Aug. 4, 2017)
- insidesales.com, Inc. v. SalesLoft, Inc.*
 “Moreover, if **Fourco was controlling law** at the time InsideSales filed its Complaint ... InsideSales **misrepresented** to the court that **venue was proper ...**” 2:16CV859DAK (D. Utah Sept. 27, 2017)

Change in Law?



In re Micron Tech (Fed. Cir. Nov. 15, 2017)

“... the results has been widespread disagreement over the change-of-law question relevant to waiver ...”

“We conclude that *TC Heartland* changed the controlling law in the relevant sense ...

... But the waiver rule, we also conclude, is not the only basis on which a district court might reject a venue defense for non-merits reasons, such as determining that the defense was not timely presented.”

2017-138 at * 2

“**This is a common-sense interpretation** of Rule 12(g)(2). Where controlling law precluded the district court, at the time of the motion, from adopting a defense or objection and on that basis granting the motion, it is natural to say, in this context, that the defense or objection was not ‘available’ to the movant.”

*8

“The [Supreme] Court explained ‘that a district court possesses inherent powers that are **governed not by rule** or statute **but** by the **control necessarily vested in courts** to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”

*14 (citations omitted)

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Who's law is it anyway?

- Substantive law on the issue of venue / § 1400
 - Federal Circuit

Id. *11; see *In re Cray Inc.*, No. 17-129, at *8 (Fed. Cir. Sept. 21, 2017)

- Regional Circuit law on discovery and burden

“... there is a **threshold question** that [some parties] dispute, which is whether the plaintiff or the defendant has the **burden of proof** to show that venue is proper or improper ... The court in *Cray* did not discuss the issue and the parties do not cite any other Federal Circuit authority addressing it. All the **parties assume that [the regional] Circuit law is controlling** (presumably because proving proper venue is not an issue that is unique to patent law) ...

Niazi v. St. Jude Med. S.C., Inc., 17-cv-183-jdp, at **4-5 (W.D. Wisc. Nov. 7, 2017)

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Discovery – Who Has Venue Burden?

- *Soverain* (E.D. TX July 25, 2017):
“... burden of establishing improper venue lies with **the defendant**”
Soverain IP, LLC v. Apple, Inc., 2:17-cv-207-RWS-RSP (E.D. TX July 25, 2017)
- *Valspar* (D. Minn. Aug. 4, 2017):
“Once a defendant has raised an objection to venue, **the burden is on the plaintiff** to demonstrate that venue is properly laid.”
Valspar Corp. v. PPG Indus., 0:16-cv-1429, *11 (D. Minn. Aug. 4, 2017)
- *Bristol-Myers Squibb* (D. Del. Sept. 11, 2017):
Defendant “... bears the burden to show that it does not satisfy the requirements of the second prong of § 1400(b)”
Bristol-Myers Squibb Co. v. Mylan Pharmaceuticals, Inc., 1-17-cv-000379 (D. Del. Sept. 11, 2017) (Stark, J.)
- *Univ. Minn.* (D. Minn. Oct. 20, 2017):
“...the **plaintiff bears the burden** of establishing venue.”
Regents of Univ. of Minn. v. Gilead Sciences, Inc., 16-cv-2915, *10 (D. Minn. Oct. 20, 2017)
- *Post Consumer* (E.D. Mo. Oct. 27, 2017) [noting disagreement]:
“The **moving party has the burden** of establishing that venue is improper.”
Post Consumer Brands, LLC v. General Mills, Inc., 4:17-CV-2471 SNLJ *2 (E.D. Mo. Oct. 27, 2017), quoting *Bomkarp v. Hilton Worldwide Inc.*, 2014 WL 897368 (E.D. Mo. 2014)

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Discovery to Support H-W Venue?

Bristol-Myers Squibb Co. v. Mylan Pharmaceuticals, Inc., 1-17-cv-000379 (D. Del. Sept. 11, 2017) (Stark, J.)

– Abbreviated New Drug Application (ANDA) cases:

“Defendant is part of [a] **family of companies** which have a **nationwide and global footprint**. ... [I]t appears that a key to [defendant’s] success in the generic drug business is its **constant involvement in Hatch-Waxman [ANDA] litigation**. ...

While [plaintiff] has been unable ... to identify a ‘fixed physical presence in the sense of a formal office or store’ that [defendant] maintains in Delaware, this is not required. ... **[N]o relationship between a defendant’s acts of infringement and its regular and established place of business is necessary to satisfy § 1400(b).**”

* * *

Business model “is, in large part, **predicated upon participating in a large amount of litigation.**”

Discovery allowed
Motion to dismiss denied without prejudice

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Limits on Discovery

Symbology Innovations, LLC v. Lego Systems, Inc., 2:17-cv-00086 (E.D. VA Sept. 28, 2017)

- Defendant Lego Systems = registered foreign corporation in Virginia
- Lego Brand Retail = a separate, related corporate entity w/ 3 VA stores

The **Fourth Circuit** has explained that "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." A district court act[s] within its discretion by denying discovery ... [when] there was no reason to believe that the additional information sought would alter the outcome. ...

[A]llowing plaintiffs to file suit in far-flung districts and then demand discovery on the issue of venue would recreate the inconvenience that venue rules are intended to prevent ... This unfairness is exacerbated when, as here, the parties essentially have no connection to the plaintiffs chosen forum. (*21, citations omitted)

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Discovery – Is it Allowed?

- What would discovery show?

"Telebrands merely asks for discovery on the issue. ... Such a request in response is insufficient to counter a motion made under Section 1400(b). ... Perhaps such discovery might demonstrate that this Court would ordinarily have personal jurisdiction over IIT, but this will do nothing to counter IIT's unequivocal assertions ... due to its lack of a regular and established place of business within New Jersey.

*Telebrands Corp. v. Illinois Industrial Tool, Inc., 2:17-cv-03411 *3-4, (D. NJ Sept. 18, 2017) (citations omitted)*

- Plaintiff must "state a non-frivolous basis for venue and do so with particularity" *Boston Scientific Corp. v. Cook Group Inc., 15-cv-980 (D. Del. Sept. 11, 2017)*
- Plaintiff must "offer[] a basis to believe discovery will yield information supporting venue" *Symbology Innovations, LLC v. Lego Systems, Inc., 17-cv-0086 (E.D. Va. Sept. 28, 2017)*
- Discovery appropriate to see if there is any basis for venue *Regenlab USA LLC v. Ester Techs. Ltd., No. 16-cv-08771 (S.D.N.Y. Aug. 17, 2017)*

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Summary

The term “patentable subject matter” refers to the requirement of section 101 of the Patent Act of 1952 that an invention must consist of a “process, machine, manufacture, or composition of matter” in order to be patented. The Leahy-Smith America Invents Act (AIA) of 2011, P.L. 112-29, additionally stipulated that “no patent may issue on a claim directed to or encompassing a human organism.” The AIA also limited the availability of patents claiming tax avoidance strategies.

The courts and the U.S. Patent and Trademark Office (USPTO) have generally construed the language of section 101 broadly. As a result, inventions from many different fields of human endeavor may be patented, so long as other statutory requirements such as novelty and nonobviousness are met. However, the courts recognize several implicit exceptions to the four statutory categories of patentable subject matter. In particular, laws of nature, natural phenomena, and abstract ideas have been held to be unpatentable.

For many years, section 101 was arguably used only infrequently to invalidate an issued patent or reject an application pending at the USPTO. This situation changed over the past decade due in large part to four decisions issued by the Supreme Court of the United States since 2010 addressing patentable subject matter. In each instance the Court concluded that the invention before it was unpatentable. The four cases were:

- *Bilski v. Kappos*, pertaining to a business method;
- *Mayo Collaborative Services v. Prometheus Laboratories*, considering a method of medical diagnosis;
- *Association for Molecular Pathology v. Myriad Genetics*, addressing human genes; and
- *Alice Corp. v. CLS Bank*, relating to computer software.

These decisions collectively hold that an invention is unpatentable if (1) it consists of a law of nature, natural phenomenon, or abstract idea; and (2) does not include additional, inventive elements that indicate the claim applies one of the three excluded subject matters, rather than being a fundamental concept *per se*. With regard to this second step, the Court analyzes a patent claim to determine if it covers every practical application of a fundamental concept. Claims with this preemptive scope cannot be patented under section 101. In addition, the Court does not consider a claim’s recitation of routine, nominal hardware—such as a general-purpose computer—to ameliorate concerns over section 101 eligibility.

Since the Supreme Court issued these decisions, section 101 has been more frequently invoked to invalidate issued patents in the courts and in certain administrative patent revocation proceedings, and also to reject pending patent applications at the USPTO. Further, numerous patents granted by the USPTO under earlier standards would likely be held invalid if they were subject to scrutiny today.

If the current situation is deemed acceptable, then no action need be taken. However, several stakeholder groups have recommended legislative reforms to section 101. In general, these proposals assert that an invention should be deemed patentable subject matter unless it exists in nature independently of human activity or it can be performed solely in the human mind. These proposals also state that whether an invention is implemented through conventional means is irrelevant to whether it is patentable subject matter or not. As of the date of publication of this report, legislation has yet to be introduced before Congress addressing reform of the law of patentable subject matter.

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Introduction

Some Members of Congress have expressed interest in the rules governing patentable subject matter for many years. The term “patentable subject matter” refers to the requirement of section 101 of the Patent Act of 1952 that an invention must consist of a “process, machine, manufacture, or composition of matter” in order to be patented.¹ Most recently, the Leahy-Smith America Invents Act (AIA) of 2011² stipulated that “no patent may issue on a claim directed to or encompassing a human organism.”³ The AIA also limited the availability of patents claiming tax avoidance strategies.⁴

The courts and the U.S. Patent and Trademark Office (USPTO) have historically understood the language of section 101 to allow an expansive range of patentable subject matter.⁵ However, the courts have long held that several implicit exceptions exist to the four categories of patentable subject matter set out in section 101. In particular, laws of nature, natural phenomena, and abstract ideas have been held to be unpatentable.⁶

For many years, section 101 was arguably a coarse filter that was rarely used to invalidate an issued patent or reject an application pending at the USPTO.⁷ This situation changed over the past decade due to a series of decisions issued by the Supreme Court of the United States. Four Supreme Court opinions have issued since 2010 addressing patentable subject matter.⁸ In each instance the Court concluded that the invention before it was unpatentable under section 101. Since the Supreme Court issued its decisions, section 101 has been more frequently invoked to invalidate issued patents and reject pending patent applications at the USPTO.⁹ Further, numerous patents granted by the USPTO under earlier standards would likely be held invalid if they were subject to scrutiny by the agency or the courts.¹⁰

Views differ on whether the recent prominence of section 101 in the U.S. patent system has been desirable. Concerned observers have declared the U.S. patent system to be in a “state of crisis” due to “confusing” legal standards established by the Supreme Court.¹¹ The former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, the tribunal with exclusive jurisdiction over patent appeals, reportedly described the Supreme Court decisions as creating “total chaos” and

¹ 35 U.S.C. § 101.

² P.L. 112-29, 125 Stat. 284 (2011).

³ *Ibid* at §33(a).

⁴ *Ibid.* at §14.

⁵ Michael Risch, “Everything Is Patentable,” *Tennessee Law Review*, vol. 75 (Summer 2008), p. 591.

⁶ *Diamond v. Diehr*, 450 U.S. 175 (1981).

⁷ Timothy R. Holbrook and Mark D. Janis, “Patent-Eligible Processes: An Audience Perspective,” *Vanderbilt Journal of Entertainment and Technology Law*, vol. 17 (Winter 2015), p. 349.

⁸ *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S.Ct. 2107 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010).

⁹ Jasper L. Tran, “Two Years After Alice v. CLS Bank,” *Journal of the Patent and Trademark Office Society*, vol. 98 (2016), p. 354. Petitioners may challenge issued patents on section 101 grounds through two USPTO proceedings: post-grant review, introduced in section 6 of the AIA; and a “transitional program for covered business method patents,” introduced in section 17 of the AIA.

¹⁰ Halie Wimberly, “The Changing Landscape of the Patent Subject Matter Eligibility and its Impact on Biotechnological Innovation,” *Houston Law Review*, vol. 54, pp. 995, 1007.

¹¹ David O. Taylor, “Confusing Patent Eligibility,” *Tennessee Law Review*, vol. 84 (Fall 2016), p. 157.

marking “a very harmful and completely unnecessary departure from a sensible patent policy.”¹² Other observers believe that these decisions may lead to patents of appropriate scope,¹³ curb abusive patent litigation,¹⁴ and encourage patent lawyers to draft and procure higher quality patents.¹⁵

This report reviews the current law governing patentable subject matter and recent proposals for legislative reform. It begins by providing a basic overview of the patent system and introducing the principles of patentable subject matter. It then considers the leading Supreme Court decisions construing section 101 of the Patent Act. The report then considers the implications of these decisions within the information technology and life sciences industries. The report closes with a review of legislative reform options.

Patent System Fundamentals

Individuals and enterprises must prepare and submit applications to the USPTO if they wish to obtain patent protection.¹⁶ USPTO officials, known as examiners, assess whether the application merits the award of a patent. Under the Patent Act of 1952, a patent application must include a specification that so completely describes the invention that skilled artisans are able to practice it without undue experimentation.¹⁷ The Patent Act also requires that applicants draft at least one claim that particularly points out and distinctly claims the subject matter that they regard as their invention.¹⁸ The patent acquisition process is commonly known as “prosecution.”¹⁹

While reviewing a submitted application, the examiner will determine whether the claimed invention fulfills certain substantive standards set by the patent statute. Two of the most important patentability criteria are novelty and nonobviousness. To be judged novel, the claimed invention must not be fully anticipated by a prior patent, publication, or other knowledge within the public domain.²⁰ The sum of these earlier materials is termed the “prior art.” To meet the standard of nonobviousness, an invention must not have been readily within the ordinary skills of a competent artisan based upon the teachings of the prior art.²¹ The invention must also be useful, a requirement that is satisfied if the invention is operable and provides a tangible benefit.²²

¹² Gene Quinn, “Judge Michel Says Alice Decision ‘Will Create Total Chaos,’” IPWatchdog, August 6, 2014, <http://www.ipwatchdog.com/2014/08/06/judge-michel-says-alice-decision-will-create-total-chaos/id=50696/>.

¹³ Margaret Kubick, “An Uncertain Future: The Impact of Medical Process and Diagnostic Method Patents on Healthcare in the United States,” *Northwestern Journal of Technology & Intellectual Property*, vol. 9 (Fall 2010), p. 280.

¹⁴ Daryl Lim, “Standard Essential Patents, Trolls, and the Smartphone Wars: Triangulating the End Game,” *Penn State Law Review*, vol. 119 (2014), pp. 1, 82.

¹⁵ Jacob S. Sherkow, “The Natural Complexity of Patent Eligibility,” *Iowa Law Review*, vol. 99 (Mar. 2014), pp. 1137, 1190.

¹⁶ 35 U.S.C. §111.

¹⁷ 35 U.S.C. §112(a).

¹⁸ 35 U.S.C. §112(b).

¹⁹ John R. Thomas, “On Preparatory Texts and Proprietary Technologies: The Place of Prosecution Histories in Patent Claim Interpretation,” 47 *UCLA Law Review* (1999), p. 183.

²⁰ 35 U.S.C. §102.

²¹ 35 U.S.C. §103.

²² *In re Fischer*, 421 F.3d 1365 (Fed. Cir. 2005).

Even if these requirements of novelty, nonobviousness, and utility are met, an invention is not patentable unless it falls within at least one category of patentable subject matter. Section 101 of the Patent Act provides:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.²³

The statute defines the term “process” to mean a “process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.”²⁴ Process patents claim a series of steps that may be performed to achieve a specific result. Process patents typically relate to methods of manufacture or use.²⁵ A process patent may claim a method of making a product, for example, or a method of using a chemical compound to treat a disease.

The other three categories of patentable subject matter pertain to products. The Supreme Court has held that the term “machine” includes “every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.”²⁶ The Court has construed the term “manufacture” to mean “the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.”²⁷ The term “composition of matter” has been held to mean “all compositions of two or more substances and ... all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids.”²⁸

Although the wording of section 101 is quite broad, courts and the USPTO have nonetheless established certain limits upon the sorts of processes that may be patented. In particular, laws of nature, natural phenomena, and abstract ideas have been judged not to be patentable.²⁹ The Supreme Court has described these sorts of inventions as the “basic tools of scientific and technological work”³⁰ that should be “free to all men and reserved exclusively to none.”³¹ As explained by Supreme Court Justice Stephen Breyer, this rule “reflects a basic judgment that protection in such cases, despite its potentially positive incentive effects, would too severely interfere with, or discourage, development and the further spread of future knowledge itself.”³²

If the USPTO determines that a patent application satisfies section 101 and the other requirements for patenting, it will allow the application to issue as a granted patent. The patent proprietor then obtains the right to exclude others from making, using, selling, offering to sell or importing into the United States the claimed invention.³³ The term of the patent is ordinarily set at twenty years

²³ 35 U.S.C. §101.

²⁴ 35 U.S.C. § 100(b).

²⁵ *In re Pleuddemann*, 910 F.2d 823, 826 (Fed. Cir. 1990).

²⁶ *Corning v. Burden*, 15 How. 252, 267-68 (1854).

²⁷ *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980).

²⁸ *Ibid.*

²⁹ *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, 548 U.S. 124 (2006) (opinion of Justice Breyer, dissenting from dismissal of writ of certiorari as improvidently granted) (hereinafter “LabCorp.”).

³⁰ *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972).

³¹ *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

³² *LabCorp.*, *supra*, at 128.

³³ 35 U.S.C. §271.

from the date the patent application was filed.³⁴ Patent title therefore provides inventors with limited periods of exclusivity in which they may practice their inventions, or license others to do so. The grant of a patent permits inventors to receive a return on the expenditure of resources leading to the discovery, often by charging a higher price than would prevail in a competitive market.

A patent proprietor bears responsibility for monitoring its competitors to determine whether they are using the patented invention. Patent owners who wish to compel others to observe their intellectual property rights must usually commence litigation in the federal courts. Although issued patents enjoy a presumption of validity, accused infringers may assert that a patent is invalid or unenforceable on a number of grounds.³⁵ The Federal Circuit possesses national jurisdiction over most patent appeals.³⁶ The Supreme Court retains discretionary authority to review cases decided by the Federal Circuit.³⁷

Patentable Subject Matter at the Supreme Court

Until its recent spate of decisions, the last time the Court addressed the law of patentable subject matter was nearly four decades ago. In its 1980 decision in *Diamond v. Chakrabarty*,³⁸ the Court held that a genetically engineered microorganism could be patented. Similarly, in its 1981 opinion *Diamond v. Diehr*,³⁹ the Court ruled that a process for curing artificial rubber through the use of a computer and a mathematical formula was patentable. These two decisions arguably set the stage for a period where the range of patentable subject matter was quite broad, both for information technologies and the life sciences. Since they issued, the lower courts and USPTO arguably made only occasional use of section 101 to invalidate issued patents or reject pending patent applications.⁴⁰

The Supreme Court revisited the law of patentable subject matter in a series of four decisions issued from 2010 through 2014. In each instance, the Court held each invention it considered to be unpatentable under section 101. As one commentator asserts: “No one can reasonably deny that the Supreme Court’s decisions narrowing patent eligibility have had a significant impact on the patent system.”⁴¹ This report discusses each decision in the order of issuance.

Business Methods and *Bilski v. Kappos*

In its 2010 decision *Bilski v. Kappos*,⁴² the Supreme Court considered the patentability of a method of hedging risk in the field of commodities trading. The patent application before the Court claimed:

³⁴ 35 U.S.C. §154(a)(2).

³⁵ 35 U.S.C. §282.

³⁶ 28 U.S.C. §1295(a)(1).

³⁷ 28 U.S.C. §1254(1).

³⁸ 447 U.S. 303 (1980).

³⁹ 450 U.S. 175 (1981).

⁴⁰ Rebecca S. Eisenberg, “Diagnostics Need Not Apply,” *Boston University Journal of Science and Technology Law*, vol. 21 (Summer 2015), p. 256.

⁴¹ Taylor, *supra*, at 159.

⁴² 561 U.S. 593 (2010).

A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of:

initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer;

identifying market participants for said commodity having a counter-risk position to said consumers; and

initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.⁴³

The USPTO rejected the application as claiming subject matter that was ineligible for patenting under section 101.

On appeal, the Federal Circuit characterized the “true issue before us then is whether Applicants are seeking to claim a fundamental principle (such as an abstract idea) or a mental process.” The Federal Circuit explained:

A claimed process is surely patent-eligible under §101 if: (1) it is tied to a particular machine or apparatus, *or* (2) it transforms a particular article into a different state or thing.⁴⁴

Applying this standard, the Federal Circuit concluded that Bilski’s application did not claim patentable subject matter. The Court of Appeals acknowledged Bilski’s admission that his claimed invention was not limited to any specific machine or apparatus, and therefore did not satisfy the first prong of the section 101 inquiry. The Federal Circuit also reasoned that the claimed process did not achieve a physical transformation. According to then-Chief Judge Michel, “[p]urported transformations or manipulations simply of public or private legal obligations or relationships, business risks, or other such abstractions cannot meet the test because they are not physical objects or substances, and they are not representative of physical objects or substances.”⁴⁵ As a result, the USPTO decision to deny Bilski’s application was affirmed.

After agreeing to hear the case, the Supreme Court issued a total of three opinions, consisting of a plurality opinion for the Court and two concurring opinions. No single opinion was joined by a majority of Justices for all of its parts. The opinion for the Court, authored by Justice Kennedy, agreed that Bilski’s invention could not be patented. But the plurality rejected the Federal Circuit’s conclusion that the machine or transformation test was the sole standard for identifying patentable processes. Rather, that standard was deemed “an important and useful clue.”⁴⁶

The Court instead resolved the case based on the traditional rule that abstract ideas were not patentable subject matter. Justice Kennedy reasoned that hedging was a “fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance

⁴³ Ibid at 599.

⁴⁴ Ibid at 600.

⁴⁵ 545 F.3d 943, 965 (Fed. Cir. 2008).

⁴⁶ 561 U.S. at 603.

class.”⁴⁷ He explained that “[a]llowing petitioners to patent risk hedging would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.”⁴⁸

Justice Stevens, joined by Justices Breyer, Ginsburg, and Sotomayor, issued a lengthy concurring opinion on the day of his retirement from the Supreme Court. He agreed that the machine-or-transformation test was “reliable in most cases” but “not the exclusive test.”⁴⁹ In his view, the Court should “restore patent law to its historical and constitutional moorings” by declaring that “methods of doing business are not, in themselves, covered by the statute.”⁵⁰

Justice Breyer also issued a concurring opinion that Justice Scalia joined in part. Justice Breyer identified four points on which all nine justices agreed: (1) the range of patentable subject matter is broad but not without limit; (2) the machine-or-transformation test has proven to be of use in determining whether a process is patentable or not; (3) the machine-or-transformation test is not the sole standard for assessing the patentability of processes; and (4) not everything that merely achieves a “useful, concrete, and tangible result” qualifies as patentable subject matter.⁵¹

Diagnostic Methods and *Mayo v. Prometheus*

In its next section 101 case, *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*,⁵² the Supreme Court shifted focus from information technologies to the life sciences. Prometheus Laboratories, Inc., is the sole licensee of two patents (U.S. Patent Nos. 6,355,623 and 6,680,302) claiming methods for determining optimal dosages of thiopurine drugs used to treat autoimmune diseases. Stated generally, the patents claim methods of (a) administering a thiopurine drug to a patient, and (b) determining the levels of the drug or the drug’s metabolites in red blood cells in the patient. The measured metabolite levels are then compared to known metabolite levels. If the measured metabolite levels in the patient are outside the known range, then the physician should increase or decrease the level of drug to be administered so as to reduce toxicity and enhance treatment efficacy. Claim 1 of the ‘623 patent, which reads as follows, was representative of the claims of the two patents at issue:

A method of optimizing therapeutic efficacy for treatment of an immune-mediated gastrointestinal disorder, comprising:

(a) administering a drug providing 6-thioguanine to a subject having said immune-mediated gastrointestinal disorder; and

(b) determining the level of 6-thioguanine in said subject having said immune-mediated gastrointestinal disorder,

wherein the level of 6-thioguanine less than about 230 pmol per 8×10^8 red blood cells indicates a need to increase the amount of said drug subsequently administered to said subject and

⁴⁷ Ibid at 611.

⁴⁸ Ibid at 611-612.

⁴⁹ Ibid at 613 (Stevens, J., concurring).

⁵⁰ Ibid at 657.

⁵¹ Ibid at 658-60 (Breyer, J., concurring).

⁵² 566 U.S. 60 (2012).

wherein the level of 6-thioguanine greater than about 400 pmol per 8×10^8 red blood cells indicates a need to decrease the amount of said drug subsequently administered to said subject.⁵³

In a unanimous decision authored by Justice Breyer, the Supreme Court concluded that the claims were directed towards natural laws and were therefore unpatentable. The Court reviewed its precedents in order to explain that phenomena of nature and abstract concepts could not be patented because the “monopolization of these basic tools through the grant of a patent might tend to impede innovation more than it would tend to promote it.”⁵⁴ The earlier cases recognized that all inventions at some level embody or apply laws of nature, however, and that processes that applied natural laws in a particular, useful way were eligible for patenting under section 101 of the Patent Act.

Applying these principles to the case at hand, the Court recognized that the claims in part recited “laws of nature,” in particular relationships between the concentration of thiopurine metabolites and the likelihood that a dosage of a thiopurine drug will prove ineffective or harmful. However, the claims included steps in addition to the law of nature—in particular, they called for “administering” the thiopurine drug and “determining” the level of the relevant metabolites, “wherein” the drug dosage should be adjusted. According to Justice Breyer, the question before the Court was whether the claims amounted merely to the natural laws, or whether they added enough to the statement of the correlations to qualify as patent-eligible processes that applied natural laws.⁵⁵

The Court reasoned that the three additional claimed steps did not suffice to render the claimed inventions patentable subject matter. Justice Breyer explained that the “administering” step referred simply to the relevant audience of the invention, namely, physicians who treat patients with certain diseases with thiopurine drugs. However, merely limiting the use of a natural law to a particular technological environment cannot render the principle patentable.⁵⁶

Similarly, the “determining” step merely advised physicians to measure the level of metabolites in a patient’s blood—a step that had been done for years and was routine in the field. Justice Breyer stated that conventional or obvious pre-solution activity did not convert an unpatentable law of nature into a patent-eligible application of such law.⁵⁷ Finally, the “wherein” clauses simply informed physicians that they should take account of pertinent natural laws in their practices. According to Justice Breyer, an unpatentable law of nature does not become patentable merely by advising individuals to use the law. As a result, the Court concluded that the three steps recited in the claim did not “transform unpatentable natural correlations into patentable applications of those regularities.”⁵⁸

The Supreme Court’s opinion in *Mayo v. Prometheus* addressed a number of additional contentions raised during the litigation. First, the Court rejected the argument that the Prometheus patents satisfied the machine-or-transformation test. The Federal Circuit had reasoned that the patents-in-suit transformed both human blood (by analyzing it to measure metabolite levels) and the human body (by administering a thiopurine drug). Justice Breyer countered that the claims at

⁵³ Ibid at 74.

⁵⁴ Ibid at 71.

⁵⁵ Ibid at 77.

⁵⁶ Ibid at 78.

⁵⁷ Ibid at 79.

⁵⁸ Ibid at 80.

issue required only that the metabolite levels be measured, not that human blood be transformed. And he also explained that the transformation of the human body was not pertinent to the patentability determination, for that claim limitation merely identified the group of individuals who might be interested in applying the law of nature.⁵⁹

The Court also responded to the position that virtually any step beyond a statement of a law of nature should be deemed to fulfill section 101 standards. Under this view, section 101 might be satisfied fairly readily; other requirements imposed under the Patent Act, including novelty and nonobviousness, would play a more significant role in deciding whether the patent should issue or not. Justice Breyer rejected this proposal, stating that the policy concerns that underlie section 101 were distinct from those of the other patentability requirements.⁶⁰

Third, the Court responded to concerns that rejecting the Prometheus patents would discourage diagnostic research. Justice Breyer observed that other interested parties had asserted that patents claiming the body's natural responses to illness and medical treatment should not be granted because they might limit physician access to critical scientific data. In view of these competing views, the Court was reluctant to depart from precedent denying patents on natural laws.⁶¹

Genetic Materials and the *Myriad* Case

In a June 2013 decision, the Supreme Court of the United States ruled in *Association for Molecular Pathology v. Myriad Genetics, Inc.*,⁶² that genomic DNA was ineligible for patenting under 35 U.S.C. §101 because of the “product of nature” doctrine. Under longstanding case law, products of nature (preexisting substances found in the wild) may not be patented, *per se*. However, the courts have also determined that such a product of nature may be patentable if significant artificial changes are made. By purifying, isolating, or otherwise altering a naturally occurring product, an inventor may obtain a patent on the product in its altered form.⁶³

Adopting the view that isolated and purified genomic DNA satisfied this exception to the “product of nature” doctrine, the USPTO issued over 50,000 patents relating at least in part to DNA.⁶⁴ However, some experts believed that the decision to patent human genes misconstrued the “product of nature” principle. In their view, the fact that scientists have isolated a gene is a “technicality” that did not allow genes to be patented.⁶⁵

The Supreme Court decision in *Myriad* reflects this latter position. The litigation commenced on May 12, 2009, when the Association for Molecular Pathology and 19 other plaintiffs, including individual physicians, patients, and researchers, filed a lawsuit against the USPTO, Myriad Genetics, Inc., and the Directors of the University of Utah Research Foundation. The plaintiffs challenged several patents owned by Myriad that claim isolated human genes known as BRCA1 and BRCA2.⁶⁶ Certain alterations or mutations in these genes are associated with a predisposition

⁵⁹ Ibid at 87-88.

⁶⁰ Ibid at 89.

⁶¹ Ibid at 91-92.

⁶² 133 S.Ct. 2107 (2013).

⁶³ *Diamond v. Chakrabarty*, 417 U.S. 303 (1980).

⁶⁴ Guyan Lian, “Molecules or Carriers of Biological Information: A Chemist’s Perspective on the Patentability of Isolated Genes,” 22 *Albany Law Journal of Science and Technology* (2012), 133.

⁶⁵ Eileen M. Kane, “Splitting the Gene: DNA Patents and the Genetic Code,” 71 *Tennessee Law Review* (2004), 707.

⁶⁶ For example, claim 1 of U.S. Patent No. 5,747,282 recites: “An isolated DNA coding for a BRCA1 polypeptide, said polypeptide having the [following] amino acid sequence....”

to breast and ovarian cancers. Due to its intellectual property rights, Myriad was the sole commercial provider of genetic testing related to breast and ovarian cancer associated with the BRCA1 and BRCA2 genes. The plaintiffs asserted that Myriad’s gene patent claims were invalid because, in their view, human genes are naturally occurring products that do not constitute patentable subject matter.

The U.S. District Court for the Southern District of New York sided with the plaintiffs and held that Myriad’s gene patent claims were invalid under 35 U.S.C. §101.⁶⁷ Judge Sweet reasoned that Myriad’s claimed isolated DNA was not “markedly different from native DNA as it exists in nature” and therefore could not be patented.⁶⁸ Following an appeal, the Federal Circuit reversed this holding.⁶⁹ The Court of Appeals reasoned that “isolated” DNA is not merely “purified” DNA—rather, it has been “manipulated chemically so as to produce a molecule that is markedly different from that which exists in the body.”⁷⁰ Under this reasoning, human genes consist of patentable subject matter.

The Supreme Court subsequently agreed to hear the *Myriad* case but did not issue a ruling in the matter. Rather, on March 26, 2012, the Court vacated the judgment and remanded the matter back to the Federal Circuit with instructions to reconsider the appeal. The Federal Circuit responded by once again upholding Myriad’s claims.⁷¹ The Supreme Court then agreed to hear the case.

Justice Thomas, writing for the Court, initially observed that Myriad had neither created nor altered the generic information encoded in the BRCA1 and BRCA2 genes. Rather, Myriad had discovered the precise location and genetic sequence of those genes. According to Justice Thomas, then, “Myriad did not create anything. To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.”⁷² The Supreme Court also was unimpressed that Myriad claimed DNA that had been isolated from the human genome through the severing of chemical bonds, with a non-naturally occurring molecule as a result. According to Justice Thomas, “Myriad’s claims are simply not expressed in terms of chemical composition, nor do they rely in any way on the chemical changes that result from the isolation of a particular section of DNA.”⁷³

The Court took a more favorable view of a second set of claims pertaining to “complementary DNA,” however. More commonly known as cDNA, these claims were directed to synthetic DNA in which the sequence of bases is complementary to naturally-occurring DNA. Observing that “cDNA retains the naturally occurring exons of DNA, but it is distinct from the DNA from which it was derived,” Justice Thomas concluded that cDNA did not constitute a “product of nature” and therefore could be patented.⁷⁴

Justice Thomas also found it important to note what the *Myriad* opinion did not implicate. The case involved neither an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, the Court explained, nor new applications of knowledge about those genes. The Court also indicated that it had not considered the patentability of DNA in which the

⁶⁷ 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

⁶⁸ *Ibid* at 232.

⁶⁹ 653 F.3d 1329.

⁷⁰ *Ibid* at 1352.

⁷¹ 689 F.3d 1323 (Fed. Cir. 2012).

⁷² 133 S.Ct. at 2117.

⁷³ *Ibid* at 2118.

⁷⁴ *Ibid* at 2119.

order of the naturally occurring nucleotides has been altered. Instead, the Court “merely [held] that genes and the information they encode are not patent eligible under §101 simply because they have been isolated from the surrounding genetic material.”⁷⁵

The opinion of Justice Thomas was joined in full by seven of his colleagues. Justice Scalia contributed a one-paragraph concurring opinion that joined the judgment of the Court and all of its opinion except those portions “going into fine details of molecular biology.”⁷⁶ Justice Scalia found himself “unable to affirm those details on my own knowledge or even my own belief.”⁷⁷ This shortcoming did not prevent him from concluding that isolated genomic DNA was identical to its natural state, however, while cDNA could be patented because it was a synthetic creation not found in nature.

Computer Software and *Alice v. CLS*

In the most recent of its section 101 decisions, the Supreme Court considered the patentability of a computer-implemented financial exchange system. The inventions at issue in *Alice Corp. v. CLS Bank International*⁷⁸ were designed to mitigate “settlement risk”—the risk that only one party to a financial transaction will pay what it owes. The patents at issue were more specifically directed to (1) a method for exchanging financial obligations (the method claims); (2) a computer system used to carry out those methods (the computer system claims); and (3) a computer-readable medium, such as disk or memory stick, containing program code for performing those methods (the computer-readable media claims).⁷⁹ The district court concluded that the inventions were unpatentable because they represented a “basic business or financial concept” that “remains a fundamental, abstract concept.”⁸⁰

The patent owner appealed the decision to the Federal Circuit, which affirmed the district court’s ruling.⁸¹ The Supreme Court agreed to hear the case in order to address “whether claims to computer-implemented inventions—including claims to systems and machines, processes, and items of manufacture—are directed to patent-eligible subject matter within the meaning of section 101.”⁸² The Supreme Court unanimously upheld the Federal Circuit’s determination that the patents were directed to a patent-ineligible abstract idea.⁸³

Writing for the Court, Justice Thomas explained that the Court’s section 101 precedent established a two-part test for identifying patents that claim laws of nature, natural phenomena, and abstract ideas. First, the claim should be analyzed to determine whether it claims one of these types of excluded subject matter. If it does, then the claim should be reviewed to determine whether the claim recites additional elements that transform the claim into a patent-eligible application of a law of nature, natural phenomenon, or abstract idea. Justice Thomas described this second test as determining whether the claim incorporates an “inventive concept” that

⁷⁵ Ibid at 2119-20.

⁷⁶ Ibid at 2120 (Scalia, J., concurring)

⁷⁷ Ibid.

⁷⁸ 134 S.Ct. 2347 (2014).

⁷⁹ Ibid at 2353.

⁸⁰ 768 F.Supp.2d 221 (D.D.C. 2011).

⁸¹ 717 F.3d 1269 (Fed. Cir. 2013).

⁸² 134 S.Ct. 734 (2013).

⁸³ Justices Sotomayor, Ginsburg, and Breyer joined the majority opinion, but wrote separately that business methods should be excluded from patent eligibility under section 101. 134 S.Ct. at 2360-61.

amounts to more than merely applying the law of nature, natural phenomenon, or abstract idea to a particular technological environment.⁸⁴

With this framework established, Justice Thomas turned first to the method claims. Applying the two-step process it established in *Mayo v. Prometheus*, the Court first determined that the method claims were drawn to the abstract idea of intermediated settlement—a fundamental and longstanding economic practice. The Court then turned to the second prong of the *Mayo* inquiry—namely, whether the claim contains “an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” The Court determined that the patented claims amounted to nothing more than implementation of an abstract idea on a computer. According to Justice Thomas, the “mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” To hold otherwise, he explained, would allow any abstract principle to become patentable simply by incorporating everyday computer hardware into the claim.⁸⁵

The Court rejected the computer system and computer-readable media claims for the same reason. Justice Thomas explained that the claims recited only generic computer hardware that failed to do more than generally link the invention to a specific technological environment—that is to say, computer implementation. Because these claims were not meaningfully restricted by these system and media limitations, they too were unpatentable.⁸⁶

Analysis

The Supreme Court decisions in *Bilski*, *Mayo v. Prometheus*, *Myriad*, and *Alice* present the current law of the land with respect to whether a particular invention is eligible for patenting. Several key themes may be gleaned from these four opinions. First, the courts and USPTO conduct a two-part test developed from the case law. That test asks (1) whether the claim recites a law of nature, natural phenomenon, or abstract idea; and (2) if so, whether the claim includes additional, inventive elements that indicate the claim applies one of the three excluded subject matters, rather than being a fundamental concept *per se*.⁸⁷

With regard to this second step, the Court will analyze a patent claim to determine if it preempts a field of activity. If a claim covers every practical application of a fundamental concept, then it cannot be patented under section 101.⁸⁸ In addition, the Court does not consider a claim’s recitation of routine, nominal hardware—such as a general-purpose computer—to ameliorate concerns over section 101 eligibility. Finally, although the machine-or-transformation test does not exclusively govern the patent eligibility of processes, it remains a useful guidepost within the decisionmaking process.⁸⁹

Section 101 determinations have proven amenable to resolution early within the process of litigation, often at the pleading stage or a prompt summary judgment motion.⁹⁰ In addition, the

⁸⁴ *Ibid* at 2355.

⁸⁵ *Ibid* at 2357-58.

⁸⁶ *Ibid* at 2360.

⁸⁷ Amy Landers, “Patentable Subject Matter as a Policy Driver,” *Houston Law Review*, vol. 53 (2015), p. 505.

⁸⁸ Jeffrey A. Lestin, “The Three Faces of *Prometheus*: A Post-*Alice* Jurisprudence of Abstractions,” *North Carolina Journal of Law & Technology*, June 2015, pp. 647, 664-65.

⁸⁹ Samuel Roger, “It’s Not So Obvious: How the Manifestly Evident Standard Affects Litigation Costs by Reducing the Need for Claim Construction,” *Texas A&M Law Review*, vol. 1 (Spring 2014), pp. 729, 737.

⁹⁰ Jacob Koering, “The Rise of the Patent-Eligibility Defense: The Absurd Abstraction of *Alice*,” *Aspatore*, vol. 2016 (continued...)

courts have often not required a formal construction of the patent’s claims in order to resolve section 101 challenges.⁹¹ Statistical analyses suggest that when these motions are raised, the moving party enjoys a good probability of invalidating the challenged claims. In particular, one empirical study concluded:

As of June 19, 2016 (i.e. *Alice*’s two-year mark), courts have examined 568 challenged patents brought under §101 motions citing *Alice*, resulting in 190 valid patents and 378 patents invalidated with an average invalidation rate of 66.5%. Specifically, the Federal Circuit upheld 3 patents and invalidated 34 patents—an average invalidation rate of 91.9%. The [USPTO] has rejected over 36,000 published patent applications under *Alice*, where over 5,000 such applications were abandoned.⁹²

Notably, these statistics do not suggest that approximately two-thirds of all issued patents do not comply with section 101. Rather, they indicate that when attorneys assert that a particular patent claim is invalid in view of the existing law of patentable subject matter or a nonfrivolous argument for modifying existing law, they have a good chance of success.⁹³ Such motions are not routinely brought with regard to such claimed subject matter as chemicals, consumer devices, electronics, medical devices, pharmaceuticals, tools, vehicles, and any number of other technologies. However, these statistics may be read to suggest that recent Supreme Court interest in patentable subject matter has animated a patent validity doctrine with implications for both information technologies and the life sciences.⁹⁴ This report briefly considers these two fields next.

Implications for Information Technology

The implications of recent Supreme Court case law have arguably been most keenly felt with respect to information technologies. The courts have invalidated numerous patents on computer-related inventions following the standards established in *Bilski* and *Alice*. As a general matter, patent claims that do not describe specific solutions to a problem, or identify an “improvement in the functioning of technology,”⁹⁵ tend to be the most vulnerable to a section 101 challenge. Among the patent claims invalidated were those directed towards the following inventions:

- a computer system of generating a second menu from a first menu that allows users to select particular categories and items;⁹⁶
- a computer system and method for collecting, analyzing, and displaying information relating to an electric power grid using conventional computer and network technology;⁹⁷

(...continued)

WL (April 2016), pp. 2984927, at *7.

⁹¹ Timothy J. Busse, “The Relativity of an Abstract Idea: A Practicable Approach to *Alice*’s Inventive Concept,” *Houston Business and Tax Law Journal*, vol. 16 (2016), p. 252.

⁹² Jasper L. Tran, “Two Years After *Alice v. CLS Bank*,” *Journal of the Patent and Trademark Office Society*, vol. 98 (2016), p. 354, 358-59.

⁹³ Federal Rule of Civil Procedure 11.

⁹⁴ Christopher M. Holman, “Patent Eligibility Post-Myriad: A Reinvigorated Judicial Wildcard of Uncertain Effect,” *Georgetown Law Review*, vol. 82 (November 2014), p. 1796.

⁹⁵ *Trading Techs. Int’l, Inc. v. CQG, Inc.*, 675 Fed. Appx. 1001, 1005 (Fed. Cir. 2017).

⁹⁶ *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229 (Fed. Cir. 2016).

⁹⁷ *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016).

- a method of (1) extracting data from hard copy documents using an automated digitizing unit such as a scanner, (2) recognizing specific information from the extracted data, and (3) storing that information in a memory, using conventional scanners and computers;⁹⁸
- systems and methods for administering and tracking the value of life insurance policies in separate accounts,⁹⁹ and
- a computer-aided method and system for processing credit applications over electronic networks.¹⁰⁰

The patent invalidated in another representative decision, *Affinity Labs of Tex. v. DIRECTV, LLC*,¹⁰¹ claimed a broadcast system in which a cellular telephone located outside the territory of a regional broadcaster (1) requests and receives content from the broadcaster via a streaming signal, (2) downloads an application for performing those functions, and (3) contains a display that allows the user to select particular content.¹⁰² Applying the Supreme Court’s two-part test for patentable subject matter, the Federal Circuit first deemed the concept of providing out-of-region access to a local broadcast to constitute an abstract idea. Judge Bryson explained that the “practice of conveying regional content to out-of-region recipients has been employed by nearly every form of media that has a local distribution,” ranging from the mailing of local newspaper to distant locations, to the delivery of broadcasts of sporting events to a national audience.¹⁰³

Second, Judge Bryson observed that “nothing in claim 1 [was] directed to how to implement out-of-region broadcasting on a cellular telephone. Rather, the claim is drawn to the idea itself.”¹⁰⁴ In particular, the patent did not describe how the invention accomplished the claimed functions. It merely confined the idea to one particular technological environment—cellular telephones. Under Supreme Court case law, the Federal Circuit concluded, these circumstances did not satisfy section 101.

The Federal Circuit has not accepted a section 101 challenge in every case. For example, the court of appeals has upheld patents directed towards an e-commerce system and method,¹⁰⁵ an information management and database system,¹⁰⁶ a method and system of filtering Internet content,¹⁰⁷ and a method of automatically animating lip synchronization and facial expressions of three-dimensional animated characters.¹⁰⁸ As a general matter, claims have been more likely to survive section 101 if they avoid broad functional language and recite discrete structures to achieve specific results.¹⁰⁹

⁹⁸ *Content Extraction and Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014).

⁹⁹ *Bancorp Services, LLC v. Sun Life Assurance Co.*, 687 F.3d 1266 (Fed. Cir. 2012).

¹⁰⁰ *Dealertrack, Inc. v. Huber*, 674 F.3d 1315 (Fed. Cir. 2012).

¹⁰¹ 838 F.3d 1253 (Fed. Cir. 2016).

¹⁰² *Ibid* at 1256.

¹⁰³ *Ibid* at 1258.

¹⁰⁴ *Ibid*.

¹⁰⁵ *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014).

¹⁰⁶ *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

¹⁰⁷ *BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016).

¹⁰⁸ *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299 (Fed. Cir. 2016).

¹⁰⁹ Robert Mazzola, “The 101 Conundrum: Creating a Framework to Solve Problems Surrounding Interpretation of 35 U.S.C. §101,” *Chicago-Kent Journal of Intellectual Property*, vol. 14 (Spring 2015), p. 400.

Implications for the Life Sciences

The Supreme Court decisions in *Mayo v. Prometheus* and *Association for Molecular Pathology v. Myriad Genetics* have held consequences for the life sciences industry. Due to *Mayo v. Prometheus*, predictive diagnostic methods that depend on the presence or absence of a biomarker, as well as diagnostic methods that measure that biomarker, may be subject to narrow patents or be difficult to patent at all. In turn, the *Myriad* case appears to make any isolated bodily substance, including genes, proteins, and cell lines, of doubtful patentability. On the other hand, even slightly altered genes and other naturally derived substances likely pass the §101 threshold.¹¹⁰

Fewer published judicial opinions have addressed the interaction of section 101 with respect to the life sciences than to information technologies.¹¹¹ However, one such decision, the 2015 ruling of the Federal Circuit in *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*,¹¹² has been subject to considerable discussion within the patent community. That case involved a non-invasive pre-natal diagnostic method useful for determining the gender and blood type of the fetus, as well as whether the fetus was subject to any genetic disorders. Sequenom was the exclusive licensee of U.S. Patent No. 6,258,540. Claim 1 of that patent recited:

1. A method for detecting a paternally inherited nucleic acid of fetal origin performed on a maternal serum or plasma sample from a pregnant female, which method comprises amplifying a paternally inherited nucleic acid from the serum or plasma sample and detecting the presence of a paternally inherited nucleic acid of fetal origin in the sample.¹¹³

The Federal Circuit explained that the inventors had discovered cell-free fetal DNA (cffDNA) in maternal plasma or serum. The inventors then used known laboratory techniques to implement a method for detecting the small fraction of paternally inherited ccfDNA in maternal plasma or serum to determine fetal characteristics. The Federal Circuit determined that this invention failed the two-part patentable subject matter test because: (1) the claims were directed to a naturally occurring phenomenon, cffDNA; and (2) the claims simply instructed physicians to apply well-understood, conventional techniques when seeking to detect cffDNA.¹¹⁴

Judge Linn contributed a concurring opinion that joined the majority but expressed dissatisfaction with the result. He explained that prior to the patented invention, prenatal diagnosis involved invasive techniques that could potentially harm the mother and the pregnancy. According to Judge Linn, “no reason, in policy or statute” suggested “why this breakthrough invention should be deemed patent ineligible.”¹¹⁵

¹¹⁰ Hallie Wimberly, “The Changing Landscape of Patent Subject Matter Eligibility and Its Impact on Biotechnological Innovation,” *Houston Law Review*, vol. 54 (2017), p. 995.

¹¹¹ *PerkinElmer, Inc. v. Intema Limited*, 496 Fed. Appx. 65 (Fed. Cir. 2012), provides one example. In that case the Federal Circuit held that a patent claiming screening methods to estimate the risk of fetal Down syndrome was invalid under section 101.

¹¹² 788 F.3d 1371 (Fed. Cir. 2015).

¹¹³ *Ibid* at 1373-74.

¹¹⁴ *Ibid* at 1376-78.

¹¹⁵ *Ibid* at 1381.

Congressional Issues and Options

Congress possesses several apparent options with respect to the law of patentable subject matter. If the current situation is deemed acceptable, then no action need be taken. Congress could otherwise alter the law of patentable subject matter through legislation. As of the date this report was published, no bill has been introduced before Congress addressing the law of patentable subject since the enactment of the Leahy-Smith America Invents Act in 2011.¹¹⁶ However, at least three different industry associations have suggested modifications to section 101.

Two of these organizations, the American Intellectual Property Law Association (AIPLA), a voluntary bar association, and the Intellectual Property Owners Association (IPO), a trade association for proprietors of patents and other intellectual property rights, have generated highly similar proposals. The AIPLA proposal would replace the existing section 101 with the following language:

35 U.S.C. § 101—Inventions Patentable

(a) Eligible Subject Matter.—Whoever invents or discovers any useful process, machine, manufacture, composition of matter, or any useful improvement thereof, shall be entitled to a patent therefor, subject only to the conditions and requirements set forth in this title.

(b) Sole Exceptions to Subject Matter Eligibility.—A claimed invention is ineligible under subsection (a) only if the claimed invention as a whole exists in nature independent of and prior to any human activity, or can be performed solely in the human mind.

(c) Sole Eligibility Standard.—The eligibility of a claimed invention under subsections (a) and (b) shall be determined without regard to the requirements or conditions of sections 102, 103, and 112 of this title, the manner in which the claimed invention was made or discovered, or whether the claimed invention includes an inventive concept.¹¹⁷

The IPO proposal reads almost identically.¹¹⁸

A third organization, the American Bar Association (ABA) Section of Intellectual Property Law, has offered a related proposal. The ABA proposal would amend section 101 to read:

§ 101. Conditions for patentability: eligible subject matter.

(a) Eligible Subject Matter.- Whoever invents or discovers any useful process, machine, manufacture, or composition of matter, or any useful improvement thereof, shall be entitled to obtain a patent on such invention or discovery, absent a finding that one or more conditions or requirements under this title have not been met.

(b) Exception.- A claim for a useful process, machine, manufacture, or composition of matter, or any useful improvement thereof, may be denied eligibility under this section 101 on the ground that the scope of the exclusive rights under such a claim would preempt the use by others of all practical applications of a law of nature, natural phenomenon, or abstract idea. Patent eligibility under this section shall not be negated

¹¹⁶ P.L. 112-29, 125 Stat. 284 (2011), at §§ 14, 33(a).

¹¹⁷ American Intellectual Property Law Association, *AIPLA Legislative Proposal and Report on Patent Eligible Subject Matter*, May 12, 2017, <http://www.patents4life.com/wp-content/uploads/2017/05/AIPLA-Report-on-101-Reform-5-12-17.pdf> (“AIPLA Proposal”), at 4.

¹¹⁸ Intellectual Property Owners Association, *Proposed Amendments to Patent Eligible Subject Matter Under 35 U.S.C. §101*, February 7, 2017, http://www.ipo.org/wp-content/uploads/2017/02/20170207_IPO-101-TF-Proposed-Amendments-and-Report.pdf (“IPO Proposal”), at 1.

when a practical application of a law of nature, natural phenomenon, or abstract idea is the subject matter of the claims upon consideration of those claims as a whole, whereby each and every limitation of the claims shall be fully considered and none ignored. Eligibility under this section 101 shall not be negated based on considerations of patentability as defined in Sections 102, 103 and 112, including whether the claims in whole or in part define an inventive concept.¹¹⁹

The AIPLA asserts that section 101 was intended to act as an “enabling provision” rather than “provide the standard for whether a particular technical advance should receive patent protection.”¹²⁰ Similarly, the ABA Section on Intellectual Property asserts that recent Supreme Court decisions “have injected ambiguity into the eligibility determination by requiring courts and the [USPTO] to apply criteria such as ‘well known,’ ‘routine,’ ‘conventional or obvious,’ factors that were previously relevant only to novelty and obviousness, in order to ignore limitations and render a claim patent ineligible and in effect have turned the gateway function of patent eligibility into a patentability test better left to the other statutory provisions....”¹²¹ For its part, the IPO explains that the Supreme Court’s analysis “is contrary to [c]ongressional intent, too restrictive, technologically incorrect, unsound from a policy standpoint, and bad law.”¹²²

Not everyone agrees that legislative reform is necessary. One commentator finds no evidence that more restrictive patent eligibility rules “have affected innovation or investment in any meaningful way.”¹²³ In his view, the proposed amendments would “essentially do away with any limits to software patenting.”¹²⁴ Another observer believes that these proposals would “eliminate any real constraint on subject matter eligibility.”¹²⁵ He also observes that the AIPLA proposal would also change the current statutory phrase “may obtain a patent subject to the conditions and requirements of this title” to “shall be entitled to a patent only subject to the conditions and requirements set forth in this title.”¹²⁶ In his view, this language would have the perhaps unintended effect of eliminating other common law patentability standards, including the so-called “obviousness-type double patenting” rule.¹²⁷

¹¹⁹ Letter from Donna P. Suchy, Chair, ABA Section of Intellectual Property Law, to The Honorable Michelle K. Lee, Director of the USPTO, March 28, 2017, <http://www.patents4life.com/wp-content/uploads/2017/05/ABA-101-proposal.pdf> (“ABA IP Proposal”), at 3-4.

¹²⁰ AIPLA Proposal at 2.

¹²¹ ABA IP Section Proposal at 2.

¹²² IPO Proposal at 2.

¹²³ Matt Levy, *Why IPO Is Wrong About Section 101*, February 7, 2017, <https://www.patentprogress.org/2017/02/07/ipo-wrong-section-101/>.

¹²⁴ *Ibid.*

¹²⁵ Josh Landau, *AIPLA Signs on to IPO’s Misguided Proposal on 101*, Patent Progress, May 17, 2017, <https://www.patentprogress.org/2017/05/17/aip-la-signs-ipos-misguided-proposal/>.

¹²⁶ The IPO proposal reads similarly. It states in relevant part, with emphasis added: “Whoever invents or discovers, and claims as an invention, any useful process, machine, manufacture, composition of matter, or any useful improvement thereto, shall be entitled to a patent for a claimed invention thereof, *subject only* to the exceptions, conditions, and requirements set forth in this Title.”

¹²⁷ This doctrine prevents an inventor from obtaining a second patent on an invention that is an obvious variation of an invention claimed in a granted patent, unless the inventor agrees that the patents will expire on the same date and be subject to common ownership. See, e.g., *Gilead Sciences, Inc. v. Natco Pharma. Ltd.*, 753 F.3d 1208 (Fed. Cir. 2014).

Concluding Observations

Patents in the fields of software and life sciences have proven controversial for decades. Recent Supreme Court interest in the topic of patentable subject matter, which has made patenting in these fields more difficult, has led to a heated debate. Many knowledgeable observers believe that section 101 helps ensure an appropriate balance between the innovative contributions of inventors and the scope of the rights that they receive. However, other experts express concern that the lack of availability of patent rights will decrease innovation and investment in the United States. Collectively, these debates may promote further inquiry into the sorts of inventions that may be appropriately patented.

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Section 101: Three Years of Uncertainty

Speakers

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Serena Farquharson-Torres, Senior Patent Counsel, Bristol-Meyers Squibb

Laura Sheridan, Senior Patent Counsel, Google

Moderator

Jonathan Berschadsky, Partner, Merchant & Gould P.C.

Prosecution Strategy

- Post-*Alice* Impact on R&D
- Application Drafting
- Handling *Alice* Rejections



Impact on Litigation Strategy

- Plaintiff Patent-Holders
 - Assess vulnerability to Alice 101 patent ineligibility before filing suit
- Defendant
 - Use mechanisms that most efficiently dispose of bad patents: 12(b)(6) Motions, CBM/PGR, Stays



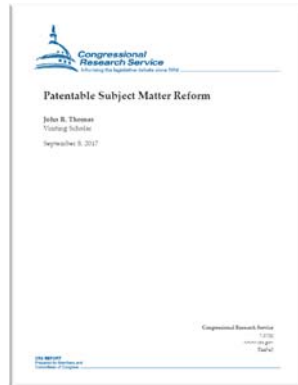
Impact on Transactional Activity

- Portfolio Value
- Impact on Agreement Drafting (e.g., Indemnification/Warranties)



Proposed Legislation

- Should there be legislation on Section 101?



Current Proposals

AIPLA Proposal*

35 U.S.C. § 101—Invention: Patentable

(a) **Eligible Subject Matter.**—Whoever invents or discovers any useful process, machine, manufacture, composition of matter, or any useful improvement thereof, shall be entitled to a patent therefor, subject only to the conditions and requirements set forth in this title.

(b) **Sole Exception to Subject Matter Eligibility.**—A claimed invention is ineligible under subsection (a) only if the claimed invention as a whole exists in nature independent of and prior to any human activity, or can be performed solely in the human mind.

(c) **Sole Eligibility Standard.**—The eligibility of a claimed invention under subsections (a) and (b) shall be determined without regard to the requirements or conditions of sections 102, 103, and 112 of this title, the manner in which the claimed invention was made or discovered, or whether the claimed invention includes an inventive concept.¹⁷

ABA Proposal

§ 101. Condition for patentability: eligible subject matter.

(a) **Eligible Subject Matter.**—Whoever invents or discovers any useful process, machine, manufacture, or composition of matter, or any useful improvement thereof, shall be entitled to obtain a patent on such invention or discovery, absent a finding that one or more conditions or requirements under this title have not been met.

(b) **Exception.**—A claim for a useful process, machine, manufacture, or composition of matter, or any useful improvement thereof, may be denied eligibility under this section 101 on the ground that the scope of the exclusive rights under such a claim would preempt the use by others of all practical applications of a law of nature, natural phenomenon, or abstract idea. Patent eligibility under this section shall not be negated when a practical application of a law of nature, natural phenomenon, or abstract idea is the subject matter of the claim upon consideration of those claims as a whole, whereby each and every limitation of the claim shall be fully considered and none ignored. Eligibility under this section 101 shall not be negated based on considerations of patentability as defined in Sections 102, 103 and 112, including whether the claims in whole or in part define an inventive concept.¹⁸

*IPO proposal reads almost identically





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Dr. Dorothy R. Auth is a partner at Cadwalader, Wickersham & Taft LLP. She holds a Ph.D. in biochemistry and has more than 20 years of experience in complex patent litigation, as well as licensing, corporate diligence, patent procurement, and intellectual property counseling in the United States and abroad. Her experience spans diverse industries, concentrating in biotechnology, pharmaceutical, and medical devices. She has litigated cases in U.S. Federal Courts and in WIPO international arbitrations. Dr. Auth counsels clients on intellectual property issues surrounding mergers, acquisitions, and bankruptcies. Dr. Auth is a Past-President for the New York Intellectual Property Law Association, a member of the American Intellectual Property Association and the Intellectual Property Owner's Association. At Cadwalader, Dorothy is a member of the Technology Committee, the Healthcare Industry Team and the Advisory Counsel for the Firm's Center for Career Advancement. Dorothy was the Partner Chair of the Women's Leadership Initiative for over 5 years.



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Jeffrey Butler advises on patent, trade secret, and other IP matters, particularly in the areas of pharmaceutical products and manufacturing processes, and capsule and other pharmaceutical and health-and-nutrition technologies and dosage form solutions. He also advises on contact, licensing, unlawful-competition, liability and other legal matters. He has significant dispute-resolution experience (litigation, arbitration, mediation) in connection with patents, trade secrets, unfair competition, breach-of-contract, product-liability, trademarks and copyrights.

He has represented global companies in US litigations and domestic and international arbitrations (and has coordinated multinational patent-office and court proceedings). He manages prosecution matters as well as contentious proceedings in the USPTO and foreign patent offices (e.g., IPRs, oppositions).

He has authored a book on US trademark law (published in 2011), coauthored a book on US patent law (published in 2016), and he has authored and coauthored other books, chapters and articles on numerous US and international IP, litigation and other legal topics, including new developments in US patent and trademark law, biotech/pharma law, antitrust and unfair competition, standard-setting organizations, copyright law, moral rights, computer law, and depositions and discovery (including e-discovery and document preservation). He has presented papers, seminars, and symposia on those subjects in the United States, Europe and Asia. He is an active member of various professional organizations, both in the USA and in Europe, including the NYIPLA (currently serving as Co-Chair of the Legislative Action Committee, and past board member and treasurer of the association); the Hon. Wm. C. Conner Inn of Court (Barrister and Member of the Executive Committee); the VPP; the DAJV; GRUR; INGRES: LES Deutsche Landesgruppe e. V.; and the American Council on Germany (ACG).

**Lobbying Disclosure Act of 1995--Current through October
1, 2007**

Note: This compilation includes language from Public Law 104-65, as well as amending language from Public Laws 105-166 and 110-81. These materials are not official evidence of the laws set forth herein. Sections 112 and 204 of title 1 of the United States Code establish the rules governing which text serves as legal evidence of the laws of the United States.

For changes, after the closing date of this publication, to provisions of law in this publication, see the United States Code Classification Tables published by the Office of the Law Revision Counsel of the House of Representatives at <http://uscode.house.gov/classification/tables.shtml>

LOBBYING DISCLOSURE ACT OF 1995¹

[As Amended Through P.L. 110–81, Enacted September 14, 2007]

AN ACT To provide for the disclosure of lobbying activities to influence the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. [2 U.S.C. 1601 note] SHORT TITLE.

This Act may be cited as the “Lobbying Disclosure Act of 1995”.

SEC. 2. [2 U.S.C. 1601] FINDINGS.

The Congress finds that—

(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government;

(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

SEC. 3. [2 U.S.C. 1602] DEFINITIONS.

As used in this Act:

(1) AGENCY.—The term “agency” has the meaning given that term in section 551(1) of title 5, United States Code.

(2) CLIENT.—The term “client” means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities,

¹Title II of Public Law 110–81 provides for amendments to the Lobby Disclosure Act of 1995. Section 215 of such Public Law provides:

SEC. 215. EFFECTIVE DATE.

Except as otherwise provided in sections 203, 204, 206, 211, 212, and 213, the amendments made by this title shall apply with respect to registrations under the Lobbying Disclosure Act of 1995 having an effective date of January 1, 2008, or later and with respect to quarterly reports under that Act covering calendar quarters beginning on or after January 1, 2008.

the client is the coalition or association and not its individual members.

(3) COVERED EXECUTIVE BRANCH OFFICIAL.—The term “covered executive branch official” means—

- (A) the President;
- (B) the Vice President;

(C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;

(D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

(E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37, United States Code; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code.

(4) COVERED LEGISLATIVE BRANCH OFFICIAL.—The term “covered legislative branch official” means—

- (A) a Member of Congress;
- (B) an elected officer of either House of Congress;
- (C) any employee of, or any other individual functioning in the capacity of an employee of—

- (i) a Member of Congress;
- (ii) a committee of either House of Congress;
- (iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;
- (iv) a joint committee of Congress; and

(v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and

(D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(5) EMPLOYEE.—The term “employee” means any individual who is an officer, employee, partner, director, or proprietor of a person or entity, but does not include—

- (A) independent contractors; or
- (B) volunteers who receive no financial or other compensation from the person or entity for their services.

(6) FOREIGN ENTITY.—The term “foreign entity” means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)).

(7) LOBBYING ACTIVITIES.—The term “lobbying activities” means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

(8) LOBBYING CONTACT.—

(A) DEFINITION.—The term “lobbying contact” means any oral or written communication (including an electronic

communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or

(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

(B) EXCEPTIONS.—The term “lobbying contact” does not include a communication that is—

(i) made by a public official acting in the public official’s official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

(vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar

publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to an official in an agency with regard to—

(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or

(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis,

if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions;

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with—

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),

with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978, or under another provision of law;

(xviii) made by—

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of the Internal Revenue Code of 1986, or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph 2(A)(iii) of such section 6033(a); and

(xix) between—

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively;

relating to the regulatory responsibilities of such organization under that Act.

(9) LOBBYING FIRM.—The term “lobbying firm” means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.

(10) LOBBYIST.—The term “lobbyist” means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.

(11) MEDIA ORGANIZATION.—The term “media organization” means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.

(12) MEMBER OF CONGRESS.—The term “Member of Congress” means a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress.

(13) ORGANIZATION.—The term “organization” means a person or entity other than an individual.

(14) PERSON OR ENTITY.—The term “person or entity” means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

(15) PUBLIC OFFICIAL.—The term “public official” means any elected official, appointed official, or employee of—

(A) a Federal, State, or local unit of government in the United States other than—

(i) a college or university;

(ii) a government-sponsored enterprise (as defined in section 3(8) of the Congressional Budget and Impoundment Control Act of 1974);

(iii) a public utility that provides gas, electricity, water, or communications;

(iv) a guaranty agency (as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1085(j))), including any affiliate of such an agency; or

(v) an agency of any State functioning as a student loan secondary market pursuant to section 435(d)(1)(F) of the Higher Education Act of 1965 (20 U.S.C. 1085(d)(1)(F));

(B) a Government corporation (as defined in section 9101 of title 31, United States Code);

(C) an organization of State or local elected or appointed officials other than officials of an entity described in clause (i), (ii), (iii), (iv), or (v) of subparagraph (A);

(D) an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e));

(E) a national or State political party or any organizational unit thereof; or

(F) a national, regional, or local unit of any foreign government, or a group of governments acting together as an international organization.

(16) STATE.—The term “State” means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

SEC. 4. [2 U.S.C. 1603] REGISTRATION OF LOBBYISTS.

(a) REGISTRATION.—

(1) GENERAL RULE.—No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives.

(2) EMPLOYER FILING.—Any organization that has 1 or more employees who are lobbyists shall file a single registration under this section on behalf of such employees for each client on whose behalf the employees act as lobbyists.

(3) EXEMPTION.—

(A) GENERAL RULE.—Notwithstanding paragraphs (1) and (2), a person or entity whose—

(i) total income for matters related to lobbying activities on behalf of a particular client (in the case of a lobbying firm) does not exceed and is not expected to exceed \$2,500; or

(ii) total expenses in connection with lobbying activities (in the case of an organization whose employees engage in lobbying activities on its own behalf) do not exceed or are not expected to exceed \$10,000, (as estimated under section 5) in the quarterly period described in section 5(a) during which the registration would be made is not required to register under subsection (a) with respect to such client.

(B) ADJUSTMENT.—The dollar amounts in subparagraph (A) shall be adjusted—

(i) on January 1, 1997, to reflect changes in the Consumer Price Index (as determined by the Secretary of Labor) since the date of enactment of this Act; and

(ii) on January 1 of each fourth year occurring after January 1, 1997, to reflect changes in the Consumer Price Index (as determined by the Secretary of Labor) during the preceding 4-year period,

rounded to the nearest \$500.

(b) CONTENTS OF REGISTRATION.—Each registration under this section shall contain—

(1) the name, address, business telephone number, and principal place of business of the registrant, and a general description of its business or activities;

(2) the name, address, and principal place of business of the registrant's client, and a general description of its business or activities (if different from paragraph (1));

(3) the name, address, and principal place of business of any organization, other than the client, that—

(A) contributes more than \$5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and

(B) actively participates in the planning, supervision, or control of such lobbying activities;

(4) the name, address, principal place of business, amount of any contribution of more than \$5,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity that—

(A) holds at least 20 percent equitable ownership in the client or any organization identified under paragraph (3);

(B) directly or indirectly, in whole or in major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or any organization identified under paragraph (3); or

(C) is an affiliate of the client or any organization identified under paragraph (3) and has a direct interest in the outcome of the lobbying activity;

(5) a statement of—

(A) the general issue areas in which the registrant expects to engage in lobbying activities on behalf of the client; and

(B) to the extent practicable, specific issues that have (as of the date of the registration) already been addressed or are likely to be addressed in lobbying activities; and

(6) the name of each employee of the registrant who has acted or whom the registrant expects to act as a lobbyist on behalf of the client and, if any such employee has served as a covered executive branch official or a covered legislative branch official in the 20 years before the date on which the employee first acted as a lobbyist on behalf of the client, the position in which such employee served.

No disclosure is required under paragraph (3)(B) if the organization that would be identified as affiliated with the client is listed on the client's publicly accessible Internet website as being a member of

or contributor to the client, unless the organization in whole or in major part plans, supervises, or controls such lobbying activities. If a registrant relies upon the preceding sentence, the registrant must disclose the specific Internet address of the web page containing the information relied upon. Nothing in paragraph (3)(B) shall be construed to require the disclosure of any information about individuals who are members of, or donors to, an entity treated as a client by this Act or an organization identified under that paragraph.

(c) GUIDELINES FOR REGISTRATION.—

(1) MULTIPLE CLIENTS.—In the case of a registrant making lobbying contacts on behalf of more than 1 client, a separate registration under this section shall be filed for each such client.

(2) MULTIPLE CONTACTS.—A registrant who makes more than 1 lobbying contact for the same client shall file a single registration covering all such lobbying contacts.

(d) TERMINATION OF REGISTRATION.—A registrant who after registration—

(1) is no longer employed or retained by a client to conduct lobbying activities, and

(2) does not anticipate any additional lobbying activities for such client,

may so notify the Secretary of the Senate and the Clerk of the House of Representatives and terminate its registration.

SEC. 5. [2 U.S.C. 1604] REPORTS BY REGISTERED LOBBYISTS.

(a) QUARTERLY REPORT.—No later than 20 days after the end of the quarterly period beginning on the first day of January, April, July, and October of each year in which a registrant is registered under section 4, or on the first business day after such 20th day if the 20th day is not a business day, each registrant shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives on its lobbying activities during such quarterly period. A separate report shall be filed for each client of the registrant.

(b) CONTENTS OF REPORT.—Each quarterly report filed under subsection (a) shall contain—

(1) the name of the registrant, the name of the client, and any changes or updates to the information provided in the initial registration, including information under section 4(b)(3);

(2) for each general issue area in which the registrant engaged in lobbying activities on behalf of the client during the quarterly period—

(A) a list of the specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branch actions;

(B) a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client;

(C) a list of the employees of the registrant who acted as lobbyists on behalf of the client; and

(D) a description of the interest, if any, of any foreign entity identified under section 4(b)(4) in the specific issues listed under subparagraph (A);

(3) in the case of a lobbying firm, a good faith estimate of the total amount of all income from the client (including any payments to the registrant by any other person for lobbying activities on behalf of the client) during the quarterly period, other than income for matters that are unrelated to lobbying activities;

(4) in the case of a registrant engaged in lobbying activities on its own behalf, a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities during the quarterly period; and

(5) for each client, immediately after listing the client, an identification of whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments.

(c) ESTIMATES OF INCOME OR EXPENSES.—For purposes of this section, estimates of income or expenses shall be made as follows:

(1) Estimates of amounts in excess of \$5,000 shall be rounded to the nearest \$10,000.

(2) In the event income or expenses do not exceed \$5,000, the registrant shall include a statement that income or expenses totaled less than \$5,000 for the reporting period.

(d) SEMIANNUAL REPORTS ON CERTAIN CONTRIBUTIONS.—

(1) IN GENERAL.—Not later than 30 days after the end of the semiannual period beginning on the first day of January and July of each year, or on the first business day after such 30th day if the 30th day is not a business day, each person or organization who is registered or is required to register under paragraph (1) or (2) of section 4(a), and each employee who is or is required to be listed as a lobbyist under section 4(b)(6) or subsection (b)(2)(C) of this section, shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives containing—

(A) the name of the person or organization;

(B) in the case of an employee, his or her employer;

(C) the names of all political committees established or controlled by the person or organization;

(D) the name of each Federal candidate or officeholder, leadership PAC, or political party committee, to whom aggregate contributions equal to or exceeding \$200 were made by the person or organization, or a political committee established or controlled by the person or organization within the semiannual period, and the date and amount of each such contribution made within the semiannual period;

(E) the date, recipient, and amount of funds contributed or disbursed during the semiannual period by the person or organization or a political committee established or controlled by the person or organization—

(i) to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official;

(ii) to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official;

(iii) to an entity established, financed, maintained, or controlled by a covered legislative branch official or covered executive branch official, or an entity designated by such official; or

(iv) to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, 1 or more covered legislative branch officials or covered executive branch officials,

except that this subparagraph shall not apply if the funds are provided to a person who is required to report the receipt of the funds under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434);

(F) the name of each Presidential library foundation, and each Presidential inaugural committee, to whom contributions equal to or exceeding \$200 were made by the person or organization, or a political committee established or controlled by the person or organization, within the semiannual period, and the date and amount of each such contribution within the semiannual period; and

(G) a certification by the person or organization filing the report that the person or organization—

(i) has read and is familiar with those provisions of the Standing Rules of the Senate and the Rules of the House of Representatives relating to the provision of gifts and travel; and

(ii) has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that receipt of the gift would violate rule XXXV of the Standing Rules of the Senate or rule XXV of the Rules of the House of Representatives.

(2) DEFINITION.—In this subsection, the term “leadership PAC” has the meaning given such term in section 304(i)(8)(B) of the Federal Election Campaign Act of 1971.

(e) ELECTRONIC FILING REQUIRED.—A report required to be filed under this section shall be filed in electronic form, in addition to any other form that the Secretary of the Senate or the Clerk of the House of Representatives may require or allow. The Secretary of the Senate and the Clerk of the House of Representatives shall use the same electronic software for receipt and recording of filings under this Act.

SEC. 6. [2 U.S.C. 1605] DISCLOSURE AND ENFORCEMENT.

(a) IN GENERAL.—The Secretary of the Senate and the Clerk of the House of Representatives shall—

(1) provide guidance and assistance on the registration and reporting requirements of this Act and develop common standards, rules, and procedures for compliance with this Act;

(2) review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and reports;

(3) develop filing, coding, and cross-indexing systems to carry out the purpose of this Act, including—

(A) a publicly available list of all registered lobbyists, lobbying firms, and their clients; and

(B) computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this Act;

(4) make available for public inspection and copying at reasonable times the registrations and reports filed under this Act and, in the case of a report filed in electronic form under section 5(e), make such report available for public inspection over the Internet as soon as technically practicable after the report is so filed;

(5) retain registrations for a period of at least 6 years after they are terminated and reports for a period of at least 6 years after they are filed;

(6) compile and summarize, with respect to each quarterly period, the information contained in registrations and reports filed with respect to such period in a clear and complete manner;

(7) notify any lobbyist or lobbying firm in writing that may be in noncompliance with this Act;

(8) notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with this Act, if the registrant has been notified in writing and has failed to provide an appropriate response within 60 days after notice was given under paragraph (7);

(9) maintain all registrations and reports filed under this Act, and make them available to the public over the Internet, without a fee or other access charge, in a searchable, sortable, and downloadable manner, to the extent technically practicable, that—

(A) includes the information contained in the registrations and reports;

(B) is searchable and sortable to the maximum extent practicable, including searchable and sortable by each of the categories of information described in section 4(b) or 5(b); and

(C) provides electronic links or other appropriate mechanisms to allow users to obtain relevant information in the database of the Federal Election Commission;

(10) retain the information contained in a registration or report filed under this Act for a period of 6 years after the registration or report (as the case may be) is filed; and

(11) make publicly available, on a semiannual basis, the aggregate number of registrants referred to the United States Attorney for the District of Columbia for noncompliance as required by paragraph (8).

(b) ENFORCEMENT REPORT.—

(1) REPORT.—The Attorney General shall report to the congressional committees referred to in paragraph (2), after the

end of each semiannual period beginning on January 1 and July 1, the aggregate number of enforcement actions taken by the Department of Justice under this Act during that semiannual period and, by case, any sentences imposed, except that such report shall not include the names of individuals, or personally identifiable information, that is not already a matter of public record.

(2) COMMITTEES.—The congressional committees referred to in paragraph (1) are the Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

SEC. 7. [2 U.S.C. 1606] PENALTIES.

(a) CIVIL PENALTY.—Whoever knowingly fails to—

(1) remedy a defective filing within 60 days after notice of such a defect by the Secretary of the Senate or the Clerk of the House of Representatives; or

(2) comply with any other provision of this Act; shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than \$200,000, depending on the extent and gravity of the violation.

(b) CRIMINAL PENALTY.—Whoever knowingly and corruptly fails to comply with any provision of this Act shall be imprisoned for not more than 5 years or fined under title 18, United States Code, or both.

SEC. 8. [2 U.S.C. 1607] RULES OF CONSTRUCTION.

(a) CONSTITUTIONAL RIGHTS.—Nothing in this Act shall be construed to prohibit or interfere with—

(1) the right to petition the Government for the redress of grievances;

(2) the right to express a personal opinion; or

(3) the right of association,

protected by the first amendment to the Constitution.

(b) PROHIBITION OF ACTIVITIES.—Nothing in this Act shall be construed to prohibit, or to authorize any court to prohibit, lobbying activities or lobbying contacts by any person or entity, regardless of whether such person or entity is in compliance with the requirements of this Act.

(c) AUDIT AND INVESTIGATIONS.—Nothing in this Act shall be construed to grant general audit or investigative authority to the Secretary of the Senate or the Clerk of the House of Representatives.

SEC. 9. AMENDMENTS TO THE FOREIGN AGENTS REGISTRATION ACT.

[Sec. 9 provides for amendments to the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.)]

SEC. 10. AMENDMENTS TO THE BYRD AMENDMENT.

[Sec. 10 provides for amendments to section 1352 of title 31, United States Code]

SEC. 11. REPEAL OF CERTAIN LOBBYING PROVISIONS.

(a) REPEAL OF THE FEDERAL REGULATION OF LOBBYING ACT.— [Sec. 11(a) provides for the repeal of the Federal Regulation of Lobbying Act (2 U.S.C. 261 et seq.) in its entirety]

(b) **REPEAL OF PROVISIONS RELATING TO HOUSING LOBBYIST ACTIVITIES.**—

(1) [Sec. 11(b)(1) provides for the repeal of section 13 of the Department of Housing and Urban Development Act (42 U.S.C. 3537b)]

(2) [Sec. 11(b)(2) provides for the repeal of section 536(d) of the Housing Act of 1949 (42 U.S.C. 1490p(d))]

SEC. 12. CONFORMING AMENDMENTS TO OTHER STATUTES.

(a) **AMENDMENT TO COMPETITIVENESS POLICY COUNCIL ACT.**— [Sec. 12(a) provides for an amendment to section 5206(e) of the Competitiveness Policy Council Act (15 U.S.C. 4804(e))]

(b) **AMENDMENTS TO TITLE 18, UNITED STATES CODE.**— [Sec. 12(b) provides for amendments to section 219(a) of title 18, United States Code]

(c) **AMENDMENT TO FOREIGN SERVICE ACT OF 1980.**— [Sec. 12(c) provides for an amendment to section 602(c) of the Foreign Service Act of 1980 (22 U.S.C. 4002(c))]

SEC. 13. [2 U.S.C. 1608] SEVERABILITY.

If any provision of this Act, or the application thereof, is held invalid, the validity of the remainder of this Act and the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 14. [2 U.S.C. 1609] IDENTIFICATION OF CLIENTS AND COVERED OFFICIALS.

(a) **ORAL LOBBYING CONTACTS.**— Any person or entity that makes an oral lobbying contact with a covered legislative branch official or a covered executive branch official shall, on the request of the official at the time of the lobbying contact—

(1) state whether the person or entity is registered under this Act and identify the client on whose behalf the lobbying contact is made; and

(2) state whether such client is a foreign entity and identify any foreign entity required to be disclosed under section 4(b)(4) that has a direct interest in the outcome of the lobbying activity.

(b) **WRITTEN LOBBYING CONTACTS.**— Any person or entity registered under this Act that makes a written lobbying contact (including an electronic communication) with a covered legislative branch official or a covered executive branch official shall—

(1) if the client on whose behalf the lobbying contact was made is a foreign entity, identify such client, state that the client is considered a foreign entity under this Act, and state whether the person making the lobbying contact is registered on behalf of that client under section 4; and

(2) identify any other foreign entity identified pursuant to section 4(b)(4) that has a direct interest in the outcome of the lobbying activity.

(c) **IDENTIFICATION AS COVERED OFFICIAL.**— Upon request by a person or entity making a lobbying contact, the individual who is contacted or the office employing that individual shall indicate whether or not the individual is a covered legislative branch official or a covered executive branch official.

SEC. 15. [2 U.S.C. 1610] ESTIMATES BASED ON TAX REPORTING SYSTEM.

(a) ENTITIES COVERED BY SECTION 6033(b) OF THE INTERNAL REVENUE CODE OF 1986.—A person, other than a lobbying firm, that is required to report and does report lobbying expenditures pursuant to section 6033(b)(8) of the Internal Revenue Code of 1986 may—

(1) make a good faith estimate (by category of dollar value) of applicable amounts that would be required to be disclosed under such section for the appropriate quarterly period to meet the requirements of sections 4(a)(3) and 5(b)(4); and

(2) for all other purposes consider as lobbying contacts and lobbying activities only—

(A) lobbying contacts with covered legislative branch officials (as defined in section 3(4)) and lobbying activities in support of such contacts; and

(B) lobbying of Federal executive branch officials to the extent that such activities are influencing legislation as defined in section 4911(d) of the Internal Revenue Code of 1986.

(b) ENTITIES COVERED BY SECTION 162(e) OF THE INTERNAL REVENUE CODE OF 1986.—A person, other than a lobbying firm, who is required to account and does account for lobbying expenditures pursuant to section 162(e) of the Internal Revenue Code of 1986 may—

(1) make a good faith estimate (by category of dollar value) of applicable amounts that would not be deductible pursuant to such section for the appropriate quarterly period to meet the requirements of sections 4(a)(3) and 5(b)(4); and

(2) for all other purposes consider as lobbying contacts and lobbying activities only—

(A) lobbying contacts with covered legislative branch officials (as defined in section 3(4)) and lobbying activities in support of such contacts; and

(B) lobbying of Federal executive branch officials to the extent that amounts paid or costs incurred in connection with such activities are not deductible pursuant to section 162(e) of the Internal Revenue Code of 1986.

(c) DISCLOSURE OF ESTIMATE.—Any registrant that elects to make estimates required by this Act under the procedures authorized by subsection (a) or (b) for reporting or threshold purposes shall—

(1) inform the Secretary of the Senate and the Clerk of the House of Representatives that the registrant has elected to make its estimates under such procedures; and

(2) make all such estimates, in a given calendar year, under such procedures.

(d) STUDY.—Not later than March 31, 1997, the Comptroller General of the United States shall review reporting by registrants under subsections (a) and (b) and report to the Congress—

(1) the differences between the definition of “lobbying activities” in section 3(7) and the definitions of “lobbying expenditures”, “influencing legislation”, and related terms in

sections 162(e) and 4911 of the Internal Revenue Code of 1986, as each are implemented by regulations;

(2) the impact that any such differences may have on filing and reporting under this Act pursuant to this subsection; and

(3) any changes to this Act or to the appropriate sections of the Internal Revenue Code of 1986 that the Comptroller General may recommend to harmonize the definitions.

SEC. 16. REPEAL OF THE RAMSPECK ACT.

(a) **REPEAL.**—Subsection (c) of section 3304 of title 5, United States Code, is repealed.

(b) **REDESIGNATION.**—Subsection (d) of section 3304 of title 5, United States Code, is redesignated as subsection (c).

(c) **EFFECTIVE DATE.**—The repeal and amendment made by this section shall take effect 2 years after the date of the enactment of this Act.

SEC. 17. EXCEPTED SERVICE AND OTHER EXPERIENCE CONSIDERATIONS FOR COMPETITIVE SERVICE APPOINTMENTS.

(a) **IN GENERAL.**—Section 3304 of title 5, United States Code (as amended by section 2 of this Act) is further amended by adding at the end thereof the following new subsection:

“(d) The Office of Personnel Management shall promulgate regulations on the manner and extent that experience of an individual in a position other than the competitive service, such as the excepted service (as defined under section 2103) in the legislative or judicial branch, or in any private or nonprofit enterprise, may be considered in making appointments to a position in the competitive service (as defined under section 2102). In promulgating such regulations OPM shall not grant any preference based on the fact of service in the legislative or judicial branch. The regulations shall be consistent with the principles of equitable competition and merit based appointments.”

(b) **EFFECTIVE DATE.**—The amendment made by this section shall take effect 2 years after the date of the enactment of this Act, except the Office of Personnel Management shall—

(1) conduct a study on excepted service considerations for competitive service appointments relating to such amendment; and

(2) take all necessary actions for the regulations described under such amendment to take effect as final regulations on the effective date of this section.

SEC. 18. [2 U.S.C. 1611] EXEMPT ORGANIZATIONS.

An organization described in section 501(c)(4) of the Internal Revenue Code of 1986 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, or loan.

SEC. 19. AMENDMENT TO THE FOREIGN AGENTS REGISTRATION ACT (P.L. 75-583).

[Sec. 19 provides for an amendment to strike and insert section 11 of the Foreign Agents Registration Act of 1938]

SEC. 20. DISCLOSURE OF THE VALUE OF ASSETS UNDER THE ETHICS IN GOVERNMENT ACT OF 1978.

[Sec. 20 provides for amendments to section 102 of the Ethics in Government Act of 1978]

SEC. 21. BAN ON TRADE REPRESENTATIVE REPRESENTING OR ADVISING FOREIGN ENTITIES.

(a) REPRESENTING AFTER SERVICE.—[Sec. 21(a) provides for amendments to section 207(f)(2) of title 18, United States Code]

(b) LIMITATION ON APPOINTMENT AS UNITED STATES TRADE REPRESENTATIVE AND DEPUTY UNITED STATES TRADE REPRESENTATIVE.—[Sec. 21(b) provides for an amendment to section 141(b) of the Trade Act of 1974 (19 U.S.C. 2171(b))]

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to an individual appointed as United States Trade Representative or as a Deputy United States Trade Representative on or after the date of enactment of this Act.

SEC. 22. FINANCIAL DISCLOSURE OF INTEREST IN QUALIFIED BLIND TRUST.

(a) IN GENERAL.—[Sec. 22(a) and (b) provides for amendments to section 102 of the Ethics in Government Act of 1978]

(c) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to reports filed under title I of the Ethics in Government Act of 1978 for calendar year 1996 and thereafter.

SEC. 23. [2 U.S.C. 1612] SENSE OF THE SENATE THAT LOBBYING EXPENSES SHOULD REMAIN NONDEDUCTIBLE.

(a) FINDINGS.—The Senate finds that ordinary Americans generally are not allowed to deduct the costs of communicating with their elected representatives.

(b) SENSE OF THE SENATE.—It is the sense of the Senate that lobbying expenses should not be tax deductible.

SEC. 24. [2 U.S.C. 1601 note] EFFECTIVE DATES.

(a) Except as otherwise provided in this section, this Act and the amendments made by this Act shall take effect on January 1, 1996.

(b) The repeals and amendments made under sections 9, 10, 11, and 12 shall take effect as provided under subsection (a), except that such repeals and amendments—

(1) shall not affect any proceeding or suit commenced before the effective date under subsection (a), and in all such proceedings or suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted; and

(2) shall not affect the requirements of Federal agencies to compile, publish, and retain information filed or received before the effective date of such repeals and amendments.

SEC. 25. [2 U.S.C. 1613] PROHIBITION ON PROVISION OF GIFTS OR TRAVEL BY REGISTERED LOBBYISTS TO MEMBERS OF CONGRESS AND TO CONGRESSIONAL EMPLOYEES.

(a) PROHIBITION.—Any person described in subsection (b) may not make a gift or provide travel to a covered legislative branch official if the person has knowledge that the gift or travel may not be accepted by that covered legislative branch official under the

Rules of the House of Representatives or the Standing Rules of the Senate (as the case may be).

(b) **PERSONS SUBJECT TO PROHIBITION.**—The persons subject to the prohibition under subsection (a) are any lobbyist that is registered or is required to register under section 4(a)(1), any organization that employs 1 or more lobbyists and is registered or is required to register under section 4(a)(2), and any employee listed or required to be listed as a lobbyist by a registrant under section 4(b)(6) or 5(b)(2)(C).

SEC. 26. [2 U.S.C. 1614] ANNUAL AUDITS AND REPORTS BY COMPTROLLER GENERAL.

(a) **AUDIT.**—On an annual basis, the Comptroller General shall audit the extent of compliance or noncompliance with the requirements of this Act by lobbyists, lobbying firms, and registrants through a random sampling of publicly available lobbying registrations and reports filed under this Act during each calendar year.

(b) **REPORTS TO CONGRESS.**—

(1) **ANNUAL REPORTS.**—Not later than April 1 of each year, the Comptroller General shall submit to the Congress a report on the review required by subsection (a) for the preceding calendar year. The report shall include the Comptroller General's assessment of the matters required to be emphasized by that subsection and any recommendations of the Comptroller General to—

(A) improve the compliance by lobbyists, lobbying firms, and registrants with the requirements of this Act; and

(B) provide the Department of Justice with the resources and authorities needed for the effective enforcement of this Act.

(2) **ASSESSMENT OF COMPLIANCE.**—The annual report under paragraph (1) shall include an assessment of compliance by registrants with the requirements of section 4(b)(3).

(c) **ACCESS TO INFORMATION.**—The Comptroller General may, in carrying out this section, request information from and access to any relevant documents from any person registered under paragraph (1) or (2) of section 4(a) and each employee who is listed as a lobbyist under section 4(b)(6) or section 5(b)(2)(C) if the material requested relates to the purposes of this section. The Comptroller General may request such person to submit in writing such information as the Comptroller General may prescribe. The Comptroller General may notify the Congress in writing if a person from whom information has been requested under this subsection refuses to comply with the request within 45 days after the request is made.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)	
U.S. Attorney’s Office for the District of Columbia)	
555 Fourth Street, NW)	
Washington, DC 20530,)	
)	
Plaintiff,)	Civil Action No. 13-0853
)	
v.)	
)	
BIASSI BUSINESS SERVICES, INC.)	
942 Woodfield Road)	
West Hempstead, NY 11552)	
)	
Defendant.)	
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**UNITED STATES’ LOBBYING DISCLOSURE ACT COMPLAINT
FOR CIVIL PENALTIES OR FINES**

1. The United States brings this action against the Defendant, an entity doing business as Biassi Business Services, Inc. (“BBSI”), under the Lobbying Disclosure Act (“LDA”), 2 U.S.C. § 1601, *et seq.*, seeking a civil penalty or fine.

2. The Government alleges that BBSI knowingly failed to comply with the periodic reporting requirements of the LDA and to remedy delinquent filings after being notified by the Secretary of the U.S. Senate (the “Senate”) and the Clerk of the U.S. House of Representatives (the “House”).

3. As such, and because BBSI has failed to remedy its unlawful actions despite a plethora of notices from the House, Senate, and the U.S. Attorney’s Office, the United States brings this action.

JURISDICTION, VENUE, AND PARTIES

4. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1345, as this action is brought by the United States; 28 U.S.C. § 2461(a), as the United States seeks to recover a civil penalty or fine prescribed for the violation of an Act of Congress; and 28 U.S.C. § 1331, as this case arises under the laws of the United States.

5. This Court has personal jurisdiction over Defendant and venue is proper in this District under 2 U.S.C. § 1605(a)(8), which contemplates the LDA will be enforced by the U.S. Attorney's Office for the District of Columbia, and 28 U.S.C. § 1391(b)(2), as a substantial part of the events and omissions giving rise to the claims in this action occurred within the District of Columbia.

6. Plaintiff, the United States of America, through the U.S. Attorney's Office for the District of Columbia brings this action pursuant to its statutorily contemplated authority to enforce the registration and reporting requirements of the LDA.

7. Defendant Biassi Business Services, Inc. is a business whose principal place of business and last known address is 942 Woodfield Road, West Hempstead, NY 11552.

8. Although BBSI's name purports to identify it as an incorporated entity, the United States has been unable to identify any state of incorporation for BBSI despite a reasonable search of state corporation records. As such, it is the Government's information and belief that BBSI is an unincorporated business entity owned and operated by its principals, which the United States understands include Mensah A. Biassi and Patricia Ann Biassi.

STATUTORY FRAMEWORK

9. The LDA requires individual lobbyists and lobbying firms or organizations employing in-house lobbyists (*i.e.*, “registrants”) to provide periodic reports of lobbying activity to the House and Senate. *See* 2 U.S.C. § 1604(a)-(d).

10. The LDA was amended effective January 1, 2008, by the Honest Leadership and Open Government Act of 2007 (“HLOGA”) to require more frequent reports of lobbying activity and the filing of semiannual reports detailing contribution activities.

11. As of January 1, 2008, registrants are required to file quarterly reports of lobbying activity for each of their clients on LD-2 forms with the Secretary of the Senate and Clerk of the House. 2 U.S.C. § 1604(a)-(c). These LD-2 reports are due “no later than 20 days after the end of the quarterly period beginning on the first day of January, April, July, and October of each year in which a registrant is registered . . . , or on the first business day after such 20th day if the 20th day is not a business day[.]” 2 U.S.C. § 1604(a).

12. Further, as of January 1, 2008, individual lobbyists and registrants are required to file semi-annual reports of contribution activities on LD-203 forms with the Secretary of the Senate and Clerk of the House. 2 U.S.C. § 1604(d). These LD-203 reports are due “not later than 30 days after the end of the semiannual period beginning on the first day of January and July of each year, or on the first business day after such 30th day if the 30th day is not a business day[.]” 2 U.S.C. § 1604(d)(1).

13. The LDA also requires registrants to file termination reports should they cease to represent a client and amended registration statements to add or subtract a registrant’s active lobbyists. 2 U.S.C. § 1603(d); *see also* 2 U.S.C. § 1604(d).

BBSI'S FAILURE TO FILE REQUIRED LD-2 AND LD-203 REPORTS

I. BBSI Files Lobbying Registration Statements with the House and Senate.

14. On or about September 1, 2001, BBSI filed a lobbying registration statement with the House and Senate registering itself as a lobbying firm and identifying The Africa Committee, Inc. as its sole client.

15. BBSI's September 2001 registration statement identified Mensah A. Biassi and Patricia Ann Biassi as the points of contact for BBSI and the lobbyists employed by BBSI.

16. Mensah A. Biassi as CEO of BBSI signed the September 2001 registration statement.

17. On February 28, 2009, BBSI filed an amended registration statement. This amended registration statement continued to identify BBSI as a lobbying firm and its sole client as The Africa Committee, Inc.

18. BBSI's February 2009 amended registration statement continued to list Mensah A. Biassi and Patricia Ann Biassi as lobbyists and identified three additional persons employed by BBSI as lobbyists, namely (i) Kouevi Adamah, (ii) Koffi Feliz Houngbeke, and (iii) Bright Ekue Adamah-Biassi.

19. Mensah A. Biassi as Associate Director of BBSI signed BBSI's February 2009 amended registration statement.

II. In Mid-2009, BBSI Begins Its Habitual Practice of Knowingly Failing to Timely File LD-2 Reports and Failing to Correct Delinquent Reports After Notice.

20. Shortly after BBSI's amended registration, BBSI began to be delinquent in filing its required LD-2 reports.

21. BBSI failed to file timely its Senate and House LD-2 reports for the first quarter of 2009, which were due on Monday, April 20, 2009.

22. Consequently, on or about May 12, 2009, the Secretary of the Senate wrote BBSI providing notice of its violation and demanding that BBSI remedy its delinquency within 60 days.

23. Presumably in response to the Senate's notice, BBSI filed its first quarter 2009 LD-2 reports with the House and Senate on May 12, 2009.

24. If BBSI was otherwise unaware of the post-HLOGA LD-2 filing requirements of the LDA, this exchange in May 2009 plainly made BBSI aware of them.

25. Further, BBSI has received numerous similar delinquency notices from the House and Senate since May 2009, which made BBSI well aware of its LD-2 filing obligations.

A. BBSI Knowingly Failed to File Twenty-Eight Quarterly LD-2 Reports on a Timely Basis.

26. Despite BBSI's knowledge of the LDA LD-2 filing requirements, after May 2009 BBSI committed numerous separate violations of them.

27. Specifically, despite its plain knowledge of the post-HLOGA LD-2 filing requirements, BBSI failed to file timely LD-2 reports for the following fourteen (14) quarters, totaling twenty-eight (28) delinquent reports:

- a. BBSI's LD-2 reports for the second quarter of 2009 were due to the House and Senate on Monday, July 20, 2009, but BBSI did not file them until February 5, 2010;
- b. BBSI's LD-2 reports for the third quarter of 2009 were due to the House and Senate on Tuesday, September 20, 2009, but BBSI did not file them until February 5, 2010;
- c. BBSI's LD-2 reports for the fourth quarter of 2009 were due to the House and Senate on Wednesday, January 20, 2010, but BBSI did not file them until February 5, 2010;
- d. BBSI's LD-2 reports for the second quarter of 2010 were due to the House and Senate on Tuesday, July 20, 2010, but BBSI has not filed them to date;

- e. BBSI's LD-2 reports for the third quarter of 2010 were due to the House and Senate on Wednesday, October 20, 2010, but BBSI did not file them until April 22, 2011;
- f. BBSI's LD-2 reports for the fourth quarter of 2010 were due to the House and Senate on Thursday, January 20, 2011, but BBSI did not file them until April 22, 2011;
- g. BBSI's LD-2 reports for the first quarter of 2011 were due to the House and Senate on Wednesday, April 20, 2011, but BBSI did not file them until April 27, 2011;
- h. BBSI's LD-2 reports for the second quarter of 2011 were due to the House and Senate on Wednesday, July 20, 2011, but BBSI did not file them until November 3, 2011;
- i. BBSI's LD-2 reports for the third quarter of 2011 were due to the House and Senate on Thursday, October 20, 2010, but BBSI did not file them until November 3, 2011;
- j. BBSI's LD-2 reports for the fourth quarter of 2011 were due to the House and Senate on Friday, January 20, 2012, but BBSI did not its House report until January 27, 2012, and has yet as of this date to file its Senate report for this quarter;
- k. BBSI's LD-2 reports for the first quarter of 2012 were due to the House and Senate on Friday, April 20, 2012, but BBSI has not filed them to date;
- l. BBSI's LD-2 reports for the second quarter of 2012 were due to the House and Senate on Friday, July 20, 2012, but BBSI has not filed them to date;
- m. BBSI's LD-2 reports for the third quarter of 2012 were due to the House and Senate on Monday, October 22, 2012, but BBSI has not filed them to date; and
- n. BBSI's LD-2 reports for the fourth quarter of 2012 were due to the House and Senate on Tuesday, January 22, 2013, but BBSI has not filed them to date.

B. Additionally, Thirteen Occasions Failed to Remedy Its Delinquent LD-2 Filings Within 60 Days of Receiving Notice from the House or Senate.

28. Not only did BBSI fail to file the above noted LD-2 reports on a timely basis, but for a number of these LD-2 reports, BBSI also failed to file them within 60 days of receiving delinquency notices from the House and Senate.

29. Specifically, BBSI failed to file LD-2 reports within 60 days of receiving delinquency notices from the House and Senate on the following thirteen (13) occasions:

- a. On August 21, 2009, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the second quarter of 2009 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, October 20, 2009). BBSI did not file this report until February 5, 2010;
- b. On November 10, 2009, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the third quarter of 2009 and demanded that BBSI file it within 60 days (*i.e.*, by Monday, January 11, 2010). BBSI did not file this report until February 5, 2010;
- c. On December 4, 2009, the House wrote BBSI regarding its then-delinquent House LD-2 report for the third quarter of 2009 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, February 2, 2010). BBSI did not file this report until February 5, 2010;
- d. On September 7, 2010, the House wrote BBSI's regarding its then-delinquent House LD-2 report for the second quarter of 2010 and demanded that BBSI file it within 60 days (*i.e.*, by Monday, November 8, 2010). BBSI has yet to file this report;
- e. On October 22, 2010, the Senate wrote BBSI's regarding its then-delinquent Senate LD-2 report for the second quarter of 2010 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, December 21, 2010). BBSI has yet to file this report;
- f. On December 8, 2010, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the third quarter of 2010 and demanded that BBSI file it within 60 days (*i.e.*, by Monday, February 7, 2011). BBSI did not file this report until April 22, 2011;
- g. On December 10, 2010, the House wrote BBSI regarding its then-delinquent House LD-2 report for the third quarter of 2010 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, February 8, 2011). BBSI did not file this report until April 22, 2011;
- h. On June 22, 2012, the House wrote BBSI regarding its then-delinquent House LD-2 report for the first quarter of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, August 21, 2012). BBSI has yet to file this report;
- i. On July 6, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the fourth quarter of 2011 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, September 4, 2012). BBSI has yet to file this report;

- j. On July 17, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the first quarter of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Monday, September 17, 2012). BBSI has yet to file this report;
- k. On August 20, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the second quarter of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Friday, October 19, 2012). BBSI has yet to file this report;
- l. On September 14, 2012, the House wrote BBSI regarding its then-delinquent House LD-2 report for the second quarter of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Tuesday, November 13, 2012). BBSI has yet to file this report; and
- m. On December 12, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-2 report for the third quarter of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Monday, February 11, 2013). BBSI has yet to file this report.

III. BBSI's LDA Violations Spread to Include Failures to File LD-203 Reports for Itself, as a Registrant, and Its Employed Lobbyists.

30. BBSI's LDA filing delinquencies were not limited to LD-2 reports. Instead, BBSI also habitually ignored its obligation to file LD-203 contribution reports on its own behalf and on behalf of its employed lobbyists.

31. Specifically, despite receiving numerous notices from the House and Senate regarding BBSI's failures to file LD-203 reports, BBSI failed to file timely LD-203 reports for the following eight (8) semiannual periods, totaling ninety-six (96) delinquent reports:

- a. BBSI's own LD-203 reports for the first half of 2009 were due to the House and Senate on Thursday, July 30, 2009, but BBSI did not file these reports until February 12, 2010;
- b. BBSI's LD-203 reports for the first half of 2009 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Thursday, July 30, 2009, but BBSI did not file these reports until February 6, 2010;
- c. BBSI's LD-203 reports for the first half of 2009 for its remaining four employed lobbyists were due to the House and Senate on Thursday, July 30, 2009, but BBSI has not filed these reports to date;
- d. BBSI's own LD-203 reports for the second half of 2009 were due to the House and Senate on Monday, February 1, 2010, but BBSI did not file these reports until February 12, 2010;

- e. BBSI's LD-203 reports for the second half of 2009 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Monday, February 1, 2010, but BBSI did not file these reports until February 6, 2010;
- f. BBSI's LD-203 reports for the second half of 2009 for its remaining four employed lobbyists were due to the House and Senate on Monday, February 1, 2010, but BBSI has not filed these reports to date;
- g. BBSI's own LD-203 reports for the first half of 2010 were due to the House and Senate on Friday, July 30, 2010, but BBSI did not file these reports until August 6, 2010;
- h. BBSI's LD-203 reports for the first half of 2010 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Friday, July 30, 2010, but BBSI did not file these reports until August 6, 2010;
- i. BBSI's LD-203 reports for the first half of 2010 for its remaining four employed lobbyists were due to the House and Senate on Friday, July 30, 2010, but BBSI has not filed these reports to date;
- j. BBSI's own LD-203 reports for the second half of 2010 were due to the House and Senate on Monday, January 31, 2011, but BBSI did not file these reports until April 22, 2011;
- k. BBSI's LD-203 reports for the second half of 2010 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Monday, January 31, 2011, but BBSI did not file these reports until April 27, 2011;
- l. BBSI's LD-203 reports for the second half of 2010 for its remaining four employed lobbyists were due to the House and Senate on Monday, January 31, 2011, but BBSI has not filed these reports to date;
- m. BBSI's own LD-203 reports for the first half of 2011 were due to the House and Senate on Monday, August 1, 2011, but BBSI did not file these reports until November 3, 2011;
- n. BBSI's LD-203 reports for the first half of 2011 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Monday, August 1, 2011, but BBSI did not file these reports until November 3, 2011;
- o. BBSI's LD-203 reports for the first half of 2011 for its remaining four employed lobbyists were due to the House and Senate on Monday, August 1, 2011, but BBSI has not filed these reports to date;
- p. BBSI's own LD-203 reports for the second half of 2011 were due to the House and Senate on Monday, January 30, 2012, but BBSI has not filed these reports to date;

- q. BBSI's LD-203 reports for the second half of 2011 for Mensah A. Biassi, one of its employed lobbyists, were due to the House and Senate on Monday, January 30, 2012, but BBSI did not file these reports until February 22, 2012;
- r. BBSI's LD-203 reports for the second half of 2011 for its remaining four employed lobbyists were due to the House and Senate on Monday, January 30, 2012, but BBSI has not filed these reports to date;
- s. BBSI's own LD-203 reports for the first half of 2012 were due to the House and Senate on Monday, July 30, 2012, but BBSI has not filed these reports to date;
- t. BBSI's LD-203 reports for the first half of 2012 for its five employed lobbyists were due to the House and Senate on Monday, July 30, 2012, but BBSI has not filed these reports to date;
- u. BBSI's own LD-203 reports for the second half of 2012 were due to the House and Senate on Wednesday, January 30, 2013, but BBSI has not filed these reports to date;
- v. BBSI's LD-203 reports for the second half of 2012 for its five employed lobbyists were due to the House and Senate on Wednesday, January 30, 2013, but BBSI has not filed these reports to date.

32. Not only did BBSI fail to file the above noted LD-203 reports on a timely basis, but for a number of these LD-203 reports, BBSI also failed to file them within 60 days of receiving delinquency notices from the House and Senate.

33. Specifically, BBSI failed to file LD-203 reports within 60 days of receiving delinquency notices from the House and Senate on the following occasions, totaling twenty-eight (28) reports BBSI failed to file within 60 days of notice:

- a. On September 1, 2009, the Senate wrote BBSI regarding its own then-delinquent Senate LD-203 report for the first half of 2009 and demanded that BBSI file it within 60 days (*i.e.*, by Friday, October 30, 2009). BBSI did not file this report until February 12, 2010;
- b. On September 28, 2009, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the first half of 2009 for its five employed lobbyists and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Friday, November 27, 2009). BBSI did not file its LD-203 report for Mensah A. Biassi until February 6, 2010, and has yet to file the remaining four reports;
- c. On May 26, 2010, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the second half of 2009 for four of its five employed lobbyists

and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Monday, July 26, 2010). BBSI has yet to file these four reports;

- d. On April 12, 2011, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the first half of 2010 for four of its five employed lobbyists and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Monday, June 13, 2011). BBSI has yet to file these four reports;
- e. On September 23, 2011, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the second half of 2010 for four of its five employed lobbyists and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Tuesday, November 22, 2011). BBSI has yet to file these four reports;
- f. On April 23, 2012, the House wrote BBSI regarding its own then-delinquent House LD-203 report for the second half of 2011 and demanded that BBSI file it within 60 days (*i.e.*, by Friday, June 22, 2012). BBSI has yet to file this report;
- g. On April 23, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the first half of 2011 for four of its five employed lobbyists and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Friday, June 22, 2012). BBSI has yet to file these four reports;
- h. On October 17, 2012, the Senate wrote BBSI regarding its then-delinquent Senate LD-203 reports for the second half of 2011 for four of its five employed lobbyists and demanded that BBSI file these missing reports within 60 days (*i.e.*, by Monday, December 17, 2012). BBSI has yet to file these four reports; and
- i. On November 26, 2012, the House wrote BBSI regarding its own then-delinquent House LD-203 report for the first half of 2012 and demanded that BBSI file it within 60 days (*i.e.*, by Friday, January 25, 2013). BBSI has yet to file this report.

* * *

34. Additionally, BBSI has ignored or failed to respond to numerous letters sent by the U.S. Attorney's Office for the District of Columbia to BBSI regarding its LDA violations.

COUNT I -- LDA -- KNOWINGLY FAILING TO COMPLY
2 U.S.C. § 1606(a)(2)

35. The United States incorporates by reference the allegations set for in Paragraphs 1 to 34 above as if fully set forth herein.

36. As described above, BBSI is a registrant under the LDA and since 2008 has been required by the provisions of the LDA to file quarterly LD-2 reports of its lobbying activity and semiannual LD-203 reports of its contributions and those of its lobbyists.

37. BBSI knew of its filing obligations under the LDA by, *inter alia*, filing timely LDA reports on occasion and receiving a plethora of correspondence regarding the requirements from the House, Senate, and U.S. Attorney's Office.

38. Despite its knowledge of its filing obligations, BBSI knowingly failed to comply with the LDA provisions requiring timely quarterly LD-2 reports on twenty-eight (28) separate occasions and knowingly failed to comply with the LDA provisions requiring timely semiannual LD-203 reports on ninety-six (96) separate occasions.

39. Accordingly, pursuant to Section 1606(a)(2) of Title 2 of the United States Code, BBSI is subject to a civil penalty or fine of not more than \$200,000 for each of its one hundred and twenty-four (124) knowing violations of the LDA reporting requirements.

COUNT II -- LDA -- KNOWINGLY FAILING TO REMEDY
2 U.S.C. § 1606(a)(2)

40. The United States incorporates by reference the allegations set for in Paragraphs 1 to 39 above as if fully set forth herein.

41. As described above, BBSI is a registrant under the LDA and since 2008 has been required by the provisions of the LDA to file quarterly LD-2 reports of its lobbying activity and semiannual LD-203 reports of its contributions and those of its lobbyists.

42. On numerous occasions, BBSI became delinquent with its LD-2 and LD-203 filing requirements and the Secretary of the Senate and Clerk of the House notified BBSI of its delinquencies.

43. Despite these notifications, and BBSI's knowledge of its reporting obligations under the LDA, on thirteen (13) occasions BBSI failed to file delinquent LD-2 reports within 60 days of notice and on twenty-eight (28) occasions BBSI failed to file delinquent LD-203 reports within 60 days of notice.

44. Accordingly, pursuant to Section 1606(a)(1) of Title 2 of the United States Code, BBSI is subject to a civil penalty or fine of not more than \$200,000 for each of its forty-one (41) knowing failures to remedy a defective filing within 60 days after notice.

* * *

PRAYER FOR RELIEF

WHEREFORE, the United States requests that this Court enter judgment in its favor and award it the following relief:

- A. Civil penalties or fines pursuant to the Lobbying Disclosure Act for each knowing failure to comply and each knowing failure to remedy a defective filing within 60 days of notice not to exceed \$200,000 per violation;
- B. Interest, costs, and other recoverable expenses permitted by law; and
- C. Such other relief as may be just and appropriate.

Dated: June 7, 2013
Washington, DC

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: _____ /s/

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Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT

for the
District of Columbia

UNITED STATES OF AMERICA

Plaintiff

v.

BIASSI BUSINESS SERVICES, INC

Defendant

Civil Action No. 13-cv-853-RLW

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

[X] the plaintiff (name) UNITED STATES OF AMERICA recover from the defendant (name) BIASSI BUSINESS SERVICES, INC the amount of \$200,000.00 dollars (\$), which includes prejudgment interest at the rate of % , plus postjudgment interest at the rate of % , along with costs.

[] the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) recover costs from the plaintiff (name)

[] other:

This action was (check one):

[] tried by a jury with Judge presiding, and the jury has rendered a verdict.

[] tried by Judge without a jury and the above decision was reached.

[X] decided by Judge Robert L. Wilkins on a motion for default judgment

Date: 12/02/2013

ANGELA D. CAESAR, CLERK OF COURT

/s/ Terri C. Barrett

Signature of Clerk or Deputy Clerk

Former Obama aide fined \$90,000 for illegally lobbying Emanuel on Uber's behalf



David Plouffe has been fined \$90,000 by the Chicago Board of Ethics for illegally lobbying Mayor Rahm Emanuel on behalf of Uber. Feb. 16, 2017.

By **Bill Ruthhart and Hal Dardick**

Chicago Tribune

FEBRUARY 16, 2017, 4:45 PM

A former **Uber** senior executive who once served as **Barack Obama's** campaign manager has been fined \$90,000 by the Chicago Board of Ethics for illegally lobbying Mayor **Rahm Emanuel** on behalf of the ride-sharing company.

The board voted 5-0 to find that David Plouffe violated city ethics rules by failing to register as a lobbyist after contacting Emanuel to help the company on regulations for picking up travelers at Chicago's two airports.

Plouffe's lobbying violation only became public after Emanuel in December released hundreds of personal emails related to public business under the pressure of two open records lawsuits alleging the mayor violated the state's open records law.

Included was a message Plouffe sent to the mayor Nov. 20, 2015.

"Assume both of us thought the airport issue was settled and we would never have to discuss again, but unfortunately two significant new hurdles were introduced," wrote Plouffe, the political strategist who managed Obama's 2008 presidential campaign and in 2015 was Uber's senior vice president of policy and strategy. "Coming to you because of their severity that would prevent us from operating. We were all set to announce Monday we were beginning pickups."

Plouffe, who like Emanuel served in the Obama White House, went on to describe concerns Uber had about pickup fees and the requirement to display an airport pickup placard in Uber vehicles.

"Sure this comes as much of a surprise to you as us, since there was an agreement in place," Plouffe wrote. "I hope we can resolve these issues before the holiday. Our team is eager to move forward and begin operating at the airports in advance of the Thanksgiving holiday — as you called for and we'd like to deliver on the schedule for you."

Emanuel, who was traveling at the time, quickly responded.

"Please speak to Negrón and David on my staff. Impossible for me to address from China," wrote Emanuel, referring to Michael Negrón, the mayor's chief of policy, and David Spielfogel, then his senior adviser.

Plouffe's communication with Emanuel came as [City Hall](#) had weighed how to regulate the emerging ride-share industry, eventually settling on rules that are less stringent than those placed on the city's taxi companies. The mayor's brother, Hollywood talent agency CEO Ari Emanuel, is an investor in Uber.

Last June, aldermen attempted to pass stronger regulations on ride-sharing companies to even the playing field for the taxi industry, only to have them watered down. When aldermen pushing for the stronger rules, which included fingerprinting drivers, tried to use a parliamentary maneuver to delay the action, Emanuel threatened to adjourn the City Council meeting. In the end, the watered-down version Emanuel preferred remained intact.

In its final determination to issue its reprimands, the Board of Ethics stated that both Uber and Plouffe "do not dispute the allegations" of violating the city's lobbying ordinance or contest the possibility of a fine. Uber and Plouffe argued he should only be subject to a \$1,000 fine, according to the ethics board.

The city's ordinance, however, calls for a \$1,000 fine for each lobbying violation and that "each day that a violation continues shall constitute a separate and distinct offense to which a separate fine shall apply." The board handed down a \$90,000 fine because Plouffe did not register until April 13, 2016, long after the five business day requirement for registration after he first lobbied Emanuel. The fine reflects the 90 business days he was not registered after first contacting the mayor.

"Mr. Plouffe and the company argue that this leads to an absurd result by having the board punish those, like him, to the same degree it would punish a person who actually had engaged in lobbying every day during this period," the ethics panel wrote in its determination. "The board rejects this argument."

The board said handing down only a \$1,000 fine would encourage unregistered lobbying activity until someone was discovered or caught.

"There would be no deterrent effect as to unregistered lobbying at all," wrote William F. Conlon, the board's chairman. "At the core of Chicago's lobbying law is the prompt and public disclosure of lobbying activity."

Plouffe could not be reached for comment.

The Board of Ethics fined Uber \$2,000, the penalty the city's ordinance requires for each act of hiring a lobbyist who violates the city's lobbying laws. Uber spokeswoman Molly Spaeth said the company accepted the ethics panel's decision.

"We work hard to ensure our registrations are accurate and up to date," Spaeth said in an emailed statement.

"We regret that in this instance we made a mistake and we will comply with the board's assessment."

The start date the ethics board used to tally Plouffe's fine was the Nov. 20 date of the email, but the lobbyist indicated in his message he had communicated with Emanuel previously on the topic by referencing that the two likely thought the ride-share regulations were an issue "we would never have to discuss again."

Asked when Plouffe began to reach out to Emanuel personally on behalf of Uber, Spaeth responded, "I don't have any additional details to share at this time."

Emanuel released the email from Plouffe as part of a settlement with the Better Government Association that sought official emails from the mayor's nongovernmental accounts. The settlement was announced in December, 12 days after the Chicago Tribune won a round in its ongoing lawsuit alleging the mayor violated the state's open records laws by refusing to release communications about city business Emanuel conducted through personal emails and text messages.

In the Tribune case, a judge has ordered Emanuel to produce an index of certain emails and text messages the mayor sent and received on his personal devices. No such requirement was part of the BGA settlement, which relied on Emanuel's personal attorney and City Hall's Law Department — not an independent party — to determine which emails were public records.

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This article is related to: [Rahm Emanuel](#), [Uber](#), [Barack Obama](#), [Chicago City Hall](#)

113th Congress }
1st Session }

SENATE

{ Document
{ 113-18

STANDING RULES OF THE SENATE

REVISED TO JANUARY 24, 2013



November 4, 2013.—Ordered to be printed

Available via the World Wide Web:
<http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>

113th Congress }
1st Session }

SENATE

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{ 113-18

STANDING RULES OF THE SENATE

REVISED TO JANUARY 24, 2013



November 4, 2013.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

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WASHINGTON : 2013

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S. RES. 285

Authorizing the Committee on Rules and Administration to prepare a revised edition of the Standing Rules of the Senate as a Senate document.

IN THE SENATE OF THE UNITED STATES

Mr. Schumer submitted the following resolution; which was referred to the Committee on Rules and Administration

November 4, 2013

RESOLUTION

Authorizing the Committee on Rules and Administration to prepare a revised edition of the Standing Rules of the Senate as a Senate document.

Resolved,

SECTION 1. PRINTING THE STANDING RULES OF THE SENATE.

(a) AUTHORIZATIONS.—The Committee on Rules and Administration shall prepare a revised edition of the Standing Rules of the Senate and such standing rules shall be printed as a Senate document.

(b) ADDITIONAL COPIES.—In addition to the usual number, 1,750 additional copies shall be printed for use by the Committee on Rules and Administration.

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STANDING RULES OF THE SENATE

[The 1979 general revision of the rules was accomplished by the adoption of S. Res. 274 on Nov. 14, 1979, a resolution submitted by Mr. Robert C. Byrd for himself and Mr. Baker; the preparation of the proposed revision was pursuant to the adoption of S. Res. 156 on May 10, 1976, a resolution by Mr. Robert C. Byrd; the general revision of the rules set forth in S. Res. 274 was somewhat altered in form by the adoption of S. Res. 389 on Mar. 25, 1980, to consolidate and renumber certain standing rules of the Senate.

[Changes to Senate rules since the last general revision in 1979 are indicated by footnotes in each succeeding edition of the Senate Manual.

[For the origin of various changes in Senate procedure between 1884 and 1979, as set forth in rules changes, adopted resolutions, and Legislative Reorganization Acts, see the table on p. XVI of *Riddick's Senate Procedure*, 1992.]

RULE I

APPOINTMENT OF A SENATOR TO THE CHAIR

1. In the absence of the Vice President, the Senate shall choose a President pro tempore, who shall hold the office and execute the duties thereof during the pleasure of the Senate and until another is elected or his term of office as a Senator expires.

2. In the absence of the Vice President, and pending the election of a President pro tempore, the Acting President pro tempore or the Secretary of the Senate, or in his absence the Assistant Secretary, shall perform the duties of the Chair.

3. The President pro tempore shall have the right to name in open Senate or, if absent, in writing, a Senator to perform the duties of the Chair, including the signing of duly enrolled bills and joint resolutions but such substitution shall not extend beyond an adjournment, except by unanimous consent; and the Senator so named shall have the right to name in open session, or, if absent, in writing, a Senator to perform the duties of the Chair, but not to extend beyond an adjournment, except by unanimous consent.

RULE II

PRESENTATION OF CREDENTIALS AND QUESTIONS OF PRIVILEGE

1. The presentation of the credentials of Senators elect or of Senators designate and other questions of privilege shall always be in order, except during the reading and correction of the Journal, while a question of order or a motion to adjourn is pending, or

while the Senate is voting or ascertaining the presence of a quorum; and all questions and motions arising or made upon the presentation of such credentials shall be proceeded with until disposed of.

2. The Secretary shall keep a record of the certificates of election and certificates of appointment of Senators by entering in a well-bound book kept for that purpose the date of the election or appointment, the name of the person elected or appointed, the date of the certificate, the name of the governor and the secretary of state signing and counter-signing the same, and the State from which such Senator is elected or appointed.

3. The Secretary of the Senate shall send copies of the following recommended forms to the governor and secretary of state of each State wherein an election is about to take place or an appointment is to be made so that they may use such forms if they see fit.

THE RECOMMENDED FORMS FOR CERTIFICATES OF ELECTION AND CERTIFICATE OF APPOINTMENT ARE AS FOLLOWS:¹

“CERTIFICATE OF ELECTION FOR SIX-YEAR TERM

“To the President of the Senate of the United States:

“This is to certify that on the day of —, 20—, A— B— was duly chosen by the qualified electors of the State of — a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 3d day of January, 20—.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“C— D—,
“Governor.

“E— F—,
“Secretary of State.”

“CERTIFICATE OF ELECTION FOR UNEXPIRED TERM

“To the President of the Senate of the United States:

“This is to certify that on the — day of —, 20—, A— B— was duly chosen by the qualified electors of the State of — a Senator for the unexpired term ending at noon on the 3d day of January, 20—, to fill the vacancy in the representation from said State in the Senate of the United States caused by the — of C— D—.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“E— F—,
“Governor.

“G— H—,
“Secretary of State.”

¹All year designations within the following certificates were changed from 19 to 20 by S. Res. 99, 106-2, Apr. 27, 2000.

“CERTIFICATE OF APPOINTMENT

“To the President of the Senate of the United States:

“This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of —, I, A— B—, the governor of said State, do hereby appoint C— D— a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the — of E— F—, is filled by election as provided by law.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“G— H—, “Governor.

“I— J—,
“Secretary of State.”

RULE III

OATHS

The oaths or affirmations required by the Constitution and prescribed by law shall be taken and subscribed by each Senator, in open Senate, before entering upon his duties.

OATH REQUIRED BY THE CONSTITUTION AND BY LAW TO BE
TAKEN BY SENATORS

“I, A— B— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.” (5 U.S.C. 3331.)

RULE IV

COMMENCEMENT OF DAILY SESSIONS

1. (a)² The Presiding Officer having taken the chair, following the prayer by the Chaplain, and after the Presiding Officer, or a Senator designated by the Presiding Officer, leads the Senate from the dais in reciting the Pledge of Allegiance to the Flag of the United States, and a Quorum being present, the Journal of the preceding day shall be read unless by nondebatable motion the reading shall be waived, the question being, “Shall the Journal stand approved to date?”, and any mistake made in the entries corrected. Except as provided in subparagraph (b) the reading of the Journal shall not be suspended unless by unanimous consent; and when any motion shall be made to amend or correct the same, it shall be deemed a privileged question, and proceeded with until disposed of.

²As amended by S. Res. 28, 99–2, Feb. 27, 1986; S. Res. 113, 106–1, June 23, 1999.

(b) Whenever the Senate is proceeding under paragraph 2 of rule XXII, the reading of the Journal shall be dispensed with and shall be considered approved to date.

(c) The proceedings of the Senate shall be briefly and accurately stated on the Journal. Messages of the President in full; titles of bills and resolutions, and such parts as shall be affected by proposed amendments; every vote, and a brief statement of the contents of each petition, memorial, or paper presented to the Senate, shall be entered.

(d) The legislative, the executive, the confidential legislative proceedings, and the proceedings when sitting as a Court of Impeachment, shall each be recorded in a separate book.

2. During a session of the Senate when that body is in continuous session, the Presiding Officer shall temporarily suspend the business of the Senate at noon each day for the purpose of having the customary daily prayer by the Chaplain.

RULE V

SUSPENSION AND AMENDMENT OF THE RULES

1. No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.

2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

RULE VI

QUORUM—ABSENT SENATORS MAY BE SENT FOR

1. A quorum shall consist of a majority of the Senators duly chosen and sworn.

2. No Senator shall absent himself from the service of the Senate without leave.

3. If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result, and these proceedings shall be without debate.

4. Whenever upon such roll call it shall be ascertained that a quorum is not present, a majority of the Senators present may direct the Sergeant at Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution, and until a quorum shall be present, no debate nor motion, except to adjourn, or to recess pursuant to a previous order entered by unanimous consent, shall be in order.

RULE VII

MORNING BUSINESS

1. On each legislative day after the Journal is read, the Presiding Officer on demand of any Senator shall lay before the Senate messages from the President, reports and communications from the heads of Departments, and other communications addressed to the Senate, and such bills, joint resolutions, and other messages from the House of Representatives as may remain upon his table from any previous day's session undisposed of. The Presiding Officer on demand of any Senator shall then call for, in the following order:

The presentation of petitions and memorials.

Reports of committees.

The introduction of bills and joint resolutions.

The submission of other resolutions.

All of which shall be received and disposed of in such order, unless unanimous consent shall be otherwise given, with newly offered resolutions being called for before resolutions coming over from a previous legislative day are laid before the Senate.

2. Until the morning business shall have been concluded, and so announced from the Chair, or until one hour after the Senate convenes at the beginning of a new legislative day, no motion to proceed to the consideration of any bill, resolution, report of a committee, or other subject upon the Calendar shall be entertained by the Presiding Officer, unless by unanimous consent: *Provided, however,* That on Mondays which are the beginning of a legislative day the Calendar shall be called under rule VIII, and until two hours after the Senate convenes no motion shall be entertained to proceed to the consideration of any bill, resolution, or other subject upon the Calendar except the motion to continue the consideration of a bill, resolution, or other subject against objection as provided in rule VIII, or until the call of the Calendar has been completed.

3. The Presiding Officer may at any time lay, and it shall be in order at any time for a Senator to move to lay, before the Senate, any bill or other matter sent to the Senate by the President or the House of Representatives for appropriate action allowed under the rules and any question pending at that time shall be suspended for this purpose. Any motion so made shall be determined without debate.

4. Petitions or memorials shall be referred, without debate, to the appropriate committee according to subject matter on the same basis as bills and resolutions, if signed by the petitioner or memorialist. A question of receiving or reference may be raised and determined without debate. But no petition or memorial or other paper signed by citizens or subjects of a foreign power shall be received, unless the same be transmitted to the Senate by the President.

5. Only a brief statement of the contents of petitions and memorials shall be printed in the Congressional Record; and no other portion of any petition or memorial shall be printed in the Record unless specifically so ordered by vote of the Senate, as provided for in paragraph 4 of rule XI, in which case the order shall be deemed to apply to the body of the petition or memorial only; and names attached to the petition or memorial shall not be printed unless

specially ordered, except that petitions and memorials from the legislatures or conventions, lawfully called, of the respective States, Territories, and insular possessions shall be printed in full in the Record whenever presented.

6. Senators having petitions, memorials, bills, or resolutions to present after the morning hour may deliver them in the absence of objection to the Presiding Officer's desk, endorsing upon them their names, and with the approval of the Presiding Officer, they shall be entered on the Journal with the names of the Senators presenting them and in the absence of objection shall be considered as having been read twice and referred to the appropriate committees, and a transcript of such entries shall be furnished to the official reporter of debates for publication in the Congressional Record, under the direction of the Secretary of the Senate.

RULE VIII

ORDER OF BUSINESS

1. At the conclusion of the morning business at the beginning of a new legislative day, unless upon motion the Senate shall at any time otherwise order, the Senate shall proceed to the consideration of the Calendar of Bills and Resolutions, and shall continue such consideration until 2 hours after the Senate convenes on such day (the end of the morning hour); and bills and resolutions that are not objected to shall be taken up in their order, and each Senator shall be entitled to speak once and for five minutes only upon any question; and an objection may be interposed at any stage of the proceedings, but upon motion the Senate may continue such consideration; and this order shall commence immediately after the call for "other resolutions", or after disposition of resolutions coming "over under the rule", and shall take precedence of the unfinished business and other special orders. But if the Senate shall proceed on motion with the consideration of any matter notwithstanding an objection, the foregoing provisions touching debate shall not apply.

2. All motions made during the first two hours of a new legislative day to proceed to the consideration of any matter shall be determined without debate, except motions to proceed to the consideration of any motion, resolution, or proposal to change any of the Standing Rules of the Senate shall be debatable. Motions made after the first two hours of a new legislative day to proceed to the consideration of bills and resolutions are debatable.

RULE IX

MESSAGES

1. Messages from the President of the United States or from the House of Representatives may be received at any stage of proceedings, except while the Senate is voting or ascertaining the presence of a quorum, or while the Journal is being read, or while a question of order or a motion to adjourn is pending.

2. Messages shall be sent to the House of Representatives by the Secretary, who shall previously certify the determination of the Senate upon all bills, joint resolutions, and other resolutions which may be communicated to the House, or in which its concurrence

may be requested; and the Secretary shall also certify and deliver to the President of the United States all resolutions and other communications which may be directed to him by the Senate.

RULE X

SPECIAL ORDERS

1. Any subject may, by a vote of two-thirds of the Senators present, be made a special order of business for consideration and when the time so fixed for its consideration arrives the Presiding Officer shall lay it before the Senate, unless there be unfinished business in which case it takes its place on the Calendar of Special Orders in the order of time at which it was made special, to be considered in that order when there is no unfinished business.

2. All motions to change such order, or to proceed to the consideration of other business, shall be decided without debate.

RULE XI

PAPERS—WITHDRAWAL, PRINTING, READING OF, AND REFERENCE

1. No memorial or other paper presented to the Senate, except original treaties finally acted upon, shall be withdrawn from its files except by order of the Senate.

2. The Secretary of the Senate shall obtain at the close of each Congress all the noncurrent records of the Senate and of each Senate committee and transfer them to the General Services Administration for preservation, subject to the orders of the Senate.

3. When the reading of a paper is called for, and objected to, it shall be determined by a vote of the Senate, without debate.

4. Every motion or resolution to print documents, reports, and other matter transmitted by the executive departments, or to print memorials, petitions, accompanying documents, or any other paper, except bills of the Senate or House of Representatives, resolutions submitted by a Senator, communications from the legislatures or conventions, lawfully called, of the respective States, shall, unless the Senate otherwise order, be referred to the Committee on Rules and Administration. When a motion is made to commit with instructions, it shall be in order to add thereto a motion to print.

5. Motions or resolutions to print additional numbers shall also be referred to the Committee on Rules and Administration; and when the committee shall report favorably, the report shall be accompanied by an estimate of the probable cost thereof; and when the cost of printing such additional numbers shall exceed the sum established by law, the concurrence of the House of Representatives shall be necessary for an order to print the same.

6. Every bill and joint resolution introduced or reported from a committee, and all bills and joint resolutions received from the House of Representatives, and all reports of committees, shall be printed, unless, for the dispatch of the business of the Senate, such printing may be dispensed with.

RULE XII

VOTING PROCEDURE

1. When the yeas and nays are ordered, the names of Senators shall be called alphabetically; and each Senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate; and no Senator shall be permitted to vote after the decision shall have been announced by the Presiding Officer, but may for sufficient reasons, with unanimous consent, change or withdraw his vote. No motion to suspend this rule shall be in order, nor shall the Presiding Officer entertain any request to suspend it by unanimous consent.

2. When a Senator declines to vote on call of his name, he shall be required to assign his reasons therefor, and having assigned them, the Presiding Officer shall submit the question to the Senate: "Shall the Senator for the reasons assigned by him, be excused from voting?" which shall be decided without debate; and these proceedings shall be had after the rollcall and before the result is announced; and any further proceedings in reference thereto shall be after such announcement.

3. A Member, notwithstanding any other provisions of this rule, may decline to vote, in committee or on the floor, on any matter when he believes that his voting on such a matter would be a conflict of interest.

4. No request by a Senator for unanimous consent for the taking of a final vote on a specified date upon the passage of a bill or joint resolution shall be submitted to the Senate for agreement thereto until after a quorum call ordered for the purpose by the Presiding Officer, it shall be disclosed that a quorum of the Senate is present; and when a unanimous consent is thus given the same shall operate as the order of the Senate, but any unanimous consent may be revoked by another unanimous consent granted in the manner prescribed above upon one day's notice.

RULE XIII

RECONSIDERATION

1. When a question has been decided by the Senate, any Senator voting with the prevailing side or who has not voted may, on the same day or on either of the next two days of actual session thereafter, move a reconsideration; and if the Senate shall refuse to reconsider such a motion entered, or if such a motion is withdrawn by leave of the Senate, or if upon reconsideration the Senate shall affirm its first decision, no further motion to reconsider shall be in order unless by unanimous consent. Every motion to reconsider shall be decided by a majority vote, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion.

2. When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if deter-

mined in the negative shall be a final disposition of the motion to reconsider.

RULE XIV

BILLS, JOINT RESOLUTIONS, RESOLUTIONS, AND PREAMBLES THERETO

1. Whenever a bill or joint resolution shall be offered, its introduction shall, if objected to, be postponed for one day.

2. Every bill and joint resolution shall receive three readings previous to its passage which readings on demand of any Senator shall be on three different legislative days, and the Presiding Officer shall give notice at each reading whether it be the first, second, or third: *Provided*, That each reading may be by title only, unless the Senate in any case shall otherwise order.

3. No bill or joint resolution shall be committed or amended until it shall have been twice read, after which it may be referred to a committee; bills and joint resolutions introduced on leave, and bills and joint resolutions from the House of Representatives, shall be read once, and may be read twice, if not objected to, on the same day for reference, but shall not be considered on that day nor debated, except for reference, unless by unanimous consent.

4. Every bill and joint resolution reported from a committee, not having previously been read, shall be read once, and twice, if not objected to, on the same day, and placed on the Calendar in the order in which the same may be reported; and every bill and joint resolution introduced on leave, and every bill and joint resolution of the House of Representatives which shall have received a first and second reading without being referred to a committee, shall, if objection be made to further proceeding thereon, be placed on the Calendar.

5. All bills, amendments, and joint resolutions shall be examined under the supervision of the Secretary of the Senate before they go out of the possession of the Senate, and all bills and joint resolutions which shall have passed both Houses shall be examined under the supervision of the Secretary of the Senate, to see that the same are correctly enrolled, and, when signed by the Speaker of the House and the President of the Senate, the Secretary of the Senate shall forthwith present the same, when they shall have originated in the Senate, to the President of the United States and report the fact and date of such presentation to the Senate.

6. All other resolutions shall lie over one day for consideration, if not referred, unless by unanimous consent the Senate shall otherwise direct. When objection is heard to the immediate consideration of a resolution or motion when it is submitted, it shall be placed on the Calendar under the heading of "Resolutions and Motions over, under the Rule," to be laid before the Senate on the next legislative day when there is no further morning business but before the close of morning business and before the termination of the morning hour.

7. When a bill or joint resolution shall have been ordered to be read a third time, it shall not be in order to propose amendments, unless by unanimous consent, but it shall be in order at any time before the passage of any bill or resolution to move its commit-

ment; and when the bill or resolution shall again be reported from the committee it shall be placed on the Calendar.

8. When a bill or resolution is accompanied by a preamble, the question shall first be put on the bill or resolution and then on the preamble, which may be withdrawn by a mover before an amendment of the same, or ordering of the yeas and nays; or it may be laid on the table without prejudice to the bill or resolution, and shall be a final disposition of such preamble.

9. Whenever a private bill, except a bill for a pension, is under consideration, it shall be in order to move the adoption of a resolution to refer the bill to the Chief Commissioner of the Court of Claims for a report in conformity with section 2509 of Title 28, United States Code.

10. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing (1) the payment of money for property damages, personal injuries, or death, for which a claim may be filed under chapter 171 of Title 28, United States Code, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record, shall be received or considered.

RULE XV

AMENDMENTS AND MOTIONS

1. (a)³ An amendment and any instruction accompanying a motion to recommit shall be reduced to writing and read and identical copies shall be provided by the Senator offering the amendment or instruction to the desks of the Majority Leader and the Minority Leader before being debated.

(b) A motion shall be reduced to writing, if desired by the Presiding Officer or by any Senator, and shall be read before being debated.

2. Any motion, amendment, or resolution may be withdrawn or modified by the mover at any time before a decision, amendment, or ordering of the yeas and nays, except a motion to reconsider, which shall not be withdrawn without leave.

3. If the question in debate contains several propositions, any Senator may have the same divided, except a motion to strike out and insert, which shall not be divided; but the rejection of a motion to strike out and insert one proposition shall not prevent a motion to strike out and insert a different proposition; nor shall it prevent a motion simply to strike out; nor shall the rejection of a motion to strike out prevent a motion to strike out and insert. But pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for the purpose of amendment as a question, and motions to amend the part to be stricken out shall have precedence.

4. When an amendment proposed to any pending measure is laid on the table, it shall not carry with it, or prejudice, such measure.

³Pursuant to Pub. L. 110-81, Sep. 14, 2007, paragraph 1 was amended.

5. It shall not be in order to consider any proposed committee amendment (other than a technical, clerical, or conforming amendment) which contains any significant matter not within the jurisdiction of the committee proposing such amendment.

RULE XVI

APPROPRIATIONS AND AMENDMENTS TO GENERAL APPROPRIATIONS BILLS

1. On a point of order made by any Senator, no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or of a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.

2. The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation or any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law if such restriction is to take effect or cease to be effective upon the happening of a contingency, and if an appropriation bill is reported to the Senate containing amendments to such bill proposing new or general legislation or any such restriction, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations.

3. All amendments to general appropriation bills moved by direction of a committee having legislative jurisdiction of the subject matter proposing to increase an appropriation already contained in the bill, or to add new items of appropriation, shall, at least one day before they are considered, be referred to the Committee on Appropriations, and when actually proposed to the bill no amendment proposing to increase the amount stated in such amendment shall be received on a point of order made by any Senator.

4. On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.

5. On a point of order made by any Senator, no amendment, the object of which is to provide for a private claim, shall be received to any general appropriation bill, unless it be to carry out the pro-

visions of an existing law or a treaty stipulation, which shall be cited on the face of the amendment.

6. When a point of order is made against any restriction on the expenditure of funds appropriated in a general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.

7. Every report on general appropriation bills filed by the Committee on Appropriations shall identify with particularity each recommended amendment which proposes an item of appropriation which is not made to carry out the provisions of an existing law, a treaty stipulation, or an act or resolution previously passed by the Senate during that session.

8. On a point of order made by any Senator, no general appropriation bill or amendment thereto shall be received or considered if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuation of appropriations for public works on which work has commenced.

RULE XVII

REFERENCE TO COMMITTEES; MOTIONS TO DISCHARGE; REPORTS OF COMMITTEES; AND HEARINGS AVAILABLE

1. Except as provided in paragraph 3, in any case in which a controversy arises as to the jurisdiction of any committee with respect to any proposed legislation, the question of jurisdiction shall be decided by the presiding officer, without debate, in favor of the committee which has jurisdiction over the subject matter which predominates in such proposed legislation; but such decision shall be subject to an appeal.

2. A motion simply to refer shall not be open to amendment, except to add instructions.

3. (a) Upon motion by both the majority leader or his designee and the minority leader or his designee, proposed legislation may be referred to two or more committees jointly or sequentially. Notice of such motion and the proposed legislation to which it relates shall be printed in the Congressional Record. The motion shall be privileged, but it shall not be in order until the Congressional Record in which the notice is printed has been available to Senators for at least twenty-four hours. No amendment to any such motion shall be in order except amendments to any instructions contained therein. Debate on any such motion, and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than two hours, the time to be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(b) Proposed legislation which is referred to two or more committees jointly may be reported only by such committees jointly and only one report may accompany any proposed legislation so jointly reported.

(c) A motion to refer any proposed legislation to two or more committees sequentially shall specify the order of referral.

(d) Any motion under this paragraph may specify the portion or portions of proposed legislation to be considered by the committees, or any of them, to which such proposed legislation is referred, and such committees or committee shall be limited, in the consideration of such proposed legislation, to the portion or portions so specified.

(e) Any motion under this subparagraph may contain instructions with respect to the time allowed for consideration by the committees, or any of them, to which proposed legislation is referred and the discharge of such committees, or any of them, from further consideration of such proposed legislation.

4. (a) All reports of committees and motions to discharge a committee from the consideration of a subject, and all subjects from which a committee shall be discharged, shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct.

(b) Whenever any committee (except the Committee on Appropriations) has reported any measure, by action taken in conformity with the requirements of paragraph 7 of rule XXVI, no point of order shall lie with respect to that measure on the ground that hearings upon that measure by the committee were not conducted in accordance with the provisions of paragraph 4 of rule XXVI.

5.⁴ Any measure or matter reported by any standing committee shall not be considered in the Senate unless the report of that committee upon that measure or matter has been available to Members for at least two calendar days (excluding Sundays and legal holidays) prior to the consideration of that measure or matter. If hearings have been held on any such measure or matter so reported, the committee reporting the measure or matter shall make every reasonable effort to have such hearings printed and available for distribution to the Members of the Senate prior to the consideration of such measure or matter in the Senate. This paragraph—

(1) may be waived by joint agreement of the majority leader and the minority leader of the Senate; and

(2) shall not apply to—

(A) any measure for the declaration of war, or the declaration of a national emergency, by the Congress, and

(B) any executive decision, determination, or action which would become, or continue to be, effective unless disapproved or otherwise invalidated by one or both Houses of Congress.

RULE XVIII

BUSINESS CONTINUED FROM SESSION TO SESSION

At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.

⁴As amended by S. Res. 28, 99-2, Feb. 27, 1986.

RULE XIX

DEBATE

1. (a) When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, and no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.

(b) At the conclusion of the morning hour at the beginning of a new legislative day or after the unfinished business or any pending business has first been laid before the Senate on any calendar day, and until after the duration of three hours of actual session after such business is laid down except as determined to the contrary by unanimous consent or on motion without debate, all debate shall be germane and confined to the specific question then pending before the Senate.

2. No Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.

3. No Senator in debate shall refer offensively to any State of the Union.

4. If any Senator, in speaking or otherwise, in the opinion of the Presiding Officer transgress the rules of the Senate the Presiding Officer shall, either on his own motion or at the request of any other Senator, call him to order; and when a Senator shall be called to order he shall take his seat, and may not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order, which motion shall be determined without debate. Any Senator directed by the Presiding Officer to take his seat, and any Senator requesting the Presiding Officer to require a Senator to take his seat, may appeal from the ruling of the Chair, which appeal shall be open to debate.

5. If a Senator be called to order for words spoken in debate, upon the demand of the Senator or of any other Senator, the exceptionable words shall be taken down in writing, and read at the table for the information of the Senate.

6. Whenever confusion arises in the Chamber or the galleries, or demonstrations of approval or disapproval are indulged in by the occupants of the galleries, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator.

7. No Senator shall introduce to or bring to the attention of the Senate during its sessions any occupant in the galleries of the Senate. No motion to suspend this rule shall be in order, nor may the Presiding Officer entertain any request to suspend it by unanimous consent.

8. Former Presidents of the United States shall be entitled to address the Senate upon appropriate notice to the Presiding Officer who shall thereupon make the necessary arrangements.

RULE XX

QUESTIONS OF ORDER

1. A question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate. When an appeal is taken, any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer without debate; and every appeal therefrom shall be decided at once, and without debate; and any appeal may be laid on the table without prejudice to the pending proposition, and thereupon shall be held as affirming the decision of the Presiding Officer.

2. The Presiding Officer may submit any question of order for the decision of the Senate.

RULE XXI

SESSION WITH CLOSED DOORS

1. On a motion made and seconded to close the doors of the Senate, on the discussion of any business which may, in the opinion of a Senator, require secrecy, the Presiding Officer shall direct the galleries to be cleared; and during the discussion of such motion the doors shall remain closed.

2. When the Senate meets in closed session, any applicable provisions of rules XXIX and XXXI, including the confidentiality of information shall apply to any information and to the conduct of any debate transacted.

RULE XXII

PRECEDENCE OF MOTIONS

1. When a question is pending, no motion shall be received but—
 - To adjourn.
 - To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.
 - To take a recess.
 - To proceed to the consideration of executive business.
 - To lay on the table.
 - To postpone indefinitely.
 - To postpone to a day certain.
 - To commit.
 - To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

2.⁵ Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business,

⁵As amended by S. Res. 28, 99-2, Feb. 27, 1986.

is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?” And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

If, for any reason, a measure or matter is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination.

No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise.

Notwithstanding other provisions of this rule, a Senator may yield all or part of his one hour to the majority or minority floor managers of the measure, motion, or matter or to the Majority or Minority Leader, but each Senator specified shall not have more than two hours so yielded to him and may in turn yield such time to other Senators.

Notwithstanding any other provision of this rule, any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only.

After cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty-four hours.

3.⁶ If a cloture motion on a motion to proceed to a measure or matter is presented in accordance with this rule and is signed by 16 Senators, including the Majority Leader, the Minority Leader, 7 additional Senators not affiliated with the majority, and 7 additional Senators not affiliated with the minority, one hour after the Senate meets on the following calendar day, the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion to proceed, the question shall be on the motion to proceed, without further debate.

RULE XXIII

PRIVILEGE OF THE FLOOR

1.⁷ Other than the Vice President and Senators, no person shall be admitted to the floor of the Senate while in session, except as follows:

The President of the United States and his private secretary.
The President elect and Vice President elect of the United States.

Ex-Presidents and ex-Vice Presidents of the United States.

Judges of the Supreme Court.

Ex-Senators and Senators elect, except as provided in paragraph 2.⁸

The officers and employees of the Senate in the discharge of their official duties.

Ex-Secretaries and ex-Sergeants at Arms of the Senate, except as provided in paragraph 2.⁹

Members of the House of Representatives and Members elect.

Ex-Speakers of the House of Representatives, except as provided in paragraph 2.¹⁰

The Sergeant at Arms of the House and his chief deputy and the Clerk of the House and his deputy.

Heads of the Executive Departments.

⁶ As amended by S. Res. 16, 113-1, Jan. 24, 2013.

⁷ Paragraph numbered pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁸ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁹ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

¹⁰ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

Ambassadors and Ministers of the United States.
 Governors of States and Territories.
 Members of the Joint Chiefs of Staff.
 The General Commanding the Army.
 The Senior Admiral of the Navy on the active list.
 Members of National Legislatures of foreign countries and
 Members of the European Parliament.
 Judges of the Court of Claims.
 The Mayor of the District of Columbia.
 The Librarian of Congress and the Assistant Librarian in
 charge of the Law Library.
 The Architect of the Capitol.
 The Chaplain of the House of Representatives.
 The Secretary of the Smithsonian Institution.
 The Parliamentarian Emeritus of the Senate.

Members of the staffs of committees of the Senate and joint committees of the Congress when in the discharge of their official duties and employees in the office of a Senator when in the discharge of their official duties (but in each case subject to such rules or regulations as may be prescribed by the Committee on Rules and Administration). Senate committee staff members and employees in the office of a Senator must be on the payroll of the Senate and members of joint committee staffs must be on the payroll of the Senate or the House of Representatives.

2.(a)¹¹ The floor privilege provided in paragraph 1 shall not apply, when the Senate is in session, to an individual covered by this paragraph who is—

- (1) a registered lobbyist or agent of a foreign principal; or
- (2) in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any Federal legislative proposal.

(b) The Committee on Rules and Administration may promulgate regulations to allow individuals covered by this paragraph floor privileges for ceremonial functions and events designated by the Majority Leader and the Minority Leader.

3. A former Member of the Senate may not exercise privileges to use Senate athletic facilities or Member-only parking spaces if such Member is—

- (a) a registered lobbyist or agent of a foreign principal; or
- (b) in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any Federal legislative proposal.

RULE XXIV

APPOINTMENT OF COMMITTEES

1. In the appointment of the standing committees, or to fill vacancies thereon, the Senate, unless otherwise ordered, shall by resolution appoint the chairman of each such committee and the other members thereof. On demand of any Senator, a separate vote shall be had on the appointment of the chairman of any such committee

¹¹ Paragraphs 2 and 3 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

and on the appointment of the other members thereof. Each such resolution shall be subject to amendment and to division of the question.

2. On demand of one-fifth of the Senators present, a quorum being present, any vote taken pursuant to paragraph 1 shall be by ballot.

3. Except as otherwise provided or unless otherwise ordered, all other committees, and the chairmen thereof, shall be appointed in the same manner as standing committees.

4. When a chairman of a committee shall resign or cease to serve on a committee, action by the Senate to fill the vacancy in such committee, unless specially otherwise ordered, shall be only to fill up the number of members of the committee, and the election of a new chairman.

RULE XXV

STANDING COMMITTEES

1. The following standing committees shall be appointed at the commencement of each Congress, and shall continue and have the power to act until their successors are appointed, with leave to report by bill or otherwise on matters within their respective jurisdictions:

(a)(1) **Committee on Agriculture, Nutrition, and Forestry**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating primarily to the following subjects:

1. Agricultural economics and research.
2. Agricultural extension services and experiment stations.
3. Agricultural production, marketing, and stabilization of prices.
4. Agriculture and agricultural commodities.
5. Animal industry and diseases.
6. Crop insurance and soil conservation.
7. Farm credit and farm security.
8. Food from fresh waters.
9. Food stamp programs.
10. Forestry, and forest reserves and wilderness areas other than those created from the public domain.
11. Home economics.
12. Human nutrition.
13. Inspection of livestock, meat, and agricultural products.
14. Pests and pesticides.
15. Plant industry, soils, and agricultural engineering.
16. Rural development, rural electrification, and watersheds.
17. School nutrition programs.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to food, nutrition, and hunger, both in the United States and in foreign countries, and rural affairs, and report thereon from time to time.

(b) **Committee on Appropriations**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Appropriation of the revenue for the support of the Government, except as provided in subparagraph (e).

2. Rescission of appropriations contained in appropriation Acts (referred to in section 105 of Title 1, United States Code).

3. The amount of new spending authority described in section 401(c)(2) (A) and (B) of the Congressional Budget Act of 1974 which is to be effective for a fiscal year.

4. New spending authority described in section 401(c)(2)(C) of the Congressional Budget Act of 1974 provided in bills and resolutions referred to the committee under section 401(b)(2) of that Act (but subject to the provisions of section 401(b)(3) of that Act).

(c)(1) **Committee on Armed Services**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Aeronautical and space activities peculiar to or primarily associated with the development of weapons systems or military operations.

2. Common defense.

3. Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force, generally.

4. Maintenance and operation of the Panama Canal, including administration, sanitation, and government of the Canal Zone.

5. Military research and development.

6. National security aspects of nuclear energy.

7. Naval petroleum reserves, except those in Alaska.

8. Pay, promotion, retirement, and other benefits and privileges of members of the Armed Forces, including overseas education of civilian and military dependents.

9. Selective service system.

10. Strategic and critical materials necessary for the common defense.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to the common defense policy of the United States, and report thereon from time to time.

(d)(1) **Committee on Banking, Housing, and Urban Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Banks, banking, and financial institutions.

2. Control of prices of commodities, rents, and services.

3. Deposit insurance.

4. Economic stabilization and defense production.

5. Export and foreign trade promotion.

6. Export controls.

7. Federal monetary policy, including Federal Reserve System.

8. Financial aid to commerce and industry.

9. Issuance and redemption of notes.

10. Money and credit, including currency and coinage.

11. Nursing home construction.

12. Public and private housing (including veterans' housing).

13. Renegotiation of Government contracts.

14. Urban development and urban mass transit.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to international economic policy as it affects United States monetary affairs, credit, and financial institutions; economic growth, urban affairs, and credit, and report thereon from time to time.

(e)(1)¹² **Committee on the Budget**, to which committee shall be referred all concurrent resolutions on the budget (as defined in section 3(a)(4) of the Congressional Budget Act of 1974) and all other matters required to be referred to that committee under Titles III and IV of that Act, and messages, petitions, memorials, and other matters relating thereto.

(2) Such committee shall have the duty—

(A) to report the matters required to be reported by it under titles III and IV of the Congressional Budget Act of 1974;

(B) to make continuing studies of the effect on budget outlays of relevant existing and proposed legislation and to report the results of such studies to the Senate on a recurring basis;

(C) to request and evaluate continuing studies of tax expenditures, to devise methods of coordinating tax expenditures, policies, and programs with direct budget outlays, and to report the results of such studies to the Senate on a recurring basis; and

(D) to review, on a continuing basis, the conduct by the Congressional Budget Office of its functions and duties.

(f)(1) **Committee on Commerce, Science, and Transportation**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Coast Guard.
2. Coastal zone management.
3. Communications.
4. Highway safety.
5. Inland waterways, except construction.
6. Interstate commerce.
7. Marine and ocean navigation, safety, and transportation, including navigational aspects of deepwater ports.
8. Marine fisheries.
9. Merchant marine and navigation.
10. Nonmilitary aeronautical and space sciences.
11. Oceans, weather, and atmospheric activities.
12. Panama Canal and interoceanic canals generally, except as provided in subparagraph (c).
13. Regulation of consumer products and services, including testing related to toxic substances, other than pesticides, and except for credit, financial services, and housing.
14. Regulation of interstate common carriers, including railroads, buses, trucks, vessels, pipelines, and civil aviation.
15. Science, engineering, and technology research and development and policy.

¹²Pursuant to S. Res. 445, 108–2, Oct. 9, 2004, the Committee on Budget's jurisdiction was amended although the Standing Rules were not modified. (See appendix for Titles I, III and V of S. Res. 445, 108–2).

16. Sports.
17. Standards and measurement.
18. Transportation.
19. Transportation and commerce aspects of Outer Continental Shelf lands.

(2) Such committee shall also study and review, on a comprehensive basis, all matters relating to science and technology, oceans policy, transportation, communications, and consumer affairs, and report thereon from time to time.

(g)(1) **Committee on Energy and Natural Resources**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Coal production, distribution, and utilization.
2. Energy policy.
3. Energy regulation and conservation.
4. Energy related aspects of deepwater ports.
5. Energy research and development.
6. Extraction of minerals from oceans and Outer Continental Shelf lands.
7. Hydroelectric power, irrigation, and reclamation.
8. Mining education and research.
9. Mining, mineral lands, mining claims, and mineral conservation.
10. National parks, recreation areas, wilderness areas, wild and scenic rivers, historical sites, military parks and battlefields, and on the public domain, preservation of prehistoric ruins and objects of interest.
11. Naval petroleum reserves in Alaska.
12. Nonmilitary development of nuclear energy.
13. Oil and gas production and distribution.
14. Public lands and forests, including farming and grazing thereon, and mineral extraction therefrom.
15. Solar energy systems.
16. Territorial possessions of the United States, including trusteeships.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to energy and resources development, and report thereon from time to time.

(h)(1) **Committee on Environment and Public Works**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Air pollution.
2. Construction and maintenance of highways.
3. Environmental aspects of Outer Continental Shelf lands.
4. Environmental effects of toxic substances, other than pesticides.
5. Environmental policy.
6. Environmental research and development.
7. Fisheries and wildlife.
8. Flood control and improvements of rivers and harbors, including environmental aspects of deepwater ports.
9. Noise pollution.

10. Nonmilitary environmental regulation and control of nuclear energy.
11. Ocean dumping.
12. Public buildings and improved grounds of the United States generally, including Federal buildings in the District of Columbia.
13. Public works, bridges, and dams.
14. Regional economic development.
15. Solid waste disposal and recycling.
16. Water pollution.
17. Water resources.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to environmental protection and resource utilization and conservation, and report thereon from time to time.

(i) **Committee on Finance**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Bonded debt of the United States, except as provided in the Congressional Budget Act of 1974.
2. Customs, collection districts, and ports of entry and delivery.
3. Deposit of public moneys.
4. General revenue sharing.
5. Health programs under the Social Security Act and health programs financed by a specific tax or trust fund.
6. National social security.
7. Reciprocal trade agreements.
8. Revenue measures generally, except as provided in the Congressional Budget Act of 1974.
9. Revenue measures relating to the insular possessions.
10. Tariffs and import quotas, and matters related thereto.
11. Transportation of dutiable goods.

(j)(1) **Committee on Foreign Relations**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Acquisition of land and buildings for embassies and legations in foreign countries.
2. Boundaries of the United States.
3. Diplomatic service.
4. Foreign economic, military, technical, and humanitarian assistance.
5. Foreign loans.
6. International activities of the American National Red Cross and the International Committee of the Red Cross.
7. International aspects of nuclear energy, including nuclear transfer policy.
8. International conferences and congresses.
9. International law as it relates to foreign policy.
10. International Monetary Fund and other international organizations established primarily for international monetary purposes (except that, at the request of the Committee on Banking, Housing, and Urban Affairs, any proposed legislation relating to such subjects reported by the Committee on Foreign

Relations shall be referred to the Committee on Banking, Housing, and Urban Affairs).

11. Intervention abroad and declarations of war.
12. Measures to foster commercial intercourse with foreign nations and to safeguard American business interests abroad.
13. National security and international aspects of trusteeships of the United States.
14. Oceans and international environmental and scientific affairs as they relate to foreign policy.
15. Protection of United States citizens abroad and expatriation.
16. Relations of the United States with foreign nations generally.
17. Treaties and executive agreements, except reciprocal trade agreements.
18. United Nations and its affiliated organizations.
19. World Bank group, the regional development banks, and other international organizations established primarily for development assistance purposes.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to the national security policy, foreign policy, and international economic policy as it relates to foreign policy of the United States, and matters relating to food, hunger, and nutrition in foreign countries, and report thereon from time to time.

(k)(1)¹³ **Committee on Governmental Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Archives of the United States.
2. Budget and accounting measures, other than appropriations, except as provided in the Congressional Budget Act of 1974.
3. Census and collection of statistics, including economic and social statistics.
4. Congressional organization, except for any part of the matter that amends the rules or orders of the Senate.
5. Federal Civil Service.
6. Government information.
7. Intergovernmental relations.
8. Municipal affairs of the District of Columbia, except appropriations therefor.
9. Organization and management of United States nuclear export policy.
10. Organization and reorganization of the executive branch of the Government.
11. Postal Service.
12. Status of officers and employees of the United States, including their classification, compensation, and benefits.

¹³Pursuant to S. Res. 445, 108-2, Oct. 9, 2004, the Committee on Homeland Security and Governmental Affairs shall be treated as the Committee on Governmental Affairs listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate. The resolution also amended the jurisdiction of the Committee although the Standing Rules were not modified. (See appendix for Titles I, III and V of S. Res. 445, 108-2).

(2) Such committee shall have the duty of—

(A) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

(B) studying the efficiency, economy, and effectiveness of all agencies and departments of the Government;

(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government; and

(D) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.

(1)(1)¹⁴ **Committee on Health, Education, Labor, and Pensions**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Measures relating to education, labor, health, and public welfare.

2. Aging.

3. Agricultural colleges.

4. Arts and humanities.

5. Biomedical research and development.

6. Child labor.

7. Convict labor and the entry of goods made by convicts into interstate commerce.

8. Domestic activities of the American National Red Cross.

9. Equal employment opportunity.

10. Gallaudet College, Howard University, and Saint Elizabeths Hospital.

11. Individuals with disabilities.¹⁵

12. Labor standards and labor statistics.

13. Mediation and arbitration of labor disputes.

14. Occupational safety and health, including the welfare of miners.

15. Private pension plans.

16. Public health.

17. Railway labor and retirement.

18. Regulation of foreign laborers.

19. Student loans.

20. Wages and hours of labor.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to health, education and training, and public welfare, and report thereon from time to time.

(m)¹⁶ **Committee on the Judiciary**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Apportionment of Representatives.

2. Bankruptcy, mutiny, espionage, and counterfeiting.

3. Civil liberties.

¹⁴Name changed pursuant to S. Res. 28, 106-1, Jan. 21, 1999; redesignated as subparagraph (1) by S. Res. 299, 106-2, Apr. 27, 2000.

¹⁵As amended, S. Res. 28, 106-1, Jan. 21, 1999.

¹⁶Redesignated as subparagraph (m) by S. Res. 299, 106-2, Apr. 27, 2000.

4. Constitutional amendments.
5. Federal courts and judges.
6. Government information.
7. Holidays and celebrations.
8. Immigration and naturalization.
9. Interstate compacts generally.
10. Judicial proceedings, civil and criminal, generally.
11. Local courts in the territories and possessions.
12. Measures relating to claims against the United States.
13. National penitentiaries.
14. Patent Office.
15. Patents, copyrights, and trademarks.
16. Protection of trade and commerce against unlawful restraints and monopolies.
17. Revision and codification of the statutes of the United States.
18. State and territorial boundary lines.

(n)(1) **Committee on Rules and Administration**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Administration of the Senate Office Buildings and the Senate wing of the Capitol, including the assignment of office space.
 2. Congressional organization relative to rules and procedures, and Senate rules and regulations, including floor and gallery rules.
 3. Corrupt practices.
 4. Credentials and qualifications of Members of the Senate, contested elections, and acceptance of incompatible offices.
 5. Federal elections generally, including the election of the President, Vice President, and Members of the Congress.
 6. Government Printing Office, and the printing and correction of the Congressional Record, as well as those matters provided for under rule XI.
 7. Meetings of the Congress and attendance of Members.
 8. Payment of money out of the contingent fund of the Senate or creating a charge upon the same (except that any resolution relating to substantive matter within the jurisdiction of any other standing committee of the Senate shall be first referred to such committee).
 9. Presidential succession.
 10. Purchase of books and manuscripts and erection of monuments to the memory of individuals.
 11. Senate Library and statuary, art, and pictures in the Capitol and Senate Office Buildings.
 12. Services to the Senate, including the Senate restaurant.
 13. United States Capitol and congressional office buildings, the Library of Congress, the Smithsonian Institution (and the incorporation of similar institutions), and the Botanic Gardens.
- (2) Such committee shall also—

(A) make a continuing study of the organization and operation of the Congress of the United States and shall recommend improvements in such organization and operation

with a view toward strengthening the Congress, simplifying its operations, improving its relationships with other branches of the United States Government, and enabling it better to meet its responsibilities under the Constitution of the United States;

(B) identify any court proceeding or action which, in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the Senate; and

(C)¹⁷ develop, implement, and update as necessary a strategy planning process and a strategic plan for the functional and technical infrastructure support of the Senate and provide oversight over plans developed by Senate officers and others in accordance with the strategic planning process.

(o)(1)¹⁸ **Committee on Small Business and Entrepreneurship**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the Small Business Administration.

(2) Any proposed legislation reported by such committee which relates to matters other than the functions of the Small Business Administration shall, at the request of the chairman of any standing committee having jurisdiction over the subject matter extraneous to the functions of the Small Business Administration, be considered and reported by such standing committee prior to its consideration by the Senate; and likewise measures reported by other committees directly relating to the Small Business Administration shall, at the request of the chairman of the Committee on Small Business, be referred to the Committee on Small Business and Entrepreneurship for its consideration of any portions of the measure dealing with the Small Business Administration, and be reported by this committee prior to its consideration by the Senate.

(3) Such committee shall also study and survey by means of research and investigation all problems of American small business enterprises, and report thereon from time to time.

(p)¹⁹ **Committee on Veterans' Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Compensation of veterans.
2. Life insurance issued by the Government on account of service in the Armed Forces.
3. National cemeteries.
4. Pensions of all wars of the United States, general and special.
5. Readjustment of servicemen to civil life.
6. Soldiers' and sailors' civil relief.
7. Veterans' hospitals, medical care and treatment of veterans.
8. Veterans' measures generally.
9. Vocational rehabilitation and education of veterans.

¹⁷ As added, S. Res. 151, 105-1, Nov. 9, 1997.

¹⁸ As added, S. Res. 101, 97-1, Mar. 25, 1981; name changed pursuant to S. Res. 123, 107-1, June 29, 2001.

¹⁹ Redesignated as subparagraph (p) by S. Res. 101, 97-1, Mar. 25, 1981.

2.²⁰ Except as otherwise provided by paragraph 4 of this rule, each of the following standing committees shall consist of the number of Senators set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Agriculture, Nutrition, and Forestry	20
Appropriations	28
Armed Services	18
Banking, Housing, and Urban Affairs	22
Commerce, Science, and Transportation	20
Energy and Natural Resources	20
Environment and Public Works	18
Finance	20
Foreign Relations	18
Health, Education, Labor, and Pensions	18
Homeland Security and Governmental Affairs	16
Judiciary	18

3. (a)²¹ Except as otherwise provided by paragraph 4 of this rule, each of the following standing committees shall consist of the number of Senators set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Budget	22
Rules and Administration	16
Veterans' Affairs	14
Small Business and Entrepreneurship	18

(b)²² Each of the following committees and joint committees shall consist of the number of Senators (or Senate members, in the case of a joint committee) set forth in the following table on the line on which the name of that committee appears:

Committee: ²³	Members
Aging	18
Intelligence	19
Joint Economic Committee	10

²⁰As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 365, 97-2, Apr. 20, 1982; S. Res. 380, 97-2, Apr. 27, 1982; S. Res. 6, 98-1, Jan. 3, 1983; S. Res. 20, 98-1, Jan. 27, 1983; S. Res. 53, 98-1, Feb. 3, 1983; S. Res. 338, 98-2, Feb. 9, 1984; S. Res. 74, 99-1, Feb. 21, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 43, 102-1, Feb. 5, 1991; S. Res. 135, 102-1, June 4, 1991; S. Res. 4, 103-1, Jan. 7, 1993; S. Res. 130, 103-1, July 1, 1993; S. Res. 132, 103-1, July 15, 1993; S. Res. 14, 104-1, Jan. 5, 1995; S. Res. 92, 104-1, Mar. 24, 1995; S. Res. 9, 105-1, Jan. 9, 1997; HELP/Judiciary reversed pursuant to S. Res. 299, 106-2, Apr. 27, 2000; S. Res. 354, 106-2, Sept. 12, 2000.

²¹As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 101, 97-1, Mar. 25, 1981; S. Res. 6, 98-1, Jan. 3, 1983; S. Res. 88, 99-1, Mar. 5, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 85, 102-1, Mar. 19, 1991; S. Res. 135, 102-1, June 4, 1991; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 130, 103-1, July 1, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 9, 105-1, Jan. 9, 1997; S. Res. 354, 106-2, Sept. 12, 2000; S. Res. 123, 107-1, June 29, 2001.

²²As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 24, 97-1, Jan. 19, 1981; S. Res. 101, 97-1, Mar. 25, 1981; S. Res. 338, 98-2, Feb. 9, 1984; S. Res. 85, 102-1, Mar. 19, 1991; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 9, 105-1, Jan. 9, 1997.

(c)²⁴ Each of the following committees and joint committees shall consist of the number of Senators (or Senate members, in the case of a joint committee) set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Ethics	6
Indian Affairs	14
Joint Committee on Taxation	5

4. (a) Except as otherwise provided by this paragraph—

(1) each Senator shall serve on two and no more committees listed in paragraph 2; and

(2) each Senator may serve on only one committee listed in paragraph 3 (a) or (b).

(b)(1) Each Senator may serve on not more than three subcommittees of each committee (other than the Committee on Appropriations) listed in paragraph 2 of which he is a member.

(2) Each Senator may serve on not more than two subcommittees of a committee listed in paragraph 3 (a) or (b) of which he is a member.

(3) Notwithstanding subparagraphs (1) and (2), a Senator serving as chairman or ranking minority member of a standing, select, or special committee of the Senate or joint committee of the Congress may serve ex officio, without vote, as a member of any subcommittee of such committee or joint committee.

(4) No committee of the Senate may establish any sub-unit of that committee other than a subcommittee, unless the Senate by resolution has given permission therefor. For purposes of this subparagraph, any subunit of a joint committee shall be treated as a subcommittee.

(c) By agreement entered into by the majority leader and the minority leader, the membership of one or more standing committees may be increased temporarily from time to time by such number or numbers as may be required to accord to the majority party a majority of the membership of all standing committees. When any such temporary increase is necessary to accord to the majority party a majority of the membership of all standing committees, members of the majority party in such number as may be required for that purpose may serve as members of three standing committees listed in paragraph 2. No such temporary increase in the membership of any standing committee under this subparagraph shall be continued in effect after the need therefor has ended. No standing committee may be increased in membership under this subparagraph by more than two members in excess of the number prescribed for that committee by paragraph 2 or 3(a).

(d) A Senator may serve as a member of any joint committee of the Congress the Senate members of which are required by law to

²³ Pursuant to S. Res. 445, 108-2, Oct. 9, 2004, the Select Committee on Intelligence shall be treated as a committee listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate. However, the resolution did not modify the Standing Rules of the Senate. (See appendix for Titles I, III and V of S. Res. 445, 108-2).

²⁴ As amended, S. Res. 448, 96-2, Dec. 11, 1980; S. Res. 88, 99-1, Mar. 5, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 100, 101-1, Apr. 11, 1989; S. Res. 44, 102-1, Feb. 5, 1991; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 92, 104-1, Mar. 24, 1995; S. Res. 9, 105-1, Jan. 9, 1997.

be appointed from a standing committee of the Senate of which he is a member, and service as a member of any such joint committee shall not be taken into account for purposes of subparagraph (a)(2).

(e)(1) No Senator shall serve at any time as chairman of more than one standing, select, or special committee of the Senate or joint committee of the Congress, except that a Senator may serve as chairman of any joint committee of the Congress having jurisdiction with respect to a subject matter which is directly related to the jurisdiction of a standing committee of which he is chairman.

(2) No Senator shall serve at any time as chairman of more than one subcommittee of each standing, select, or special committee of the Senate or joint committee of the Congress of which he is a member.

(3) A Senator who is serving as the chairman of a committee listed in paragraph 2 may serve at any time as the chairman of only one subcommittee of all committees listed in paragraph 2 of which he is a member and may serve at any time as the chairman of only one subcommittee of each committee listed in paragraph 3 (a) or (b) of which he is a member. A Senator who is serving as the chairman of a committee listed in paragraph 3 (a) or (b) may not serve as the chairman of any subcommittee of that committee, and may serve at any time as the chairman of only one subcommittee of each committee listed in paragraph 2 of which he is a member. Any other Senator may serve as the chairman of only one subcommittee of each committee listed in paragraph 2, 3(a), or 3(b) of which he is a member.

(f) A Senator serving on the Committee on Rules and Administration may not serve on any joint committee of the Congress unless the Senate members thereof are required by law to be appointed from the Committee on Rules and Administration, or unless such Senator served on the Committee on Rules and Administration and the Joint Committee on Taxation on the last day of the Ninety-eighth Congress.²⁵

(g) A Senator who on the day preceding the effective date of Title I of the Committee System Reorganization Amendments of 1977 was serving as the chairman or ranking minority member of the Committee on the District of Columbia or the Committee on Post Office and Civil Service may serve on the Committee on Governmental Affairs in addition to serving on two other standing committees listed in paragraph 2. At the request of any such Senator, he shall be appointed to serve on such committee but, while serving on such committee and two other standing committees listed in paragraph 2, he may not serve on any committee listed in paragraph 3 (a) or (b) other than the Committee on Rules and Administration. The preceding provisions of this subparagraph shall apply with respect to any Senator only so long as his service as a member of the Committee on Governmental Affairs is continuous after the date on which the appointment of the majority and minority mem-

²⁵ As amended, S. Res. 76, 99-1, Feb. 21, 1985.

bers of the Committee on Governmental Affairs is initially completed.²⁶

* * * * *

RULE XXVI

COMMITTEE PROCEDURE

1.²⁷ Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding the amount prescribed by the Committee on Rules and Administration.²⁸ The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

2.²⁹ Each committee³⁰ shall adopt rules (not inconsistent with the Rules of the Senate) governing the procedure of such committee. The rules of each committee shall be published in the Congressional Record not later than March 1 of the first year of each Congress, except that if any such committee is established on or after February 1 of a year, the rules of that committee during the year of establishment shall be published in the Congressional Record not later than sixty days after such establishment. Any amendment to the rules of a committee shall not take effect until the amendment is published in the Congressional Record.

3. Each standing committee (except the Committee on Appropriations) shall fix regular weekly, biweekly, or monthly meeting days for the transaction of business before the committee and additional meetings may be called by the chairman as he may deem necessary. If at least three members of any such committee desire that a special meeting of the committee be called by the chairman, those members may file in the offices of the committee their written request to the chairman for that special meeting. Immediately upon the filing of the request, the clerk of the committee shall notify the chairman of the filing of the request. If, within three calendar days after the filing of the request, the chairman does not call the requested special meeting, to be held within seven calendar days

²⁶ As amended, S. Res. 12, 97-1, Jan. 5, 1981; Subpara. (h), omitted here, pertains to committee service of Senators during the 103rd Congress. Provisions for the 104th Congress were established by S. Res. 13 and 17, Jan. 4, 1995, and S. Res. 27 and 29, Jan. 5, 1995. In subsequent Congresses, committee assignments made notwithstanding Rule XXV.

²⁷ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Feb. 28, 1981.

²⁸ Pursuant to 2 U.S.C. 68c (See Senate Manual Sec. 440, S. Doc. 112-1), the Committee on Rules and Administration issues "Regulations Governing Rates Payable to Commercial Reporting Firms for Reporting Committee Hearings in the Senate." Copies of the regulations currently in effect may be obtained from the Committee.

²⁹ As amended, S. Res. 250, 101-2, Mar. 1, 1990.

³⁰ The term "each committee" when used in these rules includes standing, select, and special committees unless otherwise specified.

after the filing of the request, a majority of the members of the committee may file in the offices of the committee their written notice that a special meeting of the committee will be held, specifying the date and hour of that special meeting. The committee shall meet on that date and hour. Immediately upon the filing of the notice, the clerk of the committee shall notify all members of the committee that such special meeting will be held and inform them of its date and hour. If the chairman of any such committee is not present at any regular, additional, or special meeting of the committee, the ranking member of the majority party on the committee who is present shall preside at that meeting.

4. (a) Each committee (except the Committee on Appropriations and the Committee on the Budget) shall make public announcement of the date, place, and subject matter of any hearing to be conducted by the committee on any measure or matter at least one week before the commencement of that hearing unless the committee determines that there is good cause to begin such hearing at an earlier date.

(b) Each committee (except the Committee on Appropriations) shall require each witness who is to appear before the committee in any hearing to file with the clerk of the committee, at least one day before the date of the appearance of that witness, a written statement of his proposed testimony unless the committee chairman and the ranking minority member determine that there is good cause for noncompliance. If so requested by any committee, the staff of the committee shall prepare for the use of the members of the committee before each day of hearing before the committee a digest of the statements which have been so filed by witnesses who are to appear before the committee on that day.

(c) After the conclusion of each day of hearing, if so requested by any committee, the staff shall prepare for the use of the members of the committee a summary of the testimony given before the committee on that day. After approval by the chairman and the ranking minority member of the committee, each such summary may be printed as a part of the committee hearings if such hearings are ordered by the committee to be printed.

(d) Whenever any hearing is conducted by a committee (except the Committee on Appropriations) upon any measure or matter, the minority on the committee shall be entitled, upon request made by a majority of the minority members to the chairman before the completion of such hearing, to call witnesses selected by the minority to testify with respect to the measure or matter during at least one day of hearing thereon.

5. (a) Notwithstanding any other provision of the rules, when the Senate is in session, no committee of the Senate or any subcommittee thereof may meet, without special leave, after the conclusion of the first two hours after the meeting of the Senate commenced and in no case after two o'clock postmeridian unless consent therefor has been obtained from the majority leader and the minority leader (or in the event of the absence of either of such leaders, from his designee). The prohibition contained in the preceding sentence shall not apply to the Committee on Appropriations or the Committee on the Budget. The majority leader or his designee shall announce to the Senate whenever consent has been

given under this subparagraph and shall state the time and place of such meeting. The right to make such announcement of consent shall have the same priority as the filing of a cloture motion.

(b) Each meeting of a committee, or any subcommittee thereof, including meetings to conduct hearings, shall be open to the public, except that a meeting or series of meetings by a committee or a subcommittee thereof on the same subject for a period of no more than fourteen calendar days may be closed to the public on a motion made and seconded to go into closed session to discuss only whether the matters enumerated in clauses (1) through (6) would require the meeting to be closed, followed immediately by a record vote in open session by a majority of the members of the committee or subcommittee when it is determined that the matters to be discussed or the testimony to be taken at such meeting or meetings—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement;

(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, other than through an application by such person for a specific Government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person; or

(6) may divulge matters required to be kept confidential under other provisions of law or Government regulations.

(c) Whenever any hearing conducted by any such committee or subcommittee is open to the public, that hearing may be broadcast by radio or television, or both, under such rules as the committee or subcommittee may adopt.

(d) Whenever disorder arises during a committee meeting that is open to the public, or any demonstration of approval or disapproval is indulged in by any person in attendance at any such meeting, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator. When the Chair finds it necessary to maintain order, he shall have the power to clear the room, and the committee may act in closed session for so long as there is doubt of the assurance of order.

(e)(1)³¹ Each committee shall prepare and keep a complete transcript or electronic recording adequate to fully record the proceeding of each meeting or conference whether or not such meeting or any part thereof is closed under this paragraph, unless a majority of its members vote to forgo such a record.

(2)(A)³² Except with respect to meetings closed in accordance with this rule, each committee and subcommittee shall make publicly available through the Internet a video recording, audio recording, or transcript of any meeting not later than 21 business days after the meeting occurs.

(B) Information required by subclause (A) shall be available until the end of the Congress following the date of the meeting.

(C) The Committee on Rules and Administration may waive this clause upon request based on the inability of a committee or subcommittee to comply with this clause due to technical or logistical reasons.

6. Morning meetings of committees and subcommittees thereof shall be scheduled for one or both of the periods prescribed in this paragraph. The first period shall end at eleven o'clock antemeridian. The second period shall begin at eleven o'clock antemeridian and end at two o'clock postmeridian.

7. (a)(1) Except as provided in this paragraph, each committee, and each subcommittee thereof is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee, except that no measure or matter or recommendation shall be reported from any committee unless a majority of the committee were physically present.

(2) Each such committee, or subcommittee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

(3) The vote of any committee to report a measure or matter shall require the concurrence of a majority of the members of the committee who are present. No vote of any member of any committee to report a measure or matter may be cast by proxy if rules adopted by such committee forbid the casting of votes for that purpose by proxy; however, proxies may not be voted when the absent committee member has not been informed of the matter on which he is being recorded and has not affirmatively requested that he be so recorded. Action by any committee in reporting any measure or matter in accordance with the requirements of this subparagraph shall constitute the ratification by the committee of all action theretofore taken by the committee with respect to that measure or matter, including votes taken upon the measure or matter or any amendment thereto, and no point of order shall lie with respect to that measure or matter on the ground that such previous action with respect thereto by such committee was not taken in compliance with such requirements.

³¹ Subparagraph (e)(1) numbered pursuant to Pub. L. 110-81, Sep. 14, 2007.

³² Clause (2) added pursuant to Pub. L. 110-81, Sep. 14, 2007, and takes effect Dec. 13, 2007.

(b) Each committee (except the Committee on Appropriations) shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. The results of rollcall votes taken in any meeting of any committee upon any measure, or any amendment thereto, shall be announced in the committee report on that measure unless previously announced by the committee, and such announcement shall include a tabulation of the votes cast in favor of and the votes cast in opposition to each such measure and amendment by each member of the committee who was present at that meeting.

(c) Whenever any committee by rollcall vote reports any measure or matter, the report of the committee upon such measure or matter shall include a tabulation of the votes cast by each member of the committee in favor of and in opposition to such measure or matter. Nothing contained in this subparagraph shall abrogate the power of any committee to adopt rules—

(1) providing for proxy voting on all matters other than the reporting of a measure or matter, or

(2) providing in accordance with subparagraph (a) for a lesser number as a quorum for any action other than the reporting of a measure or matter.

8. (a) In order to assist the Senate in—

(1) its analysis, appraisal, and evaluation of the application, administration, and execution of the laws enacted by the Congress, and

(2) its formulation, consideration, and enactment of such modifications of or changes in those laws, and of such additional legislation, as may be necessary or appropriate, each standing committee (except the Committees on Appropriations and the Budget), shall review and study, on a continuing basis the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the legislative jurisdiction of that committee. Such committees may carry out the required analysis, appraisal, and evaluation themselves, or by contract, or may require a government agency to do so and furnish a report thereon to the Senate. Such committees may rely on such techniques as pilot testing, analysis of costs in comparison with benefits, or provision for evaluation after a defined period of time.

(b) In each odd-numbered year, each such committee shall submit, not later than March 31, to the Senate, a report on the activities of that committee under this paragraph during the Congress ending at noon on January 3 of such year.

9.³³ (a) Except as provided in subparagraph (b), each committee shall report one authorization resolution each year authorizing the committee to make expenditures out of the contingent fund of the Senate to defray its expenses, including the compensation of members of its staff and agency contributions related to such compensation, during the period beginning on March 1 of such year and ending on the last day of February of the following year. Such annual

³³ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Jan. 1, 1981; S. Res. 479, 100-2, Sept. 30, 1988.

authorization resolution shall be reported not later than January 31 of each year, except that, whenever the designation of members of standing committees of the Senate occurs during the first session of a Congress at a date later than January 20, such resolution may be reported at any time within thirty days after the date on which the designation of such members is completed. After the annual authorization resolution of a committee for a year has been agreed to, such committee may procure authorization to make additional expenditures out of the contingent fund of the Senate during that year only by reporting a supplemental authorization resolution. Each supplemental authorization resolution reported by a committee shall amend the annual authorization resolution of such committee for that year and shall be accompanied by a report specifying with particularity the purpose for which such authorization is sought and the reason why such authorization could not have been sought at the time of the submission by such committee of its annual authorization resolution for that year.

(b) In lieu of the procedure provided in subparagraph (a), the Committee on Rules and Administration may—

(1) direct each committee to report an authorization resolution for a two year budget period beginning on March 1 of the first session of a Congress; and

(2) report one authorization resolution containing more than one committee authorization for a one year or two year budget period.

10. (a) All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; and such records shall be the property of the Senate and all members of the committee and the Senate shall have access to such records. Each committee is authorized to have printed and bound such testimony and other data presented at hearings held by the committee.

(b) It shall be the duty of the chairman of each committee to report or cause to be reported promptly to the Senate any measure approved by his committee and to take or cause to be taken necessary steps to bring the matter to a vote. In any event, the report of any committee upon a measure which has been approved by the committee shall be filed within seven calendar days (exclusive of days on which the Senate is not in session) after the day on which there has been filed with the clerk of the committee a written and signed request of a majority of the committee for the reporting of that measure. Upon the filing of any such request, the clerk of the committee shall transmit immediately to the chairman of the committee notice of the filing of that request. This subparagraph does not apply to the Committee on Appropriations.

(c) If at the time of approval of a measure or matter by any committee (except for the Committee on Appropriations), any member of the committee gives notice of intention to file supplemental, minority, or additional views, that member shall be entitled to not less than three calendar days in which to file such views, in writing, with the clerk of the committee. All such views so filed by one or more members of the committee shall be included within, and shall be a part of, the report filed by the committee with respect

to that measure or matter. The report of the committee upon that measure or matter shall be printed in a single volume which—

(1) shall include all supplemental, minority, or additional views which have been submitted by the time of the filing of the report, and

(2) shall bear upon its cover a recital that supplemental, minority, or additional views are included as part of the report. This subparagraph does not preclude—

(A) the immediate filing and printing of a committee report unless timely request for the opportunity to file supplemental, minority, or additional views has been made as provided by this subparagraph; or

(B) the filing by any such committee of any supplemental report upon any measure or matter which may be required for the correction of any technical error in a previous report made by that committee upon that measure or matter.

11. (a) The report accompanying each bill or joint resolution of a public character reported by any committee (except the Committee on Appropriations and the Committee on the Budget) shall contain—

(1) an estimate, made by such committee, of the costs which would be incurred in carrying out such bill or joint resolution in the fiscal year in which it is reported and in each of the five fiscal years following such fiscal year (or for the authorized duration of any program authorized by such bill or joint resolution, if less than five years), except that, in the case of measures affecting the revenues, such reports shall require only an estimate of the gain or loss in revenues for a one-year period; and

(2) a comparison of the estimate of costs described in subparagraph (1) made by such committee with any estimate of costs made by any Federal agency; or

(3) in lieu of such estimate or comparison, or both, a statement of the reasons why compliance by the committee with the requirements of subparagraph (1) or (2), or both, is impracticable.

(b) Each such report (except those by the Committee on Appropriations) shall also contain—

(1) an evaluation, made by such committee, of the regulatory impact which would be incurred in carrying out the bill or joint resolution. The evaluation shall include (A) an estimate of the numbers of individuals and businesses who would be regulated and a determination of the groups and classes of such individuals and businesses, (B) a determination of the economic impact of such regulation on the individuals, consumers, and businesses affected, (C) a determination of the impact on the personal privacy of the individuals affected, and (D) a determination of the amount of additional paperwork that will re-

NOTE.—Each report accompanying any bill or joint resolution relating to terms and conditions of employment or access to public services or accommodations reported by a committee of the House of Representatives or the Senate shall describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch; or in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply. (Pub. L. 104-1, Title I, Sec. 102, Jan. 23, 1995, 109 Stat. 5.) See Senate Manual Sec. 1302, S. Doc. 112-1.

sult from the regulations to be promulgated pursuant to the bill or joint resolution, which determination may include, but need not be limited to, estimates of the amount of time and financial costs required of affected parties, showing whether the effects of the bill or joint resolution could be substantial, as well as reasonable estimates of the recordkeeping requirements that may be associated with the bill or joint resolution; or

(2) in lieu of such evaluation, a statement of the reasons why compliance by the committee with the requirements of clause (1) is impracticable.

(c) It shall not be in order for the Senate to consider any such bill or joint resolution if the report of the committee on such bill or joint resolution does not comply with the provisions of subparagraphs (a) and (b) on the objection of any Senator.

12. Whenever a committee reports a bill or a joint resolution repealing or amending any statute or part thereof it shall make a report thereon and shall include in such report or in an accompanying document (to be prepared by the staff of such committee) (a) the text of the statute or part thereof which is proposed to be repealed; and (b) a comparative print of that part of the bill or joint resolution making the amendment and of the statute or part thereof proposed to be amended, showing by stricken-through type and italics, parallel columns, or other appropriate typographical devices the omissions and insertions which would be made by the bill or joint resolution if enacted in the form recommended by the committee. This paragraph shall not apply to any such report in which it is stated that, in the opinion of the committee, it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

13. (a) Each committee (except the Committee on Appropriations) which has legislative jurisdiction shall, in its consideration of all bills and joint resolutions of a public character within its jurisdiction, endeavor to insure that—

(1) all continuing programs of the Federal Government and of the government of the District of Columbia, within the jurisdiction of such committee or joint committee, are designed; and

(2) all continuing activities of Federal agencies, within the jurisdiction of such committee or joint committee, are carried on; so that, to the extent consistent with the nature, requirements, and objectives of those programs and activities, appropriations therefor will be made annually.

(b) Each committee (except the Committee on Appropriations) shall with respect to any continuing program within its jurisdiction for which appropriations are not made annually, review such program, from time to time, in order to ascertain whether such program could be modified so that appropriations therefor would be made annually.

RULE XXVII

COMMITTEE STAFF

1.³⁴ Staff members appointed to assist minority members of committees pursuant to authority of a resolution described in paragraph 9 of rule XXVI or other Senate resolution shall be accorded equitable treatment with respect to the fixing of salary rates, the assignment of facilities, and the accessibility of committee records.

2. The minority shall receive fair consideration in the appointment of staff personnel pursuant to authority of a resolution described in paragraph 9 of rule XXVI.

3. The staffs of committees (including personnel appointed pursuant to authority of a resolution described in paragraph 9 of rule XXVI or other Senate resolution) should reflect the relative number of majority and minority members of committees. A majority of the minority members of any committee may, by resolution, request that at least one-third of all funds of the committee for personnel (other than those funds determined by the chairman and ranking minority member to be allocated for the administrative and clerical functions of the committee as a whole) be allocated to the minority members of such committee for compensation of minority staff as the minority members may decide. The committee shall thereafter adjust its budget to comply with such resolution. Such adjustment shall be equitably made over a four-year period, commencing July 1, 1977, with not less than one-half being made in two years. Upon request by a majority of the minority members of any committee by resolution, proportionate space, equipment, and facilities shall be provided for such minority staff.

4. No committee shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of the Committee on Rules and Administration.

RULE XXVIII

CONFERENCE COMMITTEES; REPORTS; OPEN MEETINGS

1.³⁵ The presentation of reports of committees of conference shall always be in order when available on each Senator's desk except when the Journal is being read or a question of order or a motion to adjourn is pending, or while the Senate is voting or ascertaining the presence of a quorum; and when received the question of proceeding to the consideration of the report, if raised, shall be immediately put, and shall be determined without debate.

2.³⁶ (a) When a message from the House of Representatives is laid before the Senate, it shall be in order for a single, non-divisible motion to be made that includes—

- (1) a motion to disagree to a House amendment or insist upon a Senate amendment;

³⁴ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Feb. 28, 1981.

NOTE.—Pursuant to S. Res. 281, paragraph 1 of rule XXVII was repealed. Accordingly, subparagraphs (a), (b), (c), and (d) of paragraph 2 were renumbered as paragraphs 1, 2, 3, and 4, respectively.

³⁵ As amended by S. Res. 28, 99-2, Feb. 27, 1986.

³⁶ Paragraph 2 added pursuant to S. Res. 16, 113-1, Jan. 24, 2013.

(2) a motion to request a committee of conference with the House or to agree to a request by the House for a committee of conference; and

(3) a motion to authorize the Presiding Officer to appoint conferees (or a motion to appoint conferees).

(b) If a cloture motion is presented on a motion made pursuant to subparagraph (a), the motion shall be debatable for no more than 2 hours, equally divided in the usual form, after which the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion, the question shall be on the motion, without further debate.

3.³⁷ (a) Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.

(b) If matter which was agreed to by both Houses is stricken from the bill a point of order may be made against the report, and if the point of order is sustained, the report is rejected or shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon.

(c) If new matter is inserted in the report, a point of order may be made against the conference report and it shall be disposed of as provided under paragraph 5.

4. (a) In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees—

(1) it shall be in order for the conferees to report a substitute on the same subject matter;

(2) the conferees may not include in the report matter not committed to them by either House; and

(3) the conferees may include in their report in any such case matter which is a germane modification of subjects in disagreement.

(b) In any case in which the conferees violate subparagraph (a), a point of order may be made against the conference report and it shall be disposed of as provided under paragraph 5.

5. (a) A Senator may raise a point of order that one or more provisions of a conference report violates paragraph 3 or paragraph 4, as the case may be. The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order.

(b) If the Presiding Officer sustains the point of order as to any of the provisions against which the Senator raised the point of order, then those provisions against which the Presiding Officer sustains the point of order shall be stricken. After all other points of order under this paragraph have been disposed of—

(1) the Senate shall proceed to consider the question of whether the Senate should recede from its amendment to the House bill, or its disagreement to the amendment of the House, and concur with a further amendment, which further amendment shall consist of only that portion of the conference report that has not been stricken;

³⁷ Paragraphs 3 and 4 amended pursuant to Pub. L. 110-81, Sep. 14, 2007, and paragraphs 5-6 were added. Paragraphs 3 through 6 renumbered and amended pursuant to S. Res. 16, 113-1, Jan. 24, 2013.

(2) the question in clause (1) shall be decided under the same debate limitation as the conference report; and

(3) no further amendment shall be in order.

6. (a) Any Senator may move to waive any or all points of order under paragraph 3 or paragraph 4 with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. All motions to waive under this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order under this paragraph shall not be amendable.

(b) All appeals from rulings of the Chair under paragraph 5 shall be debatable collectively for not to exceed 1 hour, equally divided between the Majority and the Minority Leader or their designees. An affirmative vote of three-fifths of the Members of the Senate, duly chosen and sworn, shall be required in the Senate to sustain an appeal of the ruling of the Chair under paragraph 5.

7.³⁸ Each report made by a committee of conference to the Senate shall be printed as a report of the Senate. As so printed, such report shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate. Such statement shall be sufficiently detailed and explicit to inform the Senate as to the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate.

8. If time for debate in the consideration of any report of a committee of conference upon the floor of the Senate is limited, the time allotted for debate shall be equally divided between the majority party and the minority party.

9. Each conference committee between the Senate and the House of Representatives shall be open to the public except when managers of either the Senate or the House of Representatives in open session determine by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.

10. (a)(1) It shall not be in order to vote on the adoption of a report of a committee of conference unless such report has been available to Members and to the general public for at least 48 hours before such vote. If a point of order is sustained under this paragraph, then the conference report shall be set aside.

(2) For purposes of this paragraph, a report of a committee of conference is made available to the general public as of the time it is posted on a publicly accessible website controlled by a Member, committee, Library of Congress, or other office of Congress, or the Government Printing Office, as reported to the Presiding Officer by the Secretary of the Senate.

(b)(1) This paragraph may be waived in the Senate with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. A motion to waive this paragraph shall be debatable for not to exceed 1 hour equally

³⁸ Paragraphs 7 through 9 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007, and paragraph 10 was added. Paragraph 7 through 10 renumbered pursuant to S. Res. 16, 113–1, Jan. 24, 2013.

divided between the Majority Leader and the Minority Leader or their designees.

(2) An affirmative vote of three-fifths of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under this paragraph. An appeal of the ruling of the Chair shall be debatable for not to exceed 1 hour equally divided between the Majority and the Minority Leader or their designees.

(c) This paragraph may be waived by joint agreement of the Majority Leader and the Minority Leader of the Senate, upon their certification that such waiver is necessary as a result of a significant disruption to Senate facilities or to the availability of the Internet.

RULE XXIX

EXECUTIVE SESSIONS

1. When the President of the United States shall meet the Senate in the Senate Chamber for the consideration of Executive business, he shall have a seat on the right of the Presiding Officer. When the Senate shall be convened by the President of the United States to any other place, the Presiding Officer of the Senate and the Senators shall attend at the place appointed, with the necessary officers of the Senate.

2. When acting upon confidential or Executive business, unless the same shall be considered in open Executive session, the Senate Chamber shall be cleared of all persons except the Secretary, the Assistant Secretary, the Principal Legislative Clerk, the Parliamentarian, the Executive Clerk, the Minute and Journal Clerk, the Sergeant at Arms, the Secretaries to the Majority and the Minority, and such other officers as the Presiding Officer shall think necessary; and all such officers shall be sworn to secrecy.

3. All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy.

4. Whenever the injunction of secrecy shall be removed from any part of the proceedings of the Senate in closed Executive or legislative session, the order of the Senate removing the same shall be entered in the Legislative Journal as well as in the Executive Journal, and shall be published in the Congressional Record under the direction of the Secretary of the Senate.

5.³⁹ Any Senator, officer or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees and offices of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.

³⁹ As amended by S. Res. 363, 102-2, Oct. 8, 1992.

6. Whenever, by the request of the Senate or any committee thereof, any documents or papers shall be communicated to the Senate by the President or the head of any department relating to any matter pending in the Senate, the proceedings in regard to which are secret or confidential under the rules, said documents and papers shall be considered as confidential, and shall not be disclosed without leave of the Senate.

RULE XXX

EXECUTIVE SESSION—PROCEEDINGS ON TREATIES

1. (a) When a treaty shall be laid before the Senate for ratification, it shall be read a first time; and no motion in respect to it shall be in order, except to refer it to a committee, to print it in confidence for the use of the Senate, or to remove the injunction of secrecy.

(b)⁴⁰ When a treaty is reported from a committee with or without amendment, it shall, unless the Senate unanimously otherwise directs, lie over one day for consideration; after which it may be read a second time, after which amendments may be proposed. At any stage of such proceedings the Senate may remove the injunction of secrecy from the treaty.

(c) The decisions thus made shall be reduced to the form of a resolution of ratification, with or without amendments, as the case may be, which shall be proposed on a subsequent day, unless, by unanimous consent, the Senate determine otherwise, at which stage no amendment to the treaty shall be received unless by unanimous consent; but the resolution of ratification when pending shall be open to amendment in the form of reservations, declarations, statements, or understandings.

(d) On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.

2. Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.

RULE XXXI

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day

⁴⁰As amended by S. Res. 28, 99-2, Feb. 27, 1986.

on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. All business in the Senate shall be transacted in open session, unless the Senate as provided in rule XXI by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: Provided further, That any Senator may make public his vote in closed executive session.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

7. (a) The Official Reporters shall be furnished with a list of nominations to office after the proceedings of the day on which they are received, and a like list of all confirmations and rejections.

(b) All nominations to office shall be prepared for the printer by the Official Reporter, and printed in the Congressional Record, after the proceedings of the day in which they are received, also nominations recalled, and confirmed.

(c) The Secretary shall furnish to the press, and to the public upon request, the names of nominees confirmed or rejected on the day on which a final vote shall be had, except when otherwise ordered by the Senate.

RULE XXXII

THE PRESIDENT FURNISHED WITH COPIES OF RECORDS
OF EXECUTIVE SESSIONS

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the public executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

RULE XXXIII

SENATE CHAMBER—SENATE WING OF THE CAPITOL

1. The Senate Chamber shall not be granted for any other purpose than for the use of the Senate; no smoking shall be permitted at any time on the floor of the Senate, or lighted cigars, cigarettes, or pipes be brought into the Chamber.

2. It shall be the duty of the Committee on Rules and Administration to make all rules and regulations respecting such parts of the Capitol, its passages and galleries, including the restaurant and the Senate Office Buildings, as are or may be set apart for the use of the Senate and its officers, to be enforced under the direction of the Presiding Officer. The Committee shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters of newspapers and periodicals, and of news or press associations for daily news dissemination through radio, television, wires, and cables, and similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination.

RULE XXXIV

PUBLIC FINANCIAL DISCLOSURE

1. For purposes of this rule, the provisions of Title I of the Ethics in Government Act of 1978 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

2. (a)⁴¹ The Select Committee on Ethics shall transmit a copy of each report filed with it under Title I of the Ethics in Government Act of 1978 (other than a report filed by a Member of Congress) to the head of the employing office of the individual filing the report.

(b) For purposes of this rule, the head of the employing office shall be—

(1) in the case of an employee of a Member, the Member by whom that person is employed;

NOTE.—Financial disclosure requirements contained in the Ethics in Government Act as amended are codified at 5 U.S.C. App. 6. See Senate Manual Sec. 1172, S. Doc. 112-1.

⁴¹ Paragraph 2 added pursuant to S. Res. 236, 101-2, Jan. 30, 1990.

(2) in the case of an employee of a Committee, the chairman and ranking minority member of such Committee;

(3) in the case of an employee on the leadership staff, the Member of the leadership on whose staff such person serves; and

(4) in the case of any other employee of the legislative branch, the head of the office in which such individual serves.

3.⁴² In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1⁴³ the following additional information:

(a) For purposes of section 102(a)(1)(B) of the Ethics in Government Act of 1978 additional categories of income as follows:

- (1) greater than \$1,000,000 but not more than \$5,000,000, or
- (2) greater than \$5,000,000.

(b) For purposes of section 102(d)(1) of the Ethics in Government Act of 1978 additional categories of value⁴⁴ as follows:

- (1) greater than \$1,000,000 but not more than \$5,000,000;
- (2) greater than \$5,000,000 but not more than \$25,000,000;
- (3) greater than \$25,000,000 but not more than \$50,000,000;

and

- (4) greater than \$50,000,000.

(c) For purposes of this paragraph and section 102 of the Ethics in Government Act of 1978, additional categories with amounts or values greater than \$1,000,000 set forth in section 102(a)(1)(B) and 102(d)(1) shall apply to the income, assets, or liabilities of spouses and dependent children only if the income, assets, or liabilities are held jointly with the reporting individual. All other income, assets, or liabilities of the spouse or dependent children required to be reported under section 102 and this paragraph in an amount of value greater than \$1,000,000 shall be categorized only as an amount or value greater than \$1,000,000.

4.⁴⁵ In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1⁴⁶ an additional statement under section 102(a) of the Ethics in Government Act of 1978 listing the category of the total cash value of any interest of the reporting individual in a qualified blind trust as provided in section 102(d)(1) of the Ethics in Government Act of 1978, unless the trust instrument was executed prior to July 24, 1995 and precludes the beneficiary from receiving information on the total cash value of any interest in the qualified blind trust.

RULE XXXV

GIFTS⁴⁷

1. (a)(1) No Member, officer, or employee of the Senate shall knowingly accept a gift except as provided in this rule.

⁴² Paragraphs 3 and 4 added pursuant to S. Res. 158, 104-1, July 28, 1995, effective Jan. 1, 1996, as amended by S. Res. 198, 104-1, Dec. 7, 1995.

⁴³ Renumbered pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁴ The word "value" replaced the word "income" pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁵ Effective with respect to reports filed under Title I of the Ethics in Government Act of 1978 for calendar year 1996 and thereafter.

⁴⁶ Renumbered pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁷ Amended pursuant to S. Res. 158, 104-1, July 28, 1995, effective Jan. 1, 1996.

(2)(A)⁴⁸ A Member, officer, or employee may accept a gift (other than cash or cash equivalent) which the Member, officer, or employee reasonably and in good faith believes to have a value of less than \$50, and a cumulative value from one source during a calendar year of less than \$100. No gift with a value below \$10 shall count toward the \$100 annual limit. No formal recordkeeping is required by this paragraph, but a Member, officer, or employee shall make a good faith effort to comply with this paragraph.

(B) A Member, officer, or employee may not knowingly accept a gift from a registered lobbyist, an agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or an agent of a foreign principal, except as provided in subparagraphs (c) and (d).

(b)(1) For the purpose of this rule, the term “gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(2)(A) A gift to a family member of a Member, officer, or employee, or a gift to any other individual based on that individual’s relationship with the Member, officer, or employee, shall be considered a gift to the Member, officer, or employee if it is given with the knowledge and acquiescence of the Member, officer, or employee and the Member, officer, or employee has reason to believe the gift was given because of the official position of the Member, officer, or employee.

(B) If food or refreshment is provided at the same time and place to both a Member, officer, or employee and the spouse or dependent thereof, only the food or refreshment provided to the Member, officer, or employee shall be treated as a gift for purposes of this rule.

(c) The restrictions in subparagraph (a) shall not apply to the following:

(1)(A)⁴⁹ Anything for which the Member, officer, or employee pays the market value, or does not use and promptly returns to the donor.

(B) The market value of a ticket to an entertainment or sporting event shall be the face value of the ticket or, in the case of a ticket without a face value, the value of the ticket with the highest face value for the event, except that if a ticket holder can establish in advance of the event to the Select Committee on Ethics that the ticket at issue is equivalent to another ticket with a face value, then the market value shall be set at the face value of the equivalent ticket. In establishing equivalency, the ticket holder shall provide written and independently verifiable information related to the primary features of the ticket, including, at a minimum, the seat location, access to parking, availability of food and refreshments, and access to venue areas not open to the public. The Select Committee on Ethics may make a determination of equivalency only if such information is provided in advance of the event.

⁴⁸ Subparagraph (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁴⁹ Subclause (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

(C)(i)⁵⁰ Fair market value for a flight on an aircraft described in item (ii) shall be the pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size, as determined by dividing such cost by the number of Members, officers, or employees of Congress on the flight.

(ii) A flight on an aircraft described in this item is any flight on an aircraft that is not—

(I) operated or paid for by an air carrier or commercial operator certificated by the Federal Aviation Administration and required to be conducted under air carrier safety rules; or

(II) in the case of travel which is abroad, an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules.

(iii) This subclause shall not apply to an aircraft owned or leased by a governmental entity or by a Member of Congress or a Member's immediate family member (including an aircraft owned by an entity that is not a public corporation in which the Member or Member's immediate family member has an ownership interest), provided that the Member does not use the aircraft anymore than the Member's or immediate family member's proportionate share of ownership allows.

(2) A contribution, as defined in the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) that is lawfully made under that Act, or attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(3) A gift from a relative as described in section 109(16) of Title I of the Ethics Reform Act of 1989 (5 U.S.C. App. 6).⁵¹

(4)(A) Anything, including personal hospitality,⁵² provided by an individual on the basis of a personal friendship unless the Member, officer, or employee has reason to believe that, under the circumstances, the gift was provided because of the official position of the Member, officer, or employee and not because of the personal friendship.

(B) In determining whether a gift is provided on the basis of personal friendship, the Member, officer, or employee shall consider the circumstances under which the gift was offered, such as:

(i) The history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between such individuals.

(ii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

⁵⁰ Subparagraph C added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁵¹ As amended, S. Res. 198, 104–1, Dec. 7, 1995. See Senate Manual Sec. 1180, S. Doc. 112–1, for definitions.

⁵² The phrase “including personal hospitality” inserted pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

- (iii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift also at the same time gave the same or similar gifts to other Members, officers, or employees.
- (5) A contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee, that is otherwise lawfully made, subject to the disclosure requirements of the Select Committee on Ethics, except as provided in paragraph 3(c).
- (6) Any gift from another Member, officer, or employee of the Senate or the House of Representatives.
- (7) Food, refreshments, lodging, and other benefits—
- (A) resulting from the outside business or employment activities (or other outside activities that are not connected to the duties of the Member, officer, or employee as an officeholder) of the Member, officer or employee, or the spouse of the Member, officer, or employee, if such benefits have not been offered or enhanced because of the official position of the Member, officer, or employee and are customarily provided to others in similar circumstances;
- (B) customarily provided by a prospective employer in connection with bona fide employment discussions; or
- (C) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such an organization.
- (8) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.
- (9) Informational materials that are sent to the office of the Member, officer, or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.
- (10) Awards or prizes which are given to competitors in contests or events open to the public, including random drawings.
- (11) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).
- (12) Donations of products from the State that the Member represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any individual recipient.
- (13) Training (including food and refreshments furnished to all attendees as an integral part of the training) provided to a Member, officer, or employee, if such training is in the interest of the Senate.
- (14) Bequests, inheritances, and other transfers at death.
- (15) Any item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(16) Anything which is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(17) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act)⁵³ of an individual other than a registered lobbyist or agent of a foreign principal.

(18) Free attendance at a widely attended event permitted pursuant to subparagraph (d).

(19) Opportunities and benefits which are—

(A) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(B) offered to members of a group or class in which membership is unrelated to congressional employment;

(C) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(D) offered to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(E) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(F) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(20) A plaque, trophy, or other item that is substantially commemorative in nature and which is intended solely for presentation.

(21) Anything for which, in an unusual case, a waiver is granted by the Select Committee on Ethics.

(22) Food or refreshments of a nominal value offered other than as a part of a meal.

(23) An item of little intrinsic value such as a greeting card, baseball cap, or a T-shirt.

(24)⁵⁴ Subject to the restrictions in subparagraph (a)(2)(A), free attendance at a constituent event permitted pursuant to subparagraph (g).

(d)(1) A Member, officer, or employee may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(A) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by

⁵³ See Senate Manual Sec. 1180, S. Doc. 112-1, for definitions.

⁵⁴ Clause (24) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(B) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) A Member, officer, or employee, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with an event that does not meet the standards provided in paragraph 2.

(4) For purposes of this paragraph, the term "free attendance" may include waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5)⁵⁵ During the dates of the national party convention for the political party to which a Member belongs, a Member may not participate in an event honoring that Member, other than in his or her capacity as the party's presidential or vice presidential nominee or presumptive nominee, if such event is directly paid for by a registered lobbyist or a private entity that retains or employs a registered lobbyist.

(e) No Member, officer, or employee may accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception in subparagraph (c)(4) unless the Select Committee on Ethics issues a written determination that such exception applies. No determination under this subparagraph is required for gifts given on the basis of the family relationship exception.

(f) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(g)(1)⁵⁶ A Member, officer, or employee may accept an offer of free attendance in the Member's home State at a conference, symposium, forum, panel discussion, dinner event, site visit, viewing, reception, or similar event, provided by a sponsor of the event, if—

(A) the cost of meals provided the Member, officer, or employee is less than \$50;

(B)(i) the event is sponsored by constituents of, or a group that consists primarily of constituents of, the Member (or the Member by whom the officer or employee is employed); and

(ii) the event will be attended primarily by a group of at least 5 constituents of the Member (or the Member by whom

⁵⁵ Clause (5) was added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁵⁶ Subparagraph (g) was added pursuant to Pub. L. 110–81, Sep. 14, 2007.

the officer or employee is employed) provided that a registered lobbyist shall not attend the event; and

(C)(i) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) For purposes of this subparagraph, the term 'free attendance' has the same meaning given such term in subparagraph (d).

2.⁵⁷(a)(1)⁵⁸ A reimbursement (including payment in kind) to a Member, officer, or employee from an individual other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal for necessary transportation, lodging and related expenses for travel to a meeting, speaking engagement, fact-finding trip or similar event in connection with the duties of the Member, officer, or employee as an officeholder shall be deemed to be a reimbursement to the Senate and not a gift prohibited by this rule, if the Member, officer, or employee complies with the requirements of this paragraph.

(2)(A)⁵⁹ Notwithstanding clause (1), a reimbursement (including payment in kind) to a Member, officer, or employee of the Senate from an individual, other than a registered lobbyist or agent of a foreign principal, that is a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal shall be deemed to be a reimbursement to the Senate under clause (1) if—

(i) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is provided only for attendance at or participation for 1 day (exclusive of travel time and an overnight stay) at an event described in clause (1); or

(ii) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is from an organization des-

⁵⁷(Note: amendments to paragraph (2) pursuant to Pub. L. 110-81, Sep. 14, 2007, take effect 60 days after enactment or the date that the Select Committee on Ethics issues new guidelines pertaining to this paragraph.)

⁵⁸Subparagraph (a)(1) was amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁵⁹Clause (2) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

ignated under section 501(c)(3) of the Internal Revenue Code of 1986.

(B) When deciding whether to preapprove a trip under this clause, the Select Committee on Ethics shall make a determination consistent with regulations issued pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007. The committee through regulations to implement subclause (A)(i) may permit a longer stay when determined by the committee to be practically required to participate in the event, but in no event may the stay exceed 2 nights.

(3)⁶⁰ For purposes of clauses (1) and (2), events, the activities of which are substantially recreational in nature, shall not be considered to be in connection with duties of a Member, officer, or employee as an officeholder.

(b)⁶¹ Before an employee may accept reimbursement pursuant to subparagraph (a), the employee shall receive advance written authorization from the Member or officer under whose direct supervision the employee works. Each advance authorization to accept reimbursement shall be signed by the Member or officer under whose direct supervision the employee works and shall include—

- (1) the name of the employee;
- (2) the name of the person who will make the reimbursement;
- (3) the time, place, and purpose of the travel; and
- (4) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

(c)⁶² Each Member, officer, or employee that receives reimbursement under this paragraph shall disclose the expenses reimbursed or to be reimbursed, the authorization under subparagraph (b) (for an employee), and a copy of the certification in subparagraph (e)(1) to the Secretary of the Senate not later than 30 days after the travel is completed. Each disclosure made under this subparagraph of expenses reimbursed or to be reimbursed shall be signed by the Member or officer (in the case of travel by that Member or officer) or by the Member or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include—

- (1) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;
- (2) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;
- (3) a good faith estimate of total meal expenses reimbursed or to be reimbursed;
- (4) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;
- (5) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in this paragraph;

⁶⁰ Clause (3) was renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶¹ Subparagraph (b) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶² Subparagraph (c) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

(6)⁶³ a description of meetings and events attended; and

(7)⁶⁴ in the case of a reimbursement to a Member or officer, a determination that the travel was in connection with the duties of the Member or officer as an officeholder and would not create the appearance that the Member or officer is using public office for private gain.

(d)(1)⁶⁵ A Member, officer, or employee of the Senate may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under subparagraph (a) for a trip that was—

(A) planned, organized, or arranged by or at the request of a registered lobbyist or agent of a foreign principal; or

(B)(i) for trips described under subparagraph (a)(2)(A)(i) on which a registered lobbyist accompanies the Member, officer, or employee on any segment of the trip; or

(ii) for all other trips allowed under this paragraph, on which a registered lobbyist accompanies the Member, officer, or employee at any point throughout the trip.

(2) The Select Committee on Ethics shall issue regulations identifying de minimis activities by registered lobbyists or foreign agents that would not violate this subparagraph.

(e)⁶⁶ A Member, officer, or employee shall, before accepting travel otherwise permissible under this paragraph from any source—

(1) provide to the Select Committee on Ethics a written certification from such source that—

(A) the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal and is not itself a registered lobbyist or agent of a foreign principal; or

(ii) certifies that the trip meets the requirements of subclause (i) or (ii) of subparagraph (a)(2)(A);

(C) the source will not accept from a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal, funds earmarked directly or indirectly for the purpose of financing the specific trip; and

(D) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal and the traveler will not be accompanied on the trip consistent with the applicable requirements of subparagraph (d)(1)(B) by a registered lobbyist or agent of a foreign principal, except as permitted by regulations issued under subparagraph (d)(2); and

(2) after the Select Committee on Ethics has promulgated regulations pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007, obtain the prior approval of the committee for such reimbursement.

⁶³ Clause (6) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁴ Clause (7) renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁵ Subparagraph (d) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁶ Subparagraph (e) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

(f)⁶⁷ For the purposes of this paragraph, the term “necessary transportation, lodging, and related expenses”—

(1) includes reasonable expenses that are necessary for travel for a period not exceeding 3 days exclusive of travel time within the United States or 7 days exclusive of travel time outside of the United States unless approved in advance by the Select Committee on Ethics;

(2) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in clause (1);

(3) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this rule; and

(4) may include travel expenses incurred on behalf of either the spouse or a child of the Member, officer, or employee, subject to a determination signed by the Member or officer (or in the case of an employee, the Member or officer under whose direct supervision the employee works) that the attendance of the spouse or child is appropriate to assist in the representation of the Senate.

(g) The Secretary of the Senate shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received, but in no event prior to the completion of the relevant travel.

3. A gift prohibited by paragraph 1(a) includes the following:

(a) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, officer, or employee.

(b) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, officer, or employee (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph 4.

(c) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, officer, or employee.

(d) A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, officers, or employees.

4. (a) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Mem-

⁶⁷ Subparagraph (f) renumbered and subparagraph (g) renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

ber, officer, or employee shall not be considered a gift under this rule if it is reported as provided in subparagraph (b).

(b) A Member, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of honoraria described in subparagraph (a) shall report within 30 days after such designation or recommendation to the Secretary of the Senate—

- (1) the name and address of the registered lobbyist who is making the contribution in lieu of honoraria;
- (2) the date and amount of the contribution; and
- (3) the name and address of the charitable organization designated or recommended by the Member.

The Secretary of the Senate shall make public information received pursuant to this subparagraph as soon as possible after it is received.

5. For purposes of this rule—

(a) the term “registered lobbyist” means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute; and

(b) the term “agent of a foreign principal” means an agent of a foreign principal registered under the Foreign Agents Registration Act.

6. All the provisions of this rule shall be interpreted and enforced solely by the Select Committee on Ethics. The Select Committee on Ethics is authorized to issue guidance on any matter contained in this rule.

RULE XXXVI⁶⁸

OUTSIDE EARNED INCOME

For purposes of this rule, the provisions of section 501 of the Ethics in Government Act of 1978 (5 U.S.C. App. 7 501) shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

RULE XXXVII

CONFLICT OF INTEREST

1. A Member, officer, or employee of the Senate shall not receive any compensation, nor shall he permit any compensation to accrue to his beneficial interest from any source, the receipt or accrual of which would occur by virtue of influence improperly exerted from his position as a Member, officer, or employee.

2. No Member, officer, or employee shall engage in any outside business or professional activity or employment for compensation which is inconsistent or in conflict with the conscientious performance of official duties.

3. No officer or employee shall engage in any outside business or professional activity or employment for compensation unless he has reported in writing when such activity or employment commences

⁶⁸ Previous provisions of Rule XXXVI were repealed by S. Res. 512, 97-2, Dec. 14, 1982, effective Jan. 1, 1983. New Rule XXXVI language established by S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991. See Senate Manual Secs. 1184-1188, S. Doc. 112-1, for provisions of 5 U.S.C. App. 7.

and on May 15 of each year thereafter so long as such activity or employment continues, the nature of such activity or employment to his supervisor. The supervisor shall then, in the discharge of his duties, take such action as he considers necessary for the avoidance of conflict of interest or interference with duties to the Senate.

4. No Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class.

5. (a)⁶⁹ No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall (1) affiliate with a firm, partnership, association, or corporation for the purpose of providing professional services for compensation; (2) permit that individual's name to be used by such a firm, partnership, association or corporation; or (3) practice a profession for compensation to any extent during regular office hours of the Senate office in which employed. For the purposes of this paragraph, "professional services" shall include but not be limited to those which involve a fiduciary relationship.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not—

(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship; or

(4) receive compensation for teaching, without the prior notification and approval of the Select⁷⁰ Committee on Ethics.

6. (a)⁷¹ No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall serve as an officer or member of the board of any publicly held or publicly regulated corporation, financial institution, or business entity. The preceding sentence shall not apply to service of a Member, officer, or employee as—

(1) an officer or member of the board of an organization which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, if such service is performed without compensation;

⁶⁹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 5 renumbered 5(a) and subparagraph (b) added.

⁷⁰ Added pursuant to S. Res. 299, 106-2, Apr. 27, 2000.

⁷¹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 6 renumbered 6(a) and subparagraph (b) added.

(2) an officer or member of the board of an institution or organization which is principally available to Members, officers, or employees of the Senate, or their families, if such service is performed without compensation; or

(3) a member of the board of a corporation, institution, or other business entity, if (A) the Member, officer, or employee had served continuously as a member of the board thereof for at least two years prior to his election or appointment as a Member, officer, or employee of the Senate, (B) the amount of time required to perform such service is minimal, and (C) the Member, officer, or employee is not a member of, or a member of the staff of any Senate committee which has legislative jurisdiction over any agency of the Government charged with regulating the activities of the corporation, institution, or other business entity.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not serve for compensation as an officer or member of the board of any association, corporation, or other entity.

7. An employee on the staff of a committee who is compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall divest himself of any substantial holdings which may be directly affected by the actions of the committee for which he works, unless the Select Committee, after consultation with the employee's supervisor, grants permission in writing to retain such holdings or the employee makes other arrangements acceptable to the Select Committee and the employee's supervisor to avoid participation in committee actions where there is a conflict of interest, or the appearance thereof.

8.⁷² If a Member, upon leaving office, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, he shall not lobby Members, officers, or employees of the Senate for a period of two years after leaving office.

9. (a) If an employee on the staff of a Member, upon leaving that position, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the Member for whom he worked or that Member's staff for a period of one year after leaving that position.

(b) If an employee on the staff of a committee, upon leaving his position, becomes such a registered lobbyist or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the members of the committee for which he worked, or the staff of that committee, for a period of one year after leaving his position.

⁷² Paragraphs 8 and 9 amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

(c)⁷³ If an officer of the Senate or an employee on the staff of a Member or on the staff of a committee whose rate of pay is equal to or greater than 75 percent of the rate of pay of a Member and employed at such rate for more than 60 days in a calendar year, upon leaving that position, becomes a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby any Member, officer, or employee of the Senate for a period of 1 year after leaving that position.

10. ⁷⁴ Paragraphs 8 and 9 shall not apply to contacts with the staff of the Secretary of the Senate regarding compliance with the lobbying disclosure requirements of the Lobbying Disclosure Act of 1995.

11. (a) If a Member's spouse or immediate family member is a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that hires or retains a registered lobbyist for the purpose of influencing legislation, the Member shall prohibit all staff employed or supervised by that Member (including staff in personal, committee, and leadership offices) from having any contact with the Member's spouse or immediate family member that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by such person.

(b) Members and employees on the staff of a Member (including staff in personal, committee, and leadership offices) shall be prohibited from having any contact that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by any spouse of a Member who is a registered lobbyist, or is employed or retained by such a registered lobbyist.

(c) The prohibition in subparagraph (b) shall not apply to the spouse of a Member who was serving as a registered lobbyist at least 1 year prior to the most recent election of that Member to office or at least 1 year prior to his or her marriage to that Member.

12. (a)⁷⁵ Except as provided by subparagraph (b), any employee of the Senate who is required to file a report pursuant to rule XXXIV shall refrain from participating personally and substantially as an employee of the Senate in any contact with any agency of the executive or judicial branch of Government with respect to non-legislative matters affecting any non-governmental person in which the employee has a significant financial interest.

(b) Subparagraph (a) shall not apply if an employee first advises his supervising authority of his significant financial interest and obtains from his employing authority a written waiver stating that the participation of the employee is necessary. A copy of each such waiver shall be filed with the Select Committee.

13. ⁷⁶ For purposes of this rule—

⁷³ (Note: paragraph 9(c) shall apply to individuals who leave the office or employment to which such paragraph applies on or after the date of adjournment of the 1st session of the 110th Congress sine die or Dec. 31, 2007, whichever date is earlier.)

⁷⁴ Paragraphs 10 and 11 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁵ Pursuant to S. Res. 236, 101–2, Jan. 30, 1990, paragraphs 10. and 11. were renumbered as 11. and 12. respectively and paragraph 10. was added. Paragraph renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁶ Paragraph 13 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

(a) “employee of the Senate” includes an employee or individual described in paragraphs 2, 3, and 4(c) of rule XLI;

(b) an individual who is an employee on the staff of a subcommittee of a committee shall be treated as an employee on the staff of such committee; and

(c) the term “lobbying” means any oral or written communication to influence the content or disposition of any issue before Congress, including any pending or future bill, resolution, treaty, nomination, hearing, report, or investigation; but does not include—

(1) a communication (i) made in the form of testimony given before a committee or office of the Congress, or (ii) submitted for inclusion in the public record, public docket, or public file of a hearing; or

(2) a communication by an individual, acting solely on his own behalf, for redress of personal grievances, or to express his personal opinion.

14.⁷⁷ (a) A Member shall not negotiate or have any arrangement concerning prospective private employment until after his or her successor has been elected, unless such Member files a signed statement with the Secretary of the Senate, for public disclosure, regarding such negotiations or arrangements not later than 3 business days after the commencement of such negotiation or arrangement, including the name of the private entity or entities involved in such negotiations or arrangements, and the date such negotiations or arrangements commenced.

(b) A Member shall not negotiate or have any arrangement concerning prospective employment for a job involving lobbying activities as defined by the Lobbying Disclosure Act of 1995 until after his or her successor has been elected.

(c)(1) An employee of the Senate earning in excess of 75 percent of the salary paid to a Senator shall notify the Select Committee on Ethics that he or she is negotiating or has any arrangement concerning prospective private employment.

(2) The notification under this subparagraph shall be made not later than 3 business days after the commencement of such negotiation or arrangement.

(3) An employee to whom this subparagraph applies shall—

(A) recuse himself or herself from—

(i) any contact or communication with the prospective employer on issues of legislative interest to the prospective employer; and

(ii) any legislative matter in which there is a conflict of interest or an appearance of a conflict for that employee under this subparagraph; and

(B) notify the Select Committee on Ethics of such recusal.

15.⁷⁸ For purposes of this rule—

(a) a Senator or the Vice President is the supervisor of his administrative, clerical, or other assistants;

(b) a Senator who is the chairman of a committee is the supervisor of the professional, clerical, or other assistants to the

⁷⁷ Paragraph 14 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁸ Paragraph 15 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

committee except that minority staff members shall be under the supervision of the ranking minority Senator on the committee;

(c) a Senator who is a chairman of a subcommittee which has its own staff and financial authorization is the supervisor of the professional, clerical, or other assistants to the subcommittee except that minority staff members shall be under the supervision of the ranking minority Senator on the subcommittee;

(d) the President pro tempore is the supervisor of the Secretary of the Senate, Sergeant at Arms and Doorkeeper, the Chaplain, the Legislative Counsel, and the employees of the Office of the Legislative Counsel;

(e) the Secretary of the Senate is the supervisor of the employees of his office;

(f) the Sergeant at Arms and Doorkeeper is the supervisor of the employees of his office;

(g) the Majority and Minority Leaders and the Majority and Minority Whips are the supervisors of the research, clerical, or other assistants assigned to their respective offices;

(h) the Majority Leader is the supervisor of the Secretary for the Majority and the Secretary for the Majority is the supervisor of the employees of his office; and

(i) the Minority Leader is the supervisor of the Secretary for the Minority and the Secretary for the Minority is the supervisor of the employees of his office.

RULE XXXVIII

PROHIBITION OF UNOFFICIAL OFFICE ACCOUNTS

1. (a) ⁷⁹ No Member may maintain or have maintained for his use an unofficial office account. The term “unofficial office account” means an account or repository into which funds are received for the purpose, at least in part, of defraying otherwise unreimbursed expenses allowable in connection with the operation of a Member’s office. An unofficial office account does not include, and expenses incurred by a Member in connection with his official duties shall be defrayed only from—

(1) personal funds of the Member;

(2) official funds specifically appropriated for that purpose;

(3) funds derived from a political committee (as defined in section 301(d) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)); and

(4) funds received as reasonable reimbursements for expenses incurred by a Member in connection with personal services provided by the Member to the organization making the reimbursement.

⁷⁹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, paragraph 1 was renumbered 1(a) and subparagraph (b) was added. Effective date revised to May 1, 1992, by a provision of Pub. L. 102-229, Dec. 12, 1991. Provisions of 2 U.S.C. 431 are contained in the Senate Manual at Sec. 586, S. Doc. 112-1.

(b) Notwithstanding subparagraph (a), official expenses may be defrayed only as provided by subsections (d) and (i) of section 311 of the Legislative Appropriations Act, 1991 (Public Law 101–520).⁸⁰

(c)⁸¹ For purposes of reimbursement under this rule, fair market value of a flight on an aircraft shall be determined as provided in paragraph 1(c)(1)(C) of rule XXXV.

2. No contribution (as defined in section 301(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) shall be converted to the personal use of any Member or any former Member. For the purposes of this rule “personal use” does not include reimbursement of expenses incurred by a Member in connection with his official duties.

RULE XXXIX

FOREIGN TRAVEL

1. (a) Unless authorized by the Senate (or by the President of the United States after an adjournment sine die), no funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) shall be received for the purpose of travel outside the United States by any Member of the Senate whose term will expire at the end of a Congress after—

(1) the date of the general election in which his successor is elected; or

(2) in the case of a Member who is not a candidate in such general election, the earlier of the date of such general election or the adjournment sine die of the second regular session of that Congress.

(b)⁸² The travel restrictions provided by subparagraph (a) with respect to a Member of the Senate whose term will expire at the end of a Congress shall apply to travel by—

(1) any employee of the Member;

(2) any elected officer of the Senate whose employment will terminate at the end of a Congress; and

(3) any employee of a committee whose employment will terminate at the end of a Congress.

2. No Member, officer, or employee engaged in foreign travel may claim payment or accept funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) for any expense for which the individual has received reimbursement from any other source; nor may such Member, officer, or employee receive reimbursement for the same expense more than once from the United States Government. No Member, officer, or employee shall use any funds furnished to him to defray ordinary and necessary expenses of foreign travel for any purpose other than the purpose or purposes for which such funds were furnished.

⁸⁰ Section 311(d) of the Legislative Branch Appropriations Act, 1991, (2 U.S.C. 59e(d)), was amended by the Legislative Appropriations Act, 2002 (Pub. Law 107–68). 2 U.S.C. 59e—Senate Manual Sec. 349, S. Doc. 112–1.

⁸¹ Subparagraph (c) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁸² Pursuant to S. Res. 80, 100–1, Jan. 28, 1987, paragraph 1 was renumbered as 1. (a) and subparagraph (b) was added.

3. A per diem allowance provided a Member, officer, or employee in connection with foreign travel shall be used solely for lodging, food, and related expenses and it is the responsibility of the Member, officer, or employee receiving such an allowance to return to the United States Government that portion of the allowance received which is not actually used for necessary lodging, food, and related expenses.

RULE XL

FRANKING PRIVILEGE AND RADIO AND TELEVISION STUDIOS⁸³

1. A Senator or an individual who is a candidate for nomination for election, or election, to the Senate may not use the frank for any mass mailing (as defined in section 3210(a)(6)(E)⁸⁴ of Title 39, United States Code) if such mass mailing is mailed at or delivered to any postal facility less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which the Senator is a candidate for public office or the individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.⁸⁵

2. A Senator shall use only official funds of the Senate, including his official Senate allowances, to purchase paper, to print, or to prepare any mass mailing material which is to be sent out under the frank.

3. (a) When a Senator disseminates information under the frank by a mass mailing (as defined in section 3210(a)(6)(E) of Title 39, United States Code), the Senator shall register quarterly⁸⁶ with the Secretary of the Senate such mass mailings. Such registration shall be made by filing with the Secretary a copy of the matter mailed and providing, on a form supplied by the Secretary, a description of the group or groups of persons to whom the mass mailing was mailed.

(b) The Secretary of the Senate shall promptly make available for public inspection and copying a copy of the mail matter registered, and a description of the group or groups of persons to whom the mass mailing was mailed.

4. Nothing in this rule shall apply to any mailing under the frank which is (a) in direct response to inquiries or requests from persons to whom the matter is mailed; (b) addressed to colleagues in Congress or to government officials (whether Federal, State, or local); or (c) consists entirely of news releases to the communications media.

5. The Senate computer facilities shall not be used (a) to store, maintain, or otherwise process any lists or categories of lists of names and addresses identifying the individuals included in such lists as campaign workers or contributors, as members of a political party, or by any other partisan political designation, (b) to produce

⁸³Section 3210 of Title 39, U.S.C., contains statutory provisions that are parallel to certain provisions of rule XL relating to the franking privilege. See Senate Manual Sec. 1481, S. Doc. 112-1.

⁸⁴Citation corrected by S. Res. 187, 101-1, Oct. 2, 1989, pursuant to Pub. L. 97-69, Oct. 26, 1981.

⁸⁵As amended, S. Res. 224, 103-2, June 21, 1994.

⁸⁶Pursuant to Pub. L. 101-520, Nov. 5, 1990, 2 U.S.C. 59g, See Senate Manual Sec. 351. S. Doc. 112-1.

computer printouts except as authorized by user guides approved by the Committee on Rules and Administration, or (c) to produce mailing labels for mass mailings, or computer tapes and discs, for use other than in service facilities maintained and operated by the Senate or under contract to the Senate. The Committee on Rules and Administration shall prescribe such regulations not inconsistent with the purposes of this paragraph as it determines necessary to carry out such purposes.

6. (a) The radio and television studios provided by the Senate or by the House of Representatives may not be used by a Senator or an individual who is a candidate for nomination for election, or election, to the Senate less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which that Senator is a candidate for public office or that individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.⁸⁷

(b) This paragraph shall not apply if the facilities are to be used at the request of, and at the expense of, a licensed broadcast organization or an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954.

RULE XLI

POLITICAL FUND ACTIVITY; DEFINITIONS

1. No officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be a Member of the Senate or to any other Federal office. This prohibition does not apply to three⁸⁸ assistants to a Senator, at least one of whom is in Washington, District of Columbia, who have been designated by that Senator to perform any of the functions described in the first sentence of this paragraph and who are compensated at an annual rate in excess of \$10,000 if such designation has been made in writing and filed with the Secretary of the Senate and if each such assistant files a financial statement in the form provided under rule XXXIV for each year during which he is designated under this rule. The Majority Leader and the Minority Leader may each designate an employee of their respective leadership office staff as one of the 3 designees referred to in the second sentence.⁸⁹ The Secretary of the Senate shall make the designation available for public inspection.

2. For purposes of the Senate Code of Official Conduct—

(a) an employee of the Senate includes any employee whose salary is disbursed by the Secretary of the Senate; and

(b) the compensation of an officer or employee of the Senate who is a reemployed annuitant shall include amounts received by such officer or employee as an annuity, and such amounts shall be treated as disbursed by the Secretary of the Senate.

3. Before approving the utilization by any committee of the Senate of the services of an officer or employee of the Government in

⁸⁷ As amended, S. Res. 224, 103-2, June 21, 1994.

⁸⁸ As amended by S. Res. 258, 100-1, Oct. 1, 1987.

⁸⁹ Pursuant to S. Res. 236, 101-2, Jan. 30, 1990.

accordance with paragraph 4⁹⁰ of rule XXVII or with an authorization provided by Senate resolution, the Committee on Rules and Administration shall require such officer or employee to agree in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate. Any such officer or employee shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation he is receiving as an officer or employee of the Government.

4. No Member, officer, or employee of the Senate shall utilize the full-time services of an individual for more than ninety days in a calendar year in the conduct of official duties of any committee or office of the Senate (including a Member's office) unless such individual—

- (a) is an officer or employee of the Senate,
- (b) is an officer or employee of the Government (other than the Senate), or
- (c) agrees in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate.

Any individual to whom subparagraph (c) applies shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation which such individual is receiving from any source for performing such services.

5. In exceptional circumstances for good cause shown, the Select Committee on Ethics may waive the applicability of any provision of the Senate Code of Official Conduct to an employee hired on a per diem basis.

6. (a) The supervisor of an individual who performs services for any Member, committee, or office of the Senate for a period in excess of four weeks and who receives compensation therefor from any source other than the United States Government shall report to the Select Committee on Ethics with respect to the utilization of the services of such individual.

(b) A report under subparagraph (a) shall be made with respect to an individual—

- (1) when such individual begins performing services described in such subparagraph;
- (2) at the close of each calendar quarter while such individual is performing such services; and
- (3) when such individual ceases to perform such services.

Each such report shall include the identity of the source of the compensation received by such individual and the amount or rate of compensation paid by such source.

(c) No report shall be required under subparagraph (a) with respect to an individual who normally performs services for a Member, committee, or office for less than eight hours a week.

⁹⁰Reference corrected by S. Res. 192, 102-1, Oct. 31, 1991.

(d) For purposes of this paragraph, the supervisor of an individual shall be determined under paragraph 12 of rule XXXVII.⁹¹

RULE XLII

EMPLOYMENT PRACTICES

1. No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

- (a) fail or refuse to hire an individual;
- (b) discharge an individual; or
- (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

2.⁹² For purposes of this rule, the provisions of section 509(a) of the Americans With Disabilities Act of 1990 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

RULE XLIII

REPRESENTATION BY MEMBERS⁹³

1. In responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies.

2. At the request of a petitioner, a Member of the Senate, or a Senate employee, may communicate with an executive or independent government official or agency on any matter to—

- (a) request information or a status report;
- (b) urge prompt consideration;
- (c) arrange for interviews or appointments;
- (d) express judgments;
- (e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or
- (f) perform any other service of a similar nature consistent with the provisions of this rule.

3. The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest.

4. A Member shall make a reasonable effort to assure that representations made in the Member's name by any Senate employee

⁹¹Redesignated pursuant to S. Res. 236, 101-2, Jan. 30, 1990 and S. Res. 299, 106-2, Apr. 27, 2000.

⁹²Added by S. Res. 192, 102-1, Oct. 31, 1991, effective July 26, 1990. ADA was subsequently amended by the Government Employee Rights Act of 1991 (Title 3, Civil Rights Act of 1991, Pub. L. 102-166, codified at 2 U.S.C. 1201 et seq.). See Senate Manual Secs. 751, 752, S. Doc. 112-1.

⁹³Rule established by S. Res. 273, 102-2, July 2, 1992.

are accurate and conform to the Member's instructions and to this rule.

5. Nothing in this rule shall be construed to limit the authority of Members, and Senate employees, to perform legislative, including committee, responsibilities.

6.⁹⁴ No Member, with the intent to influence solely on the basis of partisan political affiliation an employment decision or employment practice of any private entity, shall—

(a) take or withhold, or offer or threaten to take or withhold, an official act; or

(b) influence, or offer or threaten to influence the official act of another.

RULE XLIV⁹⁵

CONGRESSIONALLY DIRECTED SPENDING AND RELATED ITEMS

1. (a) It shall not be in order to vote on a motion to proceed to consider a bill or joint resolution reported by any committee unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, or in the committee report accompanying the bill or joint resolution, has been identified through lists, charts, or other similar means including the name of each Senator who submitted a request to the committee for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website in a searchable format at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, the motion to proceed shall be suspended until the sponsor of the motion or his or her designee has requested resumption and compliance with this paragraph has been achieved.

2. (a) It shall not be in order to vote on a motion to proceed to consider a Senate bill or joint resolution not reported by committee unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, has been identified through lists, charts, or other similar means, including the name of each Senator who submitted a request to the sponsor of the bill or joint resolution for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website in a searchable format at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, the motion to proceed shall be suspended until the sponsor of the motion or his or her designee has requested resumption and compliance with this paragraph has been achieved.

⁹⁴ Paragraph 6 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁹⁵ Rule XLIV added pursuant to Pub. L. 110–81, Sep. 14, 2007.

3. (a) It shall not be in order to vote on the adoption of a report of a committee of conference unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the conference report, or in the joint statement of managers accompanying the conference report, has been identified through lists, charts, or other means, including the name of each Senator who submitted a request to the committee of jurisdiction for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, then the conference report shall be set aside.

4. (a) If during consideration of a bill or joint resolution, a Senator proposes an amendment containing a congressionally directed spending item, limited tax benefit, or limited tariff benefit which was not included in the bill or joint resolution as placed on the calendar or as reported by any committee, in a committee report on such bill or joint resolution, or a committee report of the Senate on a companion measure, then as soon as practicable, the Senator shall ensure that a list of such items (and the name of any Senator who submitted a request to the Senator for each respective item included in the list) is printed in the Congressional Record.

(b) If a committee reports a bill or joint resolution that includes congressionally directed spending items, limited tax benefits, or limited tariff benefits in the bill or joint resolution, or in the committee report accompanying the bill or joint resolution, the committee shall as soon as practicable identify on a publicly accessible congressional website each such item through lists, charts, or other similar means, including the name of each Senator who submitted a request to the committee for each item so identified. Availability on the Internet of a committee report that contains the information described in this subparagraph shall satisfy the requirements of this subparagraph.

(c) To the extent technically feasible, information made available on publicly accessible congressional websites under paragraphs 3 and 4 shall be provided in a searchable format.

5. For the purpose of this rule—

(a) the term “congressionally directed spending item” means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process;

(b) the term “limited tax benefit” means—

(1) any revenue provision that—

(A) provides a Federal tax deduction, credit, exclusion, or preference to a particular beneficiary or lim-

ited group of beneficiaries under the Internal Revenue Code of 1986; and

(B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision;

(c) the term “limited tariff benefit” means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities; and

(d) except as used in subparagraph 8(e), the term “item” when not preceded by “congressionally directed spending” means any provision that is a congressionally directed spending item, a limited tax benefit, or a limited tariff benefit.

6. (a) A Senator who requests a congressionally directed spending item, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report (or an accompanying joint statement of managers) shall provide a written statement to the chairman and ranking member of the committee of jurisdiction, including—

(1) the name of the Senator;

(2) in the case of a congressionally directed spending item, the name and location of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity;

(3) in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Senator;

(4) the purpose of such congressionally directed spending item or limited tax or tariff benefit; and

(5) a certification that neither the Senator nor the Senator’s immediate family has a pecuniary interest in the item, consistent with the requirements of paragraph 9.

(b) With respect to each item included in a Senate bill or joint resolution (or accompanying report) reported by committee or considered by the Senate, or included in a conference report (or joint statement of managers accompanying the conference report) considered by the Senate, each committee of jurisdiction shall make available for public inspection on the Internet the certifications under subparagraph (a)(5) as soon as practicable.

7. In the case of a bill, joint resolution, or conference report that contains congressionally directed spending items in any classified portion of a report accompanying the measure, the committee of jurisdiction shall, to the greatest extent practicable, consistent with the need to protect national security (including intelligence sources and methods), include on the list required by paragraph 1, 2, or 3 as the case may be, a general program description in unclassified language, funding level, and the name of the sponsor of that congressionally directed spending item.

8. (a) A Senator may raise a point of order against one or more provisions of a conference report if they constitute new directed spending provisions. The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order.

(b) If the Presiding Officer sustains the point of order as to any of the provisions against which the Senator raised the point of

order, then those provisions against which the Presiding Officer sustains the point of order shall be stricken. After all other points of order under this paragraph have been disposed of—

(1) the Senate shall proceed to consider the question of whether the Senate should recede from its amendment to the House bill, or its disagreement to the amendment of the House, and concur with a further amendment, which further amendment shall consist of only that portion of the conference report that has not been stricken; and

(2) the question in clause (1) shall be decided under the same debate limitation as the conference report and no further amendment shall be in order.

(c) Any Senator may move to waive any or all points of order under this paragraph with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. All motions to waive under this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order under this paragraph shall not be amendable.

(d) All appeals from rulings of the Chair under this paragraph shall be debatable collectively for not to exceed 1 hour, equally divided between the Majority and the Minority Leader or their designees. An affirmative vote of three-fifths of the Members of the Senate, duly chosen and sworn, shall be required in the Senate to sustain an appeal of the ruling of the Chair under this paragraph.

(e) The term 'new directed spending provision' as used in this paragraph means any item that consists of a specific provision containing a specific level of funding for any specific account, specific program, specific project, or specific activity, when no specific funding was provided for such specific account, specific program, specific project, or specific activity in the measure originally committed to the conferees by either House.

9. No Member, officer, or employee of the Senate shall knowingly use his official position to introduce, request, or otherwise aid the progress or passage of congressionally directed spending items, limited tax benefits, or limited tariff benefits a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he or his immediate family, or enterprises controlled by them, are members of the affected class.

10. Any Senator may move to waive application of paragraph 1, 2, or 3 with respect to a measure by an affirmative vote of three-fifths of the Members, duly chosen and sworn. A motion to waive under this paragraph with respect to a measure shall be debatable for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. With respect to points of order raised under paragraphs 1, 2, or 3, only one appeal from a ruling of the Chair shall be in order, and debate on such an appeal from a ruling of the Chair on such point of order shall be limited to one hour.

11. Any Senator may move to waive all points of order under this rule with respect to the pending measure or motion by an affirma-

tive vote of three-fifths of the Members, duly chosen and sworn. All motions to waive all points of order with respect to a measure or motion as provided by this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order with respect to a measure or motion as provided by this paragraph shall not be amendable.

12. Paragraph 1, 2, or 3 of this rule may be waived by joint agreement of the Majority Leader and the Minority Leader of the Senate upon their certification that such waiver is necessary as a result of a significant disruption to Senate facilities or to the availability of the Internet.

APPENDIX

NOTE.—S. Res. 445, 108–2, a resolution to eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence, passed the Senate Oct. 9, 2004. The resolution made several changes to the jurisdiction, treatment and name of Senate Committees. However, the provisions of S. Res. 445 did not modify the Standing Rules of the Senate and therefore could not be included in this document except as an appendix. The effective date for the provisions of the resolution was the convening of the 109th Congress. Titles I, III and V of S. Res. 445 are printed in this appendix.

S. Res. 28, 112–1, a resolution to establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter, passed the Senate Jan. 27, 2011. S. Res. 29, 112–1, a resolution to permit the waiving of the reading of an amendment if the text and adequate notice are provided, passed the Senate Jan. 27, 2011. S. Res. 15, 113–1, a resolution to improve procedures for the consideration of legislation and nominations in the Senate, passed the Senate Jan. 24, 2013. These resolutions made changes to Senate procedure but did not modify the Standing Rules of the Senate and therefore could not be included in this document except as an appendix. S. Res. 28, S. Res. 29 and S. Res. 15 are printed in this appendix.

S. RES. 445

To eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence.

IN THE SENATE OF THE UNITED STATES

October 1, 2004

Mr. Lott submitted the following resolution; which was referred to the Committee on Rules and Administration

October 5, 2004

Reported by Mr. Lott, without amendment

October 9, 2004

Considered, amended, and agreed to

RESOLUTION

To eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence.

Resolved,

SEC. 100. PURPOSE.

It is the purpose of titles I through V of this resolution to improve the effectiveness of the Senate Select Committee on Intelligence, especially with regard to its oversight of the Intelligence Community of the United States Government, and to improve the Senate's oversight of homeland security.

TITLE I—HOMELAND SECURITY OVERSIGHT REFORM**SEC. 101. HOMELAND SECURITY.**

(a) COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS.—The Committee on Governmental Affairs is renamed as the Committee on Homeland Security and Governmental Affairs.

(b) JURISDICTION.—There shall be referred to the committee all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

- (1) Department of Homeland Security, except matters relating to—
 - (A) the Coast Guard, the Transportation Security Administration, the Federal Law Enforcement Training Center or the Secret Service; and
 - (B)(i) the United States Citizenship and Immigration Service; or
 - (ii) the immigration functions of the United States Customs and Border Protection or the United States Immigration and Custom Enforcement or the Directorate of Border and Transportation Security; and
 - (C) the following functions performed by any employee of the Department of Homeland Security—
 - (i) any customs revenue function including any function provided for in section 415 of the Homeland Security Act of 2002 (Public Law 107–296);
 - (ii) any commercial function or commercial operation of the Bureau of Customs and Border Protection or Bureau of Immigration and Customs Enforcement, including matters relating to trade facilitation and trade regulation; or
 - (iii) any other function related to clause (i) or (ii) that was exercised by the United States Customs Service on the day before the effective date of the Homeland Security Act of 2002 (Public Law 107–296).

The jurisdiction of the Committee on Homeland Security and Governmental Affairs in this paragraph shall supersede the jurisdiction of any other committee of the Senate provided in the rules of the Senate: *Provided*, That the jurisdiction pro-

vided under section 101(b)(1) shall not include the National Flood Insurance Act of 1968, or functions of the Federal Emergency Management Agency related thereto.

- (2) Archives of the United States.
 - (3) Budget and accounting measures, other than appropriations, except as provided in the Congressional Budget Act of 1974.
 - (4) Census and collection of statistics, including economic and social statistics.
 - (5) Congressional organization, except for any part of the matter that amends the rules or orders of the Senate.
 - (6) Federal Civil Service.
 - (7) Government information.
 - (8) Intergovernmental relations.
 - (9) Municipal affairs of the District of Columbia, except appropriations therefor.
 - (10) Organization and management of United States nuclear export policy.
 - (11) Organization and reorganization of the executive branch of the Government.
 - (12) Postal Service.
 - (13) Status of officers and employees of the United States, including their classification, compensation, and benefits.
- (c) ADDITIONAL DUTIES.—The committee shall have the duty of—
- (1) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;
 - (2) studying the efficiency, economy, and effectiveness of all agencies and departments of the Government;
 - (3) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government; and
 - (4) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.
- (d) JURISDICTION OF BUDGET COMMITTEE.—Notwithstanding paragraph (b)(3) of this section, and except as otherwise provided in the Congressional Budget Act of 1974, the Committee on the Budget shall have exclusive jurisdiction over measures affecting the congressional budget process, which are—
- (1) the functions, duties, and powers of the Budget Committee;
 - (2) the functions, duties, and powers of the Congressional Budget Office;
 - (3) the process by which Congress annually establishes the appropriate levels of budget authority, outlays, revenues, deficits or surpluses, and public debt—including subdivisions thereof—and including the establishment of mandatory ceilings on spending and appropriations, a floor on revenues, timetables for congressional action on concurrent resolutions, on the reporting of authorization bills, and on the enactment of appropriation bills, and enforcement mechanisms for budgetary limits and timetables;
 - (4) the limiting of backdoor spending devices;
 - (5) the timetables for Presidential submission of appropriations and authorization requests;
 - (6) the definitions of what constitutes impoundment—such as “rescissions” and “deferrals”;
 - (7) the process and determination by which impoundments must be reported to and considered by Congress;
 - (8) the mechanisms to insure Executive compliance with the provisions of the Impoundment Control Act, title X—such as GAO review and lawsuits; and
 - (9) the provisions which affect the content or determination of amounts included in or excluded from the congressional budget or the calculation of such amounts, including the definition of terms provided by the Budget Act.
- (e) OMB NOMINEES.—The Committee on the Budget and the Committee on Homeland Security and Governmental Affairs shall have joint jurisdiction over the nominations of persons nominated by the President to fill the positions of Director and Deputy Director for Budget within the Office of Management and Budget, and if one committee votes to order reported such a nomination, the other must report within 30 calendar days session, or be automatically discharged.

TITLE III—COMMITTEE STATUS

SEC. 301. COMMITTEE STATUS.

(a) **HOMELAND SECURITY.**—The Committee on Homeland Security and Governmental Affairs shall be treated as the Committee on Governmental Affairs listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate.

(b) **INTELLIGENCE.**—The Select Committee on Intelligence shall be treated as a committee listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate.

TITLE V—EFFECTIVE DATE

SEC. 501. EFFECTIVE DATE.

This resolution shall take effect on the convening of the 109th Congress.

S. RES. 28

To establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter.

IN THE SENATE OF THE UNITED STATES

January 27, 2011

Mr. WYDEN (for himself, Mr. GRASSLEY, Mrs. MCCASKILL, Mr. BROWN of Ohio, Mr. BINGAMAN, Mr. INHOFE, Mrs. MURRAY, Mrs. SHAHEEN, Mr. UDALL of Colorado, Mr. WHITEHOUSE, Ms. KLOBUCHAR, Ms. COLLINS, Mr. DURBIN, Mrs. GILLIBRAND, Mr. TESTER, Mr. JOHANNIS, Mr. MERKLEY, Mr. BEGICH, and Mr. MANCHIN) submitted the following resolution; which was considered and agreed to

RESOLUTION

To establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter.

Resolved,

SECTION 1. ELIMINATING SECRET SENATE HOLDS.

(a) In General—

(1) COVERED REQUEST—This standing order shall apply to a notice of intent to object to the following covered requests:

(A) A unanimous consent request to proceed to a bill, resolution, joint resolution, concurrent resolution, conference report, or amendment between the Houses.

(B) A unanimous consent request to pass a bill or joint resolution or adopt a resolution, concurrent resolution, conference report, or the disposition of an amendment between the Houses.

(C) A unanimous consent request for disposition of a nomination.

(2) RECOGNITION OF NOTICE OF INTENT—The majority and minority leaders of the Senate or their designees shall recognize a notice of intent to object to a covered request of a Senator who is a member of their caucus if the Senator--

(A) submits the notice of intent to object in writing to the appropriate leader and grants in the notice of intent to object permission for the leader or designee to object in the Senator's name; and

(B) not later than 2 session days after submitting the notice of intent to object to the appropriate leader, submits a copy of the notice of intent to object to the Congressional Record and to the Legislative Clerk for inclusion in the applicable calendar section described in subsection (b).

(3) FORM OF NOTICE—To be recognized by the appropriate leader a Senator shall submit the following notice of intent to object:

"I, Senator XXX, intend to object to XXX, dated XXX. I will submit a copy of this notice to the Legislative Clerk and the Congressional Record within 2 session days and I give my permission to the objecting Senator to object in my name." The first blank shall be filled with the name of the Senator, the second blank shall be filled with the name of the covered request, the name of the measure or matter and, if applicable, the calendar number, and the third blank shall be filled with the date that the notice of intent to object is submitted.

(4) NOTICES ON THE SENATE FLOOR- The requirement to submit a notice of intent to object to the Legislative Clerk and the Congressional Record shall not apply in the event a Senator objects on the floor of the Senate and states the following:

"I object to XXX, on behalf of Senator XXX."

(b) Calendar—

(1) OBJECTION—Upon receiving the submission under subsection (a)(2)(B), the Legislative Clerk shall add the information from the notice of intent to object to the applicable Calendar section entitled 'Notices of Intent to Object to Proceeding' created by Public Law 110-81. Each section shall include the name of each Senator filing a notice under subsection (a)(2)(B), the measure or matter covered by the calendar to which the notice of intent to object relates, and the date the notice of intent to object was filed.

(2) OBJECTION ON BEHALF- In the case of an objection made under subsection (a)(4), not later than 2 session days after the objection is made on the floor, the Legislative Clerk shall add the information from such objection to the applicable Calendar section entitled 'Notices of Intent to Object to Proceeding' created by Public Law 110-81. Each section shall include the name of the Senator on whose behalf the objection was made, the measure or matter objected to, and the date the objection was made on the floor.

(c) Removal- A Senator may have a notice of intent to object relating to that Senator removed from a calendar to which it was added under subsection (b) by submitting to the Legislative Clerk the following notice:

"I, Senator XXX, do not object to XXX, dated XXX." The first blank shall be filled with the name of the Senator, the second blank shall be filled with the name of the covered request, the name of the measure or matter and, if applicable, the calendar number, and the third blank shall be filled with the date of the submission to the Legislative Clerk under this subsection.

(d) Objecting on Behalf of a Member- Except with respect to objections made under subsection (a)(4), if a Senator who has notified his or her leader of an intent to object to a covered request fails to submit a notice of intent to object under subsection (a)(2)(B) within 2 session days following an objection to a covered request by the leader or his or her designee on that Senator's behalf, the Legislative Clerk shall list the Senator who made the objection to the covered request in the applicable 'Notice of Intent to Object to Proceeding' calendar section.

S. RES. 29

To permit the waiving of the reading of an amendment if the text and adequate notice are provided.

IN THE SENATE OF THE UNITED STATES

January 27, 2011

Mr. UDALL of Colorado (for himself and Mr. MERKLEY) submitted the following resolution; which was considered and agreed to

RESOLUTION

To permit the waiving of the reading of an amendment if the text and adequate notice are provided.

Resolved,

SECTION 1. READING OF AMENDMENTS.

- (a) Standing Order—This section shall be a standing order of the Senate.
- (b) Waiver—The reading of an amendment may be waived by a non-debatable motion if the amendment—
 - (1) has been submitted at least 72 hours before the motion; and
 - (2) is available in printed or electronic form in the Congressional Record.

S. RES. 15

To improve procedures for the consideration of legislation and nominations in the Senate.

IN THE SENATE OF THE UNITED STATES

JANUARY 24 (legislative day, JANUARY 3), 2013

Mr. REID (for himself, Mr. LEVIN, and Mr. MCCAIN) submitted the following resolution; which was considered and agreed to

RESOLUTION

To improve procedures for the consideration of legislation and nominations in the Senate.

Resolved,

SECTION 1. CONSIDERATION OF LEGISLATION.

(a) MOTION TO PROCEED AND CONSIDERATION OF AMENDMENTS.—A motion to proceed to the consideration of a measure or matter made pursuant to this section shall be debatable for no more than 4 hours, equally divided in the usual form. If the motion to proceed is agreed to the following conditions shall apply:

(1) The first amendments in order to the measure or matter shall be one first-degree amendment each offered by the minority, the majority, the minority, and the majority, in that order. If an amendment is not offered in its designated order under this paragraph, the right to offer that amendment is forfeited.

(2) If a cloture motion has been filed pursuant to rule XXII of the Standing Rules of the Senate on a measure or matter proceeded to under this section, it shall not be in order for the minority to propose its first amendment unless it has been submitted to the Senate Journal Clerk by 1:00 p.m. on the day following the filing of that cloture motion, for the majority to propose its first amendment unless it has been submitted to the Senate Journal Clerk by 3:00 p.m. on the day following the filing of that cloture motion, for the minority to propose its second amendment unless it has been submitted to the Senate Journal Clerk by 5:00 p.m. on the day following the filing of that cloture motion, or for the majority to propose its second amendment unless it has been submitted to the Senate Journal Clerk by 7:00 p.m. on the day following the filing of that cloture motion. If an amendment is not timely submitted under this paragraph, the right to offer that amendment is forfeited.

(3) An amendment offered under paragraph (1) shall be disposed of before the next amendment in order under paragraph (1) may be offered.

(4) An amendment offered under paragraph (1) is not divisible or subject to amendment while pending.

(5) An amendment offered under paragraph (1), if adopted, shall be considered original text for purpose of further amendment.

(6) No points of order shall be waived by virtue of this section.

(7) No motion to commit or recommit shall be in order during the pendency of any amendment offered pursuant to paragraph (1).

(8) Notwithstanding rule XXII of the Standing Rules of the Senate, if cloture is invoked on the measure or matter before all amendments offered under paragraph (1) are disposed of, any amendment in order under paragraph (1) but not actually pending upon the expiration of post-cloture time may be offered and may be debated for not to exceed 1 hour, equally divided in the usual form. Any amendment offered under paragraph (1) that is ruled non-germane on a point of order shall not fall upon that ruling, but instead shall remain pending and shall require 60 votes in the affirmative to be agreed to.

(b) SUNSET.—This section shall expire on the day after the date of the sine die adjournment of the 113th Congress.

SEC. 2. CONSIDERATION OF NOMINATIONS.

(a) IN GENERAL.—

(1) Post-Cloture Consideration.—If cloture is invoked in accordance with rule XXII of the Standing Rules of the Senate on a nomination described in para-

graph (2), there shall be no more than 8 hours of post-cloture consideration equally divided in the usual form.

(2) Nominations Covered.—A nomination described in this paragraph is any nomination except for the nomination of an individual—

(A) to a position at level I of the Executive Schedule under section 5312 of title 5, United States Code; or

(B) to serve as a judge or justice appointed to hold office during good behavior.

(b) SPECIAL RULE FOR DISTRICT COURT NOMINEES.—If cloture is invoked in accordance with rule XXII of the Standing Rules of the Senate on a nomination of an individual to serve as a judge of a district court of the United States, there shall be no more than 2 hours of post-cloture consideration equally divided in the usual form.

(c) SUNSET.—This section shall expire on the day after the date of the sine die adjournment of the 113th Congress.

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RULES
of the
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS



PREPARED BY
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RULES OF THE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

RULE I THE SPEAKER

Approval of the Journal

1. The Speaker shall take the Chair on every legislative day precisely at the hour to which the House last adjourned and immediately call the House to order. Having examined and approved the Journal of the last day's proceedings, the Speaker shall announce to the House approval thereof. The Speaker's approval of the Journal shall be deemed agreed to unless a Member, Delegate, or Resident Commissioner demands a vote thereon. If such a vote is decided in the affirmative, it shall not be subject to a motion to reconsider. If such a vote is decided in the negative, then one motion that the Journal be read shall be privileged, shall be decided without debate, and shall not be subject to a motion to reconsider.

Preservation of order

2. The Speaker shall preserve order and decorum and, in case of disturbance or disorderly conduct in the galleries or in the lobby, may cause the same to be cleared.

Control of Capitol facilities

3. Except as otherwise provided by rule or law, the Speaker shall have general control of the Hall of the House, the corridors and passages in the part of the Capitol assigned to the use of the House, and the disposal of unappropriated rooms in that part of the Capitol.

Signature of documents

4. The Speaker shall sign all acts and joint resolutions passed by the two Houses and all writs, warrants, and subpoenas of, or issued by order of, the House. The Speaker may sign enrolled bills and joint resolutions whether or not the House is in session.

Questions of order

5. The Speaker shall decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner. On such an appeal a Member, Delegate, or Resident Commissioner may not speak more than once without permission of the House.

Form of a question

6. The Speaker shall put a question in this form: "Those in favor (of the question), say 'Aye.'"; and after the affirmative voice is expressed, "Those opposed, say 'No.'" After a vote by voice under this clause, the Speaker

may use such voting procedures as may be invoked under rule XX.

Discretion to vote

7. The Speaker is not required to vote in ordinary legislative proceedings, except when such vote would be decisive or when the House is engaged in voting by ballot.

Speaker pro tempore

8. (a) The Speaker may appoint a Member to perform the duties of the Chair. Except as specified in paragraph (b), such an appointment may not extend beyond three legislative days.

(b)(1) In the case of illness, the Speaker may appoint a Member to perform the duties of the Chair for a period not exceeding 10 days, subject to the approval of the House. If the Speaker is absent and has omitted to make such an appointment, then the House shall elect a Speaker pro tempore to act during the absence of the Speaker.

(2) With the approval of the House, the Speaker may appoint a Member to act as Speaker pro tempore only to sign enrolled bills and joint resolutions for a specified period of time.

(3)(A) In the case of a vacancy in the Office of Speaker, the next Member on the list described in subdivision (B) shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end.

(B) As soon as practicable after the election of the Speaker and whenever appropriate thereafter, the Speaker shall deliver to the Clerk a list of Members in the order in which each shall act as Speaker pro tempore under subdivision (A).

(C) For purposes of subdivision (A), a vacancy in the Office of Speaker may exist by reason of the physical inability of the Speaker to discharge the duties of the office.

Other responsibilities

9. The Speaker, in consultation with the Minority Leader, shall develop through an appropriate entity of the House a system for drug testing in the House. The system may provide for the testing of a Member, Delegate, Resident Commissioner, officer, or employee of the House, and otherwise shall be comparable in scope to the system for drug testing in the executive branch pursuant to Executive Order 12564 (Sept. 15, 1986). The expenses of

the system may be paid from applicable accounts of the House for official expenses.

Designation of travel

10. The Speaker may designate a Member, Delegate, Resident Commissioner, officer, or employee of the House to travel on the business of the House within or without the United States, whether the House is meeting, has recessed, or has adjourned. Expenses for such travel may be paid from applicable accounts of the House described in clause 1(k)(1) of rule X on vouchers approved and signed solely by the Speaker.

Committee appointment

11. The Speaker shall appoint all select, joint, and conference committees ordered by the House. At any time after an original appointment, the Speaker may remove Members, Delegates, or the Resident Commissioner from, or appoint additional Members, Delegates, or the Resident Commissioner to, a select or conference committee. In appointing Members, Delegates, or the Resident Commissioner to conference committees, the Speaker shall appoint no less than a majority who generally supported the House position as determined by the Speaker, shall name those who are primarily responsible for the legislation, and shall, to the fullest extent feasible, include the principal proponents of the major provisions of the bill or resolution passed or adopted by the House.

Recess and convening authorities

12. (a) To suspend the business of the House for a short time when no question is pending before the House, the Speaker may declare a recess subject to the call of the Chair.

(b)(1) To suspend the business of the House when notified of an imminent threat to its safety, the Speaker may declare an emergency recess subject to the call of the Chair.

(2) To suspend the business of the Committee of the Whole House on the state of the Union when notified of an imminent threat to its safety, the chair of the Committee of the Whole may declare an emergency recess subject to the call of the Chair.

(c) During any recess or adjournment of not more than three days, if the Speaker is notified by the Sergeant-at-Arms of an imminent impairment of the place of reconvening at the time previously appointed, then the Speaker may, in consultation with the Minority Leader—

RULES OF THE

Rule II, clause 3

Rule II, clause 3

(1) postpone the time for reconvening within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly; or

(2) reconvene the House before the time previously appointed solely to declare the House in recess within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly.

(d) The Speaker may convene the House in a place at the seat of government other than the Hall of the House if, in the opinion of the Speaker, the public interest shall warrant it.

(e) During any recess or adjournment of not more than three days, if in the opinion of the Speaker the public interest so warrants, then the Speaker, after consultation with the Minority Leader, may reconvene the House at a time other than that previously appointed, within the limits of clause 4, section 5, article I of the Constitution, and notify Members accordingly.

(f) The Speaker may name a designee for purposes of paragraphs (c), (d), and (e).

RULE II

OTHER OFFICERS AND OFFICIALS

Elections

1. There shall be elected at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain. Each of these officers shall take an oath to support the Constitution of the United States, and for the true and faithful exercise of the duties of the office to the best of the knowledge and ability of the officer, and to keep the secrets of the House. Each of these officers shall appoint all of the employees of the department concerned provided for by law. The Clerk, Sergeant-at-Arms, and Chief Administrative Officer may be removed by the House or by the Speaker.

Clerk

2. (a) At the commencement of the first session of each Congress, the Clerk shall call the Members, Delegates, and Resident Commissioner to order and proceed to record their presence by States in alphabetical order, either by call of the roll or by use of the electronic voting system. Pending the election of a Speaker or Speaker pro tempore, and in the absence of a Member acting as Speaker pro tempore pursuant to clause 8(b)(3)(A) of rule I, the Clerk shall preserve order and decorum and decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner.

(b) At the commencement of every regular session of Congress, the Clerk shall make and cause to be delivered to each Member, Delegate, and the Resident Commissioner a list of the reports that any officer or Department is required to make to Congress, citing the law or resolution in which the require-

ment may be contained and placing under the name of each officer the list of reports required to be made by such officer.

(c) The Clerk shall—

(1) note all questions of order, with the decisions thereon, the record of which shall be appended to the Journal of each session;

(2) enter on the Journal the hour at which the House adjourns;

(3) complete the distribution of the Journal to Members, Delegates, and the Resident Commissioner, together with an accurate and complete index, as soon as possible after the close of a session; and

(4) send a copy of the Journal to the executive of and to each branch of the legislature of every State as may be requested by such State officials.

(d)(1) The Clerk shall attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House and certify the passage of all bills and joint resolutions.

(2) The Clerk shall examine all bills, amendments, and joint resolutions after passage by the House and, in cooperation with the Senate, examine all bills and joint resolutions that have passed both Houses to see that they are correctly enrolled and forthwith present those bills and joint resolutions that originated in the House to the President in person after their signature by the Speaker and the President of the Senate, and report to the House the fact and date of their presentation.

(e) The Clerk shall cause the calendars of the House to be distributed each legislative day.

(f) The Clerk shall—

(1) retain in the library at the Office of the Clerk for the use of the Members, Delegates, Resident Commissioner, and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; and

(2) deliver to any Member, Delegate, or the Resident Commissioner an extra copy of each document requested by that Member, Delegate, or Resident Commissioner that has been printed by order of either House of Congress in any Congress in which the Member, Delegate, or Resident Commissioner served.

(g) The Clerk shall provide for the temporary absence or disability of the Clerk by designating an official in the Office of the Clerk to sign all papers that may require the official signature of the Clerk and to perform all other official acts that the Clerk may be required to perform under the rules and practices of the House, except such official acts as are provided for by statute. Official acts performed by the designated official shall be under the name of the Clerk. The designation shall be in writing and shall be laid before the House and entered on the Journal.

(h) The Clerk may receive messages from the President and from the Senate at any time when the House is in recess or adjournment.

(i)(1) The Clerk shall supervise the staff and manage the office of a Member, Delegate, or Resident Commissioner who has died, resigned, or been expelled until a successor is elected. The Clerk shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the person representing such district or other reason. When acting as a supervisory authority over such staff, the Clerk shall have authority to terminate employees and, with the approval of the Committee on House Administration, may appoint such staff as is required to operate the office until a successor is elected.

(2) For 60 days following the death of a former Speaker, the Clerk shall maintain on the House payroll, and shall supervise in the same manner, staff appointed under House Resolution 1238, Ninety-first Congress (as enacted into permanent law by chapter VIII of the Supplemental Appropriations Act, 1971) (2 U.S.C. 5128).

(j) In addition to any other reports required by the Speaker or the Committee on House Administration, the Clerk shall report to the Committee on House Administration not later than 45 days following the close of each semi-annual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Clerk. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(k) The Clerk shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Sergeant-at-Arms

3. (a) The Sergeant-at-Arms shall attend the House during its sittings and maintain order under the direction of the Speaker or other presiding officer. The Sergeant-at-Arms shall execute the commands of the House, and all processes issued by authority thereof, directed to the Sergeant-at-Arms by the Speaker.

(b) The symbol of the Office of the Sergeant-at-Arms shall be the mace, which shall be borne by the Sergeant-at-Arms while enforcing order on the floor.

(c) The Sergeant-at-Arms shall enforce strictly the rules relating to the privileges of the Hall of the House and be responsible to the House for the official conduct of employees of the Office of the Sergeant-at-Arms.

(d) The Sergeant-at-Arms may not allow a person to enter the room over the Hall of the House during its sittings and, from 15 minutes before the hour of the meeting of the House

HOUSE OF REPRESENTATIVES

Rule III, clause 2

each day until 10 minutes after adjournment, shall see that the floor is cleared of all persons except those privileged to remain.

(e) In addition to any other reports required by the Speaker or the Committee on House Administration, the Sergeant-at-Arms shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Sergeant-at-Arms. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(f) The Sergeant-at-Arms shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(g)(1) The Sergeant-at-Arms is authorized and directed to impose a fine against a Member, Delegate, or the Resident Commissioner for the use of an electronic device for still photography or for audio or visual recording or broadcasting in contravention of clause 5 of rule XVII and any applicable Speaker's announced policy on electronic devices.

(2) A fine imposed pursuant to this paragraph shall be \$500 for a first offense and \$2,500 for any subsequent offense.

(3)(A) The Sergeant-at-Arms shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker, the Chief Administrative Officer, and the Committee on Ethics of any such fine.

(B) Such Member, Delegate, or Resident Commissioner may appeal the fine in writing to the Committee on Ethics not later than 30 calendar days or five legislative days, whichever is later, after notification pursuant to subdivision (A).

(C) Upon receipt of an appeal pursuant to subdivision (B), the Committee on Ethics shall have 30 calendar days or five legislative days, whichever is later, to either dismiss the fine or allow it to proceed. Upon a determination regarding the appeal or if no appeal has been filed at the expiration of the period specified in subdivision (B), the chair of the Committee on Ethics shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker and the Chief Administrative Officer. The Speaker shall promptly lay such notification before the House.

(4) The Sergeant-at-Arms and the Committee on Ethics are authorized to establish policies and procedures for the implementation of this paragraph.

Chief Administrative Officer

4. (a) The Chief Administrative Officer shall have operational and financial responsibility for functions as assigned by the Committee on House Ad-

ministration and shall be subject to the policy direction and oversight of the Committee on House Administration.

(b) In addition to any other reports required by the Committee on House Administration, the Chief Administrative Officer shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or December 31 on the financial and operational status of each function under the jurisdiction of the Chief Administrative Officer. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(c) The Chief Administrative Officer shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(d)(1) Upon notification from the chair of the Committee on Ethics pursuant to clause 3(g)(3)(C), the Chief Administrative Officer shall deduct the amount of any fine levied under clause 3(g) from the net salary otherwise due the Member, Delegate, or the Resident Commissioner.

(2) The Chief Administrative Officer is authorized to establish policies and procedures for such salary deductions.

Chaplain

5. The Chaplain shall offer a prayer at the commencement of each day's sitting of the House.

Office of Inspector General

6. (a) There is established an Office of Inspector General.

(b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.

(c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only—

(1) provide audit, investigative, and advisory services to the House and joint entities in a manner consistent with government-wide standards;

(2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause;

(4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on Appropriations and the Committee on House Administration a report of each audit conducted under this clause; and

Rule III, clause 2

(5) report to the Committee on Ethics information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.

Office of the Historian

7. There is established an Office of the Historian of the House of Representatives. The Speaker shall appoint and set the annual rate of pay for employees of the Office of the Historian.

Office of General Counsel

8. (a) There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group.

(b) There is established a Bipartisan Legal Advisory Group composed of the Speaker and the majority and minority leaderships. Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.

(c) The House, the Speaker, a committee or the chair of a committee authorized during a prior Congress to act in a litigation matter is authorized to act as the successor in interest to the House, the Speaker, such committee or the chair of such committee of a prior Congress, respectively, with respect to such litigation matter, and to take such steps as may be appropriate to ensure continuation of such litigation matter.

RULE III

THE MEMBERS, DELEGATES, AND
RESIDENT COMMISSIONER OF PUERTO
RICO

Voting

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question.

2. (a) A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.

(b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

RULES OF THE

Rule V, clause 3

Delegates and the Resident Commissioner

3. (a) Each Delegate and the Resident Commissioner shall be elected to serve on standing committees in the same manner as Members and shall possess in such committees the same powers and privileges as the other members of the committee.

(b) The Delegates and the Resident Commissioner may be appointed to any select committee and to any conference committee.

RULE IV

THE HALL OF THE HOUSE

Use and admittance

1. The Hall of the House shall be used only for the legislative business of the House and for caucus and conference meetings of its Members, except when the House agrees to take part in any ceremonies to be observed therein.

2. (a) Only the following persons shall be admitted to the Hall of the House or rooms leading thereto:

(1) Members of Congress, Members-elect, and contestants in election cases during the pendency of their cases on the floor.

(2) The Delegates and the Resident Commissioner.

(3) The President and Vice President of the United States and their private secretaries.

(4) Justices of the Supreme Court.

(5) Elected officers and minority employees nominated as elected officers of the House.

(6) The Parliamentarian.

(7) Staff of committees when business from their committee is under consideration, and staff of the respective party leaderships when so assigned with the approval of the Speaker.

(8) Not more than one person from the staff of a Member, Delegate, or Resident Commissioner when that Member, Delegate, or Resident Commissioner has an amendment under consideration (subject to clause 5).

(9) The Architect of the Capitol.

(10) The Librarian of Congress and the assistant in charge of the Law Library.

(11) The Secretary and Sergeant-at-Arms of the Senate.

(12) Heads of departments.

(13) Foreign ministers.

(14) Governors of States.

(15) Former Members, Delegates, and Resident Commissioners; former Parliamentarians of the House; and former elected officers and minority employees nominated as elected officers of the House (subject to clause 4).

(16) One attorney to accompany a Member, Delegate, or Resident Commissioner who is the respondent in an investigation undertaken by the Committee on Ethics when a recommendation of that committee is under consideration in the House.

(17) Such persons as have, by name, received the thanks of Congress.

(b) The Speaker may not entertain a unanimous consent request or a motion to suspend this clause or clauses 1, 3, 4, or 5.

3. (a) Except as provided in paragraph (b), all persons not entitled to the privilege of the floor during the session shall be excluded at all times from the Hall of the House and the cloakrooms.

(b) Until 15 minutes of the hour of the meeting of the House, persons employed in its service, accredited members of the press entitled to admission to the press gallery, and other persons on request of a Member, Delegate, or Resident Commissioner by card or in writing, may be admitted to the Hall of the House.

4. (a) A former Member, Delegate, or Resident Commissioner; a former Parliamentarian of the House; or a former elected officer of the House or former minority employee nominated as an elected officer of the House shall not be entitled to the privilege of admission to the Hall of the House and rooms leading thereto if such individual—

(1) is a registered lobbyist or agent of a foreign principal as those terms are defined in clause 5 of rule XXV;

(2) has any direct personal or pecuniary interest in any legislative measure pending before the House or reported by a committee; or

(3) is in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any legislative proposal.

(b) The Speaker may promulgate regulations to carry out this rule including regulations that exempt ceremonial or educational functions from the restrictions of this clause.

5. A person from the staff of a Member, Delegate, or Resident Commissioner may be admitted to the Hall of the House or rooms leading thereto under clause 2 only upon prior notice to the Speaker. Such persons, and persons from the staff of committees admitted under clause 2, may not engage in efforts in the Hall of the House or rooms leading thereto to influence Members with regard to the legislation being amended. Such persons are admitted only to advise the Member, Delegate, Resident Commissioner, or committee responsible for their admission. A person who violates this clause may be excluded during the session from the Hall of the House and rooms leading thereto by the Speaker.

Gallery

6. (a) The Speaker shall set aside a portion of the west gallery for the use of the President, the members of the Cabinet, justices of the Supreme Court, foreign ministers and suites, and the members of their respective families. The Speaker shall set aside another portion of the same gallery for the accommodation of persons to be admitted on the cards of Members, Delegates, or the Resident Commissioner.

Rule V, clause 3

(b) The Speaker shall set aside the southerly half of the east gallery for the use of the families of Members of Congress. The Speaker shall control one bench. On the request of a Member, Delegate, Resident Commissioner, or Senator, the Speaker shall issue a card of admission to the family of such individual, which may include their visitors. No other person shall be admitted to this section.

Prohibition on campaign contributions

7. A Member, Delegate, Resident Commissioner, officer, or employee of the House, or any other person entitled to admission to the Hall of the House or rooms leading thereto by this rule, may not knowingly distribute a political campaign contribution in the Hall of the House or rooms leading thereto.

RULE V

BROADCASTING THE HOUSE

1. The Speaker shall administer, direct, and control a system for closed-circuit viewing of floor proceedings of the House in the offices of all Members, Delegates, the Resident Commissioner, and committees and in such other places in the Capitol and the House Office Buildings as the Speaker considers appropriate. Such system may include other communications functions as the Speaker considers appropriate. Any such communications shall be subject to rules and regulations issued by the Speaker.

2. (a) The Speaker shall administer, direct, and control a system for complete and unedited audio and visual broadcasting and recording of the floor proceedings of the House. The Speaker shall provide for the distribution of such broadcasts and recordings to news media, for the storage of audio and video recordings of the proceedings, and for the closed-captioning of the proceedings for hearing-impaired persons.

(b) All television and radio broadcasting stations, networks, services, and systems (including cable systems) that are accredited to the House Radio and Television Correspondents' Galleries, and all radio and television correspondents who are so accredited, shall be provided access to the live coverage of the House.

(c) Coverage made available under this clause, including any recording thereof—

(1) may not be used for any partisan political campaign purpose;

(2) may not be used in any commercial advertisement; and

(3) may not be broadcast with commercial sponsorship except as part of a bona fide news program or public affairs documentary program.

3. The Speaker may delegate any of the responsibilities under this rule to such legislative entity as the Speaker considers appropriate.

HOUSE OF REPRESENTATIVES

Rule VIII, clause 2

Rule VIII, clause 2

RULE VI

OFFICIAL REPORTERS AND NEWS MEDIA GALLERIES

Official reporters

1. Subject to the direction and control of the Speaker, the Clerk shall appoint, and may remove for cause, the official reporters of the House, including stenographers of committees, and shall supervise the execution of their duties.

News media galleries

2. A portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use. Reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may prescribe from time to time. The Standing Committee of Correspondents for the Press Gallery, and the Executive Committee of Correspondents for the Periodical Press Gallery, shall supervise such galleries, including the designation of its employees, subject to the direction and control of the Speaker. The Speaker may admit to the floor, under such regulations as the Speaker may prescribe, not more than one representative of each press association.

3. A portion of the gallery as may be necessary to accommodate reporters of news to be disseminated by radio, television, and similar means of transmission, wishing to report debates and proceedings, shall be set aside for their use. Reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may prescribe. The Executive Committee of the Radio and Television Correspondents' Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker. The Speaker may admit to the floor, under such regulations as the Speaker may prescribe, not more than one representative of each media outlet.

RULE VII

RECORDS OF THE HOUSE

Archiving

1. (a) At the end of each Congress, the chair of each committee shall transfer to the Clerk any noncurrent records of such committee, including the subcommittees thereof.

(b) At the end of each Congress, each officer of the House elected under rule II shall transfer to the Clerk any noncurrent records made or acquired in the course of the duties of such officer.

2. The Clerk shall deliver the records transferred under clause 1, together with any other noncurrent records of the House, to the Archivist of the United States for preservation at the National Archives and Records Administration. Records so delivered are the permanent property of the House and remain subject to this rule and any order of the House.

Public availability

3. (a) The Clerk shall authorize the Archivist to make records delivered under clause 2 available for public use, subject to clause 4(b) and any order of the House.

(b)(1) A record shall immediately be made available if it was previously made available for public use by the House or a committee or a subcommittee.

(2) An investigative record that contains personal data relating to a specific living person (the disclosure of which would be an unwarranted invasion of personal privacy), an administrative record relating to personnel, or a record relating to a hearing that was closed under clause 2(g)(2) of rule XI shall be made available if it has been in existence for 50 years.

(3) A record for which a time, schedule, or condition for availability is specified by order of the House shall be made available in accordance with that order. Except as otherwise provided by order of the House, a record of a committee for which a time, schedule, or condition for availability is specified by order of the committee (entered during the Congress in which the record is made or acquired by the committee) shall be made available in accordance with the order of the committee.

(4) A record (other than a record referred to in subparagraph (1), (2), or (3)) shall be made available if it has been in existence for 30 years.

4. (a) A record may not be made available for public use under clause 3 if the Clerk determines that such availability would be detrimental to the public interest or inconsistent with the rights and privileges of the House. The Clerk shall notify in writing the chair and ranking minority member of the Committee on House Administration of any such determination.

(b) A determination of the Clerk under paragraph (a) is subject to later orders of the House and, in the case of a record of a committee, later orders of the committee.

5. (a) This rule does not supersede rule VIII or clause 11 of rule X and does not authorize the public disclosure of any record if such disclosure is prohibited by law or executive order of the President.

(b) The Committee on House Administration may prescribe guidelines and regulations governing the applicability and implementation of this rule.

(c) A committee may withdraw from the National Archives and Records Administration any record of the committee delivered to the Archivist under this rule. Such a withdrawal shall be on a temporary basis and for official use of the committee.

Definition of record

6. (a) In this rule the term "record" means any official, permanent record of the House (other than a record of an individual Member, Delegate, or Resi-

dent Commissioner as described in paragraph (b)), including—

(1) with respect to a committee, an official, permanent record of the committee (including any record of a legislative, oversight, or other activity of such committee or a subcommittee thereof); and

(2) with respect to an officer of the House elected under rule II, an official, permanent record made or acquired in the course of the duties of such officer.

(b) Records created, generated, or received by the congressional office of a Member, Delegate, or the Resident Commissioner in the performance of official duties are exclusively the personal property of the individual Member, Delegate, or the Resident Commissioner and such Member, Delegate, or Resident Commissioner has control over such records.

Withdrawal of papers

7. A memorial or other paper presented to the House may not be withdrawn from its files without its leave. If withdrawn certified copies thereof shall be left in the Office of the Clerk. When an act passes for the settlement of a claim, the Clerk may transmit to the officer charged with the settlement thereof the papers on file in the Office of the Clerk relating to such claim. The Clerk may lend temporarily to an officer or bureau of the executive departments any papers on file in the Office of the Clerk relating to any matter pending before such officer or bureau, taking proper receipt therefor.

RULE VIII

RESPONSE TO SUBPOENAS

1. (a) When a Member, Delegate, Resident Commissioner, officer, or employee of the House is properly served with a judicial subpoena or order, such Member, Delegate, Resident Commissioner, officer, or employee shall comply, consistently with the privileges and rights of the House, with the judicial subpoena or order as hereinafter provided, unless otherwise determined under this rule.

(b) For purposes of this rule, "judicial subpoena or order" means a judicial subpoena or judicial order directing appearance as a witness relating to the official functions of the House or for the production or disclosure of any document relating to the official functions of the House.

2. (a) Upon receipt of a properly served judicial subpoena or order, a Member, Delegate, Resident Commissioner, officer, or employee of the House shall promptly notify the Speaker in writing of its receipt together with either:

(1) a determination as to whether the issuance of the judicial subpoena or order is a proper exercise of jurisdiction by the court and is consistent with the privileges and rights of the House; or

(2) a statement that such Member, Delegate, Resident Commissioner, of-

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ficer, or employee of the House intends to make a determination with respect to the matters described in subparagraph (1).

(b) The notification required by paragraph (a) shall promptly be laid before the House by the Speaker.

3. (a) Except as specified in paragraph (b) or otherwise ordered by the House, upon notification to the House that a judicial subpoena or order is a proper exercise of jurisdiction by the court and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall comply with the judicial subpoena or order by supplying copies.

(b) Under no circumstances may minutes or transcripts of executive sessions, or evidence of witnesses in respect thereto, be disclosed or copied. During a period of recess or adjournment of longer than three days, the Speaker may authorize compliance or take such other action as the Speaker considers appropriate under the circumstances. Upon the reconvening of the House, all matters that transpired under this clause shall promptly be laid before the House by the Speaker.

4. Nothing in this rule shall be construed to deprive, condition, or waive the constitutional or legal privileges or rights applicable or available at any time to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or of the House itself, or the right of such Member, Delegate, Resident Commissioner, officer, or employee, or of the House itself, to assert such privileges or rights before a court in the United States.

RULE IX

QUESTIONS OF PRIVILEGE

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member, Delegate, or Resident Commissioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution. Oral announcement of the form of

the resolution may be dispensed with by unanimous consent.

(2) The time allotted for debate on a resolution offered from the floor as a question of the privileges of the House shall be equally divided between (A) the proponent of the resolution, and (B) the Majority Leader, the Minority Leader, or a designee, as determined by the Speaker.

(b) A question of personal privilege shall have precedence of all other questions except motions to adjourn.

RULE X

ORGANIZATION OF COMMITTEES

Committees and their legislative jurisdictions

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

(a) **Committee on Agriculture.**

(1) Adulteration of seeds, insect pests, and protection of birds and animals in forest reserves.

(2) Agriculture generally.

(3) Agricultural and industrial chemistry.

(4) Agricultural colleges and experiment stations.

(5) Agricultural economics and research.

(6) Agricultural education extension services.

(7) Agricultural production and marketing and stabilization of prices of agricultural products, and commodities (not including distribution outside of the United States).

(8) Animal industry and diseases of animals.

(9) Commodity exchanges.

(10) Crop insurance and soil conservation.

(11) Dairy industry.

(12) Entomology and plant quarantine.

(13) Extension of farm credit and farm security.

(14) Inspection of livestock, poultry, meat products, and seafood and seafood products.

(15) Forestry in general and forest reserves other than those created from the public domain.

(16) Human nutrition and home economics.

(17) Plant industry, soils, and agricultural engineering.

(18) Rural electrification.

(19) Rural development.

(20) Water conservation related to activities of the Department of Agriculture.

(b) **Committee on Appropriations.**

(1) Appropriation of the revenue for the support of the Government.

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(2) Rescissions of appropriations contained in appropriation Acts.

(3) Transfers of unexpended balances.

(4) Bills and joint resolutions reported by other committees that provide new entitlement authority as defined in section 3(9) of the Congressional Budget Act of 1974 and referred to the committee under clause 4(a)(2).

(5) Bills and joint resolutions that provide new budget authority, limitation on the use of funds, or other authority relating to new direct loan obligations and new loan guarantee commitments referencing section 504(b) of the Congressional Budget Act of 1974.

(c) **Committee on Armed Services.**

(1) Ammunition depots; forts; arsenals; and Army, Navy, and Air Force reservations and establishments.

(2) Common defense generally.

(3) Conservation, development, and use of naval petroleum and oil shale reserves.

(4) The Department of Defense generally, including the Departments of the Army, Navy, and Air Force, generally.

(5) Interoceanic canals generally, including measures relating to the maintenance, operation, and administration of interoceanic canals.

(6) Merchant Marine Academy and State Maritime Academies.

(7) Military applications of nuclear energy.

(8) Tactical intelligence and intelligence-related activities of the Department of Defense.

(9) National security aspects of merchant marine, including financial assistance for the construction and operation of vessels, maintenance of the U.S. shipbuilding and ship repair industrial base, cabotage, cargo preference, and merchant marine officers and seamen as these matters relate to the national security.

(10) Pay, promotion, retirement, and other benefits and privileges of members of the armed forces.

(11) Scientific research and development in support of the armed services.

(12) Selective service.

(13) Size and composition of the Army, Navy, Marine Corps, and Air Force.

(14) Soldiers' and sailors' homes.

(15) Strategic and critical materials necessary for the common defense.

(16) Cemeteries administered by the Department of Defense.

(d) **Committee on the Budget.**

(1) Concurrent resolutions on the budget (as defined in section 3(4) of the Congressional Budget Act of 1974), other matters required to be referred to the committee under ti-

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titles III and IV of that Act, and other measures setting forth appropriate levels of budget totals for the United States Government.

(2) Budget process generally.

(3) Establishment, extension, and enforcement of special controls over the Federal budget, including the budgetary treatment of off-budget Federal agencies and measures providing exemption from reduction under any order issued under part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

(e) **Committee on Education and the Workforce.**

(1) Child labor.

(2) Gallaudet University and Howard University and Hospital.

(3) Convict labor and the entry of goods made by convicts into interstate commerce.

(4) Food programs for children in schools.

(5) Labor standards and statistics.

(6) Education or labor generally.

(7) Mediation and arbitration of labor disputes.

(8) Regulation or prevention of importation of foreign laborers under contract.

(9) Workers' compensation.

(10) Vocational rehabilitation.

(11) Wages and hours of labor.

(12) Welfare of miners.

(13) Work incentive programs.

(f) **Committee on Energy and Commerce.**

(1) Biomedical research and development.

(2) Consumer affairs and consumer protection.

(3) Health and health facilities (except health care supported by payroll deductions).

(4) Interstate energy compacts.

(5) Interstate and foreign commerce generally.

(6) Exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including all fossil fuels, solar energy, and other unconventional or renewable energy resources.

(7) Conservation of energy resources.

(8) Energy information generally.

(9) The generation and marketing of power (except by federally chartered or Federal regional power marketing authorities); reliability and interstate transmission of, and ratemaking for, all power; and siting of generation facilities (except the installation of interconnections between Government waterpower projects).

(10) General management of the Department of Energy and management and all functions of the Federal Energy Regulatory Commission.

(11) National energy policy generally.

(12) Public health and quarantine.

(13) Regulation of the domestic nuclear energy industry, including regulation of research and development reactors and nuclear regulatory research.

(14) Regulation of interstate and foreign communications.

(15) Travel and tourism.

The committee shall have the same jurisdiction with respect to regulation of nuclear facilities and of use of nuclear energy as it has with respect to regulation of nonnuclear facilities and of use of nonnuclear energy.

(g) **Committee on Ethics.**

The Code of Official Conduct.

(h) **Committee on Financial Services.**

(1) Banks and banking, including deposit insurance and Federal monetary policy.

(2) Economic stabilization, defense production, renegotiation, and control of the price of commodities, rents, and services.

(3) Financial aid to commerce and industry (other than transportation).

(4) Insurance generally.

(5) International finance.

(6) International financial and monetary organizations.

(7) Money and credit, including currency and the issuance of notes and redemption thereof; gold and silver, including the coinage thereof; valuation and revaluation of the dollar.

(8) Public and private housing.

(9) Securities and exchanges.

(10) Urban development.

(i) **Committee on Foreign Affairs.**

(1) Relations of the United States with foreign nations generally.

(2) Acquisition of land and buildings for embassies and legations in foreign countries.

(3) Establishment of boundary lines between the United States and foreign nations.

(4) Export controls, including nonproliferation of nuclear technology and nuclear hardware.

(5) Foreign loans.

(6) International commodity agreements (other than those involving sugar), including all agreements for cooperation in the export of nuclear technology and nuclear hardware.

(7) International conferences and congresses.

(8) International education.

(9) Intervention abroad and declarations of war.

(10) Diplomatic service.

(11) Measures to foster commercial intercourse with foreign nations and to safeguard American business interests abroad.

(12) International economic policy.

(13) Neutrality.

(14) Protection of American citizens abroad and expatriation.

(15) The American National Red Cross.

(16) Trading with the enemy.

(17) United Nations organizations.

(j) **Committee on Homeland Security.**

(1) Overall homeland security policy.

(2) Organization, administration, and general management of the Department of Homeland Security.

(3) Functions of the Department of Homeland Security relating to the following:

(A) Border and port security (except immigration policy and non-border enforcement).

(B) Customs (except customs revenue).

(C) Integration, analysis, and dissemination of homeland security information.

(D) Domestic preparedness for and collective response to terrorism.

(E) Research and development.

(F) Transportation security.

(k) **Committee on House Administration.**

(1) Appropriations from accounts for committee salaries and expenses (except for the Committee on Appropriations); House Information Resources; and allowance and expenses of Members, Delegates, the Resident Commissioner, officers, and administrative offices of the House.

(2) Auditing and settling of all accounts described in subparagraph (1).

(3) Employment of persons by the House, including staff for Members, Delegates, the Resident Commissioner, and committees; and reporters of debates, subject to rule VI.

(4) Except as provided in paragraph (r)(11), the Library of Congress, including management thereof; the House Library; statuary and pictures; acceptance or purchase of works of art for the Capitol; the Botanic Garden; and purchase of books and manuscripts.

(5) The Smithsonian Institution and the incorporation of similar institutions (except as provided in paragraph (r)(11)).

(6) Expenditure of accounts described in subparagraph (1).

(7) Franking Commission.

(8) Printing and correction of the Congressional Record.

(9) Accounts of the House generally.

(10) Assignment of office space for Members, Delegates, the Resident Commissioner, and committees.

(11) Disposition of useless executive papers.

(12) Election of the President, Vice President, Members, Senators,

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Delegates, or the Resident Commissioner; corrupt practices; contested elections; credentials and qualifications; and Federal elections generally.

(13) Services to the House, including the House Restaurant, parking facilities, and administration of the House Office Buildings and of the House wing of the Capitol.

(14) Travel of Members, Delegates, and the Resident Commissioner.

(15) Raising, reporting, and use of campaign contributions for candidates for office of Representative, of Delegate, and of Resident Commissioner.

(16) Compensation, retirement, and other benefits of the Members, Delegates, the Resident Commissioner, officers, and employees of Congress.

(l) **Committee on the Judiciary.**

(1) The judiciary and judicial proceedings, civil and criminal.

(2) Administrative practice and procedure.

(3) Apportionment of Representatives.

(4) Bankruptcy, mutiny, espionage, and counterfeiting.

(5) Civil liberties.

(6) Constitutional amendments.

(7) Criminal law enforcement and criminalization.

(8) Federal courts and judges, and local courts in the Territories and possessions.

(9) Immigration policy and non-border enforcement.

(10) Interstate compacts generally.

(11) Claims against the United States.

(12) Meetings of Congress; attendance of Members, Delegates, and the Resident Commissioner; and their acceptance of incompatible offices.

(13) National penitentiaries.

(14) Patents, the Patent and Trademark Office, copyrights, and trademarks.

(15) Presidential succession.

(16) Protection of trade and commerce against unlawful restraints and monopolies.

(17) Revision and codification of the Statutes of the United States.

(18) State and territorial boundary lines.

(19) Subversive activities affecting the internal security of the United States.

(m) **Committee on Natural Resources.**

(1) Fisheries and wildlife, including research, restoration, refuges, and conservation.

(2) Forest reserves and national parks created from the public domain.

(3) Forfeiture of land grants and alien ownership, including alien ownership of mineral lands.

(4) Geological Survey.

(5) International fishing agreements.

(6) Interstate compacts relating to apportionment of waters for irrigation purposes.

(7) Irrigation and reclamation, including water supply for reclamation projects and easements of public lands for irrigation projects; and acquisition of private lands when necessary to complete irrigation projects.

(8) Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds.

(9) Insular areas of the United States generally (except those affecting the revenue and appropriations).

(10) Military parks and battlefields, national cemeteries administered by the Secretary of the Interior, parks within the District of Columbia, and the erection of monuments to the memory of individuals.

(11) Mineral land laws and claims and entries thereunder.

(12) Mineral resources of public lands.

(13) Mining interests generally.

(14) Mining schools and experimental stations.

(15) Marine affairs, including coastal zone management (except for measures relating to oil and other pollution of navigable waters).

(16) Oceanography.

(17) Petroleum conservation on public lands and conservation of the radium supply in the United States.

(18) Preservation of prehistoric ruins and objects of interest on the public domain.

(19) Public lands generally, including entry, easements, and grazing thereon.

(20) Relations of the United States with Native Americans and Native American tribes.

(21) Trans-Alaska Oil Pipeline (except ratemaking).

(n) **Committee on Oversight and Government Reform.**

(1) Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement.

(2) Municipal affairs of the District of Columbia in general (other than appropriations).

(3) Federal paperwork reduction.

(4) Government management and accounting measures generally.

(5) Holidays and celebrations.

(6) Overall economy, efficiency, and management of government operations and activities, including Federal procurement.

(7) National archives.

(8) Population and demography generally, including the Census.

(9) Postal service generally, including transportation of the mails.

(10) Public information and records.

(11) Relationship of the Federal Government to the States and municipalities generally.

(12) Reorganizations in the executive branch of the Government.

(o) **Committee on Rules.**

(1) Rules and joint rules (other than those relating to the Code of Official Conduct) and the order of business of the House.

(2) Recesses and final adjournments of Congress.

(p) **Committee on Science, Space, and Technology.**

(1) All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories.

(2) Astronautical research and development, including resources, personnel, equipment, and facilities.

(3) Civil aviation research and development.

(4) Environmental research and development.

(5) Marine research.

(6) Commercial application of energy technology.

(7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.

(8) National Aeronautics and Space Administration.

(9) National Space Council.

(10) National Science Foundation.

(11) National Weather Service.

(12) Outer space, including exploration and control thereof.

(13) Science scholarships.

(14) Scientific research, development, and demonstration, and projects therefor.

(q) **Committee on Small Business.**

(1) Assistance to and protection of small business, including financial aid, regulatory flexibility, and paperwork reduction.

(2) Participation of small-business enterprises in Federal procurement and Government contracts.

(r) **Committee on Transportation and Infrastructure.**

(1) Coast Guard, including life-saving service, lighthouses, lightships, ocean derelicts, and the Coast Guard Academy.

(2) Federal management of emergencies and natural disasters.

(3) Flood control and improvement of rivers and harbors.

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(4) Inland waterways.

(5) Inspection of merchant marine vessels, lights and signals, life-saving equipment, and fire protection on such vessels.

(6) Navigation and laws relating thereto, including pilotage.

(7) Registering and licensing of vessels and small boats.

(8) Rules and international arrangements to prevent collisions at sea.

(9) The Capitol Building and the Senate and House Office Buildings.

(10) Construction or maintenance of roads and post roads (other than appropriations therefor).

(11) Construction or reconstruction, maintenance, and care of buildings and grounds of the Botanic Garden, the Library of Congress, and the Smithsonian Institution.

(12) Merchant marine (except for national security aspects thereof).

(13) Purchase of sites and construction of post offices, custom-houses, Federal courthouses, and Government buildings within the District of Columbia.

(14) Oil and other pollution of navigable waters, including inland, coastal, and ocean waters.

(15) Marine affairs, including coastal zone management, as they relate to oil and other pollution of navigable waters.

(16) Public buildings and occupied or improved grounds of the United States generally.

(17) Public works for the benefit of navigation, including bridges and dams (other than international bridges and dams).

(18) Related transportation regulatory agencies (except the Transportation Security Administration).

(19) Roads and the safety thereof.

(20) Transportation, including civil aviation, railroads, water transportation, transportation safety (except automobile safety and transportation security functions of the Department of Homeland Security), transportation infrastructure, transportation labor, and railroad retirement and unemployment (except revenue measures related thereto).

(21) Water power.

(s) **Committee on Veterans' Affairs.**

(1) Veterans' measures generally.

(2) Cemeteries of the United States in which veterans of any war or conflict are or may be buried, whether in the United States or abroad (except cemeteries administered by the Secretary of the Interior).

(3) Compensation, vocational rehabilitation, and education of veterans.

(4) Life insurance issued by the Government on account of service in the Armed Forces.

(5) Pensions of all the wars of the United States, general and special.

(6) Readjustment of servicemembers to civil life.

(7) Servicemembers' civil relief.

(8) Veterans' hospitals, medical care, and treatment of veterans.

(t) **Committee on Ways and Means.**

(1) Customs revenue, collection districts, and ports of entry and delivery.

(2) Reciprocal trade agreements.

(3) Revenue measures generally.

(4) Revenue measures relating to insular possessions.

(5) Bonded debt of the United States, subject to the last sentence of clause 4(f).

(6) Deposit of public monies.

(7) Transportation of dutiable goods.

(8) Tax exempt foundations and charitable trusts.

(9) National social security (except health care and facilities programs that are supported from general revenues as opposed to payroll deductions and except work incentive programs).

General oversight responsibilities

2. (a) The various standing committees shall have general oversight responsibilities as provided in paragraph (b) in order to assist the House in—

(1) its analysis, appraisal, and evaluation of—

(A) the application, administration, execution, and effectiveness of Federal laws; and

(B) conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation; and

(2) its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.

(b)(1) In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated, each standing committee (other than the Committee on Appropriations) shall review and study on a continuing basis—

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and

(D) future research and forecasting on subjects within its jurisdiction.

(2) Each committee to which subparagraph (1) applies having more than 20 members shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions, to assist in carrying out its responsibilities under this clause. The establishment of an oversight subcommittee does not limit the responsibility of a subcommittee with legislative jurisdiction in carrying out its oversight responsibilities.

(c) Each standing committee shall review and study on a continuing basis the impact or probable impact of tax policies affecting subjects within its jurisdiction as described in clauses 1 and 3.

(d)(1) Not later than February 15 of the first session of a Congress, each standing committee (other than the Committee on Appropriations, the Committee on Ethics, and the Committee on Rules) shall, in a meeting that is open to the public, adopt its authorization and oversight plan for that Congress. Such plan shall be submitted simultaneously to the Committee on Oversight and Government Reform, the Committee on House Administration, and the Committee on Appropriations.

(2) Each such plan shall include, with respect to programs and agencies within the committee's jurisdiction, and to the maximum extent practicable—

(A) a list of such programs or agencies with lapsed authorizations that received funding in the prior fiscal year or, in the case of a program or agency with a permanent authorization, which has not been subject to a comprehensive review by the committee in the prior three Congresses;

(B) a description of each such program or agency to be authorized in the current Congress;

(C) a description of each such program or agency to be authorized in the next Congress, if applicable;

(D) a description of any oversight to support the authorization of each such program or agency in the current Congress; and

(E) recommendations for changes to existing law for moving such programs or agencies from mandatory funding to discretionary appropriations, where appropriate.

(3) Each such plan may include, with respect to the programs and agencies within the committee's jurisdiction—

(A) recommendations for the consolidation or termination of such programs or agencies that are duplicative, unnecessary, or inconsistent with the appropriate roles and responsibilities of the Federal Government;

(B) recommendations for changes to existing law related to Federal rules, regulations, statutes, and court decisions affecting such programs and agencies that are inconsistent with the authorities of the

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Congress under Article I of the Constitution; and

(C) a description of such other oversight activities as the committee may consider necessary.

(4) In the development of such plan, the chair of each committee shall coordinate with other committees of jurisdiction to ensure that programs and agencies are subject to routine, comprehensive authorization efforts.

(5) Not later than March 31 in the first session of a Congress, after consultation with the Speaker, the Majority Leader, and the Minority Leader, the Committee on Oversight and Government Reform shall report to the House the authorization and oversight plans submitted by committees together with any recommendations that it, or the House leadership group described above, may make to ensure the most effective coordination of authorization and oversight plans and otherwise to achieve the objectives of this clause.

(e) The Speaker, with the approval of the House, may appoint special ad hoc oversight committees for the purpose of reviewing specific matters within the jurisdiction of two or more standing committees.

Special oversight functions

3. (a) The Committee on Appropriations shall conduct such studies and examinations of the organization and operation of executive departments and other executive agencies (including an agency the majority of the stock of which is owned by the United States) as it considers necessary to assist it in the determination of matters within its jurisdiction.

(b) The Committee on Armed Services shall review and study on a continuing basis laws, programs, and Government activities relating to international arms control and disarmament and the education of military dependents in schools.

(c) The Committee on the Budget shall study on a continuing basis the effect on budget outlays of relevant existing and proposed legislation and report the results of such studies to the House on a recurring basis.

(d) The Committee on Education and the Workforce shall review, study, and coordinate on a continuing basis laws, programs, and Government activities relating to domestic educational programs and institutions and programs of student assistance within the jurisdiction of other committees.

(e) The Committee on Energy and Commerce shall review and study on a continuing basis laws, programs, and Government activities relating to nuclear and other energy and nonmilitary nuclear energy research and development including the disposal of nuclear waste.

(f) The Committee on Foreign Affairs shall review and study on a continuing basis laws, programs, and Government activities relating to customs administration, intelligence activities relating

to foreign policy, international financial and monetary organizations, and international fishing agreements.

(g)(1) The Committee on Homeland Security shall review and study on a continuing basis all Government activities relating to homeland security, including the interaction of all departments and agencies with the Department of Homeland Security.

(2) In addition, the committee shall review and study on a primary and continuing basis all Government activities, programs and organizations related to homeland security that fall within its primary legislative jurisdiction.

(h) The Committee on Natural Resources shall review and study on a continuing basis laws, programs, and Government activities relating to Native Americans.

(i) The Committee on Oversight and Government Reform shall review and study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency.

(j) The Committee on Rules shall review and study on a continuing basis the congressional budget process, and the committee shall report its findings and recommendations to the House from time to time.

(k) The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development.

(l) The Committee on Small Business shall study and investigate on a continuing basis the problems of all types of small business.

(m) The Permanent Select Committee on Intelligence shall review and study on a continuing basis laws, programs, and activities of the intelligence community and shall review and study on an exclusive basis the sources and methods of entities described in clause 11(b)(1)(A).

Additional functions of committees

4. (a)(1)(A) The Committee on Appropriations shall, within 30 days after the transmittal of the Budget to Congress each year, hold hearings on the Budget as a whole with particular reference to—

(i) the basic recommendations and budgetary policies of the President in the presentation of the Budget; and

(ii) the fiscal, financial, and economic assumptions used as bases in arriving at total estimated expenditures and receipts.

(B) In holding hearings under subdivision (A), the committee shall receive testimony from the Secretary of the Treasury, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, and such other persons as the committee may desire.

(C) A hearing under subdivision (A), or any part thereof, shall be held in open session, except when the com-

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mittee, in open session and with a quorum present, determines by record vote that the testimony to be taken at that hearing on that day may be related to a matter of national security. The committee may by the same procedure close one subsequent day of hearing. A transcript of all such hearings shall be printed and a copy thereof furnished to each Member, Delegate, and the Resident Commissioner.

(D) A hearing under subdivision (A), or any part thereof, may be held before a joint meeting of the committee and the Committee on Appropriations of the Senate in accordance with such procedures as the two committees jointly may determine.

(2) Pursuant to section 401(b)(2) of the Congressional Budget Act of 1974, when a committee reports a bill or joint resolution that provides new entitlement authority as defined in section 3(9) of that Act, and enactment of the bill or joint resolution, as reported, would cause a breach of the committee's pertinent allocation of new budget authority under section 302(a) of that Act, the bill or joint resolution may be referred to the Committee on Appropriations with instructions to report it with recommendations (which may include an amendment limiting the total amount of new entitlement authority provided in the bill or joint resolution). If the Committee on Appropriations fails to report a bill or joint resolution so referred within 15 calendar days (not counting any day on which the House is not in session), the committee automatically shall be discharged from consideration of the bill or joint resolution, and the bill or joint resolution shall be placed on the appropriate calendar.

(3) In addition, the Committee on Appropriations shall study on a continuing basis those provisions of law that (on the first day of the first fiscal year for which the congressional budget process is effective) provide spending authority or permanent budget authority and shall report to the House from time to time its recommendations for terminating or modifying such provisions.

(4) In the manner provided by section 302 of the Congressional Budget Act of 1974, the Committee on Appropriations (after consulting with the Committee on Appropriations of the Senate) shall subdivide any allocations made to it in the joint explanatory statement accompanying the conference report on such concurrent resolution, and promptly report the subdivisions to the House as soon as practicable after a concurrent resolution on the budget for a fiscal year is agreed to.

(b) The Committee on the Budget shall—

(1) review on a continuing basis the conduct by the Congressional Budget Office of its functions and duties;

(2) hold hearings and receive testimony from Members, Senators, Delegates, the Resident Commissioner, and such appropriate representatives

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of Federal departments and agencies, the general public, and national organizations as it considers desirable in developing concurrent resolutions on the budget for each fiscal year;

(3) make all reports required of it by the Congressional Budget Act of 1974;

(4) study on a continuing basis those provisions of law that exempt Federal agencies or any of their activities or outlays from inclusion in the Budget of the United States Government, and report to the House from time to time its recommendations for terminating or modifying such provisions;

(5) study on a continuing basis proposals designed to improve and facilitate the congressional budget process, and report to the House from time to time the results of such studies, together with its recommendations; and

(6) request and evaluate continuing studies of tax expenditures, devise methods of coordinating tax expenditures, policies, and programs with direct budget outlays, and report the results of such studies to the House on a recurring basis.

(c)(1) The Committee on Oversight and Government Reform shall—

(A) receive and examine reports of the Comptroller General of the United States and submit to the House such recommendations as it considers necessary or desirable in connection with the subject matter of the reports;

(B) evaluate the effects of laws enacted to reorganize the legislative and executive branches of the Government; and

(C) study intergovernmental relationships between the United States and the States and municipalities and between the United States and international organizations of which the United States is a member.

(2) In addition to its duties under subparagraph (1), the Committee on Oversight and Government Reform may at any time conduct investigations of any matter without regard to clause 1, 2, 3, or this clause conferring jurisdiction over the matter to another standing committee. The findings and recommendations of the committee in such an investigation shall be made available to any other standing committee having jurisdiction over the matter involved.

(3)(A) The Committee on Oversight and Government Reform may adopt a rule authorizing and regulating the taking of depositions by a member or counsel of the committee, including pursuant to subpoena under clause 2(m) of rule XI (which hereby is made applicable for such purpose).

(B) A rule adopted by the committee pursuant to this subparagraph—

(i) may provide that a deponent be directed to subscribe an oath or affirmation before a person authorized by law to administer the same;

(ii) shall ensure that the minority members and staff of the committee are accorded equitable treatment with respect to notice of and a reasonable opportunity to participate in any proceeding conducted thereunder; and

(iii) shall, unless waived by the deponent, require the attendance of a member of the committee.

(C) Information secured pursuant to the authority described in subdivision (A) shall retain the character of discovery until offered for admission in evidence before the committee, at which time any proper objection shall be timely.

(d)(1) The Committee on House Administration shall—

(A) provide policy direction for the Chief Administrative Officer and the Inspector General and oversight of the Clerk, Sergeant-at-Arms, Chief Administrative Officer, and Inspector General;

(B) oversee the management of services provided to the House by the Architect of the Capitol, except those services that lie within the jurisdiction of the Committee on Transportation and Infrastructure under clause 1(r);

(C) have the function of accepting on behalf of the House a gift, except as otherwise provided by law, if the gift does not involve a duty, burden, or condition, or is not made dependent on some future performance by the House;

(D) promulgate regulations to carry out subdivision (C); and

(E) establish and maintain standards for making documents publicly available in electronic form by the House and its committees.

(2) An employing office of the House may enter into a settlement of a complaint under the Congressional Accountability Act of 1995 that provides for the payment of funds only after receiving the joint approval of the chair and ranking minority member of the Committee on House Administration concerning the amount of such payment.

(e)(1) Each standing committee shall, in its consideration of all public bills and public joint resolutions within its jurisdiction, ensure that appropriations for continuing programs and activities of the Federal Government and the government of the District of Columbia will be made annually to the maximum extent feasible and consistent with the nature, requirement, and objective of the programs and activities involved. In this subparagraph programs and activities of the Federal Government and the government of the District of Columbia includes programs and activities of any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Federal Government or of the government of the District of Columbia.

(2) Each standing committee shall review from time to time each con-

tinuing program within its jurisdiction for which appropriations are not made annually to ascertain whether the program should be modified to provide for annual appropriations.

Budget Act responsibilities

(f)(1) Each standing committee shall submit to the Committee on the Budget not later than six weeks after the submission of the budget by the President, or at such time as the Committee on the Budget may request—

(A) its views and estimates with respect to all matters to be set forth in the concurrent resolution on the budget for the ensuing fiscal year that are within its jurisdiction or functions; and

(B) an estimate of the total amounts of new budget authority, and budget outlays resulting therefrom, to be provided or authorized in all bills and resolutions within its jurisdiction that it intends to be effective during that fiscal year.

(2) The views and estimates submitted by the Committee on Ways and Means under subparagraph (1) shall include a specific recommendation, made after holding public hearings, as to the appropriate level of the public debt that should be set forth in the concurrent resolution on the budget.

Election and membership of standing committees

5. (a)(1) The standing committees specified in clause 1 shall be elected by the House within seven calendar days after the commencement of each Congress, from nominations submitted by the respective party caucus or conference. A resolution proposing to change the composition of a standing committee shall be privileged if offered by direction of the party caucus or conference concerned.

(2)(A) The Committee on the Budget shall be composed of members as follows:

(i) Members, Delegates, or the Resident Commissioner who are members of other standing committees, including five from the Committee on Appropriations, five from the Committee on Ways and Means, and one from the Committee on Rules;

(ii) one Member designated by the elected leadership of the majority party; and

(iii) one Member designated by the elected leadership of the minority party.

(B) Except as permitted by subdivision (C), a member of the Committee on the Budget other than one described in subdivision (A)(ii) or (A)(iii) may not serve on the committee during more than four Congresses in a period of six successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(C) A Member, Delegate, or Resident Commissioner may exceed the limitation of subdivision (B) if elected to serve a second consecutive Congress as

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the chair or a second consecutive Congress as the ranking minority member.

(3)(A) The Committee on Ethics shall be composed of 10 members, five from the majority party and five from the minority party.

(B) Except as permitted by subdivision (C), a member of the Committee on Ethics may not serve on the committee during more than three Congresses in a period of five successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(C) A member of the Committee on Ethics may serve on the committee during a fourth Congress in a period of five successive Congresses only as either the chair or the ranking minority member of the committee.

(4)(A) At the beginning of a Congress, the Speaker or a designee and the Minority Leader or a designee each shall name 10 Members, Delegates, or the Resident Commissioner from the respective party of such individual who are not members of the Committee on Ethics to be available to serve on investigative subcommittees of that committee during that Congress. The lists of Members, Delegates, or the Resident Commissioner so named shall be announced to the House.

(B) Whenever the chair and the ranking minority member of the Committee on Ethics jointly determine that Members, Delegates, or the Resident Commissioner named under subdivision (A) should be assigned to serve on an investigative subcommittee of that committee, each of them shall select an equal number of such Members, Delegates, or Resident Commissioner from the respective party of such individual to serve on that subcommittee.

(b)(1) Membership on a standing committee during the course of a Congress shall be contingent on continuing membership in the party caucus or conference that nominated the Member, Delegate, or Resident Commissioner concerned for election to such committee. Should a Member, Delegate, or Resident Commissioner cease to be a member of a particular party caucus or conference, that Member, Delegate, or Resident Commissioner shall automatically cease to be a member of each standing committee to which elected on the basis of nomination by that caucus or conference. The chair of the relevant party caucus or conference shall notify the Speaker whenever a Member, Delegate, or Resident Commissioner ceases to be a member of that caucus or conference. The Speaker shall notify the chair of each affected committee that the election of such Member, Delegate, or Resident Commissioner to the committee is automatically vacated under this subparagraph.

(2)(A) Except as specified in subdivision (B), a Member, Delegate, or Resident Commissioner may not serve simultaneously as a member of more than two standing committees or more

than four subcommittees of the standing committees.

(B)(i) Ex officio service by a chair or ranking minority member of a committee on each of its subcommittees under a committee rule does not count against the limitation on subcommittee service.

(ii) Service on an investigative subcommittee of the Committee on Ethics under paragraph (a)(4) does not count against the limitation on subcommittee service.

(iii) Any other exception to the limitations in subdivision (A) may be approved by the House on the recommendation of the relevant party caucus or conference.

(C) In this subparagraph the term "subcommittee" includes a panel (other than a special oversight panel of the Committee on Armed Services), task force, special subcommittee, or other subunit of a standing committee that is established for a cumulative period longer than six months in a Congress.

(c)(1) One of the members of each standing committee shall be elected by the House, on the nomination of the majority party caucus or conference, as chair thereof. In the absence of the member serving as chair, the member next in rank (and so on, as often as the case shall happen) shall act as chair. Rank shall be determined by the order members are named in resolutions electing them to the committee. In the case of a vacancy in the elected chair of a committee, the House shall elect another chair.

(2) Except in the case of the Committee on Rules, a member of a standing committee may not serve as chair of the same standing committee, or of the same subcommittee of a standing committee, during more than three consecutive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(d)(1) Except as permitted by subparagraph (2), a committee may have not more than five subcommittees.

(2)(A) A committee that maintains a subcommittee on oversight may have not more than six subcommittees.

(B) The Committee on Appropriations may have not more than 13 subcommittees.

(C) The Committee on Armed Services may have not more than seven subcommittees.

(D) The Committee on Foreign Affairs may have not more than seven subcommittees.

(E) The Committee on Oversight and Government Reform may have not more than seven subcommittees.

(F) The Committee on Transportation and Infrastructure may have not more than six subcommittees.

(e) The House shall fill a vacancy on a standing committee by election on the nomination of the respective party caucus or conference.

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Expense resolutions

6. (a) Whenever a committee, commission, or other entity (other than the Committee on Appropriations) is granted authorization for the payment of its expenses (including staff salaries) for a Congress, such authorization initially shall be procured by one primary expense resolution reported by the Committee on House Administration. A primary expense resolution may include a reserve fund for unanticipated expenses of committees. An amount from such a reserve fund may be allocated to a committee only by the approval of the Committee on House Administration. A primary expense resolution reported to the House may not be considered in the House unless a printed report thereon was available on the previous calendar day. For the information of the House, such report shall—

(1) state the total amount of the funds to be provided to the committee, commission, or other entity under the primary expense resolution for all anticipated activities and programs of the committee, commission, or other entity; and

(2) to the extent practicable, contain such general statements regarding the estimated foreseeable expenditures for the respective anticipated activities and programs of the committee, commission, or other entity as may be appropriate to provide the House with basic estimates of the expenditures contemplated by the primary expense resolution.

(b) After the date of adoption by the House of a primary expense resolution for a committee, commission, or other entity for a Congress, authorization for the payment of additional expenses (including staff salaries) in that Congress may be procured by one or more supplemental expense resolutions reported by the Committee on House Administration, as necessary. A supplemental expense resolution reported to the House may not be considered in the House unless a printed report thereon was available on the previous calendar day. For the information of the House, such report shall—

(1) state the total amount of additional funds to be provided to the committee, commission, or other entity under the supplemental expense resolution and the purposes for which those additional funds are available; and

(2) state the reasons for the failure to procure the additional funds for the committee, commission, or other entity by means of the primary expense resolution.

(c) The preceding provisions of this clause do not apply to—

(1) a resolution providing for the payment from committee salary and expense accounts of the House of sums necessary to pay compensation for staff services performed for, or to pay other expenses of, a committee, commission, or other entity at any time after the beginning of an odd-

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numbered year and before the date of adoption by the House of the primary expense resolution described in paragraph (a) for that year; or

(2) a resolution providing each of the standing committees in a Congress additional office equipment, airmail and special-delivery postage stamps, supplies, staff personnel, or any other specific item for the operation of the standing committees, and containing an authorization for the payment from committee salary and expense accounts of the House of the expenses of any of the foregoing items provided by that resolution, subject to and until enactment of the provisions of the resolution as permanent law.

(d) From the funds made available for the appointment of committee staff by a primary or additional expense resolution, the chair of each committee shall ensure that sufficient staff is made available to each subcommittee to carry out its responsibilities under the rules of the committee and that the minority party is treated fairly in the appointment of such staff.

(e) Funds authorized for a committee under this clause and clauses 7 and 8 are for expenses incurred in the activities of the committee.

Interim funding

7. (a) For the period beginning at noon on January 3 and ending at midnight on March 31 in each odd-numbered year, such sums as may be necessary shall be paid out of the committee salary and expense accounts of the House for continuance of necessary investigations and studies by—

(1) each standing and select committee established by these rules; and

(2) except as specified in paragraph (b), each select committee established by resolution.

(b) In the case of the first session of a Congress, amounts shall be made available for a select committee established by resolution in the preceding Congress only if—

(1) a resolution proposing to reestablish such select committee is introduced in the present Congress; and

(2) the House has not adopted a resolution of the preceding Congress providing for termination of funding for investigations and studies by such select committee.

(c) Each committee described in paragraph (a) shall be entitled for each month during the period specified in paragraph (a) to 9 percent (or such lesser percentage as may be determined by the Committee on House Administration) of the total annualized amount made available under expense resolutions for such committee in the preceding session of Congress.

(d) Payments under this clause shall be made on vouchers authorized by the committee involved, signed by the chair of the committee, except as provided in paragraph (e), and approved by

the Committee on House Administration.

(e) Notwithstanding any provision of law, rule of the House, or other authority, from noon on January 3 of the first session of a Congress until the election by the House of the committee concerned in that Congress, payments under this clause shall be made on vouchers signed by the ranking member of the committee as it was constituted at the expiration of the preceding Congress who is a member of the majority party in the present Congress.

(f)(1) The authority of a committee to incur expenses under this clause shall expire upon adoption by the House of a primary expense resolution for the committee.

(2) Amounts made available under this clause shall be expended in accordance with regulations prescribed by the Committee on House Administration.

(3) This clause shall be effective only insofar as it is not inconsistent with a resolution reported by the Committee on House Administration and adopted by the House after the adoption of these rules.

Travel

8. (a) Local currencies owned by the United States shall be made available to the committee and its employees engaged in carrying out their official duties outside the United States or its territories or possessions. Appropriated funds, including those authorized under this clause and clause 6, may not be expended for the purpose of defraying expenses of members of a committee or its employees in a country where local currencies are available for this purpose.

(b) The following conditions shall apply with respect to travel outside the United States or its territories or possessions:

(1) A member or employee of a committee may not receive or expend local currencies for subsistence in a country for a day at a rate in excess of the maximum per diem set forth in applicable Federal law.

(2) A member or employee shall be reimbursed for the expenses of such individual for a day at the lesser of—

(A) the per diem set forth in applicable Federal law; or

(B) the actual, unreimbursed expenses (other than for transportation) incurred during that day.

(3) Each member or employee of a committee shall make to the chair of the committee an itemized report showing the dates each country was visited, the amount of per diem furnished, the cost of transportation furnished, and funds expended for any other official purpose and shall summarize in these categories the total foreign currencies or appropriated funds expended. Each report shall be filed with the chair of the committee not later than 60 days following the completion of travel for use in complying with reporting requirements

in applicable Federal law and shall be open for public inspection.

(c)(1) In carrying out the activities of a committee outside the United States in a country where local currencies are unavailable, a member or employee of a committee may not receive reimbursement for expenses (other than for transportation) in excess of the maximum per diem set forth in applicable Federal law.

(2) A member or employee shall be reimbursed for the expenses of such individual for a day, at the lesser of—

(A) the per diem set forth in applicable Federal law; or

(B) the actual unreimbursed expenses (other than for transportation) incurred during that day.

(3) A member or employee of a committee may not receive reimbursement for the cost of any transportation in connection with travel outside the United States unless the member or employee actually paid for the transportation.

(d) The restrictions respecting travel outside the United States set forth in paragraph (c) also shall apply to travel outside the United States by a Member, Delegate, Resident Commissioner, officer, or employee of the House authorized under any standing rule.

Committee staffs

9. (a)(1) Subject to subparagraph (2) and paragraph (f), each standing committee may appoint, by majority vote, not more than 30 professional staff members to be compensated from the funds provided for the appointment of committee staff by primary and additional expense resolutions. Each professional staff member appointed under this subparagraph shall be assigned to the chair and the ranking minority member of the committee, as the committee considers advisable.

(2) Subject to paragraph (f) whenever a majority of the minority party members of a standing committee (other than the Committee on Ethics or the Permanent Select Committee on Intelligence) so request, not more than 10 persons (or one-third of the total professional committee staff appointed under this clause, whichever is fewer) may be selected, by majority vote of the minority party members, for appointment by the committee as professional staff members under subparagraph (1). The committee shall appoint persons so selected whose character and qualifications are acceptable to a majority of the committee. If the committee determines that the character and qualifications of a person so selected are unacceptable, a majority of the minority party members may select another person for appointment by the committee to the professional staff until such appointment is made. Each professional staff member appointed under this subparagraph shall be assigned to such committee business as the minority party members of the committee consider advisable.

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(b)(1) The professional staff members of each standing committee—

(A) may not engage in any work other than committee business during congressional working hours; and

(B) may not be assigned a duty other than one pertaining to committee business.

(2)(A) Subparagraph (1) does not apply to staff designated by a committee as “associate” or “shared” staff who are not paid exclusively by the committee, provided that the chair certifies that the compensation paid by the committee for any such staff is commensurate with the work performed for the committee in accordance with clause 8 of rule XXIII.

(B) The use of any “associate” or “shared” staff by a committee other than the Committee on Appropriations shall be subject to the review of, and to any terms, conditions, or limitations established by, the Committee on House Administration in connection with the reporting of any primary or additional expense resolution.

(c) Each employee on the professional or investigative staff of a standing committee shall be entitled to pay at a single gross per annum rate, to be fixed by the chair and that does not exceed the maximum rate of pay as in effect from time to time under applicable provisions of law.

(d) Subject to appropriations hereby authorized, the Committee on Appropriations may appoint by majority vote such staff as it determines to be necessary (in addition to the clerk of the committee and assistants for the minority). The staff appointed under this paragraph, other than minority assistants, shall possess such qualifications as the committee may prescribe.

(e) A committee may not appoint to its staff an expert or other personnel detailed or assigned from a department or agency of the Government except with the written permission of the Committee on House Administration.

(f) If a request for the appointment of a minority professional staff member under paragraph (a) is made when no vacancy exists for such an appointment, the committee nevertheless may appoint under paragraph (a) a person selected by the minority and acceptable to the committee. A person so appointed shall serve as an additional member of the professional staff of the committee until such a vacancy occurs (other than a vacancy in the position of head of the professional staff, by whatever title designated), at which time that person is considered as appointed to that vacancy. Such a person shall be paid from the applicable accounts of the House described in clause 1(k)(1) of rule X. If such a vacancy occurs on the professional staff when seven or more persons have been so appointed who are eligible to fill that vacancy, a majority of the minority party members shall designate which of those persons shall fill the vacancy.

(g) Each staff member appointed pursuant to a request by minority party

members under paragraph (a), and each staff member appointed to assist minority members of a committee pursuant to an expense resolution described in clause 6(a), shall be accorded equitable treatment with respect to the fixing of the rate of pay, the assignment of work facilities, and the accessibility of committee records.

(h) Paragraph (a) may not be construed to authorize the appointment of additional professional staff members of a committee pursuant to a request under paragraph (a) by the minority party members of that committee if 10 or more professional staff members provided for in paragraph (a)(1) who are satisfactory to a majority of the minority party members are otherwise assigned to assist the minority party members.

(i) Notwithstanding paragraph (a)(2), a committee may employ nonpartisan staff, in lieu of or in addition to committee staff designated exclusively for the majority or minority party, by an affirmative vote of a majority of the members of the majority party and of a majority of the members of the minority party.

Select and joint committees

10. (a) Membership on a select or joint committee appointed by the Speaker under clause 11 of rule I during the course of a Congress shall be contingent on continuing membership in the party caucus or conference of which the Member, Delegate, or Resident Commissioner concerned was a member at the time of appointment. Should a Member, Delegate, or Resident Commissioner cease to be a member of that caucus or conference, that Member, Delegate, or Resident Commissioner shall automatically cease to be a member of any select or joint committee to which assigned. The chair of the relevant party caucus or conference shall notify the Speaker whenever a Member, Delegate, or Resident Commissioner ceases to be a member of a party caucus or conference. The Speaker shall notify the chair of each affected select or joint committee that the appointment of such Member, Delegate, or Resident Commissioner to the select or joint committee is automatically vacated under this paragraph.

(b) Each select or joint committee, other than a conference committee, shall comply with clause 2(a) of rule XI unless specifically exempted by law.

Permanent Select Committee on Intelligence

11. (a)(1) There is established a Permanent Select Committee on Intelligence (hereafter in this clause referred to as the “select committee”). The select committee shall be composed of not more than 22 Members, Delegates, or the Resident Commissioner, of whom not more than 13 may be from the same party. The select committee shall include at least one Member, Delegate, or the Resident

Commissioner from each of the following committees:

(A) the Committee on Appropriations;

(B) the Committee on Armed Services;

(C) the Committee on Foreign Affairs; and

(D) the Committee on the Judiciary.

(2) The Speaker and the Minority Leader shall be ex officio members of the select committee but shall have no vote in the select committee and may not be counted for purposes of determining a quorum thereof.

(3) The Speaker and Minority Leader each may designate a respective leadership staff member to assist in the capacity of the Speaker or Minority Leader as ex officio member, with the same access to committee meetings, hearings, briefings, and materials as employees of the select committee and subject to the same security clearance and confidentiality requirements as employees of the select committee under this clause.

(4)(A) Except as permitted by subdivision (B), a Member, Delegate, or Resident Commissioner, other than the Speaker or the Minority Leader, may not serve as a member of the select committee during more than four Congresses in a period of six successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(B) In the case of a Member, Delegate, or Resident Commissioner appointed to serve as the chair or the ranking minority member of the select committee, tenure on the select committee shall not be limited.

(b)(1) There shall be referred to the select committee proposed legislation, messages, petitions, memorials, and other matters relating to the following:

(A) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program as defined in section 3(6) of the National Security Act of 1947.

(B) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(C) The organization or reorganization of a department or agency of the Government to the extent that the organization or reorganization relates to a function or activity involving intelligence or intelligence-related activities.

(D) Authorizations for appropriations, both direct and indirect, for the following:

(i) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program as defined in section 3(6) of the National Security Act of 1947.

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(ii) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(iii) A department, agency, subdivision, or program that is a successor to an agency or program named or referred to in (i) or (ii).

(2) Proposed legislation initially reported by the select committee (other than provisions solely involving matters specified in subparagraph (1)(A) or subparagraph (1)(D)(i)) containing any matter otherwise within the jurisdiction of a standing committee shall be referred by the Speaker to that standing committee. Proposed legislation initially reported by another committee that contains matter within the jurisdiction of the select committee shall be referred by the Speaker to the select committee if requested by the chair of the select committee.

(3) Nothing in this clause shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee.

(4) Nothing in this clause shall be construed as amending, limiting, or otherwise changing the authority of a standing committee to obtain full and prompt access to the product of the intelligence and intelligence-related activities of a department or agency of the Government relevant to a matter otherwise within the jurisdiction of that committee.

(c)(1) For purposes of accountability to the House, the select committee shall make regular and periodic reports to the House on the nature and extent of the intelligence and intelligence-related activities of the various departments and agencies of the United States. The select committee shall promptly call to the attention of the House, or to any other appropriate committee, a matter requiring the attention of the House or another committee. In making such report, the select committee shall proceed in a manner consistent with paragraph (g) to protect national security.

(2) The select committee shall obtain annual reports from the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, the Secretary of State, and the Director of the Federal Bureau of Investigation. Such reports shall review the intelligence and intelligence-related activities of the agency or department concerned and the intelligence and intelligence-related activities of foreign countries directed at the United States or its interests. An unclassified version of each report may be made available to the public at the discretion of the select committee. Nothing herein shall be construed as requiring the public disclosure in such re-

ports of the names of persons engaged in intelligence or intelligence-related activities for the United States or the divulging of intelligence methods employed or the sources of information on which the reports are based or the amount of funds authorized to be appropriated for intelligence and intelligence-related activities.

(3) Within six weeks after the President submits a budget under section 1105(a) of title 31, United States Code, or at such time as the Committee on the Budget may request, the select committee shall submit to the Committee on the Budget the views and estimates described in section 301(d) of the Congressional Budget Act of 1974 regarding matters within the jurisdiction of the select committee.

(d)(1) Except as specified in subparagraph (2), clauses 8(a), (b), and (c) and 9(a), (b), and (c) of this rule, and clauses 1, 2, and 4 of rule XI shall apply to the select committee to the extent not inconsistent with this clause.

(2) Notwithstanding the requirements of the first sentence of clause 2(g)(2) of rule XI, in the presence of the number of members required under the rules of the select committee for the purpose of taking testimony or receiving evidence, the select committee may vote to close a hearing whenever a majority of those present determines that the testimony or evidence would endanger the national security.

(e) An employee of the select committee, or a person engaged by contract or otherwise to perform services for or at the request of the select committee, may not be given access to any classified information by the select committee unless such employee or person has—

(1) agreed in writing and under oath to be bound by the Rules of the House, including the jurisdiction of the Committee on Ethics and of the select committee concerning the security of classified information during and after the period of the employment or contractual agreement of such employee or person with the select committee; and

(2) received an appropriate security clearance, as determined by the select committee in consultation with the Director of National Intelligence, that is commensurate with the sensitivity of the classified information to which such employee or person will be given access by the select committee.

(f) The select committee shall formulate and carry out such rules and procedures as it considers necessary to prevent the disclosure, without the consent of each person concerned, of information in the possession of the select committee that unduly infringes on the privacy or that violates the constitutional rights of such person. Nothing herein shall be construed to prevent the select committee from publicly disclosing classified information in a case in which it determines that national interest in the disclosure of

classified information clearly outweighs any infringement on the privacy of a person.

(g)(1) The select committee may disclose publicly any information in its possession after a determination by the select committee that the public interest would be served by such disclosure. With respect to the disclosure of information for which this paragraph requires action by the select committee—

(A) the select committee shall meet to vote on the matter within five days after a member of the select committee requests a vote; and

(B) a member of the select committee may not make such a disclosure before a vote by the select committee on the matter, or after a vote by the select committee on the matter except in accordance with this paragraph.

(2)(A) In a case in which the select committee votes to disclose publicly any information that has been classified under established security procedures, that has been submitted to it by the executive branch, and that the executive branch requests be kept secret, the select committee shall notify the President of such vote.

(B) The select committee may disclose publicly such information after the expiration of a five-day period following the day on which notice of the vote to disclose is transmitted to the President unless, before the expiration of the five-day period, the President, personally in writing, notifies the select committee that the President objects to the disclosure of such information, provides reasons therefor, and certifies that the threat to the national interest of the United States posed by the disclosure is of such gravity that it outweighs any public interest in the disclosure.

(C) If the President, personally in writing, notifies the select committee of objections to the disclosure of information as provided in subdivision (B), the select committee may, by majority vote, refer the question of the disclosure of such information, with a recommendation thereon, to the House. The select committee may not publicly disclose such information without leave of the House.

(D) Whenever the select committee votes to refer the question of disclosure of any information to the House under subdivision (C), the chair shall, not later than the first day on which the House is in session following the day on which the vote occurs, report the matter to the House for its consideration.

(E) If the chair of the select committee does not offer in the House a motion to consider in closed session a matter reported under subdivision (D) within four calendar days on which the House is in session after the recommendation described in subdivision (C) is reported, then such a motion shall be privileged when offered by a Member, Delegate, or Resident Com-

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missioner. In either case such a motion shall be decided without debate or intervening motion except one that the House adjourn.

(F) Upon adoption by the House of a motion to resolve into closed session as described in subdivision (E), the Speaker may declare a recess subject to the call of the Chair. At the expiration of the recess, the pending question, in closed session, shall be, "Shall the House approve the recommendation of the select committee?"

(G) Debate on the question described in subdivision (F) shall be limited to two hours equally divided and controlled by the chair and ranking minority member of the select committee. After such debate the previous question shall be considered as ordered on the question of approving the recommendation without intervening motion except one motion that the House adjourn. The House shall vote on the question in open session but without divulging the information with respect to which the vote is taken. If the recommendation of the select committee is not approved, then the question is considered as recommitted to the select committee for further recommendation.

(3)(A) Information in the possession of the select committee relating to the lawful intelligence or intelligence-related activities of a department or agency of the United States that has been classified under established security procedures, and that the select committee has determined should not be disclosed under subparagraph (1) or (2), may not be made available to any person by a Member, Delegate, Resident Commissioner, officer, or employee of the House except as provided in subdivision (B).

(B) The select committee shall, under such regulations as it may prescribe, make information described in subdivision (A) available to a committee or a Member, Delegate, or Resident Commissioner, and permit a Member, Delegate, or Resident Commissioner to attend a hearing of the select committee that is closed to the public. Whenever the select committee makes such information available, it shall keep a written record showing, in the case of particular information, which committee or which Member, Delegate, or Resident Commissioner received the information. A Member, Delegate, or Resident Commissioner who, and a committee that, receives information under this subdivision may not disclose the information except in a closed session of the House.

(4) The Committee on Ethics shall investigate any unauthorized disclosure of intelligence or intelligence-related information by a Member, Delegate, Resident Commissioner, officer, or employee of the House in violation of subparagraph (3) and report to the House concerning any allegation that it finds to be substantiated.

(5) Upon the request of a person who is subject to an investigation described

in subparagraph (4), the Committee on Ethics shall release to such person at the conclusion of its investigation a summary of its investigation, together with its findings. If, at the conclusion of its investigation, the Committee on Ethics determines that there has been a significant breach of confidentiality or unauthorized disclosure by a Member, Delegate, Resident Commissioner, officer, or employee of the House, it shall report its findings to the House and recommend appropriate action. Recommendations may include censure, removal from committee membership, or expulsion from the House, in the case of a Member, or removal from office or employment or punishment for contempt, in the case of an officer or employee.

(h) The select committee may permit a personal representative of the President, designated by the President to serve as a liaison to the select committee, to attend any closed meeting of the select committee.

(i) Subject to the Rules of the House, funds may not be appropriated for a fiscal year, with the exception of a bill or joint resolution continuing appropriations, or an amendment thereto, or a conference report thereon, to, or for use of, a department or agency of the United States to carry out any of the following activities, unless the funds shall previously have been authorized by a bill or joint resolution passed by the House during the same or preceding fiscal year to carry out such activity for such fiscal year:

(1) The activities of the Director of National Intelligence and the Office of the Director of National Intelligence.

(2) The activities of the Central Intelligence Agency.

(3) The activities of the Defense Intelligence Agency.

(4) The activities of the National Security Agency.

(5) The intelligence and intelligence-related activities of other agencies and subdivisions of the Department of Defense.

(6) The intelligence and intelligence-related activities of the Department of State.

(7) The intelligence and intelligence-related activities of the Federal Bureau of Investigation.

(8) The intelligence and intelligence-related activities of all other departments and agencies of the executive branch.

(j)(1) In this clause the term "intelligence and intelligence-related activities" includes—

(A) the collection, analysis, production, dissemination, or use of information that relates to a foreign country, or a government, political group, party, military force, movement, or other association in a foreign country, and that relates to the defense, foreign policy, national security, or related policies of the United States and other activity in support of the collection, analysis,

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production, dissemination, or use of such information;

(B) activities taken to counter similar activities directed against the United States;

(C) covert or clandestine activities affecting the relations of the United States with a foreign government, political group, party, military force, movement, or other association;

(D) the collection, analysis, production, dissemination, or use of information about activities of persons within the United States, its territories and possessions, or nationals of the United States abroad whose political and related activities pose, or may be considered by a department, agency, bureau, office, division, instrumentality, or employee of the United States to pose, a threat to the internal security of the United States; and

(E) covert or clandestine activities directed against persons described in subdivision (D).

(2) In this clause the term "department or agency" includes any organization, committee, council, establishment, or office within the Federal Government.

(3) For purposes of this clause, reference to a department, agency, bureau, or subdivision shall include a reference to any successor department, agency, bureau, or subdivision to the extent that a successor engages in intelligence or intelligence-related activities now conducted by the department, agency, bureau, or subdivision referred to in this clause.

(k) Clause 12(a) of rule XXII does not apply to meetings of a conference committee respecting legislation (or any part thereof) reported by the Permanent Select Committee on Intelligence.

RULE XI

PROCEDURES OF COMMITTEES AND UNFINISHED BUSINESS

In general

1. (a)(1)(A) The Rules of the House are the rules of its committees and subcommittees so far as applicable.

(B) Each subcommittee is a part of its committee and is subject to the authority and direction of that committee and to its rules, so far as applicable.

(2)(A) In a committee or subcommittee—

(i) a motion to recess from day to day, or to recess subject to the call of the Chair (within 24 hours), shall be privileged; and

(ii) a motion to dispense with the first reading (in full) of a bill or resolution shall be privileged if printed copies are available.

(B) A motion accorded privilege under this subparagraph shall be decided without debate.

(b)(1) Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X. Subject to the adoption of expense resolutions as re-

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quired by clause 6 of rule X, each committee may incur expenses, including travel expenses, in connection with such investigations and studies.

(2) A proposed investigative or oversight report shall be considered as read in committee if it has been available to the members for at least 24 hours (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day).

(3) A report of an investigation or study conducted jointly by more than one committee may be filed jointly, provided that each of the committees complies independently with all requirements for approval and filing of the report.

(4) After an adjournment sine die of the last regular session of a Congress, an investigative or oversight report may be filed with the Clerk at any time, provided that a member who gives timely notice of intention to file supplemental, minority, additional, or dissenting views shall be entitled to not less than seven calendar days in which to submit such views for inclusion in the report.

(c) Each committee may have printed and bound such testimony and other data as may be presented at hearings held by the committee or its subcommittees. All costs of stenographic services and transcripts in connection with a meeting or hearing of a committee shall be paid from the applicable accounts of the House described in clause 1(k)(1) of rule X.

(d)(1) Not later than January 2 of each odd-numbered year, a committee shall submit to the House a report on the activities of that committee.

(2) Such report shall include—

(A) separate sections summarizing the legislative and oversight activities of that committee under this rule and rule X during the Congress;

(B) a summary of the authorization and oversight plans submitted by the committee under clause 2(d) of rule X;

(C) a summary of the actions taken and recommendations made with respect to the authorization and oversight plans specified in subdivision (B);

(D) a summary of any additional oversight activities undertaken by that committee and any recommendations made or actions taken thereon; and

(E) a delineation of any hearings held pursuant to clauses 2(n), (o), or (p) of this rule.

(3) After an adjournment sine die of the last regular session of a Congress, or after December 15 of an even-numbered year, whichever occurs first, the chair of a committee may file the report described in subparagraph (1) with the Clerk at any time and without approval of the committee, provided that—

(A) a copy of the report has been available to each member of the committee for at least seven calendar days; and

(B) the report includes any supplemental, minority, additional, or dissenting views submitted by a member of the committee.

Adoption of written rules

2. (a)(1) Each standing committee shall adopt written rules governing its procedure. Such rules—

(A) shall be adopted in a meeting that is open to the public unless the committee, in open session and with a quorum present, determines by record vote that all or part of the meeting on that day shall be closed to the public;

(B) may not be inconsistent with the Rules of the House or with those provisions of law having the force and effect of Rules of the House;

(C) shall in any event incorporate all of the succeeding provisions of this clause to the extent applicable; and

(D) shall include provisions to govern the implementation of clause 4 as provided in paragraph (f) of such clause.

(2) Each committee shall make its rules publicly available in electronic form and submit such rules for publication in the Congressional Record not later than 30 days after the chair of the committee is elected in each odd-numbered year.

(3) A committee may adopt a rule providing that the chair be directed to offer a motion under clause 1 of rule XXII whenever the chair considers it appropriate.

Regular meeting days

(b) Each standing committee shall establish regular meeting days for the conduct of its business, which shall be not less frequent than monthly. Each such committee shall meet for the consideration of a bill or resolution pending before the committee or the trans-action of other committee business on all regular meeting days fixed by the committee if notice is given pursuant to paragraph (g)(3).

Additional and special meetings

(c)(1) The chair of each standing committee may call and convene, as the chair considers necessary, additional and special meetings of the committee for the consideration of a bill or resolution pending before the committee or for the conduct of other committee business, subject to such rules as the committee may adopt. The committee shall meet for such purpose under that call of the chair.

(2) Three or more members of a standing committee may file in the offices of the committee a written request that the chair call a special meeting of the committee. Such request shall specify the measure or matter to be considered. Immediately upon the filing of the request, the clerk of the committee shall notify the chair of the filing of the request. If the chair does not call the requested special meeting within three calendar days after the filing of the request (to be

held within seven calendar days after the filing of the request) a majority of the members of the committee may file in the offices of the committee their written notice that a special meeting of the committee will be held. The written notice shall specify the date and hour of the special meeting and the measure or matter to be considered. The committee shall meet on that date and hour. Immediately upon the filing of the notice, the clerk of the committee shall notify all members of the committee that such special meeting will be held and inform them of its date and hour and the measure or matter to be considered. Such notice shall also be made publicly available in electronic form and shall be deemed to satisfy paragraph (g)(3)(A)(ii). Only the measure or matter specified in that notice may be considered at that special meeting.

Temporary absence of chair

(d) A member of the majority party on each standing committee or subcommittee thereof shall be designated by the chair of the full committee as the vice chair of the committee or subcommittee, as the case may be, and shall preside during the absence of the chair from any meeting. If the chair and vice chair of a committee or subcommittee are not present at any meeting of the committee or subcommittee, the ranking majority member who is present shall preside at that meeting.

Committee records

(e)(1)(A) Each committee shall keep a complete record of all committee action which shall include—

(i) in the case of a meeting or hearing transcript, a substantially verbatim account of remarks actually made during the proceedings, subject only to technical, grammatical, and typographical corrections authorized by the person making the remarks involved; and

(ii) a record of the votes on any question on which a record vote is taken.

(B)(i) Except as provided in subdivision (B)(ii) and subject to paragraph (k)(7), the result of each such record vote shall be made available by the committee for inspection by the public at reasonable times in its offices and also made publicly available in electronic form within 48 hours of such record vote. Information so available shall include a description of the amendment, motion, order, or other proposition, the name of each member voting for and each member voting against such amendment, motion, order, or proposition, and the names of those members of the committee present but not voting.

(ii) The result of any record vote taken in executive session in the Committee on Ethics may not be made available for inspection by the public without an affirmative vote of a majority of the members of the committee.

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(2)(A) Except as provided in subdivision (B), all committee records (including hearings, data, charts, and files) shall be kept separate and distinct from the congressional office records of the member serving as its chair. Such records shall be the property of the House, and each Member, Delegate, and the Resident Commissioner shall have access thereto.

(B) A Member, Delegate, or Resident Commissioner, other than members of the Committee on Ethics, may not have access to the records of that committee respecting the conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House without the specific prior permission of that committee.

(3) Each committee shall include in its rules standards for availability of records of the committee delivered to the Archivist of the United States under rule VII. Such standards shall specify procedures for orders of the committee under clause 3(b)(3) and clause 4(b) of rule VII, including a requirement that nonavailability of a record for a period longer than the period otherwise applicable under that rule shall be approved by vote of the committee.

(4) Each committee shall make its publications available in electronic form to the maximum extent feasible.

(5) To the maximum extent practicable, each committee shall—

(A) provide audio and video coverage of each hearing or meeting for the transaction of business in a manner that allows the public to easily listen to and view the proceedings; and

(B) maintain the recordings of such coverage in a manner that is easily accessible to the public.

(6) Not later than 24 hours after the adoption of any amendment to a measure or matter considered by a committee, the chair of such committee shall cause the text of each such amendment to be made publicly available in electronic form.

Prohibition against proxy voting

(f) A vote by a member of a committee or subcommittee with respect to any measure or matter may not be cast by proxy.

Open meetings and hearings

(g)(1) Each meeting for the transaction of business, including the markup of legislation, by a standing committee or subcommittee thereof (other than the Committee on Ethics or its subcommittees) shall be open to the public, including to radio, television, and still photography coverage, except when the committee or subcommittee, in open session and with a majority present, determines by record vote that all or part of the remainder of the meeting on that day shall be in executive session because disclosure of matters to be considered would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade, or in-

criminate any person, or otherwise would violate a law or rule of the House. Persons, other than members of the committee and such noncommittee Members, Delegates, Resident Commissioner, congressional staff, or departmental representatives as the committee may authorize, may not be present at a business or markup session that is held in executive session. This subparagraph does not apply to open committee hearings, which are governed by clause 4(a)(1) of rule X or by subparagraph (2).

(2)(A) Each hearing conducted by a committee or subcommittee (other than the Committee on Ethics or its subcommittees) shall be open to the public, including to radio, television, and still photography coverage, except when the committee or subcommittee, in open session and with a majority present, determines by record vote that all or part of the remainder of that hearing on that day shall be closed to the public because disclosure of testimony, evidence, or other matters to be considered would endanger national security, would compromise sensitive law enforcement information, or would violate a law or rule of the House.

(B) Notwithstanding the requirements of subdivision (A), in the presence of the number of members required under the rules of the committee for the purpose of taking testimony, a majority of those present may—

(i) agree to close the hearing for the sole purpose of discussing whether testimony or evidence to be received would endanger national security, would compromise sensitive law enforcement information, or would violate clause 2(k)(5); or

(ii) agree to close the hearing as provided in clause 2(k)(5).

(C) A Member, Delegate, or Resident Commissioner may not be excluded from nonparticipatory attendance at a hearing of a committee or subcommittee (other than the Committee on Ethics or its subcommittees) unless the House by majority vote authorizes a particular committee or subcommittee, for purposes of a particular series of hearings on a particular article of legislation or on a particular subject of investigation, to close its hearings to Members, Delegates, and the Resident Commissioner by the same procedures specified in this subparagraph for closing hearings to the public.

(D) The committee or subcommittee may vote by the same procedure described in this subparagraph to close one subsequent day of hearing, except that the Committee on Appropriations, the Committee on Armed Services, the Committee on Homeland Security, and the Permanent Select Committee on Intelligence, and the subcommittees thereof, may vote by the same procedure to close up to five additional, consecutive days of hearings.

(3)(A) The chair of a committee shall announce the date, place, and subject matter of—

(i) a committee hearing, which may not commence earlier than one week after such notice; or

(ii) a committee meeting, which may not commence earlier than the third day on which members have notice thereof.

(B) A hearing or meeting may begin sooner than specified in subdivision (A) in either of the following circumstances (in which case the chair shall make the announcement specified in subdivision (A) at the earliest possible time):

(i) the chair of the committee, with the concurrence of the ranking minority member, determines that there is good cause; or

(ii) the committee so determines by majority vote in the presence of the number of members required under the rules of the committee for the transaction of business.

(C) An announcement made under this subparagraph shall be published promptly in the Daily Digest and made publicly available in electronic form.

(D) This subparagraph and subparagraph (4) shall not apply to the Committee on Rules.

(4) At least 24 hours prior to the commencement of a meeting for the markup of legislation, or at the time of an announcement under subparagraph (3)(B) made within 24 hours before such meeting, the chair of the committee shall cause the text of such legislation to be made publicly available in electronic form.

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in elec-

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tronic form not later than one day after the witness appears.

(6)(A) Except as provided in subdivision (B), a point of order does not lie with respect to a measure reported by a committee on the ground that hearings on such measure were not conducted in accordance with this clause.

(B) A point of order on the ground described in subdivision (A) may be made by a member of the committee that reported the measure if such point of order was timely made and improperly disposed of in the committee.

(7) This paragraph does not apply to hearings of the Committee on Appropriations under clause 4(a)(1) of rule X.

Quorum requirements

(h)(1) A measure or recommendation may not be reported by a committee unless a majority of the committee is actually present.

(2) Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which may not be less than two.

(3) Each committee (other than the Committee on Appropriations, the Committee on the Budget, and the Committee on Ways and Means) may fix the number of its members to constitute a quorum for taking any action other than one for which the presence of a majority of the committee is otherwise required, which may not be less than one-third of the members.

(4)(A) Each committee may adopt a rule authorizing the chair of a committee or subcommittee—

(i) to postpone further proceedings when a record vote is ordered on the question of approving a measure or matter or on adopting an amendment; and

(ii) to resume proceedings on a postponed question at any time after reasonable notice.

(B) A rule adopted pursuant to this subparagraph shall provide that when proceedings resume on a postponed question, notwithstanding any intervening order for the previous question, an underlying proposition shall remain subject to further debate or amendment to the same extent as when the question was postponed.

Limitation on committee sittings

(i) A committee may not sit during a joint session of the House and Senate or during a recess when a joint meeting of the House and Senate is in progress.

Calling and questioning of witnesses

(j)(1) Whenever a hearing is conducted by a committee on a measure or matter, the minority members of the committee shall be entitled, upon request to the chair by a majority of them before the completion of the hearing, to call witnesses selected by the minority to testify with respect to that measure or matter during at least one day of hearing thereon.

(2)(A) Subject to subdivisions (B) and (C), each committee shall apply the

five-minute rule during the questioning of witnesses in a hearing until such time as each member of the committee who so desires has had an opportunity to question each witness.

(B) A committee may adopt a rule or motion permitting a specified number of its members to question a witness for longer than five minutes. The time for extended questioning of a witness under this subdivision shall be equal for the majority party and the minority party and may not exceed one hour in the aggregate.

(C) A committee may adopt a rule or motion permitting committee staff for its majority and minority party members to question a witness for equal specified periods. The time for extended questioning of a witness under this subdivision shall be equal for the majority party and the minority party and may not exceed one hour in the aggregate.

Hearing procedures

(k)(1) The chair at a hearing shall announce in an opening statement the subject of the hearing.

(2) A copy of the committee rules and of this clause shall be made available to each witness on request.

(3) Witnesses at hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(4) The chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.

(5) Whenever it is asserted by a member of the committee that the evidence or testimony at a hearing may tend to defame, degrade, or incriminate any person, or it is asserted by a witness that the evidence or testimony that the witness would give at a hearing may tend to defame, degrade, or incriminate the witness—

(A) notwithstanding paragraph (g)(2), such testimony or evidence shall be presented in executive session if, in the presence of the number of members required under the rules of the committee for the purpose of taking testimony, the committee determines by vote of a majority of those present that such evidence or testimony may tend to defame, degrade, or incriminate any person; and

(B) the committee shall proceed to receive such testimony in open session only if the committee, a majority being present, determines that such evidence or testimony will not tend to defame, degrade, or incriminate any person.

In either case the committee shall afford such person an opportunity voluntarily to appear as a witness, and receive and dispose of requests from such person to subpoena additional witnesses.

(6) Except as provided in subparagraph (5), the chair shall receive and

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the committee shall dispose of requests to subpoena additional witnesses.

(7) Evidence or testimony taken in executive session, and proceedings conducted in executive session, may be released or used in public sessions only when authorized by the committee, a majority being present.

(8) In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinence of testimony and evidence adduced at its hearing.

(9) A witness may obtain a transcript copy of the testimony of such witness given at a public session or, if given at an executive session, when authorized by the committee.

Supplemental, minority, additional, or dissenting views

(1) If at the time of approval of a measure or matter by a committee (other than the Committee on Rules) a member of the committee gives notice of intention to file supplemental, minority, additional, or dissenting views for inclusion in the report to the House thereon, all members shall be entitled to not less than two additional calendar days after the day of such notice (excluding Saturdays, Sundays, and legal holidays except when the House is in session on such a day) to file such written and signed views with the clerk of the committee.

Power to sit and act; subpoena power

(m)(1) For the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII), a committee or subcommittee is authorized (subject to subparagraph (3)(A))—

(A) to sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, and to hold such hearings as it considers necessary; and

(B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.

(2) The chair of the committee, or a member designated by the chair, may administer oaths to witnesses.

(3)(A)(i) Except as provided in subdivision (A)(ii), a subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of an investigation or series of investigations or activities only when authorized by the committee or subcommittee, a majority being present. The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chair of the committee or by a member designated by the committee.

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(ii) In the case of a subcommittee of the Committee on Ethics, a subpoena may be authorized and issued only by an affirmative vote of a majority of its members.

(B) A subpoena duces tecum may specify terms of return other than at a meeting or hearing of the committee or subcommittee authorizing the subpoena.

(C) Compliance with a subpoena issued by a committee or subcommittee under subparagraph (1)(B) may be enforced only as authorized or directed by the House.

(n)(1) Each standing committee, or a subcommittee thereof, shall hold at least one hearing during each 120-day period following the establishment of the committee on the topic of waste, fraud, abuse, or mismanagement in Government programs which that committee may authorize.

(2) A hearing described in subparagraph (1) shall include a focus on the most egregious instances of waste, fraud, abuse, or mismanagement as documented by any report the committee has received from a Federal Office of the Inspector General or the Comptroller General of the United States.

(o) Each committee, or a subcommittee thereof, shall hold at least one hearing in any session in which the committee has received disclaimers of agency financial statements from auditors of any Federal agency that the committee may authorize to hear testimony on such disclaimers from representatives of any such agency.

(p) Each standing committee, or a subcommittee thereof, shall hold at least one hearing on issues raised by reports issued by the Comptroller General of the United States indicating that Federal programs or operations are at high risk for waste, fraud, and mismanagement, known as the "high-risk list" or the "high-risk series."

Committee on Ethics

3. (a) The Committee on Ethics has the following functions:

(1) The committee may recommend to the House from time to time such administrative actions as it may consider appropriate to establish or enforce standards of official conduct for Members, Delegates, the Resident Commissioner, officers, and employees of the House. A letter of reproof or other administrative action of the committee pursuant to an investigation under subparagraph (2) shall only be issued or implemented as a part of a report required by such subparagraph.

(2) The committee may investigate, subject to paragraph (b), an alleged violation by a Member, Delegate, Resident Commissioner, officer, or employee of the House of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, Delegate, Resident

Commissioner, officer, or employee in the performance of the duties or the discharge of the responsibilities of such individual. After notice and hearing (unless the right to a hearing is waived by the Member, Delegate, Resident Commissioner, officer, or employee), the committee shall report to the House its findings of fact and recommendations, if any, for the final disposition of any such investigation and such action as the committee may consider appropriate in the circumstances.

(3) The committee may report to the appropriate Federal or State authorities, either with the approval of the House or by an affirmative vote of two-thirds of the members of the committee, any substantial evidence of a violation by a Member, Delegate, Resident Commissioner, officer, or employee of the House, of a law applicable to the performance of the duties or the discharge of the responsibilities of such individual that may have been disclosed in a committee investigation.

(4) The committee may consider the request of a Member, Delegate, Resident Commissioner, officer, or employee of the House for an advisory opinion with respect to the general propriety of any current or proposed conduct of such Member, Delegate, Resident Commissioner, officer, or employee. With appropriate deletions to ensure the privacy of the person concerned, the committee may publish such opinion for the guidance of other Members, Delegates, the Resident Commissioner, officers, and employees of the House.

(5) The committee may consider the request of a Member, Delegate, Resident Commissioner, officer, or employee of the House for a written waiver in exceptional circumstances with respect to clause 4 of rule XXIII.

(6)(A) The committee shall offer annual ethics training to each Member, Delegate, Resident Commissioner, officer, and employee of the House. Such training shall—

(i) involve the classes of employees for whom the committee determines such training to be appropriate; and

(ii) include such knowledge of the Code of Official Conduct and related House rules as may be determined appropriate by the committee.

(B)(i) A new Member, Delegate, Resident Commissioner, officer, or employee of the House shall receive training under this paragraph not later than 60 days after beginning service to the House.

(ii) Not later than January 31 of each year, each officer and employee of the House shall file a certification with the committee that the officer or employee attended ethics training in the last year as established by this subparagraph.

(b)(1)(A) Unless approved by an affirmative vote of a majority of its

members, the Committee on Ethics may not report a resolution, report, recommendation, or advisory opinion relating to the official conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House, or, except as provided in subparagraph (2), undertake an investigation of such conduct.

(B)(i) Upon the receipt of information offered as a complaint that is in compliance with this rule and the rules of the committee, the chair and ranking minority member jointly may appoint members to serve as an investigative subcommittee.

(ii) The chair and ranking minority member of the committee jointly may gather additional information concerning alleged conduct that is the basis of a complaint or of information offered as a complaint until they have established an investigative subcommittee or either of them has placed on the agenda of the committee the issue of whether to establish an investigative subcommittee.

(2) Except in the case of an investigation undertaken by the committee on its own initiative, the committee may undertake an investigation relating to the official conduct of an individual Member, Delegate, Resident Commissioner, officer, or employee of the House only—

(A) upon receipt of information offered as a complaint, in writing and under oath, from a Member, Delegate, or Resident Commissioner and transmitted to the committee by such Member, Delegate, or Resident Commissioner;

(B) upon receipt of information offered as a complaint, in writing and under oath, from a person not a Member, Delegate, or Resident Commissioner provided that a Member, Delegate, or Resident Commissioner certifies in writing to the committee that such Member, Delegate, or Resident Commissioner believes the information is submitted in good faith and warrants the review and consideration of the committee; or

(C) upon receipt of a report regarding a referral from the board of the Office of Congressional Ethics.

If a complaint is not disposed of within the applicable periods set forth in the rules of the Committee on Ethics, the chair and ranking minority member shall establish jointly an investigative subcommittee and forward the complaint, or any portion thereof, to that subcommittee for its consideration. However, if at any time during those periods either the chair or ranking minority member places on the agenda the issue of whether to establish an investigative subcommittee, then an investigative subcommittee may be established only by an affirmative vote of a majority of the members of the committee.

(3) The committee may not undertake an investigation of an alleged violation of a law, rule, regulation, or standard of conduct that was not in ef-

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fect at the time of the alleged violation. The committee may not undertake an investigation of such an alleged violation that occurred before the third previous Congress unless the committee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress.

(4) A member of the committee shall be ineligible to participate as a member of the committee in a committee proceeding relating to the member's official conduct. Whenever a member of the committee is ineligible to act as a member of the committee under the preceding sentence, the Speaker shall designate a Member, Delegate, or Resident Commissioner from the same political party as the ineligible member to act in any proceeding of the committee relating to that conduct.

(5) A member of the committee may seek disqualification from participating in an investigation of the conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House upon the submission in writing and under oath of an affidavit of disqualification stating that the member cannot render an impartial and unbiased decision in the case in which the member seeks to be disqualified. If the committee approves and accepts such affidavit of disqualification, the chair shall so notify the Speaker and request the Speaker to designate a Member, Delegate, or Resident Commissioner from the same political party as the disqualifying member to act in any proceeding of the committee relating to that case.

(6) Information or testimony received, or the contents of a complaint or the fact of its filing, may not be publicly disclosed by any committee or staff member unless specifically authorized in each instance by a vote of the full committee.

(7) The committee shall have the functions designated in titles I and V of the Ethics in Government Act of 1978, in sections 7342, 7351, and 7353 of title 5, United States Code, and in clause 11(g)(4) of rule X.

(8)(A) Except as provided by subdivisions (B), (C), and (D), not later than 45 calendar days or 5 legislative days, whichever is later, after receipt of a written report and any findings and supporting documentation regarding a referral from the board of the Office of Congressional Ethics or of a referral of the matter from the board pursuant to a request under paragraph (r), the chair of the Committee on Ethics shall make public the written report and findings of the board unless the chair and ranking member, acting jointly, decide or the committee votes to withhold such information for not more than one additional period of the same duration, in which case the chair shall—

(i) upon the termination of such additional period, make public the written report and findings; and

(ii) upon the day of such decision or vote, make a public statement that

the matter, relating to the referral made by the board of the Office of Congressional Ethics regarding the Member, officer, or employee of the House who is the subject of the applicable referral, has been extended.

At least one calendar day before the committee makes public any written report and findings of the board, the chair shall notify such board and the applicable Member, officer, or employee of that fact and transmit to such individual a copy of the statement on the committee's disposition of, and any committee report on, the matter.

(B)(i) Notwithstanding subdivision (A)(i), if the committee votes to dismiss a matter which is the subject of a referral from the board of the Office of Congressional Ethics, the committee is not required to make public the written report and findings described in such subdivision unless the committee's vote is inconsistent with the recommendation of the board. For purposes of the previous sentence, a vote by the committee to dismiss a matter is not inconsistent with a report from the board respecting the matter as unresolved due to a tie vote.

(ii) Notwithstanding subdivision (A)(ii), if the board transmits a report respecting any matter with a recommendation to dismiss or as unresolved due to a tie vote, and the matter is extended for an additional period as provided in subdivision (A), the committee is not required to make a public statement that the matter has been extended.

(iii) Except as provided by subdivision (E), if the committee establishes an investigative subcommittee respecting any such matter, then the report and findings of the board shall not be made public until the conclusion of the investigative subcommittee process and the committee shall issue a public statement of the establishment of an investigative subcommittee, which statement shall include the name of the applicable Member, officer, or employee, and shall set forth the alleged violation. If any such investigative subcommittee does not conclude its review within one year after the board transmits a report respecting any matter, then the committee shall make public the report and upon the expiration of the Congress in which the report is made public, the committee shall make public any findings.

(C)(i) If, after receipt of a written report and any findings and supporting documentation regarding a referral from the board of the Office of Congressional Ethics or of a referral of the matter from the board pursuant to a request under paragraph (r), the committee agrees to a request from an appropriate law enforcement or regulatory authority to defer taking action on the matter—

(I) notwithstanding subdivision (A)(i), the committee is not required to make public the written report and findings described in such subdivision, except that if the rec-

ommendation of the board with respect to the report is that the matter requires further review, the committee shall make public the written report but not the findings; and

(II) before the end of the first day (excluding Saturdays, Sundays, and public holidays) after the day that the committee agrees to the request, the committee shall make a public statement that it is deferring taking action on the matter at the request of such authority.

(ii) If, upon the expiration of the one-year period that begins on the date the committee makes the public statement described in item (i)(II), the committee has not acted on the matter, the committee shall make a new public statement that it is still deferring taking action on the matter, and shall make a new statement upon the expiration of each succeeding one-year period during which the committee has not acted on the matter.

(D) The committee may not receive any referral from the board of the Office of Congressional Ethics within 60 days before a Federal, State, or local election in which the subject of the referral is a candidate. The committee may delay any reporting requirement under this subparagraph that falls within that 60-day period until the end of such period and in that case, for purposes of subdivision (A), days within the 60-day period shall not be counted.

(E) If, at the close of any applicable period for a reporting requirement under this subparagraph with respect to a referral from the board of the Office of Congressional Ethics, the vote of the committee is a tie or the committee fails to act, the report and the findings of the board shall be made public by the committee, along with a public statement by the chair explaining the status of the matter.

(c)(1) Notwithstanding clause 2(g)(1) of rule XI, each meeting of the Committee on Ethics or a subcommittee thereof shall occur in executive session unless the committee or subcommittee, by an affirmative vote of a majority of its members, opens the meeting to the public.

(2) Notwithstanding clause 2(g)(2) of rule XI, each hearing of an adjudicatory subcommittee or sanction hearing of the Committee on Ethics shall be held in open session unless the committee or subcommittee, in open session by an affirmative vote of a majority of its members, closes all or part of the remainder of the hearing on that day to the public.

(d) Before a member, officer, or employee of the Committee on Ethics, including members of a subcommittee of the committee selected under clause 5(a)(4) of rule X and shared staff, may have access to information that is confidential under the rules of the committee, the following oath (or affirmation) shall be executed:

"I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on

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Ethics, any information received in the course of my service with the committee, except as authorized by the committee or in accordance with its rules.”

Copies of the executed oath shall be retained by the Clerk as part of the records of the House. This paragraph establishes a standard of conduct within the meaning of paragraph (a)(2). Breaches of confidentiality shall be investigated by the Committee on Ethics and appropriate action shall be taken.

(e)(1) If a complaint or information offered as a complaint is deemed frivolous by an affirmative vote of a majority of the members of the Committee on Ethics, the committee may take such action as it, by an affirmative vote of a majority of its members, considers appropriate in the circumstances.

(2) Complaints filed before the One Hundred Fifth Congress may not be deemed frivolous by the Committee on Ethics.

Committee agendas

(f) The committee shall adopt rules providing that the chair shall establish the agenda for meetings of the committee, but shall not preclude the ranking minority member from placing any item on the agenda.

Committee staff

(g)(1) The committee shall adopt rules providing that—

(A) the staff be assembled and retained as a professional, nonpartisan staff;

(B) each member of the staff shall be professional and demonstrably qualified for the position for which hired;

(C) the staff as a whole and each member of the staff shall perform all official duties in a nonpartisan manner;

(D) no member of the staff shall engage in any partisan political activity directly affecting any congressional or presidential election;

(E) no member of the staff or outside counsel may accept public speaking engagements or write for publication on any subject that is in any way related to the employment or duties with the committee of such individual without specific prior approval from the chair and ranking minority member; and

(F) no member of the staff or outside counsel may make public, unless approved by an affirmative vote of a majority of the members of the committee, any information, document, or other material that is confidential, derived from executive session, or classified and that is obtained during the course of employment with the committee.

(2) Only subdivisions (C), (E), and (F) of subparagraph (1) shall apply to shared staff.

(3)(A) All staff members shall be appointed by an affirmative vote of a majority of the members of the committee. Such vote shall occur at the

first meeting of the membership of the committee during each Congress and as necessary during the Congress.

(B) Subject to the approval of the Committee on House Administration, the committee may retain counsel not employed by the House of Representatives whenever the committee determines, by an affirmative vote of a majority of the members of the committee, that the retention of outside counsel is necessary and appropriate.

(C) If the committee determines that it is necessary to retain staff members for the purpose of a particular investigation or other proceeding, then such staff shall be retained only for the duration of that particular investigation or proceeding.

(D) Outside counsel may be dismissed before the end of a contract between the committee and such counsel only by an affirmative vote of a majority of the members of the committee.

(4) In addition to any other staff provided for by law, rule, or other authority, with respect to the committee, the chair and ranking minority member each may appoint one individual as a shared staff member from the respective personal staff of the chair or ranking minority member to perform service for the committee. Such shared staff may assist the chair or ranking minority member on any subcommittee on which the chair or ranking minority member serves.

Meetings and hearings

(h) The committee shall adopt rules providing that—

(1) all meetings or hearings of the committee or any subcommittee thereof, other than any hearing held by an adjudicatory subcommittee or any sanction hearing held by the committee, shall occur in executive session unless the committee or subcommittee by an affirmative vote of a majority of its members opens the meeting or hearing to the public; and

(2) any hearing held by an adjudicatory subcommittee or any sanction hearing held by the committee shall be open to the public unless the committee or subcommittee by an affirmative vote of a majority of its members closes the hearing to the public.

Public disclosure

(i) The committee shall adopt rules providing that, unless otherwise determined by a vote of the committee, only the chair or ranking minority member, after consultation with each other, may make public statements regarding matters before the committee or any subcommittee thereof.

Requirements to constitute a complaint

(j) The committee shall adopt rules regarding complaints to provide that whenever information offered as a complaint is submitted to the committee, the chair and ranking minority member shall have 14 calendar days or five legislative days, whichever is sooner, to determine whether the information

meets the requirements of the rules of the committee for what constitutes a complaint.

Duties of chair and ranking minority member regarding properly filed complaints

(k)(1) The committee shall adopt rules providing that whenever the chair and ranking minority member jointly determine that information submitted to the committee meets the requirements of the rules of the committee for what constitutes a complaint, they shall have 45 calendar days or five legislative days, whichever is later, after that determination (unless the committee by an affirmative vote of a majority of its members votes otherwise) to—

(A) recommend to the committee that it dispose of the complaint, or any portion thereof, in any manner that does not require action by the House, which may include dismissal of the complaint or resolution of the complaint by a letter to the Member, officer, or employee of the House against whom the complaint is made;

(B) establish an investigative subcommittee; or

(C) request that the committee extend the applicable 45-calendar day or five-legislative day period by one additional 45-calendar day period when they determine more time is necessary in order to make a recommendation under subdivision (A).

(2) The committee shall adopt rules providing that if the chair and ranking minority member jointly determine that information submitted to the committee meets the requirements of the rules of the committee for what constitutes a complaint, and the complaint is not disposed of within the applicable time periods under subparagraph (1), then they shall establish an investigative subcommittee and forward the complaint, or any portion thereof, to that subcommittee for its consideration. However, if, at any time during those periods, either the chair or ranking minority member places on the agenda the issue of whether to establish an investigative subcommittee, then an investigative subcommittee may be established only by an affirmative vote of a majority of the members of the committee.

Duties of chair and ranking minority member regarding information not constituting a complaint

(1) The committee shall adopt rules providing that whenever the chair and ranking minority member jointly determine that information submitted to the committee does not meet the requirements of the rules of the committee for what constitutes a complaint, they may—

(1) return the information to the complainant with a statement that it fails to meet the requirements of the rules of the committee for what constitutes a complaint; or

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(2) recommend to the committee that it authorize the establishment of an investigative subcommittee.

Investigative and adjudicatory subcommittees

(m) The committee shall adopt rules providing that—

(1)(A) an investigative subcommittee shall be composed of four Members (with equal representation from the majority and minority parties) whenever such a subcommittee is established pursuant to the rules of the committee;

(B) an adjudicatory subcommittee shall be composed of the members of the committee who did not serve on the pertinent investigative subcommittee (with equal representation from the majority and minority parties) whenever such a subcommittee is established pursuant to the rules of the committee; and

(C) notwithstanding any other provision of this clause, the chair and ranking minority member of the committee may consult with an investigative subcommittee either on their own initiative or on the initiative of the subcommittee, shall have access to information before a subcommittee with which they so consult, and shall not thereby be precluded from serving as full, voting members of any adjudicatory subcommittee;

(2) at the time of appointment, the chair shall designate one member of a subcommittee to serve as chair and the ranking minority member shall designate one member of the subcommittee to serve as the ranking minority member; and

(3) the chair and ranking minority member of the committee may serve as members of an investigative subcommittee, but may not serve as non-voting, ex officio members.

Standard of proof for adoption of statement of alleged violation

(n) The committee shall adopt rules to provide that an investigative subcommittee may adopt a statement of alleged violation only if it determines by an affirmative vote of a majority of the members of the subcommittee that there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member, officer, or employee of the House of Representatives, has occurred.

Subcommittee powers

(o)(1) The committee shall adopt rules providing that an investigative subcommittee or an adjudicatory subcommittee may authorize and issue subpoenas only when authorized by an affirmative vote of a majority of the members of the subcommittee.

(2) The committee shall adopt rules providing that an investigative subcommittee may, upon an affirmative

vote of a majority of its members, expand the scope of its investigation when approved by an affirmative vote of a majority of the members of the committee.

(3) The committee shall adopt rules to provide that—

(A) an investigative subcommittee may, upon an affirmative vote of a majority of its members, amend its statement of alleged violation anytime before the statement of alleged violation is transmitted to the committee; and

(B) if an investigative subcommittee amends its statement of alleged violation, the respondent shall be notified in writing and shall have 30 calendar days from the date of that notification to file an answer to the amended statement of alleged violation.

Due process rights of respondents

(p) The committee shall adopt rules to provide that—

(1) not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a statement of alleged violation, the subcommittee shall provide the respondent with a copy of the statement of alleged violation it intends to adopt together with all evidence it intends to use to prove those charges which it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, unless the subcommittee by an affirmative vote of a majority of its members decides to withhold certain evidence in order to protect a witness; but if such evidence is withheld, the subcommittee shall inform the respondent that evidence is being withheld and of the count to which such evidence relates;

(2) neither the respondent nor the counsel of the respondent shall, directly or indirectly, contact the subcommittee or any member thereof during the period of time set forth in paragraph (1) except for the sole purpose of settlement discussions where counsel for the respondent and the subcommittee are present;

(3) if, at any time after the issuance of a statement of alleged violation, the committee or any subcommittee thereof determines that it intends to use evidence not provided to a respondent under paragraph (1) to prove the charges contained in the statement of alleged violation (or any amendment thereof), such evidence shall be made immediately available to the respondent, and it may be used in any further proceeding under the rules of the committee;

(4) evidence provided pursuant to paragraph (1) or (3) shall be made available to the respondent and the counsel of the respondent only after each agrees, in writing, that no document, information, or other mate-

rials obtained pursuant to that paragraph shall be made public until—

(A) such time as a statement of alleged violation is made public by the committee if the respondent has waived the adjudicatory hearing; or

(B) the commencement of an adjudicatory hearing if the respondent has not waived an adjudicatory hearing;

but the failure of respondent and the counsel of the respondent to so agree in writing, and their consequent failure to receive the evidence, shall not preclude the issuance of a statement of alleged violation at the end of the period referred to in paragraph (1);

(5) a respondent shall receive written notice whenever—

(A) the chair and ranking minority member determine that information the committee has received constitutes a complaint;

(B) a complaint or allegation is transmitted to an investigative subcommittee;

(C) an investigative subcommittee votes to authorize its first subpoena or to take testimony under oath, whichever occurs first; or

(D) an investigative subcommittee votes to expand the scope of its investigation;

(6) whenever an investigative subcommittee adopts a statement of alleged violation and a respondent enters into an agreement with that subcommittee to settle a complaint on which that statement is based, that agreement, unless the respondent requests otherwise, shall be in writing and signed by the respondent and respondent's counsel, the chair and ranking minority member of the subcommittee, and the outside counsel, if any;

(7) statements or information derived solely from a respondent or the counsel of a respondent during any settlement discussions between the committee or a subcommittee thereof and the respondent shall not be included in any report of the subcommittee or the committee or otherwise publicly disclosed without the consent of the respondent; and

(8) whenever a motion to establish an investigative subcommittee does not prevail, the committee shall promptly send a letter to the respondent informing the respondent of such vote.

Committee reporting requirements

(q) The committee shall adopt rules to provide that—

(1) whenever an investigative subcommittee does not adopt a statement of alleged violation and transmits a report to that effect to the committee, the committee may by an affirmative vote of a majority of its members transmit such report to the House of Representatives;

(2) whenever an investigative subcommittee adopts a statement of al-

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leged violation, the respondent admits to the violations set forth in such statement, the respondent waives the right to an adjudicatory hearing, and the respondent's waiver is approved by the committee—

(A) the subcommittee shall prepare a report for transmittal to the committee, a final draft of which shall be provided to the respondent not less than 15 calendar days before the subcommittee votes on whether to adopt the report;

(B) the respondent may submit views in writing regarding the final draft to the subcommittee within seven calendar days of receipt of that draft;

(C) the subcommittee shall transmit a report to the committee regarding the statement of alleged violation together with any views submitted by the respondent pursuant to subdivision (B), and the committee shall make the report together with the respondent's views available to the public before the commencement of any sanction hearing; and

(D) the committee shall by an affirmative vote of a majority of its members issue a report and transmit such report to the House of Representatives, together with the respondent's views previously submitted pursuant to subdivision (B) and any additional views respondent may submit for attachment to the final report; and

(3) members of the committee shall have not less than 72 hours to review any report transmitted to the committee by an investigative subcommittee before both the commencement of a sanction hearing and the committee vote on whether to adopt the report.

(r) Upon receipt of any written notification from the board of the Office of Congressional Ethics that the board is undertaking a review of any alleged conduct of any Member, officer, or employee of the House and if the committee is investigating such matter, the committee may at any time so notify the board and request that the board cease its review and refer the matter to the committee for its consideration. If at the end of the applicable time period (including any permissible extension) the committee has not reached a final resolution of the matter or has not referred the matter to the appropriate Federal or State authorities, the committee shall so notify the board of the Office of Congressional Ethics in writing. The committee may not request the same matter from the board more than one time.

(s) The committee may not take any action that would deny any person any right or protection provided under the Constitution of the United States.

Audio and visual coverage of committee proceedings

4. (a) The purpose of this clause is to provide a means, in conformity with

acceptable standards of dignity, propriety, and decorum, by which committee hearings or committee meetings that are open to the public may be covered by audio and visual means—

(1) for the education, enlightenment, and information of the general public, on the basis of accurate and impartial news coverage, regarding the operations, procedures, and practices of the House as a legislative and representative body, and regarding the measures, public issues, and other matters before the House and its committees, the consideration thereof, and the action taken thereon; and

(2) for the development of the perspective and understanding of the general public with respect to the role and function of the House under the Constitution as an institution of the Federal Government.

(b) In addition, it is the intent of this clause that radio and television tapes and television film of any coverage under this clause may not be used for any partisan political campaign purpose or be made available for such use.

(c) It is, further, the intent of this clause that the general conduct of each meeting (whether of a hearing or otherwise) covered under authority of this clause by audio or visual means, and the personal behavior of the committee members and staff, other Government officials and personnel, witnesses, television, radio, and press media personnel, and the general public at the hearing or other meeting, shall be in strict conformity with and observance of the acceptable standards of dignity, propriety, courtesy, and decorum traditionally observed by the House in its operations, and may not be such as to—

(1) distort the objects and purposes of the hearing or other meeting or the activities of committee members in connection with that hearing or meeting or in connection with the general work of the committee or of the House; or

(2) cast discredit or dishonor on the House, the committee, or a Member, Delegate, or Resident Commissioner or bring the House, the committee, or a Member, Delegate, or Resident Commissioner into disrepute.

(d) The coverage of committee hearings and meetings by audio and visual means shall be permitted and conducted only in strict conformity with the purposes, provisions, and requirements of this clause.

(e) Whenever a hearing or meeting conducted by a committee or subcommittee is open to the public, those proceedings shall be open to coverage by audio and visual means. A committee or subcommittee chair may not limit the number of television or still cameras to fewer than two representatives from each medium (except for legitimate space or safety considerations, in which case pool coverage shall be authorized).

(f) Written rules adopted by each committee pursuant to clause

2(a)(1)(D) shall contain provisions to the following effect:

(1) If audio or visual coverage of the hearing or meeting is to be presented to the public as live coverage, that coverage shall be conducted and presented without commercial sponsorship.

(2) The allocation among the television media of the positions or the number of television cameras permitted by a committee or subcommittee chair in a hearing or meeting room shall be in accordance with fair and equitable procedures devised by the Executive Committee of the Radio and Television Correspondents' Galleries.

(3) Television cameras shall be placed so as not to obstruct in any way the space between a witness giving evidence or testimony and any member of the committee or the visibility of that witness and that member to each other.

(4) Television cameras shall operate from fixed positions but may not be placed in positions that obstruct unnecessarily the coverage of the hearing or meeting by the other media.

(5) Equipment necessary for coverage by the television and radio media may not be installed in, or removed from, the hearing or meeting room while the committee is in session.

(6)(A) Except as provided in subdivision (B), floodlights, spotlights, strobelights, and flashguns may not be used in providing any method of coverage of the hearing or meeting.

(B) The television media may install additional lighting in a hearing or meeting room, without cost to the Government, in order to raise the ambient lighting level in a hearing or meeting room to the lowest level necessary to provide adequate television coverage of a hearing or meeting at the current state of the art of television coverage.

(7) If requests are made by more of the media than will be permitted by a committee or subcommittee chair for coverage of a hearing or meeting by still photography, that coverage shall be permitted on the basis of a fair and equitable pool arrangement devised by the Standing Committee of Press Photographers.

(8) Photographers may not position themselves between the witness table and the members of the committee at any time during the course of a hearing or meeting.

(9) Photographers may not place themselves in positions that obstruct unnecessarily the coverage of the hearing by the other media.

(10) Personnel providing coverage by the television and radio media shall be currently accredited to the Radio and Television Correspondents' Galleries.

(11) Personnel providing coverage by still photography shall be cur-

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rently accredited to the Press Photographers' Gallery.

(12) Personnel providing coverage by the television and radio media and by still photography shall conduct themselves and their coverage activities in an orderly and unobtrusive manner.

Pay of witnesses

5. Witnesses appearing before the House or any of its committees shall be paid the same per diem rate as established, authorized, and regulated by the Committee on House Administration for Members, Delegates, the Resident Commissioner, and employees of the House, plus actual expenses of travel to or from the place of examination. Such per diem may not be paid when a witness has been summoned at the place of examination.

Unfinished business of the session

6. All business of the House at the end of one session shall be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place.

RULE XII

RECEIPT AND REFERRAL OF MEASURES AND MATTERS

Messages

1. Messages received from the Senate, or from the President, shall be entered on the Journal and published in the Congressional Record of the proceedings of that day.

Referral

2. (a) The Speaker shall refer each bill, resolution, or other matter that relates to a subject listed under a standing committee named in clause 1 of rule X in accordance with the provisions of this clause.

(b) The Speaker shall refer matters under paragraph (a) in such manner as to ensure to the maximum extent feasible that each committee that has jurisdiction under clause 1 of rule X over the subject matter of a provision thereof may consider such provision and report to the House thereon. Precedents, rulings, or procedures in effect before the Ninety-Fourth Congress shall be applied to referrals under this clause only to the extent that they will contribute to the achievement of the objectives of this clause.

(c) In carrying out paragraphs (a) and (b) with respect to the referral of a matter, the Speaker—

(1) shall designate a committee of primary jurisdiction (except where the Speaker determines that extraordinary circumstances justify review by more than one committee as though primary);

(2) may refer the matter to one or more additional committees for consideration in sequence, either initially or after the matter has been reported by the committee of primary jurisdiction;

(3) may refer portions of the matter reflecting different subjects and ju-

risdictions to one or more additional committees;

(4) may refer the matter to a special, ad hoc committee appointed by the Speaker with the approval of the House, and including members of the committees of jurisdiction, for the specific purpose of considering that matter and reporting to the House thereon;

(5) may subject a referral to appropriate time limitations; and

(6) may make such other provision as may be considered appropriate.

(d) A bill for the payment or adjudication of a private claim against the Government may not be referred to a committee other than the Committee on Foreign Affairs or the Committee on the Judiciary, except by unanimous consent.

Petitions, memorials, and private bills

3. If a Member, Delegate, or Resident Commissioner has a petition, memorial, or private bill to present, the Member, Delegate, or Resident Commissioner shall sign it, deliver it to the Clerk, and may specify the reference or disposition to be made thereof. Such petition, memorial, or private bill (except when judged by the Speaker to be obscene or insulting) shall be entered on the Journal with the name of the Member, Delegate, or Resident Commissioner presenting it and shall be printed in the Congressional Record.

4. A private bill or private resolution (including an omnibus claim or pension bill), or amendment thereto, may not be received or considered in the House if it authorizes or directs—

(a) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Tort Claims Procedure provided in title 28, United States Code, or for a pension (other than to carry out a provision of law or treaty stipulation);

(b) the construction of a bridge across a navigable stream; or

(c) the correction of a military or naval record.

Prohibition on commemorations

5. (a) A bill or resolution, or an amendment thereto, may not be introduced or considered in the House if it establishes or expresses a commemoration.

(b) In this clause the term "commemoration" means a remembrance, celebration, or recognition for any purpose through the designation of a specified period of time.

Excluded matters

6. A petition, memorial, bill, or resolution excluded under this rule shall be returned to the Member, Delegate, or Resident Commissioner from whom it was received. A petition or private bill that has been inappropriately referred may, by direction of the committee having possession of it, be properly referred in the manner originally presented. An erroneous reference of a petition or private bill under this clause

does not confer jurisdiction on a committee to consider or report it.

Sponsorship

7. (a) Bills, memorials, petitions, and resolutions, endorsed with the names of Members, Delegates, or the Resident Commissioner introducing them, may be delivered to the Speaker to be referred. The titles and references of all bills, memorials, petitions, resolutions, and other documents referred under this rule shall be entered on the Journal and printed in the Congressional Record. An erroneous reference may be corrected by the House in accordance with rule X on any day immediately after the Pledge of Allegiance to the Flag by unanimous consent or motion. Such a motion shall be privileged if offered by direction of a committee to which the bill has been erroneously referred or by direction of a committee claiming jurisdiction and shall be decided without debate.

(b)(1) The sponsor of a public bill or public resolution may name cosponsors. The name of a cosponsor added after the initial printing of a bill or resolution shall appear in the next printing of the bill or resolution on the written request of the sponsor. Such a request may be submitted to the Speaker at any time until the last committee authorized to consider and report the bill or resolution reports it to the House or is discharged from its consideration.

(2) The name of a cosponsor of a bill or resolution may be deleted by unanimous consent. The Speaker may entertain such a request only by the Member, Delegate, or Resident Commissioner whose name is to be deleted or by the sponsor of the bill or resolution, and only until the last committee authorized to consider and report the bill or resolution reports it to the House or is discharged from its consideration. The Speaker may not entertain a request to delete the name of the sponsor of a bill or resolution. A deletion shall be indicated by date in the next printing of the bill or resolution.

(3) The addition or deletion of the name of a cosponsor of a bill or resolution shall be entered on the Journal and printed in the Congressional Record of that day.

(4) A bill or resolution shall be reprinted on the written request of the sponsor. Such a request may be submitted to the Speaker only when 20 or more cosponsors have been added since the last printing of the bill or resolution.

(5) When a bill or resolution is introduced "by request," those words shall be entered on the Journal and printed in the Congressional Record.

(c)(1) A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a

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portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

(2) Before consideration of a Senate bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under subparagraph (1) as though the chair were the sponsor of the Senate bill or joint resolution.

Executive communications

8. Estimates of appropriations and all other communications from the executive departments intended for the consideration of any committees of the House shall be addressed to the Speaker for referral as provided in clause 2 of rule XIV.

RULE XIII

CALENDARS AND COMMITTEE REPORTS

Calendars

1. (a) All business reported by committees shall be referred to one of the following three calendars:

(1) A Calendar of the Committee of the Whole House on the state of the Union, to which shall be referred public bills and public resolutions raising revenue, involving a tax or charge on the people, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, or releasing any liability to the United States for money or property.

(2) A House Calendar, to which shall be referred all public bills and public resolutions not requiring referral to the Calendar of the Committee of the Whole House on the state of the Union.

(3) A Private Calendar as provided in clause 5 of rule XV, to which shall be referred all private bills and private resolutions.

(b) There is established a Calendar of Motions to Discharge Committees as provided in clause 2 of rule XV.

Filing and printing of reports

2. (a)(1) Except as provided in subparagraph (2), all reports of committees (other than those filed from the floor) shall be delivered to the Clerk for printing and reference to the proper calendar under the direction of the Speaker in accordance with clause 1. The title or subject of each report shall be entered on the Journal and printed in the Congressional Record.

(2) A bill or resolution reported adversely (other than those filed as privileged) shall be laid on the table unless a committee to which the bill or resolution was referred requests at the time of the report its referral to an appropriate calendar under clause 1 or unless, within three days thereafter, a Member, Delegate, or Resident Commissioner makes such a request.

(b)(1) It shall be the duty of the chair of each committee to report or cause to be reported promptly to the House a

measure or matter approved by the committee and to take or cause to be taken steps necessary to bring the measure or matter to a vote.

(2) In any event, the report of a committee on a measure that has been approved by the committee shall be filed within seven calendar days (exclusive of days on which the House is not in session) after the day on which a written request for the filing of the report, signed by a majority of the members of the committee, has been filed with the clerk of the committee. The clerk of the committee shall immediately notify the chair of the filing of such a request. This subparagraph does not apply to a report of the Committee on Rules with respect to a rule, joint rule, or order of business of the House, or to the reporting of a resolution of inquiry addressed to the head of an executive department.

(c) All supplemental, minority, additional, or dissenting views filed under clause 2(1) of rule XI by one or more members of a committee shall be included in, and shall be a part of, the report filed by the committee with respect to a measure or matter. When time guaranteed by clause 2(1) of rule XI has expired (or, if sooner, when all separate views have been received), the committee may arrange to file its report with the Clerk not later than one hour after the expiration of such time. This clause and provisions of clause 2(1) of rule XI do not preclude the immediate filing or printing of a committee report in the absence of a timely request for the opportunity to file supplemental, minority, additional, or dissenting views as provided in clause 2(1) of rule XI.

Content of reports

3. (a)(1) Except as provided in subparagraph (2), the report of a committee on a measure or matter shall be printed in a single volume that—

(A) shall include all supplemental, minority, additional, or dissenting views that have been submitted by the time of the filing of the report; and

(B) shall bear on its cover a recital that any such supplemental, minority, additional, or dissenting views (and any material submitted under paragraph (c)(3)) are included as part of the report.

(2) A committee may file a supplemental report for the correction of a technical error in its previous report on a measure or matter. A supplemental report only correcting errors in the depiction of record votes under paragraph (b) may be filed under this subparagraph and shall not be subject to the requirement in clause 4 or clause 6 concerning the availability of reports.

(b) With respect to each record vote on a motion to report a measure or matter of a public nature, and on any amendment offered to the measure or matter, the total number of votes cast for and against, and the names of mem-

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bers voting for and against, shall be included in the committee report. The preceding sentence does not apply to votes taken in executive session by the Committee on Ethics.

(c) The report of a committee on a measure that has been approved by the committee shall include, separately set out and clearly identified, the following:

(1) Oversight findings and recommendations under clause 2(b)(1) of rule X.

(2) The statement required by section 308(a) of the Congressional Budget Act of 1974, except that an estimate of new budget authority shall include, when practicable, a comparison of the total estimated funding level for the relevant programs to the appropriate levels under current law.

(3) An estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 if timely submitted to the committee before the filing of the report.

(4) A statement of general performance goals and objectives, including outcome-related goals and objectives, for which the measure authorizes funding.

(5) On a bill or joint resolution that establishes or reauthorizes a Federal program, a statement indicating whether any such program is known to be duplicative of another such program, including at a minimum an explanation of whether any such program was included in a report to Congress pursuant to section 21 of Public Law 111-139 or whether the most recent Catalog of Federal Domestic Assistance (published pursuant to section 6104 of title 31, United States Code) identified other programs related to the program established or reauthorized by the measure.

(d) Each report of a committee on a public bill or public joint resolution shall contain the following:

(1)(A) An estimate by the committee of the costs that would be incurred in carrying out the bill or joint resolution in the fiscal year in which it is reported and in each of the five fiscal years following that fiscal year (or for the authorized duration of any program authorized by the bill or joint resolution if less than five years);

(B) a comparison of the estimate of costs described in subdivision (A) made by the committee with any estimate of such costs made by a Government agency and submitted to such committee; and

(C) when practicable, a comparison of the total estimated funding level for the relevant programs with the appropriate levels under current law.

(2)(A) In subparagraph (1) the term "Government agency" includes any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Fed-

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eral Government or the government of the District of Columbia.

(B) Subparagraph (1) does not apply to the Committee on Appropriations, the Committee on House Administration, the Committee on Rules, or the Committee on Ethics, and does not apply when a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been included in the report under paragraph (c)(3).

(e)(1) Whenever a committee reports a bill or joint resolution proposing to repeal or amend a statute or part thereof, it shall include in its report or in an accompanying document (showing by appropriate typographical devices the omissions and insertions proposed)—

(A) the entire text of each section of a statute that is proposed to be repealed; and

(B) a comparative print of each amendment to the entire text of a section of a statute that the bill or joint resolution proposes to make.

(2) If a committee reports a bill or joint resolution proposing to repeal or amend a statute or part thereof with a recommendation that the bill or joint resolution be amended, the comparative print required by subparagraph (1) shall reflect the changes in existing law proposed to be made by the bill or joint resolution as proposed to be amended.

(f)(1) A report of the Committee on Appropriations on a general appropriation bill shall include—

(A) a concise statement describing the effect of any provision of the accompanying bill that directly or indirectly changes the application of existing law; and

(B) a list of all appropriations contained in the bill for expenditures not currently authorized by law for the period concerned (excepting classified intelligence or national security programs, projects, or activities), along with a statement of the last year for which such expenditures were authorized, the level of expenditures authorized for that year, the actual level of expenditures for that year, and the level of appropriations in the bill for such expenditures.

(2) Whenever the Committee on Appropriations reports a bill or joint resolution including matter specified in clause 1(b)(2) or (3) of rule X, it shall include—

(A) in the bill or joint resolution, separate headings for “Rescissions” and “Transfers of Unexpended Balances”; and

(B) in the report of the committee, a separate section listing such rescissions and transfers.

(g) Whenever the Committee on Rules reports a resolution proposing to repeal or amend a standing rule of the House, it shall include in its report or in an accompanying document—

(1) the text of any rule or part thereof that is proposed to be repealed; and

(2) a comparative print of any part of the resolution proposing to amend the rule and of the rule or part thereof proposed to be amended, showing by appropriate typographical devices the omissions and insertions proposed.

(h) It shall not be in order to consider a bill or joint resolution reported by the Committee on Ways and Means that proposes to amend the Internal Revenue Code of 1986 unless—

(1) the report includes a tax complexity analysis prepared by the Joint Committee on Taxation in accordance with section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998; or

(2) the chair of the Committee on Ways and Means causes such a tax complexity analysis to be printed in the Congressional Record before consideration of the bill or joint resolution.

Availability of reports

4. (a)(1) Except as specified in subparagraph (2), it shall not be in order to consider in the House a measure or matter reported by a committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which each report of a committee on that measure or matter has been available to Members, Delegates, and the Resident Commissioner.

(2) Subparagraph (1) does not apply to—

(A) a resolution providing a rule, joint rule, or order of business reported by the Committee on Rules considered under clause 6;

(B) a resolution providing amounts from the applicable accounts described in clause 1(k)(1) of rule X reported by the Committee on House Administration considered under clause 6 of rule X;

(C) a resolution presenting a question of the privileges of the House reported by any committee;

(D) a measure for the declaration of war, or the declaration of a national emergency, by Congress; and

(E) a measure providing for the disapproval of a decision, determination, or action by a Government agency that would become, or continue to be, effective unless disapproved or otherwise invalidated by one or both Houses of Congress. In this subdivision the term “Government agency” includes any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Federal Government or of the government of the District of Columbia.

(b) A committee that reports a measure or matter shall make every reasonable effort to have its hearings thereon (if any) printed and available for distribution to Members, Delegates, and the Resident Commissioner before the

consideration of the measure or matter in the House.

Privileged reports, generally

5. (a) The following committees shall have leave to report at any time on the following matters, respectively:

(1) The Committee on Appropriations, on general appropriation bills and on joint resolutions continuing appropriations for a fiscal year after September 15 in the preceding fiscal year.

(2) The Committee on the Budget, on the matters required to be reported by such committee under titles III and IV of the Congressional Budget Act of 1974.

(3) The Committee on House Administration, on enrolled bills, on contested elections, on matters referred to it concerning printing for the use of the House or the two Houses, on expenditure of the applicable accounts of the House described in clause 1(k)(1) of rule X, and on matters relating to preservation and availability of noncurrent records of the House under rule VII.

(4) The Committee on Rules, on rules, joint rules, and the order of business.

(5) The Committee on Ethics, on resolutions recommending action by the House with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House as a result of an investigation by the committee relating to the official conduct of such Member, Delegate, Resident Commissioner, officer, or employee.

(b) A report filed from the floor as privileged under paragraph (a) may be called up as a privileged question by direction of the reporting committee, subject to any requirement concerning its availability to Members, Delegates, and the Resident Commissioner under clause 4 or concerning the timing of its consideration under clause 6.

Privileged reports by the Committee on Rules

6. (a) A report by the Committee on Rules on a rule, joint rule, or the order of business may not be called up for consideration on the same day it is presented to the House except—

(1) when so determined by a vote of two-thirds of the Members voting, a quorum being present;

(2) in the case of a resolution proposing only to waive a requirement of clause 4 or of clause 8 of rule XXII concerning the availability of reports; or

(3) during the last three days of a session of Congress.

(b) Pending the consideration of a report by the Committee on Rules on a rule, joint rule, or the order of business, the Speaker may entertain one motion that the House adjourn but may not entertain any other dilatory motion until the report shall have been disposed of.

(c) The Committee on Rules may not report a rule or order that would pre-

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vent the motion to recommit a bill or joint resolution from being made as provided in clause 2(b) of rule XIX, including a motion to recommit with instructions to report back an amendment otherwise in order, if offered by the Minority Leader or a designee, except with respect to a Senate bill or joint resolution for which the text of a House-passed measure has been substituted.

(d) The Committee on Rules shall present to the House reports concerning rules, joint rules, and the order of business, within three legislative days of the time when they are ordered. If such a report is not considered immediately, it shall be referred to the calendar. If such a report on the calendar is not called up by the member of the committee who filed the report within seven legislative days, any member of the committee may call it up as a privileged question on the day after the calendar day on which the member announces to the House intention to do so. The Speaker shall recognize a member of the committee who seeks recognition for that purpose.

(e) An adverse report by the Committee on Rules on a resolution proposing a special order of business for the consideration of a public bill or public joint resolution may be called up as a privileged question by a Member, Delegate, or Resident Commissioner on a day when it is in order to consider a motion to discharge committees under clause 2 of rule XV.

(f) If the House has adopted a resolution making in order a motion to consider a bill or resolution, and such a motion has not been offered within seven calendar days thereafter, such a motion shall be privileged if offered by direction of all reporting committees having initial jurisdiction of the bill or resolution.

(g) Whenever the Committee on Rules reports a resolution providing for the consideration of a measure, it shall to the maximum extent possible specify in the accompanying report any waiver of a point of order against the measure or against its consideration.

Resolutions of inquiry

7. A report on a resolution of inquiry addressed to the head of an executive department may be filed from the floor as privileged. If such a resolution is not reported to the House within 14 legislative days after its introduction, a motion to discharge a committee from its consideration shall be privileged.

Estimates of major legislation

8. (a) An estimate provided by the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 for any major legislation shall, to the extent practicable, incorporate the budgetary effects of changes in economic output, employment, capital stock, and other macroeconomic variables resulting from such legislation.

(b) An estimate provided by the Joint Committee on Taxation to the Director

of the Congressional Budget Office under section 201(f) of the Congressional Budget Act of 1974 for any major legislation shall, to the extent practicable, incorporate the budgetary effects of changes in economic output, employment, capital stock, and other macroeconomic variables resulting from such legislation.

(c) An estimate referred to in this clause shall, to the extent practicable, include—

(1) a qualitative assessment of the budgetary effects (including macroeconomic variables described in paragraphs (a) and (b)) of such legislation in the 20-fiscal year period beginning after the last fiscal year of the most recently agreed to concurrent resolution on the budget that set forth appropriate levels required by section 301 of the Congressional Budget Act of 1974; and

(2) an identification of the critical assumptions and the source of data underlying that estimate.

(d) As used in this clause—

(1) the term “major legislation” means any bill or joint resolution—

(A) for which an estimate is required to be prepared pursuant to section 402 of the Congressional Budget Act of 1974 and that causes a gross budgetary effect (before incorporating macroeconomic effects) in any fiscal year over the years of the most recently agreed to concurrent resolution on the budget equal to or greater than 0.25 percent of the current projected gross domestic product of the United States for that fiscal year; or

(B) designated as such by the chair of the Committee on the Budget for all direct spending legislation other than revenue legislation or the Member who is chair or vice chair, as applicable, of the Joint Committee on Taxation for revenue legislation; and

(2) the term “budgetary effects” means changes in revenues, outlays, and deficits.

RULE XIV

ORDER AND PRIORITY OF BUSINESS

1. The daily order of business (unless varied by the application of other rules and except for the disposition of matters of higher precedence) shall be as follows:

First. Prayer by the Chaplain.

Second. Reading and approval of the Journal, unless postponed under clause 8 of rule XX.

Third. The Pledge of Allegiance to the Flag.

Fourth. Correction of reference of public bills.

Fifth. Disposal of business on the Speaker's table as provided in clause 2.

Sixth. Unfinished business as provided in clause 3.

Seventh. The morning hour for the consideration of bills called up by committees as provided in clause 4.

Eighth. Motions that the House resolve into the Committee of the

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Whole House on the state of the Union subject to clause 5.

Ninth. Orders of the day.

2. Business on the Speaker's table shall be disposed of as follows:

(a) Messages from the President shall be referred to the appropriate committees without debate.

(b) Communications addressed to the House, including reports and communications from heads of departments and bills, resolutions, and messages from the Senate, may be referred to the appropriate committees in the same manner and with the same right of correction as public bills and public resolutions presented by Members, Delegates, or the Resident Commissioner.

(c) Motions to dispose of Senate amendments on the Speaker's table may be entertained as provided in clauses 1, 2, and 4 of rule XXII.

(d) Senate bills and resolutions substantially the same as House measures already favorably reported and not required to be considered in the Committee of the Whole House on the state of the Union may be disposed of by motion. Such a motion shall be privileged if offered by direction of all reporting committees having initial jurisdiction of the House measure.

3. Consideration of unfinished business in which the House may have been engaged at an adjournment, except business in the morning hour and proceedings postponed under clause 8 of rule XX, shall be resumed as soon as the business on the Speaker's table is finished, and at the same time each day thereafter until disposed of. The consideration of all other unfinished business shall be resumed whenever the class of business to which it belongs shall be in order under the rules.

4. After the unfinished business has been disposed of, the Speaker shall call each standing committee in regular order and then select committees. Each committee when named may call up for consideration a bill or resolution reported by it on a previous day and on the House Calendar. If the Speaker does not complete the call of the committees before the House passes to other business, the next call shall resume at the point it left off, giving preference to the last bill or resolution under consideration. A committee that has occupied the call for two days may not call up another bill or resolution until the other committees have been called in their turn.

5. After consideration of bills or resolutions under clause 4 for one hour, it shall be in order, pending consideration thereof, to entertain a motion that the House resolve into the Committee of the Whole House on the state of the Union or, when authorized by a committee, that the House resolve into the Committee of the Whole House on the state of the Union to consider a particular bill. Such a motion shall be subject to only one amendment designating another bill. If such a motion is

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decided in the negative, another such motion may not be considered until the matter that was pending when such motion was offered is disposed of.

6. All questions relating to the priority of business shall be decided by a majority without debate.

RULE XV

BUSINESS IN ORDER ON SPECIAL DAYS

Suspensions

1. (a) A rule may not be suspended except by a vote of two-thirds of the Members voting, a quorum being present. The Speaker may not entertain a motion that the House suspend the rules except on Mondays, Tuesdays, and Wednesdays and during the last six days of a session of Congress.

(b) Pending a motion that the House suspend the rules, the Speaker may entertain one motion that the House adjourn but may not entertain any other motion until the vote is taken on the suspension.

(c) A motion that the House suspend the rules is debatable for 40 minutes, one-half in favor of the motion and one-half in opposition thereto.

Discharge motions, second and fourth Mondays

2. (a) Motions to discharge committees shall be in order on the second and fourth Mondays of a month.

(b)(1) A Member may present to the Clerk a motion in writing to discharge—

(A) a committee from consideration of a public bill or public resolution that has been referred to it for 30 legislative days; or

(B) the Committee on Rules from consideration of a resolution that has been referred to it for seven legislative days and that proposes a special order of business for the consideration of a public bill or public resolution that has been reported by a committee or has been referred to a committee for 30 legislative days.

(2) Only one motion may be presented for a bill or resolution. A Member may not file a motion to discharge the Committee on Rules from consideration of a resolution providing for the consideration of more than one public bill or public resolution or admitting or effecting a nongermane amendment to a public bill or public resolution.

(c) A motion presented under paragraph (b) shall be placed in the custody of the Clerk, who shall arrange a convenient place for the signatures of Members. A signature may be withdrawn by a Member in writing at any time before a motion is entered on the Journal. The Clerk shall make the signatories a matter of public record, causing the names of the Members who have signed a discharge motion during a week to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspection in an appropriate office of the House. The Clerk

shall devise a means for making such lists available to offices of the House and to the public in electronic form. When a majority of the total membership of the House shall have signed the motion, it shall be entered on the Journal, published with the signatories thereto in the Record, and referred to the Calendar of Motions to Discharge Committees.

(d)(1) On the second and fourth Mondays of a month (except during the last six days of a session of Congress), immediately after the Pledge of Allegiance to the Flag, a motion to discharge that has been on the calendar for at least seven legislative days shall be privileged if called up by a Member whose signature appears thereon. When such a motion is called up, the House shall proceed to its consideration under this paragraph without intervening motion except one motion to adjourn. Privileged motions to discharge shall have precedence in the order of their entry on the Journal.

(2) When a motion to discharge is called up, the bill or resolution to which it relates shall be read by title only. The motion is debatable for 20 minutes, one-half in favor of the motion and one-half in opposition thereto.

(e)(1) If a motion prevails to discharge the Committee on Rules from consideration of a resolution, the House shall immediately consider the resolution, pending which the Speaker may entertain one motion that the House adjourn but may not entertain any other dilatory motion until the resolution has been disposed of. If the resolution is adopted, the House shall immediately proceed to its execution.

(2) If a motion prevails to discharge a committee from consideration of a public bill or public resolution, a motion that the House proceed to the immediate consideration of such bill or resolution shall be privileged if offered by a Member whose signature appeared on the motion to discharge. The motion to proceed is not debatable. If the motion to proceed is adopted, the bill or resolution shall be considered immediately under the general rules of the House. If unfinished before adjournment of the day on which it is called up, the bill or resolution shall remain the unfinished business until it is disposed of. If the motion to proceed is rejected, the bill or resolution shall be referred to the appropriate calendar, where it shall have the same status as if the committee from which it was discharged had duly reported it to the House.

(f)(1) When a motion to discharge originated under this clause has once been acted on by the House, it shall not be in order to entertain during the same session of Congress—

(A) a motion to discharge a committee from consideration of that bill or resolution or of any other bill or resolution that, by relating in substance to or dealing with the same subject matter, is substantially the same; or

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(B) a motion to discharge the Committee on Rules from consideration of a resolution providing a special order of business for the consideration of that bill or resolution or of any other bill or resolution that, by relating in substance to or dealing with the same subject matter, is substantially the same.

(2) A motion to discharge on the Calendar of Motions to Discharge Committees that is rendered out of order under subparagraph (1) shall be stricken from that calendar.

Adverse report by the Committee on Rules, second and fourth Mondays

3. An adverse report by the Committee on Rules on a resolution proposing a special order of business for the consideration of a public bill or public joint resolution may be called up under clause 6(e) of rule XIII as a privileged question by a Member, Delegate, or Resident Commissioner on a day when it is in order to consider a motion to discharge committees under clause 2.

District of Columbia business, second and fourth Mondays

4. The second and fourth Mondays of a month shall be set apart for the consideration of such District of Columbia business as may be called up by the Committee on Oversight and Government Reform after the disposition of motions to discharge committees and after the disposal of such business on the Speaker's table as requires reference only.

Private Calendar, first and third Tuesdays

5. (a) On the first Tuesday of a month, the Speaker shall direct the Clerk to call the bills and resolutions on the Private Calendar after disposal of such business on the Speaker's table as requires reference only. If two or more Members, Delegates, or the Resident Commissioner object to the consideration of a bill or resolution so called, it shall be recommitted to the committee that reported it. No other business shall be in order before completion of the call of the Private Calendar on this day unless two-thirds of the Members voting, a quorum being present, agree to a motion that the House dispense with the call.

(b)(1) On the third Tuesday of a month, after the disposal of such business on the Speaker's table as requires reference only, the Speaker may direct the Clerk to call the bills and resolutions on the Private Calendar. Preference shall be given to omnibus bills containing the texts of bills or resolutions that have previously been objected to on a call of the Private Calendar. If two or more Members, Delegates, or the Resident Commissioner object to the consideration of a bill or resolution so called (other than an omnibus bill), it shall be recommitted to the committee that reported it. Two-thirds of the Members voting, a quorum being present, may adopt a

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motion that the House dispense with the call on this day.

(2) Omnibus bills shall be read for amendment by paragraph. No amendment shall be in order except to strike or to reduce amounts of money or to provide limitations. An item or matter stricken from an omnibus bill may not thereafter during the same session of Congress be included in an omnibus bill. Upon passage such an omnibus bill shall be resolved into the several bills and resolutions of which it is composed. The several bills and resolutions, with any amendments adopted by the House, shall be engrossed, when necessary, and otherwise considered as passed severally by the House as distinct bills and resolutions.

(c) The Speaker may not entertain a reservation of the right to object to the consideration of a bill or resolution under this clause. A bill or resolution considered under this clause shall be considered in the House as in the Committee of the Whole. A motion to dispense with the call of the Private Calendar under this clause shall be privileged. Debate on such a motion shall be limited to five minutes in support and five minutes in opposition.

Calendar Call of Committees, Wednesdays

6. (a) On Wednesday of each week, business shall not be in order before completion of the call of those committees (except as provided by clause 4 of rule XIV) whose chair, or other member authorized by the committee, has announced to the House a request for such call on the preceding legislative day.

(b) A bill or resolution on either the House or the Union Calendar, except bills or resolutions that are privileged under the Rules of the House, may be called under this clause. A bill or resolution called up from the Union Calendar shall be considered in the Committee of the Whole House on the state of the Union without motion, subject to clause 3 of rule XVI. General debate on a measure considered under this clause shall be confined to the measure and may not exceed two hours equally divided between a proponent and an opponent.

(c) This clause does not apply during the last two weeks of a session of Congress.

(d) Precedents, rulings, or procedures in effect before the One Hundred Eleventh Congress regarding the priority of business and the availability of other business on Wednesday shall be applied only to the extent consistent with this clause.

RULE XVI

MOTIONS AND AMENDMENTS

Motions

1. Every motion entertained by the Speaker shall be reduced to writing on the demand of a Member, Delegate, or Resident Commissioner and, unless it is withdrawn the same day, shall be entered on the Journal with the name of

the Member, Delegate, or Resident Commissioner offering it. A dilatory motion may not be entertained by the Speaker.

Withdrawal

2. When a motion is entertained, the Speaker shall state it or cause it to be read aloud by the Clerk before it is debated. The motion then shall be in the possession of the House but may be withdrawn at any time before a decision or amendment thereon.

Question of consideration

3. When a motion or proposition is entertained, the question, "Will the House now consider it?" may not be put unless demanded by a Member, Delegate, or Resident Commissioner.

Precedence of motions

4. (a) When a question is under debate, only the following motions may be entertained (which shall have precedence in the following order):

- (1) To adjourn.
- (2) To lay on the table.
- (3) For the previous question.
- (4) To postpone to a day certain.
- (5) To refer.
- (6) To amend.
- (7) To postpone indefinitely.

(b) A motion to adjourn, to lay on the table, or for the previous question shall be decided without debate. A motion to postpone to a day certain, to refer, or to postpone indefinitely, being decided, may not be allowed again on the same day at the same stage of the question.

(c)(1) It shall be in order at any time for the Speaker, in the discretion of the Speaker, to entertain a motion—

(A) that the Speaker be authorized to declare a recess; or

(B) that when the House adjourns it stand adjourned to a day and time certain.

(2) Either motion shall be of equal privilege with the motion to adjourn and shall be decided without debate.

Divisibility

5. (a) Except as provided in paragraph (b), a question shall be divided on the demand of a Member, Delegate, or Resident Commissioner before the question is put if it includes propositions so distinct in substance that, one being taken away, a substantive proposition remains.

(b)(1) A motion or resolution to elect members to a standing committee of the House, or to a joint standing committee, is not divisible.

(2) A resolution or order reported by the Committee on Rules providing a special order of business is not divisible.

(c) A motion to strike and insert is not divisible, but rejection of a motion to strike does not preclude another motion to amend.

Amendments

6. When an amendable proposition is under consideration, a motion to amend and a motion to amend that amendment shall be in order, and it

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also shall be in order to offer a further amendment by way of substitute for the original motion to amend, to which one amendment may be offered but which may not be voted on until the original amendment is perfected. An amendment may be withdrawn in the House at any time before a decision or amendment thereon. An amendment to the title of a bill or resolution shall not be in order until after its passage or adoption and shall be decided without debate.

Germaneness

7. No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.

Readings

8. Bills and joint resolutions are subject to readings as follows:

(a) A first reading is in full when the bill or joint resolution is first considered.

(b) A second reading occurs only when the bill or joint resolution is read for amendment in a Committee of the Whole House on the state of the Union under clause 5 of rule XVIII.

(c) A third reading precedes passage when the Speaker states the question: "Shall the bill [or joint resolution] be engrossed [when applicable] and read a third time?" If that question is decided in the affirmative, then the bill or joint resolution shall be read the final time by title and then the question shall be put on its passage.

RULE XVII

DECORUM AND DEBATE

Decorum

1. (a) A Member, Delegate, or Resident Commissioner who desires to speak or deliver a matter to the House shall respectfully address the Speaker and, on being recognized, may address the House from any place on the floor. When invited by the Chair, a Member, Delegate, or Resident Commissioner may speak from the Clerk's desk.

(b) Remarks in debate (which may include references to the Senate or its Members) shall be confined to the question under debate, avoiding personality.

Recognition

2. When two or more Members, Delegates, or the Resident Commissioner seek recognition, the Speaker shall name the Member, Delegate, or Resident Commissioner who is first to speak. A Member, Delegate, or Resident Commissioner may not occupy more than one hour in debate on a question in the House or in the Committee of the Whole House on the state of the Union except as otherwise provided in this rule.

Managing debate

3. (a) The Member, Delegate, or Resident Commissioner who calls up a measure may open and close debate

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thereon. When general debate extends beyond one day, that Member, Delegate, or Resident Commissioner shall be entitled to one hour to close without regard to the time used in opening.

(b) Except as provided in paragraph (a), a Member, Delegate, or Resident Commissioner may not speak more than once to the same question without leave of the House.

(c) A manager of a measure who opposes an amendment thereto is entitled to close controlled debate thereon.

Call to order

4. (a) If a Member, Delegate, or Resident Commissioner, in speaking or otherwise, transgresses the Rules of the House, the Speaker shall, or a Member, Delegate, or Resident Commissioner may, call to order the offending Member, Delegate, or Resident Commissioner, who shall immediately sit down unless permitted on motion of another Member, Delegate, or the Resident Commissioner to explain. If a Member, Delegate, or Resident Commissioner is called to order, the Member, Delegate, or Resident Commissioner making the call to order shall indicate the words excepted to, which shall be taken down in writing at the Clerk's desk and read aloud to the House.

(b) The Speaker shall decide the validity of a call to order. The House, if appealed to, shall decide the question without debate. If the decision is in favor of the Member, Delegate, or Resident Commissioner called to order, the Member, Delegate, or Resident Commissioner shall be at liberty to proceed, but not otherwise. If the case requires it, an offending Member, Delegate, or Resident Commissioner shall be liable to censure or such other punishment as the House may consider proper. A Member, Delegate, or Resident Commissioner may not be held to answer a call to order, and may not be subject to the censure of the House therefor, if further debate or other business has intervened.

Comportment

5. When the Speaker is putting a question or addressing the House, a Member, Delegate, or Resident Commissioner may not exit or cross the Hall. When a Member, Delegate, or Resident Commissioner is speaking, a Member, Delegate, or Resident Commissioner may not pass between the person speaking and the Chair. During the session of the House, a Member, Delegate, or Resident Commissioner may not wear a hat or remain by the Clerk's desk during the call of the roll or the counting of ballots. A person on the floor of the House may not smoke or use a mobile electronic device that impairs decorum. The Sergeant-at-Arms is charged with the strict enforcement of this clause.

Exhibits

6. When the use of an exhibit in debate is objected to by a Member, Delegate, or Resident Commissioner, the Chair, in the discretion of the Chair,

may submit the question of its use to the House without debate.

Galleries

7. During a session of the House, it shall not be in order for a Member, Delegate, or Resident Commissioner to introduce to or to bring to the attention of the House an occupant in the galleries of the House. The Speaker may not entertain a request for the suspension of this rule by unanimous consent or otherwise.

Congressional Record

8. (a) The Congressional Record shall be a substantially verbatim account of remarks made during the proceedings of the House, subject only to technical, grammatical, and typographical corrections authorized by the Member, Delegate, or Resident Commissioner making the remarks.

(b) Unparliamentary remarks may be deleted only by permission or order of the House.

(c) This clause establishes a standard of conduct within the meaning of clause 3(a)(2) of rule XI.

Legislative Proceedings

9.(a) A Member, Delegate, the Resident Commissioner, officer, or employee of the House may not engage in disorderly or disruptive conduct in the Chamber, including—

(1) intentionally obstructing or impeding the passage of others in the Chamber;

(2) the use of an exhibit to impede, disrupt, or disturb the proceedings of the House; and

(3) the denial of legislative instruments to others seeking to engage in legislative proceedings.

(b) This clause establishes a standard of conduct within the meaning of clause 3(a)(2) of rule XI.

Secret sessions

10. When confidential communications are received from the President, or when the Speaker or a Member, Delegate, or Resident Commissioner informs the House that such individual has communications that such individual believes ought to be kept secret for the present, the House shall be cleared of all persons except the Members, Delegates, Resident Commissioner, and officers of the House for the reading of such communications, and debates and proceedings thereon, unless otherwise ordered by the House.

RULE XVIII

THE COMMITTEE OF THE WHOLE HOUSE ON THE STATE OF THE UNION

Resolving into the Committee of the Whole

1. Whenever the House resolves into the Committee of the Whole House on the state of the Union, the Speaker shall leave the chair after appointing a Member, Delegate, or the Resident Commissioner as Chair to preside. In case of disturbance or disorderly conduct in the galleries or lobby, the Chair may cause the same to be cleared.

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2. (a) Except as provided in paragraph (b) and in clause 6 of rule XV, the House resolves into the Committee of the Whole House on the state of the Union by motion. When such a motion is entertained, the Speaker shall put the question without debate: "Shall the House resolve itself into the Committee of the Whole House on the state of the Union for consideration of this matter?"; naming it.

(b) After the House has adopted a resolution reported by the Committee on Rules providing a special order of business for the consideration of a measure in the Committee of the Whole House on the state of the Union, the Speaker may at any time, when no question is pending before the House, declare the House resolved into the Committee of the Whole for the consideration of that measure without intervening motion, unless the special order of business provides otherwise.

Measures requiring initial consideration in the Committee of the Whole

3. All public bills, resolutions, or Senate amendments (as provided in clause 3 of rule XXII) involving a tax or charge on the people, raising revenue, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, or releasing any liability to the United States for money or property, shall be first considered in the Committee of the Whole House on the state of the Union. A bill, resolution, or Senate amendment that fails to comply with this clause is subject to a point of order against its consideration.

Order of business

4. (a) Subject to subparagraph (b) business on the calendar of the Committee of the Whole House on the state of the Union may be taken up in regular order, or in such order as the Committee may determine, unless the measure to be considered was determined by the House at the time of resolving into the Committee of the Whole.

(b) Motions to resolve into the Committee of the Whole for consideration of bills and joint resolutions making general appropriations have precedence under this clause.

Reading for amendment

5. (a) Before general debate commences on a measure in the Committee of the Whole House on the state of the Union, it shall be read in full. When general debate is concluded or closed by order of the House, the measure under consideration shall be read for amendment. A Member, Delegate, or Resident Commissioner who offers an amendment shall be allowed five minutes to explain it, after which the Member, Delegate, or Resident Commissioner who shall first obtain the floor shall be allowed five minutes to speak in opposition to it. There shall

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be no further debate thereon, but the same privilege of debate shall be allowed in favor of and against any amendment that may be offered to an amendment. An amendment, or an amendment to an amendment, may be withdrawn by its proponent only by the unanimous consent of the Committee of the Whole.

(b) When a Member, Delegate, or Resident Commissioner offers an amendment in the Committee of the Whole House on the state of the Union, the Clerk shall promptly transmit five copies of the amendment to the majority committee table and five copies to the minority committee table. The Clerk also shall deliver at least one copy of the amendment to the majority cloakroom and at least one copy to the minority cloakroom.

Quorum and voting

6. (a) A quorum of a Committee of the Whole House on the state of the Union is 100 Members. The first time that a Committee of the Whole finds itself without a quorum during a day, the Chair shall invoke the procedure for a quorum call set forth in clause 2 of rule XX, unless the Chair elects to invoke an alternate procedure set forth in clause 3 or clause 4(a) of rule XX. If a quorum appears, the Committee of the Whole shall continue its business. If a quorum does not appear, the Committee of the Whole shall rise, and the Chair shall report the names of absentees to the House.

(b)(1) The Chair may refuse to entertain a point of order that a quorum is not present during general debate.

(2) After a quorum has once been established on a day, the Chair may entertain a point of order that a quorum is not present only when the Committee of the Whole House on the state of the Union is operating under the five-minute rule and the Chair has put the pending proposition to a vote.

(3) Upon sustaining a point of order that a quorum is not present, the Chair may announce that, following a regular quorum call under paragraph (a), the minimum time for electronic voting on the pending question shall be not less than two minutes.

(c) When ordering a quorum call in the Committee of the Whole House on the state of the Union, the Chair may announce an intention to declare that a quorum is constituted at any time during the quorum call when the Chair determines that a quorum has appeared. If the Chair interrupts the quorum call by declaring that a quorum is constituted, proceedings under the quorum call shall be considered as vacated, and the Committee of the Whole shall continue its sitting and resume its business.

(d) A quorum is not required in the Committee of the Whole House on the state of the Union for adoption of a motion that the Committee rise.

(e) In the Committee of the Whole House on the state of the Union, the Chair shall order a recorded vote on a

request supported by at least 25 Members.

(f) In the Committee of the Whole House on the state of the Union, the Chair may reduce to not less than two minutes the minimum time for electronic voting without any intervening business or debate on any or all pending amendments after a record vote has been taken on the first pending amendment.

(g) The Chair may postpone a request for a recorded vote on any amendment. The Chair may resume proceedings on a postponed request at any time. The Chair may reduce to not less than two minutes the minimum time for electronic voting—

(1) on any postponed question that follows another electronic vote without intervening business, provided that the minimum time for electronic voting on the first in any series of questions shall be 15 minutes; or

(2) on any postponed question taken without intervening debate or motion after the Committee of the Whole resumes its sitting if in the discretion of the Chair Members would be afforded an adequate opportunity to vote.

Dispensing with the reading of an amendment

7. It shall be in order in the Committee of the Whole House on the state of the Union to move that the Committee of the Whole dispense with the reading of an amendment that has been printed in the bill or resolution as reported by a committee, or an amendment that a Member, Delegate, or Resident Commissioner has caused to be printed in the Congressional Record. Such a motion shall be decided without debate.

Closing debate

8. (a) Subject to paragraph (b) at any time after the Committee of the Whole House on the state of the Union has begun five-minute debate on amendments to any portion of a bill or resolution, it shall be in order to move that the Committee of the Whole close all debate on that portion of the bill or resolution or on the pending amendments only. Such a motion shall be decided without debate. The adoption of such a motion does not preclude further amendment, to be decided without debate.

(b) If the Committee of the Whole House on the state of the Union closes debate on any portion of a bill or resolution before there has been debate on an amendment that a Member, Delegate, or Resident Commissioner has caused to be printed in the Congressional Record at least one day before its consideration, the Member, Delegate, or Resident Commissioner who caused the amendment to be printed in the Record shall be allowed five minutes to explain it, after which the Member, Delegate, or Resident Commissioner who shall first obtain the floor shall be allowed five minutes to

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speak in opposition to it. There shall be no further debate thereon.

(c) Material submitted for printing in the Congressional Record under this clause shall indicate the full text of the proposed amendment, the name of the Member, Delegate, or Resident Commissioner proposing it, the number of the bill or resolution to which it will be offered, and the point in the bill or resolution or amendment thereto where the amendment is intended to be offered. The amendment shall appear in a portion of the Record designated for that purpose. Amendments to a specified measure submitted for printing in that portion of the Record shall be numbered in the order printed.

Striking the enacting clause

9. A motion that the Committee of the Whole House on the state of the Union rise and report a bill or resolution to the House with the recommendation that the enacting or resolving clause be stricken shall have precedence of a motion to amend, and, if carried in the House, shall constitute a rejection of the bill or resolution. Whenever a bill or resolution is reported from the Committee of the Whole with such adverse recommendation and the recommendation is rejected by the House, the bill or resolution shall stand recommitted to the Committee of the Whole without further action by the House. Before the question of concurrence is submitted, it shall be in order to move that the House refer the bill or resolution to a committee, with or without instructions. If a bill or resolution is so referred, then when it is again reported to the House it shall be referred to the Committee of the Whole without debate.

Concurrent resolution on the budget

10. (a) At the conclusion of general debate in the Committee of the Whole House on the state of the Union on a concurrent resolution on the budget under section 305(a) of the Congressional Budget Act of 1974, the concurrent resolution shall be considered as read for amendment.

(b) It shall not be in order in the House or in the Committee of the Whole House on the state of the Union to consider an amendment to a concurrent resolution on the budget, or an amendment thereto, unless the concurrent resolution, as amended by such amendment or amendments—

(1) would be mathematically consistent except as limited by paragraph (c); and

(2) would contain all the matter set forth in paragraphs (1) through (5) of section 301(a) of the Congressional Budget Act of 1974.

(c)(1) Except as specified in subparagraph (2), it shall not be in order in the House or in the Committee of the Whole House on the state of the Union to consider an amendment to a concurrent resolution on the budget, or an amendment thereto, that proposes to change the amount of the appropriate

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level of the public debt set forth in the concurrent resolution, as reported.

(2) Amendments to achieve mathematical consistency under section 305(a)(5) of the Congressional Budget Act of 1974, if offered by direction of the Committee on the Budget, may propose to adjust the amount of the appropriate level of the public debt set forth in the concurrent resolution, as reported, to reflect changes made in other figures contained in the concurrent resolution.

Applicability of Rules of the House

11. The Rules of the House are the rules of the Committee of the Whole House on the state of the Union so far as applicable.

RULE XIX

MOTIONS FOLLOWING THE AMENDMENT STAGE

Previous question

1. (a) There shall be a motion for the previous question, which, being ordered, shall have the effect of cutting off all debate and bringing the House to a direct vote on the immediate question or questions on which it has been ordered. Whenever the previous question has been ordered on an otherwise debatable question on which there has been no debate, it shall be in order to debate that question for 40 minutes, equally divided and controlled by a proponent of the question and an opponent. The previous question may be moved and ordered on a single question, on a series of questions allowable under the rules, or on an amendment or amendments, or may embrace all authorized motions or amendments and include the bill or resolution to its passage, adoption, or rejection.

(b) Incidental questions of order arising during the pendency of a motion for the previous question shall be decided, whether on appeal or otherwise, without debate.

(c) Notwithstanding paragraph (a), when the previous question is operating to adoption or passage of a measure pursuant to a special order of business, the Chair may postpone further consideration of such measure in the House to such time as may be designated by the Speaker.

Recommit

2. (a) After the previous question has been ordered on passage or adoption of a measure, or pending a motion to that end, it shall be in order to move that the House recommit (or commit, as the case may be) the measure, with or without instructions, to a standing or select committee. For such a motion to recommit, the Speaker shall give preference in recognition to a Member, Delegate, or Resident Commissioner who is opposed to the measure.

(b)(1) Except as provided in paragraph (c), a motion that the House recommit a bill or joint resolution on which the previous question has been ordered to passage shall be debatable for 10 minutes equally divided between the proponent and an opponent.

(2) A motion to recommit a bill or joint resolution may include instructions only in the form of a direction to report an amendment or amendments back to the House forthwith.

(c) On demand of the floor manager for the majority, it shall be in order to debate the motion for one hour equally divided and controlled by the proponent and an opponent.

Reconsideration

3. When a motion has been carried or lost, it shall be in order on the same or succeeding day for a Member on the prevailing side of the question to enter a motion for the reconsideration thereof. The entry of such a motion shall take precedence over all other questions except the consideration of a conference report or a motion to adjourn, and may not be withdrawn after such succeeding day without the consent of the House. Once entered, a motion may be called up for consideration by any Member. During the last six days of a session of Congress, such a motion shall be disposed of when entered.

4. A bill, petition, memorial, or resolution referred to a committee, or reported therefrom for printing and recommitment, may not be brought back to the House on a motion to reconsider.

RULE XX

VOTING AND QUORUM CALLS

1. (a) The House shall divide after the Speaker has put a question to a vote by voice as provided in clause 6 of rule I if the Speaker is in doubt or division is demanded. Those in favor of the question shall first rise or otherwise indicate from their seats and be counted, and then those opposed.

(b) If a Member, Delegate, or Resident Commissioner requests a recorded vote, and that request is supported by at least one-fifth of a quorum, the vote shall be taken by electronic device unless the Speaker invokes another procedure for recording votes provided in this rule. A recorded vote taken in the House under this paragraph shall be considered a vote by the yeas and nays.

(c) In case of a tie vote, a question shall be lost.

2. (a) Unless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device. In such a case the Clerk shall enter on the Journal and publish in the Congressional Record, in alphabetical order in each category, the names of Members recorded as voting in the affirmative, the names of Members recorded as voting in the negative, and the names of Members answering present as if they had been called in the manner provided in clause 3. Except as otherwise permitted under clause 8 or 9 of this rule or under clause 6 of rule XVIII, the minimum time for a record vote or quorum call by electronic device shall be 15 minutes.

(b) When the electronic voting system is inoperable or is not used, the Speaker or Chair may direct the Clerk

to conduct a record vote or quorum call as provided in clause 3 or 4.

3. The Speaker may direct the Clerk to conduct a record vote or quorum call by call of the roll. In such a case the Clerk shall call the names of Members, alphabetically by surname. When two or more have the same surname, the name of the State (and, if necessary to distinguish among Members from the same State, the given names of the Members) shall be added. After the roll has been called once, the Clerk shall call the names of those not recorded, alphabetically by surname. Members appearing after the second call, but before the result is announced, may vote or announce a pair.

4. (a) The Speaker may direct a record vote or quorum call to be conducted by tellers. In such a case the tellers named by the Speaker shall record the names of the Members voting on each side of the question or record their presence, as the case may be, which the Clerk shall enter on the Journal and publish in the Congressional Record. Absentees shall be noted, but the doors may not be closed except when ordered by the Speaker. The minimum time for a record vote or quorum call by tellers shall be 15 minutes.

(b) On the demand of a Member, or at the suggestion of the Speaker, the names of Members sufficient to make a quorum in the Hall of the House who do not vote shall be noted by the Clerk, entered on the Journal, reported to the Speaker with the names of the Members voting, and be counted and announced in determining the presence of a quorum to do business.

5. (a) In the absence of a quorum, a majority comprising at least 15 Members, which may include the Speaker, may compel the attendance of absent Members.

(b) Subject to clause 7(b) a majority described in paragraph (a) may order the Sergeant-at-Arms to send officers appointed by the Sergeant-at-Arms to arrest those Members for whom no sufficient excuse is made and shall secure and retain their attendance. The House shall determine on what condition they shall be discharged. Unless the House otherwise directs, the Members who voluntarily appear shall be admitted immediately to the Hall of the House and shall report their names to the Clerk to be entered on the Journal as present.

(c)(1) If the House should be without a quorum due to catastrophic circumstances, then—

(A) until there appear in the House a sufficient number of Representatives to constitute a quorum among the whole number of the House, a quorum in the House shall be determined based upon the provisional number of the House; and

(B) the provisional number of the House, as of the close of the call of the House described in subparagraph (3)(C), shall be the number of Rep-

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representatives responding to that call of the House.

(2) If a Representative counted in determining the provisional number of the House thereafter ceases to be a Representative, or if a Representative not counted in determining the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.

(3) For the purposes of subparagraph (1), the House shall be considered to be without a quorum due to catastrophic circumstances if, after a motion under paragraph (a) has been disposed of and without intervening adjournment, each of the following occurs in the stated sequence:

(A) A call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 72 hours (excluding time the House is in recess) without producing a quorum.

(B) The Speaker—

(i) with the Majority Leader and the Minority Leader (or their respective designees), receives from the Sergeant-at-Arms (or a designee) a catastrophic quorum failure report, as described in subparagraph (4);

(ii) consults with the Majority Leader and the Minority Leader (or their respective designees) on the content of that report; and

(iii) announces the content of that report to the House.

(C) A further call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 24 hours (excluding time the House is in recess) without producing a quorum.

(4)(A) For purposes of subparagraph (3), a catastrophic quorum failure report is a report advising that the inability of the House to establish a quorum is attributable to catastrophic circumstances involving natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House.

(B) Such report shall specify the following:

(i) The number of vacancies in the House and the names of former Representatives whose seats are vacant.

(ii) The names of Representatives considered incapacitated.

(iii) The names of Representatives not incapacitated but otherwise incapable of attending the proceedings of the House.

(iv) The names of Representatives unaccounted for.

(C) Such report shall be prepared on the basis of the most authoritative information available after consultation with the Attending Physician to the Congress and the Clerk (or their respective designees) and pertinent public health and law enforcement officials.

(D) Such report shall be updated every legislative day for the duration of any proceedings under or in reliance

on this paragraph. The Speaker shall make such updates available to the House.

(5) An announcement by the Speaker under subparagraph (3)(B)(iii) shall not be subject to appeal.

(6) Subparagraph (1) does not apply to a proposal to create a vacancy in the representation from any State in respect of a Representative not incapacitated but otherwise incapable of attending the proceedings of the House.

(7) For purposes of this paragraph:

(A) The term “provisional number of the House” means the number of Representatives upon which a quorum will be computed in the House until Representatives sufficient in number to constitute a quorum among the whole number of the House appear in the House.

(B) The term “whole number of the House” means the number of Representatives chosen, sworn, and living whose membership in the House has not been terminated by resignation or by the action of the House.

(d) Upon the death, resignation, expulsion, disqualification, removal, or swearing of a Member, the whole number of the House shall be adjusted accordingly. The Speaker shall announce the adjustment to the House. Such an announcement shall not be subject to appeal. In the case of a death, the Speaker may lay before the House such documentation from Federal, State, or local officials as the Speaker deems pertinent.

6. (a) When a quorum fails to vote on a question, a quorum is not present, and objection is made for that cause (unless the House shall adjourn)—

(1) there shall be a call of the House;

(2) the Sergeant-at-Arms shall proceed forthwith to bring in absent Members; and

(3) the yeas and nays on the pending question shall at the same time be considered as ordered.

(b) The Clerk shall record Members by the yeas and nays on the pending question, using such procedure as the Speaker may invoke under clause 2, 3, or 4. Each Member arrested under this clause shall be brought by the Sergeant-at-Arms before the House, whereupon the Member shall be noted as present, discharged from arrest, and given an opportunity to vote; and such vote shall be recorded. If those voting on the question and those who are present and decline to vote together make a majority of the House, the Speaker shall declare that a quorum is constituted, and the pending question shall be decided as the requisite majority of those voting shall have determined. Thereupon further proceedings under the call shall be considered as dispensed with.

(c) At any time after Members have had the requisite opportunity to respond by the yeas and nays ordered under this clause, but before a result has been announced, a motion that the House adjourn shall be in order if sec-

onded by a majority of those present, to be ascertained by actual count by the Speaker. If the House adjourns on such a motion, all proceedings under this clause shall be considered as vacated.

7. (a) The Speaker may not entertain a point of order that a quorum is not present unless a question has been put to a vote.

(b) Subject to paragraph (c) the Speaker may recognize a Member, Delegate, or Resident Commissioner to move a call of the House at any time. When a quorum is established pursuant to a call of the House, further proceedings under the call shall be considered as dispensed with unless the Speaker recognizes for a motion to compel attendance of Members under clause 5(b).

(c) A call of the House shall not be in order after the previous question is ordered unless the Speaker determines by actual count that a quorum is not present.

Postponement of proceedings

8. (a)(1) When a recorded vote is ordered, or the yeas and nays are ordered, or a vote is objected to under clause 6—

(A) on any of the questions specified in subparagraph (2), the Speaker may postpone further proceedings to a designated place in the legislative schedule within two additional legislative days; and

(B) on the question of agreeing to the Speaker's approval of the Journal, the Speaker may postpone further proceedings to a designated place in the legislative schedule on that legislative day.

(2) The questions described in subparagraph (1) are as follows:

(A) The question of passing a bill or joint resolution.

(B) The question of adopting a resolution or concurrent resolution.

(C) The question of agreeing to a motion to instruct managers on the part of the House (except that proceedings may not resume on such a motion under clause 7(c) of rule XXII if the managers have filed a report in the House).

(D) The question of agreeing to a conference report.

(E) The question of adopting a motion to recommit.

(F) The question of adopting a motion to concur in a Senate amendment, with or without amendment.

(G) The question of ordering the previous question on a question described in subdivisions (A) through (F).

(H) The question of agreeing to a motion to suspend the rules.

(I) The question of agreeing to a motion to reconsider or the question of agreeing to a motion to lay on the table a motion to reconsider.

(J) The question of agreeing to an amendment reported from the Committee of the Whole.

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Rule XXI, clause 5

(b) At the time designated by the Speaker for further proceedings on questions postponed under paragraph (a), the Speaker shall resume proceedings on each postponed question.

(c) The Speaker may reduce to five minutes the minimum time for electronic voting on a question postponed under this clause, or on a question incidental thereto, that—

(1) follows another electronic vote without intervening business, so long as the minimum time for electronic voting on the first in any series of questions is 15 minutes; or

(2) follows a report from the Committee of the Whole without intervening debate or motion if in the discretion of the Speaker Members would be afforded an adequate opportunity to vote.

(d) If the House adjourns on a legislative day designated for further proceedings on questions postponed under this clause without disposing of such questions, then on the next legislative day the unfinished business is the disposition of such questions.

Five-minute votes

9. The Speaker may reduce to five minutes the minimum time for electronic voting—

(a) on any question arising without intervening business after an electronic vote on another question if notice of possible five-minute voting for a given series of votes was issued before the preceding electronic vote; or

(b) if in the discretion of the Speaker Members would be afforded an adequate opportunity to vote—

(1) on any question arising after a report from the Committee of the Whole without debate or intervening motion; or

(2) on the question of adoption of a motion to recommit (or ordering the previous question thereon) arising without intervening motion or debate other than debate on the motion.

Automatic yeas and nays

10. The yeas and nays shall be considered as ordered when the Speaker puts the question on passage of a bill or joint resolution, or on adoption of a conference report, making general appropriations, or increasing Federal income tax rates (within the meaning of clause 5 of rule XXI), or on final adoption of a concurrent resolution on the budget or conference report thereon.

Ballot votes

11. In a case of ballot for election, a majority of the votes shall be necessary to an election. When there is not such a majority on the first ballot, the process shall be repeated until a majority is obtained. In all balloting blanks shall be rejected, may not be counted in the enumeration of votes, and may not be reported by the tellers.

Rule XXI, clause 5

RULE XXI

RESTRICTIONS ON CERTAIN BILLS

Reservation of certain points of order

1. At the time a general appropriation bill is reported, all points of order against provisions therein shall be considered as reserved.

General appropriation bills and amendments

2. (a)(1) An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress.

(2) A reappropriation of unexpended balances of appropriations may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, except to continue appropriations for public works and objects that are already in progress. This subparagraph does not apply to transfers of unexpended balances within the department or agency for which they were originally appropriated that are reported by the Committee on Appropriations.

(b) A provision changing existing law may not be reported in a general appropriation bill, including a provision making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation, except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill (which may include those recommended to the Committee on Appropriations by direction of a legislative committee having jurisdiction over the subject matter) and except rescissions of appropriations contained in appropriation Acts.

(c) An amendment to a general appropriation bill shall not be in order if changing existing law, including an amendment making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation. Except as provided in paragraph (d), an amendment proposing a limitation not specifically contained or authorized in existing law for the period of the limitation shall not be in order during consideration of a general appropriation bill.

(d) After a general appropriation bill has been read for amendment, a motion that the Committee of the Whole House on the state of the Union rise and report the bill to the House with such amendments as may have been adopted shall, if offered by the Majority Leader or a designee, have precedence over motions to amend the bill. If such a motion to rise and report is rejected or not offered, amendments proposing limitations not specifically contained or authorized in existing law for the period of the limitation or proposing germane amendments that re-

trench expenditures by reductions of amounts of money covered by the bill may be considered.

(e) A provision other than an appropriation designated an emergency under section 251(b)(2) or section 252(e) of the Balanced Budget and Emergency Deficit Control Act, a rescission of budget authority, or a reduction in direct spending or an amount for a designated emergency may not be reported in an appropriation bill or joint resolution containing an emergency designation under section 251(b)(2) or section 252(e) of such Act and may not be in order as an amendment thereto.

(f) During the reading of an appropriation bill for amendment in the Committee of the Whole House on the state of the Union, it shall be in order to consider en bloc amendments proposing only to transfer appropriations among objects in the bill without increasing the levels of budget authority or outlays in the bill. When considered en bloc under this paragraph, such amendments may amend portions of the bill not yet read for amendment (following disposition of any points of order against such portions) and are not subject to a demand for division of the question in the House or in the Committee of the Whole.

(g) An amendment to a general appropriation bill shall not be in order if proposing a net increase in the level of budget authority in the bill.

3. It shall not be in order to consider a general appropriation bill or joint resolution, or conference report thereon, that—

(a) provides spending authority derived from receipts deposited in the Highway Trust Fund (excluding any transfers from the General Fund of the Treasury); or

(b) reduces or otherwise limits the accruing balances of the Highway Trust Fund,

for any purpose other than for those activities authorized for the highway or mass transit categories.

Appropriations on legislative bills

4. A bill or joint resolution carrying an appropriation may not be reported by a committee not having jurisdiction to report appropriations, and an amendment proposing an appropriation shall not be in order during the consideration of a bill or joint resolution reported by a committee not having that jurisdiction. A point of order against an appropriation in such a bill, joint resolution, or amendment thereto may be raised at any time during pendency of that measure for amendment.

Tax and tariff measures and amendments

5. (a)(1) A bill or joint resolution carrying a tax or tariff measure may not be reported by a committee not having jurisdiction to report tax or tariff measures, and an amendment in the House or proposed by the Senate carrying a tax or tariff measure shall not be in order during the consideration of a bill or joint resolution reported by a

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committee not having that jurisdiction. A point of order against a tax or tariff measure in such a bill, joint resolution, or amendment thereto may be raised at any time during pendency of that measure for amendment.

(2) For purposes of paragraph (1), a tax or tariff measure includes an amendment proposing a limitation on funds in a general appropriation bill for the administration of a tax or tariff.

Passage of tax rate increases

(b) A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present. In this paragraph the term "Federal income tax rate increase" means any amendment to subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b), of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and thereby increases the amount of tax imposed by any such section.

Consideration of retroactive tax rate increases

(c) It shall not be in order to consider a bill, joint resolution, amendment, or conference report carrying a retroactive Federal income tax rate increase. In this paragraph—

(1) the term "Federal income tax rate increase" means any amendment to subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b), of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and thereby increases the amount of tax imposed by any such section; and

(2) a Federal income tax rate increase is retroactive if it applies to a period beginning before the enactment of the provision.

Designation of public works

6. It shall not be in order to consider a bill, joint resolution, amendment, or conference report that provides for the designation or redesignation of a public work in honor of an individual then serving as a Member, Delegate, Resident Commissioner, or Senator.

7. It shall not be in order to consider a concurrent resolution on the budget, or an amendment thereto, or a conference report thereon that contains reconciliation directives under section 310 of the Congressional Budget Act of 1974 that specify changes in law such that the reconciliation legislation reported pursuant to such directives would cause an increase in net direct spending (as such term is defined in clause 10) for the period covered by such concurrent resolution.

8. With respect to measures considered pursuant to a special order of business, points of order under title III of the Congressional Budget Act of 1974 shall operate without regard to whether the measure concerned has been reported from committee. Such points of

order shall operate with respect to (as the case may be)—

(a) the form of a measure recommended by the reporting committee where the statute uses the term "as reported" (in the case of a measure that has been so reported);

(b) the form of the measure made in order as an original bill or joint resolution for the purpose of amendment; or

(c) the form of the measure on which the previous question is ordered directly to passage.

9. (a) It shall not be in order to consider—

(1) a bill or joint resolution reported by a committee unless the report includes a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the bill or in the report (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the committee for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits;

(2) a bill or joint resolution not reported by a committee unless the chair of each committee of initial referral has caused a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the bill (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the committee for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits to be printed in the Congressional Record prior to its consideration;

(3) an amendment to a bill or joint resolution to be offered at the outset of its consideration for amendment by a member of a committee of initial referral as designated in a report of the Committee on Rules to accompany a resolution prescribing a special order of business unless the proposition has caused a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the amendment (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the proponent for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits to be printed in the Congressional Record prior to its consideration; or

(4) a conference report to accompany a bill or joint resolution unless the joint explanatory statement prepared by the managers on the part of the House and the managers on the part of the Senate includes a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the conference report or joint statement (and the name of any Member, Delegate, Resident Commis-

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sioner, or Senator who submitted a request to the House or Senate committees of jurisdiction for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits.

(b) It shall not be in order to consider a conference report to accompany a regular general appropriation bill unless the joint explanatory statement prepared by the managers on the part of the House and the managers on the part of the Senate includes—

(1) a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the conference report or joint statement (and the name of any Member, Delegate, Resident Commissioner, or Senator who submitted a request to the House or Senate committees of jurisdiction for each respective item included in such list) that were neither committed to the conference committee by either House nor in a report of a committee of either House on such bill or on a companion measure; or

(2) a statement that the proposition contains no such congressional earmarks, limited tax benefits, or limited tariff benefits.

(c) It shall not be in order to consider a rule or order that waives the application of paragraph (a) or (b). As disposition of a point of order under this paragraph or paragraph (b), the Chair shall put the question of consideration with respect to the rule or order or conference report, as applicable. The question of consideration shall be debatable for 10 minutes by the Member initiating the point of order and for 10 minutes by an opponent, but shall otherwise be decided without intervening motion except one that the House adjourn.

(d) In order to be cognizable by the Chair, a point of order raised under paragraph (a) may be based only on the failure of a report, submission to the Congressional Record, or joint explanatory statement to include a list required by paragraph (a) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits.

(e) For the purpose of this clause, the term "congressional earmark" means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.

(f) For the purpose of this clause, the term "limited tax benefit" means—

(1) any revenue-losing provision that—

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(A) provides a Federal tax deduction, credit, exclusion, or preference to 10 or fewer beneficiaries under the Internal Revenue Code of 1986, and

(B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision; or

(2) any Federal tax provision which provides one beneficiary temporary or permanent transition relief from a change to the Internal Revenue Code of 1986.

(g) For the purpose of this clause, the term “limited tariff benefit” means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.

10. (a)(1) Except as provided in paragraphs (b) and (c), it shall not be in order to consider a bill or joint resolution, or an amendment thereto or a conference report thereon, if the provisions of such measure have the net effect of increasing mandatory spending for the period of either—

(A) the current year, the budget year, and the four fiscal years following that budget year; or

(B) the current year, the budget year, and the nine fiscal years following that budget year.

(2) For the purpose of this clause, the terms “budget year” and “current year” have the meanings specified in section 250 of the Balanced Budget and Emergency Deficit Control Act of 1985, and the term “mandatory spending” has the meaning of “direct spending” specified in such section 250 except that such term shall also include provisions in appropriation Acts that make outyear modifications to substantive law as described in section 3(4)(C) of the Statutory Pay-As-You-Go Act of 2010.

(b) If a bill or joint resolution, or an amendment thereto, is considered pursuant to a special order of the House directing the Clerk to add as new matter at the end of such bill or joint resolution the entire text of a separate measure or measures as passed by the House, the new matter proposed to be added shall be included in the evaluation under paragraph (a) of the bill, joint resolution, or amendment.

(c)(1) Except as provided in subparagraph (2), the evaluation under paragraph (a) shall exclude a provision expressly designated as an emergency for the Statutory Pay-As-You-Go Act of 2010, in the case of a point of order under this clause against consideration of—

(A) a bill or joint resolution;

(B) an amendment made in order as original text by a special order of business;

(C) a conference report; or

(D) an amendment between the Houses.

(2) In the case of an amendment (other than one specified in subparagraph (1)) to a bill or joint resolution, the evaluation under paragraph (a)

shall give no cognizance to any designation of emergency.

11. It shall not be in order to consider a bill or joint resolution which has not been reported by a committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which such measure has been available to Members, Delegates, and the Resident Commissioner.

12. (a)(1) Before a bill or joint resolution proposing to repeal or amend a statute or part thereof may be considered, there shall be made available on a publicly available website of the House an easily searchable electronic comparative print that shows how the bill or joint resolution proposes to change current law, showing (to the greatest extent practicable) by appropriate typographical devices the omissions and insertions proposed.

(2) Before an amendment in the nature of a substitute may be considered if the amendment proposes to repeal or amend a statute or part thereof, there shall be made available on a publicly available website of the House an easily searchable electronic comparative print that shows (to the greatest extent practicable) how the amendment proposes to change current law, showing by appropriate typographical devices the omissions and insertions proposed.

(b) If a committee reports a bill or joint resolution, before the bill or joint resolution may be considered with text different from the text reported, there shall be made available on a publicly available website of the House a document that shows, by appropriate typographical devices, the differences between the text of the bill or joint resolution as proposed to be considered and the text of the bill or joint resolution as reported.¹

RULE XXII

HOUSE AND SENATE RELATIONS

Senate amendments

1. A motion to disagree to Senate amendments to a House proposition and to request or agree to a conference with the Senate, or a motion to insist on House amendments to a Senate proposition and to request or agree to a conference with the Senate, shall be privileged in the discretion of the Speaker if offered by direction of the primary committee and of all reporting committees that had initial referral of the proposition.

2. A motion to dispose of House bills with Senate amendments not requiring consideration in the Committee of the Whole House on the state of the Union shall be privileged.

3. Except as permitted by clause 1, before the stage of disagreement, a Senate amendment to a House bill or resolution shall be subject to the point of order that it must first be considered in the Committee of the Whole

House on the state of the Union if, originating in the House, it would be subject to such a point under clause 3 of rule XVIII.

4. When the stage of disagreement has been reached on a bill or resolution with House or Senate amendments, a motion to dispose of any amendment shall be privileged.

5. (a) Managers on the part of the House may not agree to a Senate amendment described in paragraph (b) unless specific authority to agree to the amendment first is given by the House by a separate vote with respect thereto. If specific authority is not granted, the Senate amendment shall be reported in disagreement by the conference committee back to the two Houses for disposition by separate motion.

(b) The managers on the part of the House may not agree to a Senate amendment described in paragraph (a) that—

(1) would violate clause 2(a)(1) or (c) of rule XXI if originating in the House; or

(2) proposes an appropriation on a bill other than a general appropriation bill.

6. A Senate amendment carrying a tax or tariff measure in violation of clause 5(a) of rule XXI may not be agreed to.

Conference reports; amendments reported in disagreement

7. (a) The presentation of a conference report shall be in order at any time except during a reading of the Journal or the conduct of a record vote, a vote by division, or a quorum call.

(b)(1) Subject to subparagraph (2) the time allotted for debate on a motion to instruct managers on the part of the House shall be equally divided between the majority and minority parties.

(2) If the proponent of a motion to instruct managers on the part of the House and the Member, Delegate, or Resident Commissioner of the other party identified under subparagraph (1) both support the motion, one-third of the time for debate thereon shall be allotted to a Member, Delegate, or Resident Commissioner who opposes the motion on demand of that Member, Delegate, or Resident Commissioner.

(c)(1) A motion to instruct managers on the part of the House, or a motion to discharge all managers on the part of the House and to appoint new conferees, shall be privileged after a conference committee has been appointed for 45 calendar days and 25 legislative days without making a report, but only on the day after the calendar day on which the Member, Delegate, or Resident Commissioner offering the motion announces to the House intention to do so and the form of the motion.

(2) The Speaker may designate a time in the legislative schedule on that legislative day for consideration of a motion described in subparagraph (1).

¹The effective date of clause 12 is December 31, 2017.

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Rule XXII, clause 10

Rule XXII, clause 10

(3) During the last six days of a session of Congress, a motion under subparagraph (1) shall be privileged after a conference committee has been appointed for 36 hours without making a report and the proponent meets the notice requirement in subparagraph (1).

(d) Instructions to conferees in a motion to instruct or in a motion to recommit to conference may not include argument.

(e) Each conference report to the House shall be printed as a report of the House. Each such report shall be accompanied by a joint explanatory statement prepared jointly by the managers on the part of the House and the managers on the part of the Senate. The joint explanatory statement shall be sufficiently detailed and explicit to inform the House of the effects of the report on the matters committed to conference.

8. (a)(1) Except as specified in subparagraph (2), it shall not be in order to consider a conference report until—

(A) the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which the conference report and the accompanying joint explanatory statement have been available to Members, Delegates, and the Resident Commissioner in the Congressional Record or pursuant to clause 3 of rule XXIX; and

(B) printed or electronic copies of the conference report and the accompanying joint explanatory statement have been available to Members, Delegates, and the Resident Commissioner for at least two hours.

(2) Subparagraph (1)(A) does not apply during the last six days of a session of Congress.

(b)(1) Except as specified in subparagraph (2), it shall not be in order to consider a motion to dispose of a Senate amendment reported in disagreement by a conference committee until—

(A) the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which the report in disagreement and any accompanying statement have been available to Members, Delegates, and the Resident Commissioner in the Congressional Record; and

(B) copies of the report in disagreement and any accompanying statement, together with the text of the Senate amendment, have been available to Members, Delegates, and the Resident Commissioner for at least two hours.

(2) Subparagraph (1)(A) does not apply during the last six days of a session of Congress.

(3) During consideration of a Senate amendment reported in disagreement by a conference committee on a general appropriation bill, a motion to insist on disagreement to the Senate amendment shall be preferential to any other motion to dispose of that amend-

ment if the original motion offered by the floor manager proposes to change existing law and the motion to insist is offered before debate on the original motion by the chair of the committee having jurisdiction of the subject matter of the amendment or a designee. Such a preferential motion shall be separately debatable for one hour equally divided between its proponent and the proponent of the original motion. The previous question shall be considered as ordered on the preferential motion to its adoption without intervening motion.

(c) A conference report or a Senate amendment reported in disagreement by a conference committee that has been available as provided in paragraph (a) or (b) shall be considered as read when called up.

(d)(1) Subject to subparagraph (2), the time allotted for debate on a conference report or on a motion to dispose of a Senate amendment reported in disagreement by a conference committee shall be equally divided between the majority and minority parties.

(2) If the floor manager for the majority and the floor manager for the minority both support the conference report or motion, one-third of the time for debate thereon shall be allotted to a Member, Delegate, or Resident Commissioner who opposes the conference report or motion on demand of that Member, Delegate, or Resident Commissioner.

(e) Under clause 6(a)(2) of rule XIII, a resolution proposing only to waive a requirement of this clause concerning the availability of reports to Members, Delegates, and the Resident Commissioner may be considered by the House on the same day it is reported by the Committee on Rules.

9. Whenever a disagreement to an amendment has been committed to a conference committee, the managers on the part of the House may propose a substitute that is a germane modification of the matter in disagreement. The introduction of any language presenting specific additional matter not committed to the conference committee by either House does not constitute a germane modification of the matter in disagreement. Moreover, a conference report may not include matter not committed to the conference committee by either House and may not include a modification of specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific matter as committed to the conference committee.

10. (a)(1) A Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter, as specified in subparagraph (2), before the commencement of debate on—

(A) a conference report;

(B) a motion that the House recede from its disagreement to a Senate amendment reported in disagreement

by a conference committee and concur therein, with or without amendment; or

(C) a motion that the House recede from its disagreement to a Senate amendment on which the stage of disagreement has been reached and concur therein, with or without amendment.

(2) A point of order against nongermane matter is one asserting that a proposition described in subparagraph (1) contains specified matter that would violate clause 7 of rule XVI if it were offered in the House as an amendment to the underlying measure in the form it was passed by the House.

(b) If a point of order under paragraph (a) is sustained, a motion that the House reject the nongermane matter identified by the point of order shall be privileged. Such a motion is debatable for 40 minutes, one-half in favor of the motion and one-half in opposition thereto.

(c) After disposition of a point of order under paragraph (a) or a motion to reject under paragraph (b), any further points of order under paragraph (a) not covered by a previous point of order, and any consequent motions to reject under paragraph (b), shall be likewise disposed of.

(d)(1) If a motion to reject under paragraph (b) is adopted, then after disposition of all points of order under paragraph (a) and any consequent motions to reject under paragraph (b), the conference report or motion, as the case may be, shall be considered as rejected and the matter remaining in disagreement shall be disposed of under subparagraph (2) or (3), as the case may be.

(2) After the House has adopted one or more motions to reject nongermane matter contained in a conference report under the preceding provisions of this clause—

(A) if the conference report accompanied a House measure amended by the Senate, the pending question shall be whether the House shall recede and concur in the Senate amendment with an amendment consisting of so much of the conference report as was not rejected; and

(B) if the conference report accompanied a Senate measure amended by the House, the pending question shall be whether the House shall insist further on the House amendment.

(3) After the House has adopted one or more motions to reject nongermane matter contained in a motion that the House recede and concur in a Senate amendment, with or without amendment, the following motions shall be privileged and shall have precedence in the order stated:

(A) A motion that the House recede and concur in the Senate amendment with an amendment in writing then available on the floor.

(B) A motion that the House insist on its disagreement to the Senate amendment and request a further conference with the Senate.

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(C) A motion that the House insist on its disagreement to the Senate amendment.

(e) If, on a division of the question on a motion described in paragraph (a)(1)(B) or (C), the House agrees to recede, then a Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter, as specified in paragraph (a)(2), before the commencement of debate on concurring in the Senate amendment, with or without amendment. A point of order under this paragraph shall be disposed of according to the preceding provisions of this clause in the same manner as a point of order under paragraph (a).

11. It shall not be in order to consider a conference report to accompany a bill or joint resolution that proposes to amend the Internal Revenue Code of 1986 unless—

(a) the joint explanatory statement of the managers includes a tax complexity analysis prepared by the Joint Committee on Taxation in accordance with section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998; or

(b) the chair of the Committee on Ways and Means causes such a tax complexity analysis to be printed in the Congressional Record before consideration of the conference report.

12. (a)(1) Subject to subparagraph (2), a meeting of each conference committee shall be open to the public.

(2) In open session of the House, a motion that managers on the part of the House be permitted to close to the public a meeting or meetings of their conference committee shall be privileged, shall be decided without debate, and shall be decided by the yeas and nays.

(3) In conducting conferences with the Senate, managers on the part of the House should endeavor to ensure—

(A) that meetings for the resolution of differences between the two Houses occur only under circumstances in which every manager on the part of the House has notice of the meeting and a reasonable opportunity to attend;

(B) that all provisions on which the two Houses disagree are considered as open to discussion at any meeting of a conference committee; and

(C) that papers reflecting a conference agreement are held inviolate to change without renewal of the opportunity of all managers on the part of the House to reconsider their decisions to sign or not to sign the agreement.

(4) Managers on the part of the House shall be provided a unitary time and place with access to at least one complete copy of the final conference agreement for the purpose of recording their approval (or not) of the final conference agreement by placing their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

(b) A point of order that a conference committee failed to comply with paragraph (a) may be raised immediately after the conference report is read or considered as read. If such a point of order is sustained, the conference report shall be considered as rejected, the House shall be considered to have insisted on its amendments or on disagreement to the Senate amendments, as the case may be, and to have requested a further conference with the Senate, and the Speaker may appoint new conferees without intervening motion.

13. It shall not be in order to consider a conference report the text of which differs in any way, other than clerical, from the text that reflects the action of the conferees on all of the differences between the two Houses, as recorded by their placement of their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

RULE XXIII

CODE OF OFFICIAL CONDUCT

There is hereby established by and for the House the following code of conduct, to be known as the "Code of Official Conduct":

1. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof.

3. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.

4. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept gifts except as provided by clause 5 of rule XXV.

5. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept an honorarium for a speech, a writing for publication, or other similar activity, except as otherwise provided under rule XXV.

6. A Member, Delegate, or Resident Commissioner—

(a) shall keep the campaign funds of such individual separate from the personal funds of such individual;

(b) may not convert campaign funds to personal use in excess of an amount representing reimbursement for legitimate and verifiable campaign expenditures; and

(c) except as provided in clause 1(b) of rule XXIV, may not expend funds from a campaign account of such individual that are not attributable to bona fide campaign or political purposes.

7. A Member, Delegate, or Resident Commissioner shall treat as campaign contributions all proceeds from testimonial dinners or other fund-raising events.

8. (a) A Member, Delegate, Resident Commissioner, or officer of the House may not retain an employee who does not perform duties for the offices of the employing authority commensurate with the compensation such employee receives.

(b) In the case of a committee employee who works under the direct supervision of a member of the committee other than a chair, the chair may require that such member affirm in writing that the employee has complied with clause 8(a) (subject to clause 9 of rule X) as evidence of compliance by the chair with this clause and with clause 9 of rule X.

(c)(1) Except as specified in subparagraph (2)—

(A) a Member, Delegate, or Resident Commissioner may not retain the relative of such individual in a paid position; and

(B) an employee of the House may not accept compensation for work for a committee on which the relative of such employee serves as a member.

(2) Subparagraph (1) shall not apply in the case of a relative whose pertinent employment predates the One Hundred Thirteenth Congress.

(3) As used in this paragraph, the term "relative" means an individual who is related to the Member, Delegate, or Resident Commissioner as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, grandson, or granddaughter.

9. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not discharge and may not refuse to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, religion, sex (including marital or parental status), disability, age, or national origin of such individual, but may take into consideration the domicile or political affiliation of such individual.

10. A Member, Delegate, or Resident Commissioner who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which

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such individual is a member, and a Member should refrain from voting on any question at a meeting of the House or of the Committee of the Whole House on the state of the Union, unless or until judicial or executive proceedings result in reinstatement of the presumption of the innocence of such Member or until the Member is reelected to the House after the date of such conviction.

11. A Member, Delegate, or Resident Commissioner may not authorize or otherwise allow an individual, group, or organization not under the direction and control of the House to use the words "Congress of the United States," "House of Representatives," or "Official Business," or any combination of words thereof, on any letterhead or envelope.

12. (a) Except as provided in paragraph (b), an employee of the House who is required to file a report under rule XXVI may not participate personally and substantially as an employee of the House in a contact with an agency of the executive or judicial branches of Government with respect to nonlegislative matters affecting any nongovernmental person in which the employee has a significant financial interest.

(b) Paragraph (a) does not apply if an employee first advises the employing authority of such employee of a significant financial interest described in paragraph (a) and obtains from such employing authority a written waiver stating that the participation of the employee in the activity described in paragraph (a) is necessary. A copy of each such waiver shall be filed with the Committee on Ethics.

13. Before a Member, Delegate, Resident Commissioner, officer, or employee of the House may have access to classified information, the following oath (or affirmation) shall be executed:

"I do solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorized by the House of Representatives or in accordance with its Rules."

Copies of the executed oath (or affirmation) shall be retained as part of the records of the House, in the case of a Member, Delegate, or the Resident Commissioner, by the Clerk, and in the case of an officer or employee of the House, by the Sergeant-at-Arms. The Clerk shall make the signatories a matter of public record, causing the names of each Member, Delegate, or Resident Commissioner who has signed the oath during a week (if any) to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspec-

tion in an appropriate office of the House.

14. A Member, Delegate, or Resident Commissioner may not, with the intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity—

(a) take or withhold, or offer or threaten to take or withhold, an official act; or

(b) influence, or offer or threaten to influence, the official act of another.

15. (a) Except as provided in paragraphs (b) and (c), a Member, Delegate, or Resident Commissioner may not use personal funds, official funds, or campaign funds for a flight on an aircraft.

(b) Paragraph (a) does not apply if—

(1) the aircraft is operated by an air carrier or commercial operator certificated by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules;

(2) the aircraft is owned or leased by a Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner (including an aircraft owned by an entity that is not a public corporation in which the Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner has an ownership interest, provided that such Member, Delegate, or Resident Commissioner does not use the aircraft any more than the Member, Delegate, Resident Commissioner, or family member's proportionate share of ownership allows);

(3) the flight consists of the personal use of an aircraft by a Member, Delegate, or the Resident Commissioner that is supplied by—

(A) an individual on the basis of personal friendship; or

(B) another Member, Delegate, or the Resident Commissioner;

(4) the aircraft is operated by an entity of the Federal government or an entity of the government of any State; or

(5) the owner or operator of the aircraft is paid a pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size as determined by dividing such cost by the number of Members, Delegates, or the Resident Commissioner, officers, or employees of Congress on the flight.

(c) An advance written request for a waiver of the restriction in para-

graph (a) may be granted jointly by the chair and ranking minority member of the Committee on Ethics, subject to such conditions as they may prescribe.

(d) In this clause—

(1) the term "campaign funds" includes funds of any political committee under the Federal Election Campaign Act of 1971, without regard to whether the committee is an authorized committee of the Member, Delegate, or Resident Commissioner involved under such Act;

(2) the term "family member" means an individual who is related to the Member, Delegate, or Resident Commissioner, as father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law; and

(3) the term "on the basis of personal friendship" has the same meaning as in clause 5 of rule XXV and shall be determined as under clause 5(a)(3)(D)(ii) of rule XXV.

16. A Member, Delegate, or Resident Commissioner may not condition the inclusion of language to provide funding for a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (including an accompanying joint explanatory statement of managers) on any vote cast by another Member, Delegate, or Resident Commissioner. For purposes of this clause and clause 17, the terms "congressional earmark," "limited tax benefit," and "limited tariff benefit" shall have the meanings given them in clause 9 of rule XXI.

17. (a) A Member, Delegate, or Resident Commissioner who requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers) shall provide a written statement to the chair and ranking minority member of the committee of jurisdiction, including—

(1) the name of the Member, Delegate, or Resident Commissioner;

(2) in the case of a congressional earmark, the name and address of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity;

(3) in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Member, Delegate, or Resident Commissioner;

(4) the purpose of such congressional earmark or limited tax or tariff benefit; and

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(5) a certification that the Member, Delegate, or Resident Commissioner or spouse has no financial interest in such congressional earmark or limited tax or tariff benefit.

(b) Each committee shall maintain the information transmitted under paragraph (a), and the written disclosures for any congressional earmarks, limited tax benefits, or limited tariff benefits included in any measure reported by the committee or conference report filed by the chair of the committee or any subcommittee thereof shall be open for public inspection.

18. (a) In this Code of Official Conduct, the term "officer or employee of the House" means an individual whose compensation is disbursed by the Chief Administrative Officer.

(b) An individual whose services are compensated by the House pursuant to a consultant contract shall be considered an employee of the House for purposes of clauses 1, 2, 3, 4, 8, 9, and 13 of this rule. An individual whose services are compensated by the House pursuant to a consultant contract may not lobby the contracting committee or the members or staff of the contracting committee on any matter. Such an individual may lobby other Members, Delegates, or the Resident Commissioner or staff of the House on matters outside the jurisdiction of the contracting committee. In the case of such an individual who is a member or employee of a firm, partnership, or other business organization, the other members and employees of the firm, partnership, or other business organization shall be subject to the same restrictions on lobbying that apply to the individual under this paragraph.

RULE XXIV

LIMITATIONS ON USE OF OFFICIAL FUNDS

Limitations on use of official and unofficial accounts

1. (a) Except as provided in paragraph (b), a Member, Delegate, or Resident Commissioner may not maintain, or have maintained for the use of such individual, an unofficial office account. Funds may not be paid into an unofficial office account.

(b)(1) Except as provided in subparagraph (2), a Member, Delegate, or Resident Commissioner may defray official expenses with funds of the principal campaign committee of such individual under the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

(2) The funds specified in subparagraph (1) may not be used to defray official expenses for mail or other communications, compensation for services, office space, office furniture, office equipment, or any associated information technology services (excluding handheld communications devices).

2. Notwithstanding any other provision of this rule, if an amount from the Official Expenses Allowance of a Member, Delegate, or Resident Commis-

sioner is paid into the House Recording Studio revolving fund for telecommunications satellite services, the Member, Delegate, or Resident Commissioner may accept reimbursement from nonpolitical entities in that amount for transmission to the Chief Administrative Officer for credit to the Official Expenses Allowance.

3. In this rule the term "unofficial office account" means an account or repository in which funds are received for the purpose of defraying otherwise unreimbursed expenses allowable under section 162(a) of the Internal Revenue Code of 1986 as ordinary and necessary in the operation of a congressional office, and includes a newsletter fund referred to in section 527(g) of the Internal Revenue Code of 1986.

Limitations on use of the frank

4. A Member, Delegate, or Resident Commissioner shall mail franked mail under section 3210(d) of title 39, United States Code at the most economical rate of postage practicable.

5. Before making a mass mailing, a Member, Delegate, or Resident Commissioner shall submit a sample or description of the mail matter involved to the House Commission on Congressional Mailing Standards for an advisory opinion as to whether the proposed mailing is in compliance with applicable provisions of law, rule, or regulation.

6. A mass mailing that is otherwise frankable by a Member, Delegate, or Resident Commissioner under the provisions of section 3210(e) of title 39, United States Code, is not frankable unless the cost of preparing and printing it is defrayed exclusively from funds made available in an appropriation Act.

7. A Member, Delegate, or Resident Commissioner may not send a mass mailing outside the congressional district from which elected.

8. In the case of a Member, Delegate, or Resident Commissioner, a mass mailing is not frankable under section 3210 of title 39, United States Code, when it is postmarked less than 90 days before the date of a primary or general election (whether regular, special, or runoff) in which such individual is a candidate for public office. If the mail matter is of a type that is not customarily postmarked, the date on which it would have been postmarked, if it were of a type customarily postmarked, applies.

9. In this rule the term "mass mailing" means, with respect to a session of Congress, a mailing of newsletters or other pieces of mail with substantially identical content (whether such pieces of mail are deposited singly or in bulk, or at the same time or different times), totaling more than 500 pieces of mail in that session, except that such term does not include a mailing—

(a) of matter in direct response to a communication from a person to whom the matter is mailed;

(b) from a Member, Delegate, or Resident Commissioner to other Members, Delegates, the Resident Commissioner, or Senators, or to Federal, State, or local government officials; or

(c) of a news release to the communications media.

Prohibition on use of funds by Members not elected to succeeding Congress

10. Funds from the applicable accounts described in clause 1(k)(1) of rule X, including funds from committee expense resolutions, and funds in any local currencies owned by the United States may not be made available for travel by a Member, Delegate, Resident Commissioner, or Senator after the date of a general election in which such individual was not elected to the succeeding Congress or, in the case of a Member, Delegate, or Resident Commissioner who is not a candidate in a general election, after the earlier of the date of such general election or the adjournment sine die of the last regular session of the Congress.

RULE XXV

LIMITATIONS ON OUTSIDE EARNED INCOME AND ACCEPTANCE OF GIFTS

Outside earned income; honoraria

1. (a) Except as provided by paragraph (b), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(1) have outside earned income attributable to a calendar year that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year; or

(2) receive any honorarium, except that an officer or employee of the House who is paid at a rate less than 120 percent of the minimum rate of basic pay for GS-15 of the General Schedule may receive an honorarium unless the subject matter is directly related to the official duties of the individual, the payment is made because of the status of the individual with the House, or the person offering the honorarium has interests that may be substantially affected by the performance or nonperformance of the official duties of the individual.

(b) In the case of an individual who becomes a Member, Delegate, Resident Commissioner, officer, or employee of the House, such individual may not have outside earned income attributable to the portion of a calendar year that occurs after such individual becomes a Member, Delegate, Resident Commissioner, officer, or employee that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year multiplied by a fraction, the numerator of which is the number of days the individual is a Member, Delegate, Resident Commis-

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sioner, officer, or employee during that calendar year and the denominator of which is 365.

(c) A payment in lieu of an honorarium that is made to a charitable organization on behalf of a Member, Delegate, Resident Commissioner, officer, or employee of the House may not be received by that Member, Delegate, Resident Commissioner, officer, or employee. Such a payment may not exceed \$2,000 or be made to a charitable organization from which the Member, Delegate, Resident Commissioner, officer, or employee or a parent, sibling, spouse, child, or dependent relative of the Member, Delegate, Resident Commissioner, officer, or employee, derives a financial benefit.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(a) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship except for the practice of medicine;

(b) permit the name of such individual to be used by such a firm, partnership, association, corporation, or other entity;

(c) receive compensation for practicing a profession that involves a fiduciary relationship except for the practice of medicine;

(d) serve for compensation as an officer or member of the board of an association, corporation, or other entity; or

(e) receive compensation for teaching, without the prior notification and approval of the Committee on Ethics.

Copyright royalties

3. (a) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive an advance payment on copyright royalties. This paragraph does not prohibit a literary agent, researcher, or other individual (other than an individual employed by the House or a relative of a Member, Delegate, Resident Commissioner, officer, or employee) working on behalf of a Member, Delegate, Resident Commissioner, officer, or employee with respect to a publication from receiving an advance payment of a copyright royalty directly from a publisher and solely for the benefit of that literary agent, researcher, or other individual.

(b) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive copyright royalties under a contract entered into on or after January 1, 1996, unless that contract is first approved by the Committee on Ethics as complying with the requirement of clause 4(d)(1)(E) (that royalties are received from an established publisher under usual and customary contractual terms).

Definitions

4. (a)(1) In this rule, except as provided in subparagraph (2), the term “of-

ficer or employee of the House” means an individual (other than a Member, Delegate, or Resident Commissioner) whose pay is disbursed by the Chief Administrative Officer, who is paid at a rate equal to or greater than 120 percent of the minimum rate of basic pay for GS-15 of the General Schedule, and who is so employed for more than 90 days in a calendar year.

(2)(A) When used with respect to an honorarium, the term “officer or employee of the House” means an individual (other than a Member, Delegate, or Resident Commissioner) whose salary is disbursed by the Chief Administrative Officer.

(B) When used in clause 5 of this rule, the terms “officer” and “employee” have the same meanings as in rule XXIII.

(b) In this rule the term “honorarium” means a payment of money or a thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles) by a Member, Delegate, Resident Commissioner, officer, or employee of the House, excluding any actual and necessary travel expenses incurred by that Member, Delegate, Resident Commissioner, officer, or employee (and one relative) to the extent that such expenses are paid or reimbursed by any other person. The amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not so paid or reimbursed.

(c) In this rule the term “travel expenses” means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a relative of such Member, Delegate, Resident Commissioner, officer, or employee, the cost of transportation, and the cost of lodging and meals while away from the residence or principal place of employment of such individual.

(d)(1) In this rule the term “outside earned income” means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered, but does not include —

(A) the salary of a Member, Delegate, Resident Commissioner, officer, or employee;

(B) any compensation derived by a Member, Delegate, Resident Commissioner, officer, or employee of the House for personal services actually rendered before the adoption of this rule or before such individual became a Member, Delegate, Resident Commissioner, officer, or employee;

(C) any amount paid by, or on behalf of, a Member, Delegate, Resident Commissioner, officer, or employee of the House to a tax-qualified pension, profit-sharing, or stock bonus plan and received by such individual from such a plan;

(D) in the case of a Member, Delegate, Resident Commissioner, officer,

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or employee of the House engaged in a trade or business in which such individual or the family of such individual holds a controlling interest and in which both personal services and capital are income-producing factors, any amount received by the Member, Delegate, Resident Commissioner, officer, or employee, so long as the personal services actually rendered by such individual in the trade or business do not generate a significant amount of income; or

(E) copyright royalties received from established publishers under usual and customary contractual terms; and

(2) outside earned income shall be determined without regard to community property law.

(e) In this rule the term “charitable organization” means an organization described in section 170(c) of the Internal Revenue Code of 1986.

Gifts

5. (a)(1)(A)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift except as provided in this clause.

(ii) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift from a registered lobbyist or agent of a foreign principal or from a private entity that retains or employs registered lobbyists or agents of a foreign principal except as provided in subparagraph (3) of this paragraph.

(B)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept a gift (other than cash or cash equivalent) not prohibited by subdivision (A)(ii) that the Member, Delegate, Resident Commissioner, officer, or employee reasonably and in good faith believes to have a value of less than \$50 and a cumulative value from one source during a calendar year of less than \$100. A gift having a value of less than \$10 does not count toward the \$100 annual limit. The value of perishable food sent to an office shall be allocated among the individual recipients and not to the Member, Delegate, or Resident Commissioner. Formal recordkeeping is not required by this subdivision, but a Member, Delegate, Resident Commissioner, officer, or employee of the House shall make a good faith effort to comply with this subdivision.

(ii) A gift of a ticket to a sporting or entertainment event shall be valued at the face value of the ticket or, in the case of a ticket without a face value, at the highest cost of a ticket with a face value for the event. The price printed on a ticket to an event shall be deemed its face value only if it also is the price at which the issuer offers that ticket for sale to the public.

(2)(A) In this clause the term “gift” means a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of serv-

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ices, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(B)(i) A gift to a family member of a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a gift to any other individual based on that individual's relationship with the Member, Delegate, Resident Commissioner, officer, or employee, shall be considered a gift to the Member, Delegate, Resident Commissioner, officer, or employee if it is given with the knowledge and acquiescence of the Member, Delegate, Resident Commissioner, officer, or employee and the Member, Delegate, Resident Commissioner, officer, or employee has reason to believe the gift was given because of the official position of such individual.

(ii) If food or refreshment is provided at the same time and place to both a Member, Delegate, Resident Commissioner, officer, or employee of the House and the spouse or dependent thereof, only the food or refreshment provided to the Member, Delegate, Resident Commissioner, officer, or employee shall be treated as a gift for purposes of this clause.

(3) The restrictions in subparagraph (1) do not apply to the following:

(A) Anything for which the Member, Delegate, Resident Commissioner, officer, or employee of the House pays the market value, or does not use and promptly returns to the donor.

(B) A contribution, as defined in section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) that is lawfully made under that Act, a lawful contribution for election to a State or local government office, or attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(C) A gift from a relative as described in section 109(16) of title I of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(16)).

(D)(i) Anything provided by an individual on the basis of a personal friendship unless the Member, Delegate, Resident Commissioner, officer, or employee of the House has reason to believe that, under the circumstances, the gift was provided because of the official position of such individual and not because of the personal friendship.

(ii) In determining whether a gift is provided on the basis of personal friendship, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall consider the circumstances under which the gift was offered, such as:

(I) The history of the relationship of such individual with the individual giving the gift, including any previous exchange of gifts between them.

(II) Whether to the actual knowledge of such individual the indi-

vidual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

(III) Whether to the actual knowledge of such individual the individual who gave the gift also gave the same or similar gifts to other Members, Delegates, the Resident Commissioners, officers, or employees of the House.

(E) Except as provided in paragraph (e)(3), a contribution or other payment to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Ethics.

(F) A gift from another Member, Delegate, Resident Commissioner, officer, or employee of the House or Senate.

(G) Food, refreshments, lodging, transportation, and other benefits—

(i) resulting from the outside business or employment activities of the Member, Delegate, Resident Commissioner, officer, or employee of the House (or other outside activities that are not connected to the duties of such individual as an officeholder), or of the spouse of such individual, if such benefits have not been offered or enhanced because of the official position of such individual and are customarily provided to others in similar circumstances;

(ii) customarily provided by a prospective employer in connection with bona fide employment discussions; or

(iii) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such organization.

(H) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.

(I) Informational materials that are sent to the office of the Member, Delegate, Resident Commissioner, officer, or employee of the House in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.

(J) Awards or prizes that are given to competitors in contests or events open to the public, including random drawings.

(K) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).

(L) Training (including food and refreshments furnished to all attendees

as an integral part of the training) if such training is in the interest of the House.

(M) Bequests, inheritances, and other transfers at death.

(N) An item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(O) Anything that is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(P) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act) of an individual other than a registered lobbyist or agent of a foreign principal.

(Q) Free attendance at an event permitted under subparagraph (4).

(R) Opportunities and benefits that are—

(i) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(ii) offered to members of a group or class in which membership is unrelated to congressional employment;

(iii) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(iv) offered to a group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(v) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(vi) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(S) A plaque, trophy, or other item that is substantially commemorative in nature and that is intended for presentation.

(T) Anything for which, in an unusual case, a waiver is granted by the Committee on Ethics.

(U) Food or refreshments of a nominal value offered other than as a part of a meal.

(V) Donations of products from the district or State that the Member, Delegate, or Resident Commissioner represents that are intended primarily for promotional purposes,

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such as display or free distribution, and are of minimal value to any single recipient.

(W) An item of nominal value such as a greeting card, baseball cap, or a T-shirt.

(4)(A) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(i) the Member, Delegate, Resident Commissioner, officer, or employee of the House participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the official position of such individual; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, Delegate, Resident Commissioner, officer, or employee of the House.

(B) A Member, Delegate, Resident Commissioner, officer, or employee of the House who attends an event described in subdivision (A) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual.

(C) A Member, Delegate, Resident Commissioner, officer, or employee of the House, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with the event unless—

(i) all of the net proceeds of the event are for the benefit of an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code;

(ii) reimbursement for the transportation and lodging in connection with the event is paid by such organization; and

(iii) the offer of free attendance at the event is made by such organization.

(D) In this paragraph the term "free attendance" may include waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception in subparagraph (3)(D) unless the Committee on Ethics issues a written de-

termination that such exception applies. A determination under this subparagraph is not required for gifts given on the basis of the family relationship exception in subparagraph (3)(C).

(6) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(b)(1)(A) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event in connection with the duties of such individual as an officeholder shall be considered as a reimbursement to the House and not a gift prohibited by this clause when it is from a private source other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs registered lobbyists or agents of a foreign principal (except as provided in subdivision (C)), if the Member, Delegate, Resident Commissioner, officer, or employee—

(i) in the case of an employee, receives advance authorization, from the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works, to accept reimbursement; and

(ii) discloses the expenses reimbursed or to be reimbursed and the authorization to the Clerk within 15 days after the travel is completed.

(B) For purposes of subdivision (A), events, the activities of which are substantially recreational in nature, are not considered to be in connection with the duties of a Member, Delegate, Resident Commissioner, officer, or employee of the House as an officeholder.

(C) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for any purpose described in subdivision (A) also shall be considered as a reimbursement to the House and not a gift prohibited by this clause (without regard to whether the source retains or employs registered lobbyists or agents of a foreign principal) if it is, under regulations prescribed by the Committee on Ethics to implement this provision—

(i) directly from an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(ii) provided only for attendance at or participation in a one-day event (exclusive of travel time and an overnight stay).

Regulations prescribed to implement this provision may permit a two-night stay when determined by the committee on a case-by-case basis to be practically required to participate in the one-day event.

(2) Each advance authorization to accept reimbursement shall be signed by the Member, Delegate, Resident Com-

missioner, or officer of the House under whose direct supervision the employee works and shall include—

(A) the name of the employee;

(B) the name of the person who will make the reimbursement;

(C) the time, place, and purpose of the travel; and

(D) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

(3) Each disclosure made under subparagraph (1)(A) shall be signed by the Member, Delegate, Resident Commissioner, or officer (in the case of travel by that Member, Delegate, Resident Commissioner, or officer) or by the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include—

(A) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;

(B) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;

(C) a good faith estimate of total meal expenses reimbursed or to be reimbursed;

(D) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;

(E) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in subparagraph (4);

(F) a description of meetings and events attended; and

(G) in the case of a reimbursement to a Member, Delegate, Resident Commissioner, or officer, a determination that the travel was in connection with the duties of such individual as an officeholder and would not create the appearance that the Member, Delegate, Resident Commissioner, or officer is using public office for private gain.

(4) In this paragraph the term "necessary transportation, lodging, and related expenses"—

(A) includes reasonable expenses that are necessary for travel for a period not exceeding four days within the United States or seven days exclusive of travel time outside of the United States unless approved in advance by the Committee on Ethics;

(B) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in subdivision (A);

(C) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this clause; and

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Rule XXV, clause 5

(D) may include travel expenses incurred on behalf of a relative of the Member, Delegate, Resident Commissioner, officer, or employee.

(5) The Clerk of the House shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received.

(c)(1)(A) Except as provided in subdivision (B), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip on which the traveler is accompanied on any segment by a registered lobbyist or agent of a foreign principal.

(B) Subdivision (A) does not apply to a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965.

(2) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under the exception in paragraph (b)(1)(C)(ii) of this clause for a trip that is financed in whole or in part by a private entity that retains or employs registered lobbyists or agents of a foreign principal unless any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip is de minimis under rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C) of this clause.

(3) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip (other than a trip permitted under paragraph (b)(1)(C) of this clause) if such trip is in any part planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal.

(d) A Member, Delegate, Resident Commissioner, officer, or employee of the House shall, before accepting travel otherwise permissible under paragraph (b)(1) of this clause from any private source—

(1) provide to the Committee on Ethics before such trip a written certification signed by the source or (in the case of a corporate person) by an officer of the source—

(A) that the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) that the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal; or

(ii) is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(iii) certifies that the trip meets the requirements specified in rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C)(ii) of this clause and specifically details the extent of any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip considered to qualify as de minimis under such rules;

(C) that the source will not accept from another source any funds earmarked directly or indirectly for the purpose of financing any aspect of the trip;

(D) that the traveler will not be accompanied on any segment of the trip by a registered lobbyist or agent of a foreign principal (except in the case of a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965); and

(E) that (except as permitted in paragraph (b)(1)(C) of this clause) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal; and

(2) after the Committee on Ethics has promulgated the regulations mandated in paragraph (i)(1)(B) of this clause, obtain the prior approval of the committee for such trip.

(e) A gift prohibited by paragraph (a)(1) includes the following:

(1) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(2) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, Delegate, Resident Commissioner, officer, or employee of the House (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph (f).

(3) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(4) A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, Delegates, the Resident Commissioner, officers, or employees of the House.

(f)(1) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Member, Delegate, Resident Commissioner, officer, or employee of the House is not considered a gift under this clause if it is reported as provided in subparagraph (2).

(2) A Member, Delegate, Resident Commissioner, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of an honorarium described in subparagraph (1) shall report within 30 days after such designation or recommendation to the Clerk—

(A) the name and address of the registered lobbyist who is making the contribution in lieu of an honorarium;

(B) the date and amount of the contribution; and

(C) the name and address of the charitable organization designated or recommended by the Member, Delegate, or Resident Commissioner.

The Clerk shall make public information received under this subparagraph as soon as possible after it is received.

(g) In this clause—

(1) the term “registered lobbyist” means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute;

(2) the term “agent of a foreign principal” means an agent of a foreign principal registered under the Foreign Agents Registration Act; and

(3) the terms “officer” and “employee” have the same meanings as in rule XXIII.

(h) All the provisions of this clause shall be interpreted and enforced solely by the Committee on Ethics. The Committee on Ethics is authorized to issue guidance on any matter contained in this clause.

(i)(1) Not later than 45 days after the date of adoption of this paragraph and at annual intervals thereafter, the Committee on Ethics shall develop and revise, as necessary—

(A) guidelines on judging the reasonableness of an expense or expenditure for purposes of this clause, including the factors that tend to establish—

(i) a connection between a trip and official duties;

(ii) the reasonableness of an amount spent by a sponsor;

(iii) a relationship between an event and an officially connected purpose; and

(iv) a direct and immediate relationship between a source of funding and an event; and

(B) regulations describing the information it will require individuals subject to this clause to submit to the committee in order to obtain the prior approval of the committee for any travel covered by this clause, including any required certifications.

(2) In developing and revising guidelines under subparagraph (1)(A), the

RULES OF THE

Rule XXIX, clause 4

committee shall take into account the maximum per diem rates for official Government travel published annually by the General Services Administration, the Department of State, and the Department of Defense.

Claims against the Government

6. A person may not be an officer or employee of the House, or continue in its employment, if acting as an agent for the prosecution of a claim against the Government or if interested in such claim, except as an original claimant or in the proper discharge of official duties.

7. A Member, Delegate, or Resident Commissioner shall prohibit all staff employed by that Member, Delegate, or Resident Commissioner (including staff in personal, committee, and leadership offices) from making any lobbying contact (as defined in section 3 of the Lobbying Disclosure Act of 1995) with that individual's spouse if that spouse is a lobbyist under the Lobbying Disclosure Act of 1995 or is employed or retained by such a lobbyist for the purpose of influencing legislation.

8. During the dates on which the national political party to which a Member (including a Delegate or Resident Commissioner) belongs holds its convention to nominate a candidate for the office of President or Vice President, the Member may not participate in an event honoring that Member, other than in the capacity as a candidate for such office, if such event is directly paid for by a registered lobbyist under the Lobbying Disclosure Act of 1995 or a private entity that retains or employs such a registered lobbyist.

RULE XXVI

FINANCIAL DISCLOSURE

1. The Clerk shall send a copy of each report filed with the Clerk under title I of the Ethics in Government Act of 1978 within the seven-day period beginning on the date on which the report is filed to the Committee on Ethics.

2. For the purposes of this rule, the provisions of title I of the Ethics in

Government Act of 1978 shall be considered Rules of the House as they pertain to Members, Delegates, the Resident Commissioner, officers, and employees of the House.

3. Members of the board of the Office of Congressional Ethics shall file annual financial disclosure reports with the Clerk of the House on or before May 15 of each calendar year after any year in which they perform the duties of that position. Such reports shall be on a form prepared by the Clerk that is substantially similar to form 450 of the Office of Government Ethics. The Clerk shall send a copy of each such report filed with the Clerk within the seven-day period beginning on the date on which the report is filed to the Committee on Ethics and shall have them printed as a House document and made available to the public by August 1 of each year.

RULE XXVII

DISCLOSURE BY MEMBERS AND STAFF OF EMPLOYMENT NEGOTIATIONS

1. A Member, Delegate, or Resident Commissioner shall not directly negotiate or have any agreement of future employment or compensation unless such Member, Delegate, or Resident Commissioner, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the Committee on Ethics a statement, which must be signed by the Member, Delegate, or Resident Commissioner, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.

2. An officer or an employee of the House earning in excess of 75 percent of the salary paid to a Member shall notify the Committee on Ethics that such individual is negotiating or has any agreement of future employment or compensation.

3. The disclosure and notification under this rule shall be made within 3

Rule XXIX, clause 4

business days after the commencement of such negotiation or agreement of future employment or compensation.

4. A Member, Delegate, or Resident Commissioner, and an officer or employee to whom this rule applies, shall recuse himself or herself from any matter in which there is a conflict of interest or an appearance of a conflict for that Member, Delegate, Resident Commissioner, officer, or employee under this rule and shall notify the Committee on Ethics of such recusal. A Member, Delegate, or Resident Commissioner making such recusal shall, upon such recusal, submit to the Clerk for public disclosure the statement of disclosure under clause 1 with respect to which the recusal was made.

RULE XXVIII

(RESERVED.)

RULE XXIX

GENERAL PROVISIONS

1. The provisions of law that constituted the Rules of the House at the end of the previous Congress shall govern the House in all cases to which they are applicable, and the rules of parliamentary practice comprised by Jefferson's Manual shall govern the House in all cases to which they are applicable and in which they are not inconsistent with the Rules and orders of the House.

2. In these rules words importing one gender include the other as well.

3. If a measure or matter is publicly available at an electronic document repository operated by the Clerk, it shall be considered as having been available to Members, Delegates, and the Resident Commissioner for purposes of these rules.

4. Authoritative guidance from the Committee on the Budget concerning the impact of a legislative proposition on the levels of new budget authority, outlays, direct spending, new entitlement authority and revenues may be provided by the chair of the committee.

○

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	Criminal Number:
	:	
	:	VIOLATION:
	:	
	:	Count One:
	:	18 U.S.C. § 371
v.	:	(Conspiracy)
	:	
JACK A. ABRAMOFF,	:	Count Two:
	:	18 U.S.C. §§ 1341, 1346 and 2
Defendant.	:	(Honest Services Mail Fraud)
	:	
	:	Count Three:
	:	26 U.S.C. § 7201
	:	(Tax Evasion)

INFORMATION

The United States charges that:

COUNT ONE

18 U.S.C. § 371 - Conspiracy

GENERAL ALLEGATIONS

Unless specified otherwise, at all relevant times:

1. From in or about 1994 to in or about 2004, defendant JACK A. ABRAMOFF was a Washington, D.C. lobbyist. In 1994, defendant ABRAMOFF joined a law and lobbying firm ("Firm A"). In January 2001, defendant ABRAMOFF joined a second law and lobbying firm ("Firm B").
2. Defendant ABRAMOFF solicited and obtained lobbying business from groups and companies throughout the United States, including Native American tribal governments operating, and interested in operating, gaming casinos. Defendant ABRAMOFF sought to further his clients'

interests by lobbying public officials, including, but not limited to, Members of the United States Congress. Defendant ABRAMOFF also sought to further his clients' interests by recommending vendors for grass roots work, public relations services and election campaign support.

3. In or about January 2001, Michael Scanlon ("Scanlon") established a business to provide grass roots work, public relations services and election campaign support. Scanlon also formed other companies that were used primarily to receive money for services and work performed by others (collectively referred to as "CCS").

4. In or about May 2003, defendant ABRAMOFF established a business called GrassRoots Interactive ("GRI"), which had its principal offices in Silver Spring, Maryland. GRI was purportedly formed to provide grass roots work, public relations services, and election campaign support.

5. In July 1999, Abramoff established a private foundation called Capital Athletic Foundation ("CAF") for which he sought and received federal tax-exempt status, in part to provide funding for a non-profit school.

THE CONSPIRACY AND ITS OBJECTS

6. From at least as early as 1997 through at least April 2004, in the District of Columbia and elsewhere, the defendant,

JACK A. ABRAMOFF,

did knowingly conspire and agree with Scanlon and with others to commit the following offenses against the United States:

- (A) to devise a scheme and artifice to defraud and deprive defendant ABRAMOFF's clients of their right to defendant ABRAMOFF's honest services, performed free

from deceit, fraud, concealment, conflict of interest and self-dealing, in violation of 18 U.S.C. §§ 1341, 1343, and 1346;

- (B) to devise a scheme and artifice to defraud and to obtain money and property from the clients of defendant ABRAMOFF and Scanlon through intentionally and materially false and fraudulent misrepresentations, pretenses, and promises, in violation of 18 U.S.C. §§ 1341 and 1343;
- (C) to devise a scheme and artifice to defraud and deprive Firm B of its right to defendant ABRAMOFF's honest services, performed free from deceit, fraud, concealment, conflict of interest and self-dealing, in violation of 18 U.S.C. §§ 1341, 1343, and 1346;
- (D) to corruptly give, offer and promise things of value, including money, meals, trips and entertainment, to public officials and their relatives with the intent to influence, and in return for agreements to perform, officials acts benefitting defendant ABRAMOFF, Scanlon, and their clients, in violation of 18 U.S.C. §§ 201(b)(1), 1341, 1343, and 1346; and
- (E) to knowingly cause former senior Congressional staff members to make, with the intent to influence, communications to and appearances before Members of Congress, their employees and employees of Congressional Committees, on matters on which the former congressional staff members were seeking official action on behalf of other persons within one year of the Congressional staff members' employment by those Members of Congress or Congressional Committees, in violation of 18 U.S.C. § 207(e).

PURPOSES OF THE CONSPIRACY

7. It was a purpose of the conspiracy for defendant ABRAMOFF, Scanlon and others to enrich themselves by obtaining substantial funds from their clients through fraud and concealment. A further purpose of the conspiracy was to obtain benefits for themselves and others through corrupt means.

MANNER AND MEANS

8. The conspiracy was carried out through the following manner and means:

- A. Defendant ABRAMOFF and sometimes others would persuade clients that they needed to hire CCS or GRI to perform certain grass roots and public relations services to accomplish the goals that defendant ABRAMOFF identified for them.
- B. Defendant ABRAMOFF and sometimes others would cause CCS or GRI to charge clients prices that incorporated huge profit margins for the purpose of generating funds for and concealing kickbacks that would be paid to defendant ABRAMOFF.
- C. Defendant ABRAMOFF received approximately fifty percent of the net profits Scanlon, through CCS, obtained from clients referred by defendant ABRAMOFF. Defendant ABRAMOFF would receive this money through entities he owned and controlled. Defendant ABRAMOFF and Scanlon would conceal these kickbacks from their clients.
- D. Defendant ABRAMOFF and others would cause clients to falsely believe that some of the fees charged were being used for specific purposes, when in fact, defendant ABRAMOFF and others would use those funds for their own personal benefit and not for the benefit of their clients.

- E. On some occasions, defendant ABRAMOFF would falsely represent to his clients that he had no relationship with, or received no financial benefit from, CCS or GRI, when in fact defendant ABRAMOFF received substantial monetary payments from those entities.
- F. Defendant ABRAMOFF and others would offer and provide things of value to public officials, including trips, campaign contributions, meals and entertainment in exchange for agreements that the public officials would use their official positions and influence to benefit defendant ABRAMOFF's clients and defendant ABRAMOFF's businesses.
- G. Defendant ABRAMOFF and others would hire senior congressional staff members as lobbyists, and those former congressional staff members, with the knowledge and encouragement of defendant ABRAMOFF and others despite the federal one year lobbying ban, would communicate with their former employers, either Members of Congress or Congressional Committees, and their staffs, in order to influence official action.

OVERT ACTS

9. In furtherance of the conspiracy and to achieve its purposes, defendant ABRAMOFF, Scanlon and others committed the following overt acts, among others, in the District of Columbia and elsewhere:

Deprivation of Abramoff's Clients' Right To Abramoff's Honest Services

Mississippi Tribe

10. In or about 1995, defendant ABRAMOFF was hired by a Native American tribal client based in Mississippi ("Mississippi Tribe") to provide lobbying services on various issues, including taxation of the tribe by the Federal government as well as other issues relating to Tribal sovereignty. Defendant ABRAMOFF used his knowledge of lobbying and grass roots work, which was superior to the Mississippi Tribe's knowledge of these areas, to secure and keep the trust and confidence of the Mississippi Tribe.

11. In or about early 2001, defendant ABRAMOFF advised the Mississippi Tribe to hire CCS while concealing the fact that defendant ABRAMOFF would receive approximately fifty percent of the net profits from the Mississippi Tribe's payments to CCS.

12. From in or about June 2001 until in or about April 2004, the Mississippi Tribe paid CCS approximately \$14,765,000. Pursuant to their secret profit-sharing agreement, defendant ABRAMOFF and Scanlon concealed from the Mississippi Tribe that approximately fifty percent of the profit, approximately \$6,364,000, including money that was not passed through CCS, was kicked back to defendant ABRAMOFF pursuant to their secret arrangement.

Louisiana Tribe

13. In or about March 2001, defendant ABRAMOFF and Scanlon successfully solicited a Native American tribal client based in Louisiana ("Louisiana Tribe") to hire them to provide lobbying and grass roots services to the tribe. Defendant ABRAMOFF used his knowledge of lobbying and grass roots work, which was superior to the Louisiana Tribe's knowledge of these areas, to secure and keep the trust and confidence of the Louisiana Tribe.

14. In or about March 2001, after CCS had been paid for the first project, defendant ABRAMOFF recommended and advised the Louisiana Tribe to rehire CCS while concealing the fact that defendant ABRAMOFF would receive fifty percent of the net profits from the Louisiana Tribe's payments to CCS.

15. From in or about March 2001 to in or about May 2003, the Louisiana Tribe paid Scanlon and related entities approximately \$30,510,000. Defendant ABRAMOFF and Scanlon concealed from the Louisiana Tribe that approximately fifty percent of the profit, approximately \$11,450,000, including money that was not passed through CCS, was kicked back to defendant ABRAMOFF pursuant to their secret arrangement.

Michigan Tribe

16. In or about January 2002, defendant ABRAMOFF and Scanlon successfully solicited a Native American tribal client based in Michigan ("Michigan Tribe") to hire them to provide lobbying and grass roots services to the tribe. Defendant ABRAMOFF used his knowledge of lobbying and grass roots work, which was superior to the Michigan Tribe's knowledge of these areas, to secure and keep the trust and confidence of the Michigan Tribe.

17. In or about June 2002, defendant ABRAMOFF encouraged the Michigan Tribe to expand its contract with CCS while concealing the fact that defendant ABRAMOFF would receive approximately fifty percent of the profits from the Michigan Tribe's payments to CCS.

18. From in or about June 2002 to in or about October 2003, the Michigan Tribe paid CCS approximately \$3,500,000. Pursuant to their secret arrangement, defendant ABRAMOFF and Scanlon concealed from the Michigan Tribe that approximately fifty percent of the profit, approximately \$540,000, was kicked back to defendant ABRAMOFF.

Texas Tribe

19. In or about February 2002, defendant ABRAMOFF and Scanlon successfully solicited a Native American tribal client based in Texas (“Texas Tribe #1”) to hire them to provide lobbying and grass roots services to the tribe to reopen their casino through federal legislation. After Texas Tribe #1 paid \$4,200,000 to CCS, defendant ABRAMOFF concealed his work to oppose Texas Tribe #1's efforts to reopen its casino under state law. Defendant ABRAMOFF falsely represented that he would work for free to represent Texas Tribe #1, all the while concealing from the Texas Tribe #1 that approximately fifty percent of CCS's net profits, approximately \$1,850,000, was kicked back to Abramoff pursuant to his secret arrangement with Scanlon.

Fraud Based on Affirmative Misrepresentations

20. On or about June 6, 2002, defendant ABRAMOFF and a lobbying colleague, who was also a former congressional staffer (“Staffer A”) successfully solicited one of Firm B's clients, a distilled beverages company, for a \$25,000 payment to CAF. Instead of using the money for CAF and contrary to CAF's tax exempt purpose, defendant ABRAMOFF used this money for his personal and professional benefit to partially pay for a golfing trip to Scotland for public officials, members of his staff and others.

Deprivation of Abramoff's Employer's Right To Abramoff's Honest Services

21. In 2001, defendant ABRAMOFF successfully solicited a wireless telephone company (“Wireless Company”) to make at least \$50,000 in payments to CAF. In exchange for making the payments to this entity, defendant ABRAMOFF stated that no lobbying payments need be made to Firm B, and that defendant ABRAMOFF would undertake a lobbying effort to assist Wireless Company in securing a license to install wireless telephone infrastructure for the United States

House of Representatives. In 2001 and early 2002, defendant ABRAMOFF and his Firm B colleagues lobbied for the Wireless Company without any formal retainer agreement or any payments to Firm B. At no time did defendant ABRAMOFF inform his employer, Firm B, of the payments totaling \$50,000 to CAF that were diverted from Firm B.

Bribery and Honest Services Fraud Involving Public Officials

22. From in or about 1999 through in or about April 2004, defendant ABRAMOFF, Scanlon and others, together and separately, provided a stream of things of value to a Member of the United States House of Representatives (“Representative #1”) and members of his staff, including but not limited to a lavish trip to Scotland to play golf on world-famous courses, tickets to sporting events and other entertainment, regular meals at defendant ABRAMOFF’s upscale restaurant, and campaign contributions for Representative #1, his political action committee, and other political committees on behalf of Representative #1.

23. In exchange for those things of value, from in or about March 2000 through in or about April 2004, defendant ABRAMOFF, Scanlon and others, together and separately, sought and received Representative #1’s agreement to perform a series of official acts to benefit defendant ABRAMOFF’s businesses, clients and others, including but not limited to, agreements to support and pass legislation, agreements to place statements into the Congressional Record, meetings with defendant ABRAMOFF’s clients, and advancing the application of a client of defendant ABRAMOFF for a license to install wireless telephone infrastructure in the House of Representatives.

Post-Employment Restrictions of Congressional Staffers

24. Beginning in March 2002, defendant ABRAMOFF and a former staffer to Representative #1 (“Staffer B”) contacted Representative #1, officials employed by the Office of Representative #1, and officials employed by a House Committee (“Committee”), of which Representative #1 was the chairman. These contacts occurred within one year of Staffer B having served as the Staff Director of the Committee and Chief of Staff for Representative #1. Defendant ABRAMOFF intended that Staffer B make these appearances and communications for the purpose of influencing official action on behalf of defendant ABRAMOFF’s and Staffer B’s clients, including Texas Tribe #1 and Wireless Company.

All in violation of 18 United States Code, Section 371.

COUNT TWO

18 U.S.C. §§ 1341, 1346 and 2 - Honest Services Mail Fraud of a Public Official

25. Paragraphs 1 through 5, 19, and 22 through 24 are realleged as though fully stated herein.

26. From in or about 1999 through in or about April 2004, in the District of Columbia and elsewhere, having devised and intending to devise a scheme and artifice to defraud and deprive the United States, his constituents and the United States House of Representatives of the right to the honest services of a Member of the United States House of Representatives, Representative #1, and his staff, including the right to conscientious, loyal, faithful, disinterested, unbiased service, to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud and corruption, by corruptly offering and providing a stream of things of value, including money, meals, trips and entertainment to Representative #1 and his staff, in return for their agreements to perform official acts benefitting defendant ABRAMOFF and his clients as described in paragraphs 1 through 5, 19, and 22 through 24, defendant,

JACK A. ABRAMOFF,

knowingly and willfully, for the purpose of executing, and aiding and abetting, the above-described scheme and artifice and attempting to do so, that is funding a Scotland golf trip for Representative #1 and his staff, caused a \$50,000 check solicited by Texas Tribe # 1 and defendant ABRAMOFF to be delivered by mail and commercial delivery service from Texas on or about August 12, 2002 according to the directions thereon to defendant ABRAMOFF in the District of Columbia.

All in violation of 18 United States Code, Sections 1341, 1346 and 2.

COUNT THREE

26 U.S.C. § 7201 - Tax Evasion

27. Paragraphs 1 through 5 and 7 through 24 are realleged as though fully stated herein.

28. Beginning on or about January 1, 2002, the exact date being unknown, through October 17, 2003, in the District of Columbia and elsewhere, defendant

JACK A. ABRAMOFF,

a resident of Silver Spring, Maryland, did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 2002, by committing at least one affirmative act of evasion including, but not limited to:

(a) Making and using, and causing to be made and used, false documents, false entries and alterations to financial books and records, and false invoices;

(b) Concealing assets and sources of income through the use of nominees including, but not limited to, tax-exempt organizations;

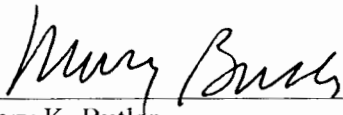
(c) Concealing substantial amounts of illegally derived income; and

(d) Filing, and causing to be filed, a false joint U.S. Individual Income Tax Return, Form 1040, for the 2002 calendar year

all for the purpose of concealing additional unreported taxable income received by, or on behalf of, the defendant during the 2002 calendar year, on which income, as the defendant then and there well knew and believed, there was due and owing to the United States of America a substantial amount of income tax.

All in violation of Title 26, United States Code, Section 7201.

NOEL L. HILLMAN
Chief, Public Integrity Section



Mary K. Butler
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Date: January 3, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
05-60204

CASE NO. _____
18 U.S.C. §371
18 U.S.C. §1343

CR - HUCK

MAGISTRATE JUDGE
SIMONTON

UNITED STATES OF AMERICA,

v.

ADAM R. KIDAN and
JACK A. ABRAMOFF,

Defendants.

U.S. DISTRICT COURT
S.D. OF FL.-FTL.
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D.C.

INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times material to this Indictment:

1. SunCruz Casino, Ltd. was a Florida general partnership which, through its general partner, CasinoCruz Inc., and its affiliated entities, Dream Boat USA Inc.; DreamCruz, Inc.; Mr. Lucky's Excursions, Inc.; Paradise of Port Richey, Inc.; DreamCruz II, Inc.; Tropic Casino Cruises, Inc.; and 3514 Ocean Drive, Inc. (hereinafter collectively referred to as "SunCruz"), owned and/or operated vessels which were utilized to transport passengers from ports and other locations within the United States into waters outside United States territorial limits where gambling activity occurred.

2. Foothill Capital Corporation (hereinafter "Foothill") was

a California corporation which was in the business of providing commercial financing to persons and entities within the United States and elsewhere.

3. Citadel Equity Fund, Ltd. was a Cayman Islands company which ultimately acquired, and therefore is the successor in interest to, Nelson Partners Ltd., a Bermuda company which was in the business of providing commercial financing to persons and entities within the United States and elsewhere. As used herein, "Citadel" refers to Citadel Equity Fund, Ltd., Nelson Partners Ltd., and any other affiliate which provided and/or assumed funding for the purchase of SunCruz.

4. Konstantinos "Gus" Boulis was the founder of SunCruz and controlled the affairs of SunCruz from in or about 1994 through September 27, 2000.

5. In or about 1998, the United States of America initiated a lawsuit against Konstantinos "Gus" Boulis and others in Southern District of Florida Case No. 98-1851-CIV-SEITZ, asserting that Boulis was ineligible to own or exert control over SunCruz based, in part, upon Boulis' lack of United States citizenship. In 1999, Boulis began negotiating a settlement of that lawsuit.

6. Beginning in or about January 2000, Konstantinos "Gus" Boulis and others within his employ began negotiating with the defendants for the sale of SunCruz.

7. In February 2000, Boulis entered into a divestiture

agreement with the United States of America, which agreement required that Boulis divest himself of his ownership interest in SunCruz within 36 months. By its terms, said agreement was to remain confidential so as not to adversely effect the ultimate purchase price any prospective buyer(s) would pay for SunCruz.

8. LEAK, Inc. was a Delaware corporation. SunCruz Casinos L.L.C. was a Florida limited liability company. JAB America, Inc. was a Florida corporation. All of these entities were formed by or on behalf of the defendants for the purpose of acquiring SunCruz from Konstantinos "Gus" Boulis.

9. In or about June 2000, the defendants sought to obtain financing for the SunCruz purchase from Foothill. Foothill invited Citadel into the transaction as a participating lender to provide a portion of the financing sought by the defendants.

10. As a condition for providing financing, Foothill and Citadel required that the defendants make a cash equity contribution toward the purchase of SunCruz in the approximate amount of \$23 million.

11. As a condition for providing financing, Foothill and Citadel required that the defendants be personal guarantors on the loans and that they submit accurate personal financial statements setting forth their respective assets and liabilities.

12. On or about September 21, 2000, an Asset Purchase Agreement was executed for the sale of SunCruz to SunCruz Casinos

L.L.C. and JAB America, Inc. for a purchase price of \$147.5 million. Said Asset Purchase Agreement provides, in pertinent part, that "[a]t the Closing, Buyer shall pay to Seller the amount of Buyer's financing plus Buyer's equity contribution in the sum of Twenty Three Million Dollars (\$23,000,000), reduced by Buyer's closing and acquisition costs, by means of a cashier's check or wire transfer ..."

13. On or about September 21, 2000, a Loan and Security Agreement was executed in favor of Foothill and Citadel which provides, in pertinent part, that the "agent shall have received evidence satisfactory to it that Adam Kidan and Jack Abramoff have made an equity contribution to [SunCruz] in cash in an amount no less than \$23,000,000 on terms and pursuant to documentation satisfactory to the Lender Group."

14. On or about September 27, 2000, Foothill and Citadel released more than \$60 million in financing in accordance with the September 21, 2000 Loan and Security Agreement.

COUNT 1

Conspiracy to Commit Wire Fraud & Mail Fraud

15. The General Allegations set forth above in paragraphs numbered one (1) through fourteen (14) of this Indictment are re-alleged and expressly incorporated by reference as though fully set forth herein.

16. Beginning in or about January 2000, the exact date being

unknown to the Grand Jury, and continuing to and including in or about June 2001, in the Southern District of Florida, and elsewhere, the defendants,

ADAM R. KIDAN
and
JACK A. ABRAMOFF,

knowingly and willfully combined, conspired, confederated and agreed with one another, and with Konstantinos "Gus" Boulis, and with other persons known and unknown to the Grand Jury, to commit offenses against the United States, that is, to devise and intend to devise a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, representations and promises and, in so doing, (a) to knowingly cause to be transmitted by means of wire communications in interstate and foreign commerce, certain signs, signals, and sounds, in violation of Title 18, United States Code, Section 1343 (Wire Fraud) and (b) to knowingly cause to be delivered by commercial interstate carrier according to the directions thereon, certain matters and things, in violation of Title 18, United States Code, Section 1341 (Mail Fraud).

OBJECT OF THE CONSPIRACY

17. It was the object of the conspiracy that the defendants and their co-conspirators, having devised and intending to devise a scheme and artifice to defraud, would obtain financing from Foothill and Citadel for the purchase of SunCruz by submitting and causing to be submitted false information and false documentation to Foothill

and Citadel in order to induce Foothill and Citadel into making loans toward the purchase in the approximate amount of \$60 million.

MANNER AND MEANS OF THE CONSPIRACY

18. The manner and means by which the defendants and their co-conspirators sought to accomplish the object of the conspiracy included, among others, the following:

A. It was part of the scheme and artifice to defraud that the defendants would seek funding from various lenders and investors in connection with their purchase of SunCruz. To that end, the defendants would solicit, or cause to be solicited, loans from individuals, which they would refer to as "flash funds," to use for the express purpose of leading potential lenders to believe that the defendants had the necessary funding to complete the sale of SunCruz when, in truth and in fact, they did not.

B. It was further part of the scheme and artifice to defraud that the defendants would submit to Foothill and Citadel false information, including personal financial statements, which overstated their respective net worth.

C. It was further part of the scheme and artifice to defraud that the defendants would make false statements to agents and employees of Foothill and Citadel concerning the defendants' prior employment and experience in order to falsely present themselves as more credit-worthy borrowers in the purchase of SunCruz than they in fact were.

D. It was further part of the scheme and artifice to defraud that the defendants would represent to agents and employees of Foothill and Citadel that they had funds available in excess of \$20 million dollars for the purchase of SunCruz when, in truth and in fact, they did not.

E. It was further part of the scheme and artifice to defraud that the defendants and their co-conspirators would represent to agents and employees of Foothill and Citadel that a \$23 million cash equity contribution had been made by the defendants toward the purchase of SunCruz when, in truth and in fact, it had not.

F. It was further part of the scheme and artifice to defraud that the defendants would create and execute, and cause to be created and executed, documents in which it was certified that they had made a cash equity contribution toward the SunCruz purchase in an aggregate amount of not less than \$23 million when, in truth and in fact, they had not.

G. It was further part of the scheme and artifice to defraud that the defendants would execute, and cause to be executed, promissory notes in the approximate amount of \$20 million in favor of Konstantinos Boulis as a substitute for the cash equity contribution which they otherwise asserted had been made toward the purchase of SunCruz, and would conceal that fact from Foothill and Citadel.

H. It was further part of the scheme and artifice to defraud that the defendants and their co-conspirators would take all

necessary steps to conceal from the agents and employees of Foothill and Citadel the fraudulent nature of the SunCruz purchase in order to induce Foothill and Citadel to extend the financing for the purchase and to avoid detection of such fraud by the agents and employees of Foothill and Citadel and by law enforcement authorities.

OVERT ACTS

19. In furtherance of the conspiracy and to achieve the object thereof, at least one of the co-conspirators committed and caused to be committed, in the Southern District of Florida and elsewhere, at least one of the following overt acts, among others:

A. On or about June 20, 2000, JACK A. ABRAMOFF caused to be sent, by facsimile transmission from Washington, D.C. to Dania Beach, Florida, a document purporting to be an accurate personal financial statement, which document contained false information concerning his assets.

B. On or about July 25, 2000, ADAM R. KIDAN caused to be sent, by facsimile transmission from Dania Beach, Florida to Santa Monica, California, a document purporting to be an accurate personal financial statement, which document contained false information concerning his assets.

C. On or about August 8, 2000, the defendants met with representatives of Foothill and Citadel in New York, New York during which JACK A. ABRAMOFF falsely claimed to be a partner in the law firm of Preston, Gates, Ellis & Rouvelas Meeds, LLP and ADAM R.

KIDAN falsely claimed to have previously worked in the casino industry.

D. On or about September 22, 2000, the defendants each executed a document titled "Equity Contribution" in which they certify that "they have made a cash equity contribution to SunCruz Casinos L.L.C. ... in an aggregate amount of not less than \$23,000,000."

E. On or about September 22, 2000, ADAM R. KIDAN, on behalf of the buyers, executed and caused to be delivered to employees of Konstantinos "Gus" Boulis two promissory notes totaling \$20 million.

F. On or about September 22, 2000, the defendants caused to be sent, by facsimile transmission from Washington, D.C. to New York, New York, closing documents bearing the signature of JACK A. ABRAMOFF and pertaining to the acquisition of SunCruz.

G. On or about September 22, 2000, the defendants caused to be sent, by commercial interstate carrier from Washington, D.C. to New York, New York, a package containing closing documents bearing the signature of JACK A. ABRAMOFF and pertaining to the acquisition of SunCruz.

H. On or about September 26, 2000, ADAM R. KIDAN, on behalf of the buyers, executed a closing statement which states, in pertinent part, "CASH FROM BUYERS in the amount of \$23,000,000 which has been received by the Sellers," which document was sent by facsimile transmission from Dania Beach, Florida to New York, New York.

I. On or about September 27, 2000, the defendants caused to be

sent to Foothill, by facsimile transmission from Dania Beach, Florida to Boston, Massachusetts, a counterfeit document purporting to be a funds transfer notification reflecting that, on September 22, 2000, \$23 million had been wire transferred from the account of LEAK, Inc. at Chevy Chase Savings Bank to the account of Konstantinos Boulis at Ocean Bank in Miami, Florida.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2- 6

Wire Fraud

20. The General Allegations set forth above in paragraphs numbered one (1) through fourteen (14), and those allegations set forth in Paragraphs 18(A) through 18(H) of Count 1 of this Indictment, are re-alleged and incorporated by reference as though fully set forth herein.

21. On or about the approximate dates enumerated as to each count, at Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ADAM R. KIDAN
and
JACK A. ABRAMOFF,

having devised a scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises, and attempting to do so, for the purpose of executing such scheme and artifice and attempting to do so, did knowingly transmit and cause to be transmitted in interstate commerce by means of wire communications, certain signals and

sounds, as more particularly described below:

<u>COUNT</u>	<u>DATE</u>	<u>WIRE COMMUNICATION</u>
2	September 21, 2000	Unexecuted promissory notes in the amounts of \$5,000,000.00 and \$15,000,000.00 respectively sent by facsimile transmission from Dania Beach, Florida to New York, New York.
3	September 22, 2000	Closing documents bearing the signature of Jack A. Abramoff sent by facsimile transmission from Washington, D.C. to New York, New York.
4	September 26, 2000	Closing statement bearing the signature of Adam R. Kidan sent by facsimile transmission from Dania Beach, Florida to New York, New York.
5	September 27, 2000	Document titled "Funds Transfer Notification" reflecting that \$23,000,000.00 had been transferred from the account of Leak, Inc. to the account of Konstantinos Boulis sent by facsimile transmission from Dania Beach, Florida to Boston, Massachusetts.
6	September 27, 2000	Wire transfer of funds in the amount of \$25,776,790.52 from the bank account of Foothill Capital Corporation in New York, New York to the bank account of Konstantinos Gus Boulis in Miami, Florida.

In violation of Title 18, United States Code, Sections 1343 and

2.

CRIMINAL FORFEITURE

22. The General Allegations portion of this Indictment, and the allegations set forth in Counts 1 through 6, are re-alleged and incorporated herein by reference.

23. As a result of the violations of Title 18, United States Code, Sections 371 and 1343 set forth in this Indictment, the defendants,

ADAM R. KIDAN
and
JACK A. ABRAMOFF,

shall forfeit to the United States of America any property, real and personal, which constitutes or is derived from proceeds traceable to the violations set forth in Counts 1 through 6 of this Indictment, all pursuant to the provisions of Title 28, United States Code, Section 2461 and Title 18, United States Code, Section 981(a)(1)(C).

24. Such forfeitures shall include, but are not limited to, the sum of approximately \$60,000,000.00, which represents property constituting, or derived from, proceeds traceable to or derived from conspiracy to commit mail and wire fraud, and wire fraud, as set forth in Counts 1 through 6 of this Indictment.

25. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred, or sold to, or deposited with a third party;
- (c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek the forfeiture of any other property of defendants up to the value of the above-described forfeitable property, pursuant to Title 18, United States Code, Section 982(b) and Title 21, United States Code, Section 853(p).

A TRUE BILL

FOREPERSON

R. Alexander Acosta

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Lawrence D. Lavecchio

LAWRENCE D. LAVECCHIO
ASSISTANT UNITED STATES ATTORNEY

Paul F. Schwartz

PAUL F. SCHWARTZ
ASSISTANT UNITED STATES ATTORNEY

RULES
of the
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS



PREPARED BY
Karen L. Haas
Clerk of the House of Representatives
JANUARY 5, 2017

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RULES OF THE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

RULE I THE SPEAKER

Approval of the Journal

1. The Speaker shall take the Chair on every legislative day precisely at the hour to which the House last adjourned and immediately call the House to order. Having examined and approved the Journal of the last day's proceedings, the Speaker shall announce to the House approval thereof. The Speaker's approval of the Journal shall be deemed agreed to unless a Member, Delegate, or Resident Commissioner demands a vote thereon. If such a vote is decided in the affirmative, it shall not be subject to a motion to reconsider. If such a vote is decided in the negative, then one motion that the Journal be read shall be privileged, shall be decided without debate, and shall not be subject to a motion to reconsider.

Preservation of order

2. The Speaker shall preserve order and decorum and, in case of disturbance or disorderly conduct in the galleries or in the lobby, may cause the same to be cleared.

Control of Capitol facilities

3. Except as otherwise provided by rule or law, the Speaker shall have general control of the Hall of the House, the corridors and passages in the part of the Capitol assigned to the use of the House, and the disposal of unappropriated rooms in that part of the Capitol.

Signature of documents

4. The Speaker shall sign all acts and joint resolutions passed by the two Houses and all writs, warrants, and subpoenas of, or issued by order of, the House. The Speaker may sign enrolled bills and joint resolutions whether or not the House is in session.

Questions of order

5. The Speaker shall decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner. On such an appeal a Member, Delegate, or Resident Commissioner may not speak more than once without permission of the House.

Form of a question

6. The Speaker shall put a question in this form: "Those in favor (of the question), say 'Aye.'"; and after the affirmative voice is expressed, "Those opposed, say 'No.'". After a vote by voice under this clause, the Speaker

may use such voting procedures as may be invoked under rule XX.

Discretion to vote

7. The Speaker is not required to vote in ordinary legislative proceedings, except when such vote would be decisive or when the House is engaged in voting by ballot.

Speaker pro tempore

8. (a) The Speaker may appoint a Member to perform the duties of the Chair. Except as specified in paragraph (b), such an appointment may not extend beyond three legislative days.

(b)(1) In the case of illness, the Speaker may appoint a Member to perform the duties of the Chair for a period not exceeding 10 days, subject to the approval of the House. If the Speaker is absent and has omitted to make such an appointment, then the House shall elect a Speaker pro tempore to act during the absence of the Speaker.

(2) With the approval of the House, the Speaker may appoint a Member to act as Speaker pro tempore only to sign enrolled bills and joint resolutions for a specified period of time.

(3)(A) In the case of a vacancy in the Office of Speaker, the next Member on the list described in subdivision (B) shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end.

(B) As soon as practicable after the election of the Speaker and whenever appropriate thereafter, the Speaker shall deliver to the Clerk a list of Members in the order in which each shall act as Speaker pro tempore under subdivision (A).

(C) For purposes of subdivision (A), a vacancy in the Office of Speaker may exist by reason of the physical inability of the Speaker to discharge the duties of the office.

Other responsibilities

9. The Speaker, in consultation with the Minority Leader, shall develop through an appropriate entity of the House a system for drug testing in the House. The system may provide for the testing of a Member, Delegate, Resident Commissioner, officer, or employee of the House, and otherwise shall be comparable in scope to the system for drug testing in the executive branch pursuant to Executive Order 12564 (Sept. 15, 1986). The expenses of

the system may be paid from applicable accounts of the House for official expenses.

Designation of travel

10. The Speaker may designate a Member, Delegate, Resident Commissioner, officer, or employee of the House to travel on the business of the House within or without the United States, whether the House is meeting, has recessed, or has adjourned. Expenses for such travel may be paid from applicable accounts of the House described in clause 1(k)(1) of rule X on vouchers approved and signed solely by the Speaker.

Committee appointment

11. The Speaker shall appoint all select, joint, and conference committees ordered by the House. At any time after an original appointment, the Speaker may remove Members, Delegates, or the Resident Commissioner from, or appoint additional Members, Delegates, or the Resident Commissioner to, a select or conference committee. In appointing Members, Delegates, or the Resident Commissioner to conference committees, the Speaker shall appoint no less than a majority who generally supported the House position as determined by the Speaker, shall name those who are primarily responsible for the legislation, and shall, to the fullest extent feasible, include the principal proponents of the major provisions of the bill or resolution passed or adopted by the House.

Recess and convening authorities

12. (a) To suspend the business of the House for a short time when no question is pending before the House, the Speaker may declare a recess subject to the call of the Chair.

(b)(1) To suspend the business of the House when notified of an imminent threat to its safety, the Speaker may declare an emergency recess subject to the call of the Chair.

(2) To suspend the business of the Committee of the Whole House on the state of the Union when notified of an imminent threat to its safety, the chair of the Committee of the Whole may declare an emergency recess subject to the call of the Chair.

(c) During any recess or adjournment of not more than three days, if the Speaker is notified by the Sergeant-at-Arms of an imminent impairment of the place of reconvening at the time previously appointed, then the Speaker may, in consultation with the Minority Leader—

RULES OF THE

Rule II, clause 3

Rule II, clause 3

(1) postpone the time for reconvening within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly; or

(2) reconvene the House before the time previously appointed solely to declare the House in recess within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly.

(d) The Speaker may convene the House in a place at the seat of government other than the Hall of the House if, in the opinion of the Speaker, the public interest shall warrant it.

(e) During any recess or adjournment of not more than three days, if in the opinion of the Speaker the public interest so warrants, then the Speaker, after consultation with the Minority Leader, may reconvene the House at a time other than that previously appointed, within the limits of clause 4, section 5, article I of the Constitution, and notify Members accordingly.

(f) The Speaker may name a designee for purposes of paragraphs (c), (d), and (e).

RULE II

OTHER OFFICERS AND OFFICIALS

Elections

1. There shall be elected at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain. Each of these officers shall take an oath to support the Constitution of the United States, and for the true and faithful exercise of the duties of the office to the best of the knowledge and ability of the officer, and to keep the secrets of the House. Each of these officers shall appoint all of the employees of the department concerned provided for by law. The Clerk, Sergeant-at-Arms, and Chief Administrative Officer may be removed by the House or by the Speaker.

Clerk

2. (a) At the commencement of the first session of each Congress, the Clerk shall call the Members, Delegates, and Resident Commissioner to order and proceed to record their presence by States in alphabetical order, either by call of the roll or by use of the electronic voting system. Pending the election of a Speaker or Speaker pro tempore, and in the absence of a Member acting as Speaker pro tempore pursuant to clause 8(b)(3)(A) of rule I, the Clerk shall preserve order and decorum and decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner.

(b) At the commencement of every regular session of Congress, the Clerk shall make and cause to be delivered to each Member, Delegate, and the Resident Commissioner a list of the reports that any officer or Department is required to make to Congress, citing the law or resolution in which the require-

ment may be contained and placing under the name of each officer the list of reports required to be made by such officer.

(c) The Clerk shall—

(1) note all questions of order, with the decisions thereon, the record of which shall be appended to the Journal of each session;

(2) enter on the Journal the hour at which the House adjourns;

(3) complete the distribution of the Journal to Members, Delegates, and the Resident Commissioner, together with an accurate and complete index, as soon as possible after the close of a session; and

(4) send a copy of the Journal to the executive of and to each branch of the legislature of every State as may be requested by such State officials.

(d)(1) The Clerk shall attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House and certify the passage of all bills and joint resolutions.

(2) The Clerk shall examine all bills, amendments, and joint resolutions after passage by the House and, in cooperation with the Senate, examine all bills and joint resolutions that have passed both Houses to see that they are correctly enrolled and forthwith present those bills and joint resolutions that originated in the House to the President in person after their signature by the Speaker and the President of the Senate, and report to the House the fact and date of their presentation.

(e) The Clerk shall cause the calendars of the House to be distributed each legislative day.

(f) The Clerk shall—

(1) retain in the library at the Office of the Clerk for the use of the Members, Delegates, Resident Commissioner, and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; and

(2) deliver to any Member, Delegate, or the Resident Commissioner an extra copy of each document requested by that Member, Delegate, or Resident Commissioner that has been printed by order of either House of Congress in any Congress in which the Member, Delegate, or Resident Commissioner served.

(g) The Clerk shall provide for the temporary absence or disability of the Clerk by designating an official in the Office of the Clerk to sign all papers that may require the official signature of the Clerk and to perform all other official acts that the Clerk may be required to perform under the rules and practices of the House, except such official acts as are provided for by statute. Official acts performed by the designated official shall be under the name of the Clerk. The designation shall be in writing and shall be laid before the House and entered on the Journal.

(h) The Clerk may receive messages from the President and from the Senate at any time when the House is in recess or adjournment.

(i)(1) The Clerk shall supervise the staff and manage the office of a Member, Delegate, or Resident Commissioner who has died, resigned, or been expelled until a successor is elected. The Clerk shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the person representing such district or other reason. When acting as a supervisory authority over such staff, the Clerk shall have authority to terminate employees and, with the approval of the Committee on House Administration, may appoint such staff as is required to operate the office until a successor is elected.

(2) For 60 days following the death of a former Speaker, the Clerk shall maintain on the House payroll, and shall supervise in the same manner, staff appointed under House Resolution 1238, Ninety-first Congress (as enacted into permanent law by chapter VIII of the Supplemental Appropriations Act, 1971) (2 U.S.C. 5128).

(j) In addition to any other reports required by the Speaker or the Committee on House Administration, the Clerk shall report to the Committee on House Administration not later than 45 days following the close of each semi-annual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Clerk. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(k) The Clerk shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Sergeant-at-Arms

3. (a) The Sergeant-at-Arms shall attend the House during its sittings and maintain order under the direction of the Speaker or other presiding officer. The Sergeant-at-Arms shall execute the commands of the House, and all processes issued by authority thereof, directed to the Sergeant-at-Arms by the Speaker.

(b) The symbol of the Office of the Sergeant-at-Arms shall be the mace, which shall be borne by the Sergeant-at-Arms while enforcing order on the floor.

(c) The Sergeant-at-Arms shall enforce strictly the rules relating to the privileges of the Hall of the House and be responsible to the House for the official conduct of employees of the Office of the Sergeant-at-Arms.

(d) The Sergeant-at-Arms may not allow a person to enter the room over the Hall of the House during its sittings and, from 15 minutes before the hour of the meeting of the House

HOUSE OF REPRESENTATIVES

Rule III, clause 2

each day until 10 minutes after adjournment, shall see that the floor is cleared of all persons except those privileged to remain.

(e) In addition to any other reports required by the Speaker or the Committee on House Administration, the Sergeant-at-Arms shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Sergeant-at-Arms. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(f) The Sergeant-at-Arms shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(g)(1) The Sergeant-at-Arms is authorized and directed to impose a fine against a Member, Delegate, or the Resident Commissioner for the use of an electronic device for still photography or for audio or visual recording or broadcasting in contravention of clause 5 of rule XVII and any applicable Speaker's announced policy on electronic devices.

(2) A fine imposed pursuant to this paragraph shall be \$500 for a first offense and \$2,500 for any subsequent offense.

(3)(A) The Sergeant-at-Arms shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker, the Chief Administrative Officer, and the Committee on Ethics of any such fine.

(B) Such Member, Delegate, or Resident Commissioner may appeal the fine in writing to the Committee on Ethics not later than 30 calendar days or five legislative days, whichever is later, after notification pursuant to subdivision (A).

(C) Upon receipt of an appeal pursuant to subdivision (B), the Committee on Ethics shall have 30 calendar days or five legislative days, whichever is later, to either dismiss the fine or allow it to proceed. Upon a determination regarding the appeal or if no appeal has been filed at the expiration of the period specified in subdivision (B), the chair of the Committee on Ethics shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker and the Chief Administrative Officer. The Speaker shall promptly lay such notification before the House.

(4) The Sergeant-at-Arms and the Committee on Ethics are authorized to establish policies and procedures for the implementation of this paragraph.

Chief Administrative Officer

4. (a) The Chief Administrative Officer shall have operational and financial responsibility for functions as assigned by the Committee on House Ad-

ministration and shall be subject to the policy direction and oversight of the Committee on House Administration.

(b) In addition to any other reports required by the Committee on House Administration, the Chief Administrative Officer shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or December 31 on the financial and operational status of each function under the jurisdiction of the Chief Administrative Officer. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(c) The Chief Administrative Officer shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(d)(1) Upon notification from the chair of the Committee on Ethics pursuant to clause 3(g)(3)(C), the Chief Administrative Officer shall deduct the amount of any fine levied under clause 3(g) from the net salary otherwise due the Member, Delegate, or the Resident Commissioner.

(2) The Chief Administrative Officer is authorized to establish policies and procedures for such salary deductions.

Chaplain

5. The Chaplain shall offer a prayer at the commencement of each day's sitting of the House.

Office of Inspector General

6. (a) There is established an Office of Inspector General.

(b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.

(c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only—

(1) provide audit, investigative, and advisory services to the House and joint entities in a manner consistent with government-wide standards;

(2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause;

(4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on Appropriations and the Committee on House Administration a report of each audit conducted under this clause; and

Rule III, clause 2

(5) report to the Committee on Ethics information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.

Office of the Historian

7. There is established an Office of the Historian of the House of Representatives. The Speaker shall appoint and set the annual rate of pay for employees of the Office of the Historian.

Office of General Counsel

8. (a) There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group.

(b) There is established a Bipartisan Legal Advisory Group composed of the Speaker and the majority and minority leaderships. Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.

(c) The House, the Speaker, a committee or the chair of a committee authorized during a prior Congress to act in a litigation matter is authorized to act as the successor in interest to the House, the Speaker, such committee or the chair of such committee of a prior Congress, respectively, with respect to such litigation matter, and to take such steps as may be appropriate to ensure continuation of such litigation matter.

RULE III

THE MEMBERS, DELEGATES, AND
RESIDENT COMMISSIONER OF PUERTO
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Voting

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question.

2. (a) A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.

(b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

RULES OF THE

Rule V, clause 3

Delegates and the Resident Commissioner

3. (a) Each Delegate and the Resident Commissioner shall be elected to serve on standing committees in the same manner as Members and shall possess in such committees the same powers and privileges as the other members of the committee.

(b) The Delegates and the Resident Commissioner may be appointed to any select committee and to any conference committee.

RULE IV

THE HALL OF THE HOUSE

Use and admittance

1. The Hall of the House shall be used only for the legislative business of the House and for caucus and conference meetings of its Members, except when the House agrees to take part in any ceremonies to be observed therein.

2. (a) Only the following persons shall be admitted to the Hall of the House or rooms leading thereto:

(1) Members of Congress, Members-elect, and contestants in election cases during the pendency of their cases on the floor.

(2) The Delegates and the Resident Commissioner.

(3) The President and Vice President of the United States and their private secretaries.

(4) Justices of the Supreme Court.

(5) Elected officers and minority employees nominated as elected officers of the House.

(6) The Parliamentarian.

(7) Staff of committees when business from their committee is under consideration, and staff of the respective party leaderships when so assigned with the approval of the Speaker.

(8) Not more than one person from the staff of a Member, Delegate, or Resident Commissioner when that Member, Delegate, or Resident Commissioner has an amendment under consideration (subject to clause 5).

(9) The Architect of the Capitol.

(10) The Librarian of Congress and the assistant in charge of the Law Library.

(11) The Secretary and Sergeant-at-Arms of the Senate.

(12) Heads of departments.

(13) Foreign ministers.

(14) Governors of States.

(15) Former Members, Delegates, and Resident Commissioners; former Parliamentarians of the House; and former elected officers and minority employees nominated as elected officers of the House (subject to clause 4).

(16) One attorney to accompany a Member, Delegate, or Resident Commissioner who is the respondent in an investigation undertaken by the Committee on Ethics when a recommendation of that committee is under consideration in the House.

(17) Such persons as have, by name, received the thanks of Congress.

(b) The Speaker may not entertain a unanimous consent request or a motion to suspend this clause or clauses 1, 3, 4, or 5.

3. (a) Except as provided in paragraph (b), all persons not entitled to the privilege of the floor during the session shall be excluded at all times from the Hall of the House and the cloakrooms.

(b) Until 15 minutes of the hour of the meeting of the House, persons employed in its service, accredited members of the press entitled to admission to the press gallery, and other persons on request of a Member, Delegate, or Resident Commissioner by card or in writing, may be admitted to the Hall of the House.

4. (a) A former Member, Delegate, or Resident Commissioner; a former Parliamentarian of the House; or a former elected officer of the House or former minority employee nominated as an elected officer of the House shall not be entitled to the privilege of admission to the Hall of the House and rooms leading thereto if such individual—

(1) is a registered lobbyist or agent of a foreign principal as those terms are defined in clause 5 of rule XXV;

(2) has any direct personal or pecuniary interest in any legislative measure pending before the House or reported by a committee; or

(3) is in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any legislative proposal.

(b) The Speaker may promulgate regulations to carry out this rule including regulations that exempt ceremonial or educational functions from the restrictions of this clause.

5. A person from the staff of a Member, Delegate, or Resident Commissioner may be admitted to the Hall of the House or rooms leading thereto under clause 2 only upon prior notice to the Speaker. Such persons, and persons from the staff of committees admitted under clause 2, may not engage in efforts in the Hall of the House or rooms leading thereto to influence Members with regard to the legislation being amended. Such persons are admitted only to advise the Member, Delegate, Resident Commissioner, or committee responsible for their admission. A person who violates this clause may be excluded during the session from the Hall of the House and rooms leading thereto by the Speaker.

Gallery

6. (a) The Speaker shall set aside a portion of the west gallery for the use of the President, the members of the Cabinet, justices of the Supreme Court, foreign ministers and suites, and the members of their respective families. The Speaker shall set aside another portion of the same gallery for the accommodation of persons to be admitted on the cards of Members, Delegates, or the Resident Commissioner.

Rule V, clause 3

(b) The Speaker shall set aside the southerly half of the east gallery for the use of the families of Members of Congress. The Speaker shall control one bench. On the request of a Member, Delegate, Resident Commissioner, or Senator, the Speaker shall issue a card of admission to the family of such individual, which may include their visitors. No other person shall be admitted to this section.

Prohibition on campaign contributions

7. A Member, Delegate, Resident Commissioner, officer, or employee of the House, or any other person entitled to admission to the Hall of the House or rooms leading thereto by this rule, may not knowingly distribute a political campaign contribution in the Hall of the House or rooms leading thereto.

RULE V

BROADCASTING THE HOUSE

1. The Speaker shall administer, direct, and control a system for closed-circuit viewing of floor proceedings of the House in the offices of all Members, Delegates, the Resident Commissioner, and committees and in such other places in the Capitol and the House Office Buildings as the Speaker considers appropriate. Such system may include other communications functions as the Speaker considers appropriate. Any such communications shall be subject to rules and regulations issued by the Speaker.

2. (a) The Speaker shall administer, direct, and control a system for complete and unedited audio and visual broadcasting and recording of the floor proceedings of the House. The Speaker shall provide for the distribution of such broadcasts and recordings to news media, for the storage of audio and video recordings of the proceedings, and for the closed-captioning of the proceedings for hearing-impaired persons.

(b) All television and radio broadcasting stations, networks, services, and systems (including cable systems) that are accredited to the House Radio and Television Correspondents' Galleries, and all radio and television correspondents who are so accredited, shall be provided access to the live coverage of the House.

(c) Coverage made available under this clause, including any recording thereof—

(1) may not be used for any partisan political campaign purpose;

(2) may not be used in any commercial advertisement; and

(3) may not be broadcast with commercial sponsorship except as part of a bona fide news program or public affairs documentary program.

3. The Speaker may delegate any of the responsibilities under this rule to such legislative entity as the Speaker considers appropriate.

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Rule VIII, clause 2

Rule VIII, clause 2

RULE VI

OFFICIAL REPORTERS AND NEWS MEDIA GALLERIES

Official reporters

1. Subject to the direction and control of the Speaker, the Clerk shall appoint, and may remove for cause, the official reporters of the House, including stenographers of committees, and shall supervise the execution of their duties.

News media galleries

2. A portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use. Reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may prescribe from time to time. The Standing Committee of Correspondents for the Press Gallery, and the Executive Committee of Correspondents for the Periodical Press Gallery, shall supervise such galleries, including the designation of its employees, subject to the direction and control of the Speaker. The Speaker may admit to the floor, under such regulations as the Speaker may prescribe, not more than one representative of each press association.

3. A portion of the gallery as may be necessary to accommodate reporters of news to be disseminated by radio, television, and similar means of transmission, wishing to report debates and proceedings, shall be set aside for their use. Reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may prescribe. The Executive Committee of the Radio and Television Correspondents' Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker. The Speaker may admit to the floor, under such regulations as the Speaker may prescribe, not more than one representative of each media outlet.

RULE VII

RECORDS OF THE HOUSE

Archiving

1. (a) At the end of each Congress, the chair of each committee shall transfer to the Clerk any noncurrent records of such committee, including the subcommittees thereof.

(b) At the end of each Congress, each officer of the House elected under rule II shall transfer to the Clerk any noncurrent records made or acquired in the course of the duties of such officer.

2. The Clerk shall deliver the records transferred under clause 1, together with any other noncurrent records of the House, to the Archivist of the United States for preservation at the National Archives and Records Administration. Records so delivered are the permanent property of the House and remain subject to this rule and any order of the House.

Public availability

3. (a) The Clerk shall authorize the Archivist to make records delivered under clause 2 available for public use, subject to clause 4(b) and any order of the House.

(b)(1) A record shall immediately be made available if it was previously made available for public use by the House or a committee or a subcommittee.

(2) An investigative record that contains personal data relating to a specific living person (the disclosure of which would be an unwarranted invasion of personal privacy), an administrative record relating to personnel, or a record relating to a hearing that was closed under clause 2(g)(2) of rule XI shall be made available if it has been in existence for 50 years.

(3) A record for which a time, schedule, or condition for availability is specified by order of the House shall be made available in accordance with that order. Except as otherwise provided by order of the House, a record of a committee for which a time, schedule, or condition for availability is specified by order of the committee (entered during the Congress in which the record is made or acquired by the committee) shall be made available in accordance with the order of the committee.

(4) A record (other than a record referred to in subparagraph (1), (2), or (3)) shall be made available if it has been in existence for 30 years.

4. (a) A record may not be made available for public use under clause 3 if the Clerk determines that such availability would be detrimental to the public interest or inconsistent with the rights and privileges of the House. The Clerk shall notify in writing the chair and ranking minority member of the Committee on House Administration of any such determination.

(b) A determination of the Clerk under paragraph (a) is subject to later orders of the House and, in the case of a record of a committee, later orders of the committee.

5. (a) This rule does not supersede rule VIII or clause 11 of rule X and does not authorize the public disclosure of any record if such disclosure is prohibited by law or executive order of the President.

(b) The Committee on House Administration may prescribe guidelines and regulations governing the applicability and implementation of this rule.

(c) A committee may withdraw from the National Archives and Records Administration any record of the committee delivered to the Archivist under this rule. Such a withdrawal shall be on a temporary basis and for official use of the committee.

Definition of record

6. (a) In this rule the term "record" means any official, permanent record of the House (other than a record of an individual Member, Delegate, or Resi-

dent Commissioner as described in paragraph (b)), including—

(1) with respect to a committee, an official, permanent record of the committee (including any record of a legislative, oversight, or other activity of such committee or a subcommittee thereof); and

(2) with respect to an officer of the House elected under rule II, an official, permanent record made or acquired in the course of the duties of such officer.

(b) Records created, generated, or received by the congressional office of a Member, Delegate, or the Resident Commissioner in the performance of official duties are exclusively the personal property of the individual Member, Delegate, or the Resident Commissioner and such Member, Delegate, or Resident Commissioner has control over such records.

Withdrawal of papers

7. A memorial or other paper presented to the House may not be withdrawn from its files without its leave. If withdrawn certified copies thereof shall be left in the Office of the Clerk. When an act passes for the settlement of a claim, the Clerk may transmit to the officer charged with the settlement thereof the papers on file in the Office of the Clerk relating to such claim. The Clerk may lend temporarily to an officer or bureau of the executive departments any papers on file in the Office of the Clerk relating to any matter pending before such officer or bureau, taking proper receipt therefor.

RULE VIII

RESPONSE TO SUBPOENAS

1. (a) When a Member, Delegate, Resident Commissioner, officer, or employee of the House is properly served with a judicial subpoena or order, such Member, Delegate, Resident Commissioner, officer, or employee shall comply, consistently with the privileges and rights of the House, with the judicial subpoena or order as hereinafter provided, unless otherwise determined under this rule.

(b) For purposes of this rule, "judicial subpoena or order" means a judicial subpoena or judicial order directing appearance as a witness relating to the official functions of the House or for the production or disclosure of any document relating to the official functions of the House.

2. (a) Upon receipt of a properly served judicial subpoena or order, a Member, Delegate, Resident Commissioner, officer, or employee of the House shall promptly notify the Speaker in writing of its receipt together with either:

(1) a determination as to whether the issuance of the judicial subpoena or order is a proper exercise of jurisdiction by the court and is consistent with the privileges and rights of the House; or

(2) a statement that such Member, Delegate, Resident Commissioner, of-

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ficer, or employee of the House intends to make a determination with respect to the matters described in subparagraph (1).

(b) The notification required by paragraph (a) shall promptly be laid before the House by the Speaker.

3. (a) Except as specified in paragraph (b) or otherwise ordered by the House, upon notification to the House that a judicial subpoena or order is a proper exercise of jurisdiction by the court and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall comply with the judicial subpoena or order by supplying copies.

(b) Under no circumstances may minutes or transcripts of executive sessions, or evidence of witnesses in respect thereto, be disclosed or copied. During a period of recess or adjournment of longer than three days, the Speaker may authorize compliance or take such other action as the Speaker considers appropriate under the circumstances. Upon the reconvening of the House, all matters that transpired under this clause shall promptly be laid before the House by the Speaker.

4. Nothing in this rule shall be construed to deprive, condition, or waive the constitutional or legal privileges or rights applicable or available at any time to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or of the House itself, or the right of such Member, Delegate, Resident Commissioner, officer, or employee, or of the House itself, to assert such privileges or rights before a court in the United States.

RULE IX

QUESTIONS OF PRIVILEGE

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member, Delegate, or Resident Commissioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution. Oral announcement of the form of

the resolution may be dispensed with by unanimous consent.

(2) The time allotted for debate on a resolution offered from the floor as a question of the privileges of the House shall be equally divided between (A) the proponent of the resolution, and (B) the Majority Leader, the Minority Leader, or a designee, as determined by the Speaker.

(b) A question of personal privilege shall have precedence of all other questions except motions to adjourn.

RULE X

ORGANIZATION OF COMMITTEES

Committees and their legislative jurisdictions

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

(a) **Committee on Agriculture.**

(1) Adulteration of seeds, insect pests, and protection of birds and animals in forest reserves.

(2) Agriculture generally.

(3) Agricultural and industrial chemistry.

(4) Agricultural colleges and experiment stations.

(5) Agricultural economics and research.

(6) Agricultural education extension services.

(7) Agricultural production and marketing and stabilization of prices of agricultural products, and commodities (not including distribution outside of the United States).

(8) Animal industry and diseases of animals.

(9) Commodity exchanges.

(10) Crop insurance and soil conservation.

(11) Dairy industry.

(12) Entomology and plant quarantine.

(13) Extension of farm credit and farm security.

(14) Inspection of livestock, poultry, meat products, and seafood and seafood products.

(15) Forestry in general and forest reserves other than those created from the public domain.

(16) Human nutrition and home economics.

(17) Plant industry, soils, and agricultural engineering.

(18) Rural electrification.

(19) Rural development.

(20) Water conservation related to activities of the Department of Agriculture.

(b) **Committee on Appropriations.**

(1) Appropriation of the revenue for the support of the Government.

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(2) Rescissions of appropriations contained in appropriation Acts.

(3) Transfers of unexpended balances.

(4) Bills and joint resolutions reported by other committees that provide new entitlement authority as defined in section 3(9) of the Congressional Budget Act of 1974 and referred to the committee under clause 4(a)(2).

(5) Bills and joint resolutions that provide new budget authority, limitation on the use of funds, or other authority relating to new direct loan obligations and new loan guarantee commitments referencing section 504(b) of the Congressional Budget Act of 1974.

(c) **Committee on Armed Services.**

(1) Ammunition depots; forts; arsenals; and Army, Navy, and Air Force reservations and establishments.

(2) Common defense generally.

(3) Conservation, development, and use of naval petroleum and oil shale reserves.

(4) The Department of Defense generally, including the Departments of the Army, Navy, and Air Force, generally.

(5) Interoceanic canals generally, including measures relating to the maintenance, operation, and administration of interoceanic canals.

(6) Merchant Marine Academy and State Maritime Academies.

(7) Military applications of nuclear energy.

(8) Tactical intelligence and intelligence-related activities of the Department of Defense.

(9) National security aspects of merchant marine, including financial assistance for the construction and operation of vessels, maintenance of the U.S. shipbuilding and ship repair industrial base, cabotage, cargo preference, and merchant marine officers and seamen as these matters relate to the national security.

(10) Pay, promotion, retirement, and other benefits and privileges of members of the armed forces.

(11) Scientific research and development in support of the armed services.

(12) Selective service.

(13) Size and composition of the Army, Navy, Marine Corps, and Air Force.

(14) Soldiers' and sailors' homes.

(15) Strategic and critical materials necessary for the common defense.

(16) Cemeteries administered by the Department of Defense.

(d) **Committee on the Budget.**

(1) Concurrent resolutions on the budget (as defined in section 3(4) of the Congressional Budget Act of 1974), other matters required to be referred to the committee under ti-

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titles III and IV of that Act, and other measures setting forth appropriate levels of budget totals for the United States Government.

(2) Budget process generally.

(3) Establishment, extension, and enforcement of special controls over the Federal budget, including the budgetary treatment of off-budget Federal agencies and measures providing exemption from reduction under any order issued under part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

(e) **Committee on Education and the Workforce.**

(1) Child labor.

(2) Gallaudet University and Howard University and Hospital.

(3) Convict labor and the entry of goods made by convicts into interstate commerce.

(4) Food programs for children in schools.

(5) Labor standards and statistics.

(6) Education or labor generally.

(7) Mediation and arbitration of labor disputes.

(8) Regulation or prevention of importation of foreign laborers under contract.

(9) Workers' compensation.

(10) Vocational rehabilitation.

(11) Wages and hours of labor.

(12) Welfare of miners.

(13) Work incentive programs.

(f) **Committee on Energy and Commerce.**

(1) Biomedical research and development.

(2) Consumer affairs and consumer protection.

(3) Health and health facilities (except health care supported by payroll deductions).

(4) Interstate energy compacts.

(5) Interstate and foreign commerce generally.

(6) Exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including all fossil fuels, solar energy, and other unconventional or renewable energy resources.

(7) Conservation of energy resources.

(8) Energy information generally.

(9) The generation and marketing of power (except by federally chartered or Federal regional power marketing authorities); reliability and interstate transmission of, and ratemaking for, all power; and siting of generation facilities (except the installation of interconnections between Government waterpower projects).

(10) General management of the Department of Energy and management and all functions of the Federal Energy Regulatory Commission.

(11) National energy policy generally.

(12) Public health and quarantine.

(13) Regulation of the domestic nuclear energy industry, including regulation of research and development reactors and nuclear regulatory research.

(14) Regulation of interstate and foreign communications.

(15) Travel and tourism.

The committee shall have the same jurisdiction with respect to regulation of nuclear facilities and of use of nuclear energy as it has with respect to regulation of nonnuclear facilities and of use of nonnuclear energy.

(g) **Committee on Ethics.**

The Code of Official Conduct.

(h) **Committee on Financial Services.**

(1) Banks and banking, including deposit insurance and Federal monetary policy.

(2) Economic stabilization, defense production, renegotiation, and control of the price of commodities, rents, and services.

(3) Financial aid to commerce and industry (other than transportation).

(4) Insurance generally.

(5) International finance.

(6) International financial and monetary organizations.

(7) Money and credit, including currency and the issuance of notes and redemption thereof; gold and silver, including the coinage thereof; valuation and revaluation of the dollar.

(8) Public and private housing.

(9) Securities and exchanges.

(10) Urban development.

(i) **Committee on Foreign Affairs.**

(1) Relations of the United States with foreign nations generally.

(2) Acquisition of land and buildings for embassies and legations in foreign countries.

(3) Establishment of boundary lines between the United States and foreign nations.

(4) Export controls, including nonproliferation of nuclear technology and nuclear hardware.

(5) Foreign loans.

(6) International commodity agreements (other than those involving sugar), including all agreements for cooperation in the export of nuclear technology and nuclear hardware.

(7) International conferences and congresses.

(8) International education.

(9) Intervention abroad and declarations of war.

(10) Diplomatic service.

(11) Measures to foster commercial intercourse with foreign nations and to safeguard American business interests abroad.

(12) International economic policy.

(13) Neutrality.

(14) Protection of American citizens abroad and expatriation.

(15) The American National Red Cross.

(16) Trading with the enemy.

(17) United Nations organizations.

(j) **Committee on Homeland Security.**

(1) Overall homeland security policy.

(2) Organization, administration, and general management of the Department of Homeland Security.

(3) Functions of the Department of Homeland Security relating to the following:

(A) Border and port security (except immigration policy and non-border enforcement).

(B) Customs (except customs revenue).

(C) Integration, analysis, and dissemination of homeland security information.

(D) Domestic preparedness for and collective response to terrorism.

(E) Research and development.

(F) Transportation security.

(k) **Committee on House Administration.**

(1) Appropriations from accounts for committee salaries and expenses (except for the Committee on Appropriations); House Information Resources; and allowance and expenses of Members, Delegates, the Resident Commissioner, officers, and administrative offices of the House.

(2) Auditing and settling of all accounts described in subparagraph (1).

(3) Employment of persons by the House, including staff for Members, Delegates, the Resident Commissioner, and committees; and reporters of debates, subject to rule VI.

(4) Except as provided in paragraph (r)(11), the Library of Congress, including management thereof; the House Library; statuary and pictures; acceptance or purchase of works of art for the Capitol; the Botanic Garden; and purchase of books and manuscripts.

(5) The Smithsonian Institution and the incorporation of similar institutions (except as provided in paragraph (r)(11)).

(6) Expenditure of accounts described in subparagraph (1).

(7) Franking Commission.

(8) Printing and correction of the Congressional Record.

(9) Accounts of the House generally.

(10) Assignment of office space for Members, Delegates, the Resident Commissioner, and committees.

(11) Disposition of useless executive papers.

(12) Election of the President, Vice President, Members, Senators,

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Delegates, or the Resident Commissioner; corrupt practices; contested elections; credentials and qualifications; and Federal elections generally.

(13) Services to the House, including the House Restaurant, parking facilities, and administration of the House Office Buildings and of the House wing of the Capitol.

(14) Travel of Members, Delegates, and the Resident Commissioner.

(15) Raising, reporting, and use of campaign contributions for candidates for office of Representative, of Delegate, and of Resident Commissioner.

(16) Compensation, retirement, and other benefits of the Members, Delegates, the Resident Commissioner, officers, and employees of Congress.

(l) **Committee on the Judiciary.**

(1) The judiciary and judicial proceedings, civil and criminal.

(2) Administrative practice and procedure.

(3) Apportionment of Representatives.

(4) Bankruptcy, mutiny, espionage, and counterfeiting.

(5) Civil liberties.

(6) Constitutional amendments.

(7) Criminal law enforcement and criminalization.

(8) Federal courts and judges, and local courts in the Territories and possessions.

(9) Immigration policy and non-border enforcement.

(10) Interstate compacts generally.

(11) Claims against the United States.

(12) Meetings of Congress; attendance of Members, Delegates, and the Resident Commissioner; and their acceptance of incompatible offices.

(13) National penitentiaries.

(14) Patents, the Patent and Trademark Office, copyrights, and trademarks.

(15) Presidential succession.

(16) Protection of trade and commerce against unlawful restraints and monopolies.

(17) Revision and codification of the Statutes of the United States.

(18) State and territorial boundary lines.

(19) Subversive activities affecting the internal security of the United States.

(m) **Committee on Natural Resources.**

(1) Fisheries and wildlife, including research, restoration, refuges, and conservation.

(2) Forest reserves and national parks created from the public domain.

(3) Forfeiture of land grants and alien ownership, including alien ownership of mineral lands.

(4) Geological Survey.

(5) International fishing agreements.

(6) Interstate compacts relating to apportionment of waters for irrigation purposes.

(7) Irrigation and reclamation, including water supply for reclamation projects and easements of public lands for irrigation projects; and acquisition of private lands when necessary to complete irrigation projects.

(8) Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds.

(9) Insular areas of the United States generally (except those affecting the revenue and appropriations).

(10) Military parks and battlefields, national cemeteries administered by the Secretary of the Interior, parks within the District of Columbia, and the erection of monuments to the memory of individuals.

(11) Mineral land laws and claims and entries thereunder.

(12) Mineral resources of public lands.

(13) Mining interests generally.

(14) Mining schools and experimental stations.

(15) Marine affairs, including coastal zone management (except for measures relating to oil and other pollution of navigable waters).

(16) Oceanography.

(17) Petroleum conservation on public lands and conservation of the radium supply in the United States.

(18) Preservation of prehistoric ruins and objects of interest on the public domain.

(19) Public lands generally, including entry, easements, and grazing thereon.

(20) Relations of the United States with Native Americans and Native American tribes.

(21) Trans-Alaska Oil Pipeline (except ratemaking).

(n) **Committee on Oversight and Government Reform.**

(1) Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement.

(2) Municipal affairs of the District of Columbia in general (other than appropriations).

(3) Federal paperwork reduction.

(4) Government management and accounting measures generally.

(5) Holidays and celebrations.

(6) Overall economy, efficiency, and management of government operations and activities, including Federal procurement.

(7) National archives.

(8) Population and demography generally, including the Census.

(9) Postal service generally, including transportation of the mails.

(10) Public information and records.

(11) Relationship of the Federal Government to the States and municipalities generally.

(12) Reorganizations in the executive branch of the Government.

(o) **Committee on Rules.**

(1) Rules and joint rules (other than those relating to the Code of Official Conduct) and the order of business of the House.

(2) Recesses and final adjournments of Congress.

(p) **Committee on Science, Space, and Technology.**

(1) All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories.

(2) Astronautical research and development, including resources, personnel, equipment, and facilities.

(3) Civil aviation research and development.

(4) Environmental research and development.

(5) Marine research.

(6) Commercial application of energy technology.

(7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.

(8) National Aeronautics and Space Administration.

(9) National Space Council.

(10) National Science Foundation.

(11) National Weather Service.

(12) Outer space, including exploration and control thereof.

(13) Science scholarships.

(14) Scientific research, development, and demonstration, and projects therefor.

(q) **Committee on Small Business.**

(1) Assistance to and protection of small business, including financial aid, regulatory flexibility, and paperwork reduction.

(2) Participation of small-business enterprises in Federal procurement and Government contracts.

(r) **Committee on Transportation and Infrastructure.**

(1) Coast Guard, including life-saving service, lighthouses, lightships, ocean derelicts, and the Coast Guard Academy.

(2) Federal management of emergencies and natural disasters.

(3) Flood control and improvement of rivers and harbors.

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(4) Inland waterways.

(5) Inspection of merchant marine vessels, lights and signals, life-saving equipment, and fire protection on such vessels.

(6) Navigation and laws relating thereto, including pilotage.

(7) Registering and licensing of vessels and small boats.

(8) Rules and international arrangements to prevent collisions at sea.

(9) The Capitol Building and the Senate and House Office Buildings.

(10) Construction or maintenance of roads and post roads (other than appropriations therefor).

(11) Construction or reconstruction, maintenance, and care of buildings and grounds of the Botanic Garden, the Library of Congress, and the Smithsonian Institution.

(12) Merchant marine (except for national security aspects thereof).

(13) Purchase of sites and construction of post offices, custom-houses, Federal courthouses, and Government buildings within the District of Columbia.

(14) Oil and other pollution of navigable waters, including inland, coastal, and ocean waters.

(15) Marine affairs, including coastal zone management, as they relate to oil and other pollution of navigable waters.

(16) Public buildings and occupied or improved grounds of the United States generally.

(17) Public works for the benefit of navigation, including bridges and dams (other than international bridges and dams).

(18) Related transportation regulatory agencies (except the Transportation Security Administration).

(19) Roads and the safety thereof.

(20) Transportation, including civil aviation, railroads, water transportation, transportation safety (except automobile safety and transportation security functions of the Department of Homeland Security), transportation infrastructure, transportation labor, and railroad retirement and unemployment (except revenue measures related thereto).

(21) Water power.

(s) **Committee on Veterans' Affairs.**

(1) Veterans' measures generally.

(2) Cemeteries of the United States in which veterans of any war or conflict are or may be buried, whether in the United States or abroad (except cemeteries administered by the Secretary of the Interior).

(3) Compensation, vocational rehabilitation, and education of veterans.

(4) Life insurance issued by the Government on account of service in the Armed Forces.

(5) Pensions of all the wars of the United States, general and special.

(6) Readjustment of servicemembers to civil life.

(7) Servicemembers' civil relief.

(8) Veterans' hospitals, medical care, and treatment of veterans.

(t) **Committee on Ways and Means.**

(1) Customs revenue, collection districts, and ports of entry and delivery.

(2) Reciprocal trade agreements.

(3) Revenue measures generally.

(4) Revenue measures relating to insular possessions.

(5) Bonded debt of the United States, subject to the last sentence of clause 4(f).

(6) Deposit of public monies.

(7) Transportation of dutiable goods.

(8) Tax exempt foundations and charitable trusts.

(9) National social security (except health care and facilities programs that are supported from general revenues as opposed to payroll deductions and except work incentive programs).

General oversight responsibilities

2. (a) The various standing committees shall have general oversight responsibilities as provided in paragraph (b) in order to assist the House in—

(1) its analysis, appraisal, and evaluation of—

(A) the application, administration, execution, and effectiveness of Federal laws; and

(B) conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation; and

(2) its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.

(b)(1) In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated, each standing committee (other than the Committee on Appropriations) shall review and study on a continuing basis—

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and

(D) future research and forecasting on subjects within its jurisdiction.

(2) Each committee to which subparagraph (1) applies having more than 20 members shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions, to assist in carrying out its responsibilities under this clause. The establishment of an oversight subcommittee does not limit the responsibility of a subcommittee with legislative jurisdiction in carrying out its oversight responsibilities.

(c) Each standing committee shall review and study on a continuing basis the impact or probable impact of tax policies affecting subjects within its jurisdiction as described in clauses 1 and 3.

(d)(1) Not later than February 15 of the first session of a Congress, each standing committee (other than the Committee on Appropriations, the Committee on Ethics, and the Committee on Rules) shall, in a meeting that is open to the public, adopt its authorization and oversight plan for that Congress. Such plan shall be submitted simultaneously to the Committee on Oversight and Government Reform, the Committee on House Administration, and the Committee on Appropriations.

(2) Each such plan shall include, with respect to programs and agencies within the committee's jurisdiction, and to the maximum extent practicable—

(A) a list of such programs or agencies with lapsed authorizations that received funding in the prior fiscal year or, in the case of a program or agency with a permanent authorization, which has not been subject to a comprehensive review by the committee in the prior three Congresses;

(B) a description of each such program or agency to be authorized in the current Congress;

(C) a description of each such program or agency to be authorized in the next Congress, if applicable;

(D) a description of any oversight to support the authorization of each such program or agency in the current Congress; and

(E) recommendations for changes to existing law for moving such programs or agencies from mandatory funding to discretionary appropriations, where appropriate.

(3) Each such plan may include, with respect to the programs and agencies within the committee's jurisdiction—

(A) recommendations for the consolidation or termination of such programs or agencies that are duplicative, unnecessary, or inconsistent with the appropriate roles and responsibilities of the Federal Government;

(B) recommendations for changes to existing law related to Federal rules, regulations, statutes, and court decisions affecting such programs and agencies that are inconsistent with the authorities of the

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Congress under Article I of the Constitution; and

(C) a description of such other oversight activities as the committee may consider necessary.

(4) In the development of such plan, the chair of each committee shall coordinate with other committees of jurisdiction to ensure that programs and agencies are subject to routine, comprehensive authorization efforts.

(5) Not later than March 31 in the first session of a Congress, after consultation with the Speaker, the Majority Leader, and the Minority Leader, the Committee on Oversight and Government Reform shall report to the House the authorization and oversight plans submitted by committees together with any recommendations that it, or the House leadership group described above, may make to ensure the most effective coordination of authorization and oversight plans and otherwise to achieve the objectives of this clause.

(e) The Speaker, with the approval of the House, may appoint special ad hoc oversight committees for the purpose of reviewing specific matters within the jurisdiction of two or more standing committees.

Special oversight functions

3. (a) The Committee on Appropriations shall conduct such studies and examinations of the organization and operation of executive departments and other executive agencies (including an agency the majority of the stock of which is owned by the United States) as it considers necessary to assist it in the determination of matters within its jurisdiction.

(b) The Committee on Armed Services shall review and study on a continuing basis laws, programs, and Government activities relating to international arms control and disarmament and the education of military dependents in schools.

(c) The Committee on the Budget shall study on a continuing basis the effect on budget outlays of relevant existing and proposed legislation and report the results of such studies to the House on a recurring basis.

(d) The Committee on Education and the Workforce shall review, study, and coordinate on a continuing basis laws, programs, and Government activities relating to domestic educational programs and institutions and programs of student assistance within the jurisdiction of other committees.

(e) The Committee on Energy and Commerce shall review and study on a continuing basis laws, programs, and Government activities relating to nuclear and other energy and nonmilitary nuclear energy research and development including the disposal of nuclear waste.

(f) The Committee on Foreign Affairs shall review and study on a continuing basis laws, programs, and Government activities relating to customs administration, intelligence activities relating

to foreign policy, international financial and monetary organizations, and international fishing agreements.

(g)(1) The Committee on Homeland Security shall review and study on a continuing basis all Government activities relating to homeland security, including the interaction of all departments and agencies with the Department of Homeland Security.

(2) In addition, the committee shall review and study on a primary and continuing basis all Government activities, programs and organizations related to homeland security that fall within its primary legislative jurisdiction.

(h) The Committee on Natural Resources shall review and study on a continuing basis laws, programs, and Government activities relating to Native Americans.

(i) The Committee on Oversight and Government Reform shall review and study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency.

(j) The Committee on Rules shall review and study on a continuing basis the congressional budget process, and the committee shall report its findings and recommendations to the House from time to time.

(k) The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development.

(l) The Committee on Small Business shall study and investigate on a continuing basis the problems of all types of small business.

(m) The Permanent Select Committee on Intelligence shall review and study on a continuing basis laws, programs, and activities of the intelligence community and shall review and study on an exclusive basis the sources and methods of entities described in clause 11(b)(1)(A).

Additional functions of committees

4. (a)(1)(A) The Committee on Appropriations shall, within 30 days after the transmittal of the Budget to Congress each year, hold hearings on the Budget as a whole with particular reference to—

(i) the basic recommendations and budgetary policies of the President in the presentation of the Budget; and

(ii) the fiscal, financial, and economic assumptions used as bases in arriving at total estimated expenditures and receipts.

(B) In holding hearings under subdivision (A), the committee shall receive testimony from the Secretary of the Treasury, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, and such other persons as the committee may desire.

(C) A hearing under subdivision (A), or any part thereof, shall be held in open session, except when the com-

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mittee, in open session and with a quorum present, determines by record vote that the testimony to be taken at that hearing on that day may be related to a matter of national security. The committee may by the same procedure close one subsequent day of hearing. A transcript of all such hearings shall be printed and a copy thereof furnished to each Member, Delegate, and the Resident Commissioner.

(D) A hearing under subdivision (A), or any part thereof, may be held before a joint meeting of the committee and the Committee on Appropriations of the Senate in accordance with such procedures as the two committees jointly may determine.

(2) Pursuant to section 401(b)(2) of the Congressional Budget Act of 1974, when a committee reports a bill or joint resolution that provides new entitlement authority as defined in section 3(9) of that Act, and enactment of the bill or joint resolution, as reported, would cause a breach of the committee's pertinent allocation of new budget authority under section 302(a) of that Act, the bill or joint resolution may be referred to the Committee on Appropriations with instructions to report it with recommendations (which may include an amendment limiting the total amount of new entitlement authority provided in the bill or joint resolution). If the Committee on Appropriations fails to report a bill or joint resolution so referred within 15 calendar days (not counting any day on which the House is not in session), the committee automatically shall be discharged from consideration of the bill or joint resolution, and the bill or joint resolution shall be placed on the appropriate calendar.

(3) In addition, the Committee on Appropriations shall study on a continuing basis those provisions of law that (on the first day of the first fiscal year for which the congressional budget process is effective) provide spending authority or permanent budget authority and shall report to the House from time to time its recommendations for terminating or modifying such provisions.

(4) In the manner provided by section 302 of the Congressional Budget Act of 1974, the Committee on Appropriations (after consulting with the Committee on Appropriations of the Senate) shall subdivide any allocations made to it in the joint explanatory statement accompanying the conference report on such concurrent resolution, and promptly report the subdivisions to the House as soon as practicable after a concurrent resolution on the budget for a fiscal year is agreed to.

(b) The Committee on the Budget shall—

(1) review on a continuing basis the conduct by the Congressional Budget Office of its functions and duties;

(2) hold hearings and receive testimony from Members, Senators, Delegates, the Resident Commissioner, and such appropriate representatives

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of Federal departments and agencies, the general public, and national organizations as it considers desirable in developing concurrent resolutions on the budget for each fiscal year;

(3) make all reports required of it by the Congressional Budget Act of 1974;

(4) study on a continuing basis those provisions of law that exempt Federal agencies or any of their activities or outlays from inclusion in the Budget of the United States Government, and report to the House from time to time its recommendations for terminating or modifying such provisions;

(5) study on a continuing basis proposals designed to improve and facilitate the congressional budget process, and report to the House from time to time the results of such studies, together with its recommendations; and

(6) request and evaluate continuing studies of tax expenditures, devise methods of coordinating tax expenditures, policies, and programs with direct budget outlays, and report the results of such studies to the House on a recurring basis.

(c)(1) The Committee on Oversight and Government Reform shall—

(A) receive and examine reports of the Comptroller General of the United States and submit to the House such recommendations as it considers necessary or desirable in connection with the subject matter of the reports;

(B) evaluate the effects of laws enacted to reorganize the legislative and executive branches of the Government; and

(C) study intergovernmental relationships between the United States and the States and municipalities and between the United States and international organizations of which the United States is a member.

(2) In addition to its duties under subparagraph (1), the Committee on Oversight and Government Reform may at any time conduct investigations of any matter without regard to clause 1, 2, 3, or this clause conferring jurisdiction over the matter to another standing committee. The findings and recommendations of the committee in such an investigation shall be made available to any other standing committee having jurisdiction over the matter involved.

(3)(A) The Committee on Oversight and Government Reform may adopt a rule authorizing and regulating the taking of depositions by a member or counsel of the committee, including pursuant to subpoena under clause 2(m) of rule XI (which hereby is made applicable for such purpose).

(B) A rule adopted by the committee pursuant to this subparagraph—

(i) may provide that a deponent be directed to subscribe an oath or affirmation before a person authorized by law to administer the same;

(ii) shall ensure that the minority members and staff of the committee are accorded equitable treatment with respect to notice of and a reasonable opportunity to participate in any proceeding conducted thereunder; and

(iii) shall, unless waived by the deponent, require the attendance of a member of the committee.

(C) Information secured pursuant to the authority described in subdivision (A) shall retain the character of discovery until offered for admission in evidence before the committee, at which time any proper objection shall be timely.

(d)(1) The Committee on House Administration shall—

(A) provide policy direction for the Chief Administrative Officer and the Inspector General and oversight of the Clerk, Sergeant-at-Arms, Chief Administrative Officer, and Inspector General;

(B) oversee the management of services provided to the House by the Architect of the Capitol, except those services that lie within the jurisdiction of the Committee on Transportation and Infrastructure under clause 1(r);

(C) have the function of accepting on behalf of the House a gift, except as otherwise provided by law, if the gift does not involve a duty, burden, or condition, or is not made dependent on some future performance by the House;

(D) promulgate regulations to carry out subdivision (C); and

(E) establish and maintain standards for making documents publicly available in electronic form by the House and its committees.

(2) An employing office of the House may enter into a settlement of a complaint under the Congressional Accountability Act of 1995 that provides for the payment of funds only after receiving the joint approval of the chair and ranking minority member of the Committee on House Administration concerning the amount of such payment.

(e)(1) Each standing committee shall, in its consideration of all public bills and public joint resolutions within its jurisdiction, ensure that appropriations for continuing programs and activities of the Federal Government and the government of the District of Columbia will be made annually to the maximum extent feasible and consistent with the nature, requirement, and objective of the programs and activities involved. In this subparagraph programs and activities of the Federal Government and the government of the District of Columbia includes programs and activities of any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Federal Government or of the government of the District of Columbia.

(2) Each standing committee shall review from time to time each con-

tinuing program within its jurisdiction for which appropriations are not made annually to ascertain whether the program should be modified to provide for annual appropriations.

Budget Act responsibilities

(f)(1) Each standing committee shall submit to the Committee on the Budget not later than six weeks after the submission of the budget by the President, or at such time as the Committee on the Budget may request—

(A) its views and estimates with respect to all matters to be set forth in the concurrent resolution on the budget for the ensuing fiscal year that are within its jurisdiction or functions; and

(B) an estimate of the total amounts of new budget authority, and budget outlays resulting therefrom, to be provided or authorized in all bills and resolutions within its jurisdiction that it intends to be effective during that fiscal year.

(2) The views and estimates submitted by the Committee on Ways and Means under subparagraph (1) shall include a specific recommendation, made after holding public hearings, as to the appropriate level of the public debt that should be set forth in the concurrent resolution on the budget.

Election and membership of standing committees

5. (a)(1) The standing committees specified in clause 1 shall be elected by the House within seven calendar days after the commencement of each Congress, from nominations submitted by the respective party caucus or conference. A resolution proposing to change the composition of a standing committee shall be privileged if offered by direction of the party caucus or conference concerned.

(2)(A) The Committee on the Budget shall be composed of members as follows:

(i) Members, Delegates, or the Resident Commissioner who are members of other standing committees, including five from the Committee on Appropriations, five from the Committee on Ways and Means, and one from the Committee on Rules;

(ii) one Member designated by the elected leadership of the majority party; and

(iii) one Member designated by the elected leadership of the minority party.

(B) Except as permitted by subdivision (C), a member of the Committee on the Budget other than one described in subdivision (A)(ii) or (A)(iii) may not serve on the committee during more than four Congresses in a period of six successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(C) A Member, Delegate, or Resident Commissioner may exceed the limitation of subdivision (B) if elected to serve a second consecutive Congress as

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the chair or a second consecutive Congress as the ranking minority member.

(3)(A) The Committee on Ethics shall be composed of 10 members, five from the majority party and five from the minority party.

(B) Except as permitted by subdivision (C), a member of the Committee on Ethics may not serve on the committee during more than three Congresses in a period of five successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(C) A member of the Committee on Ethics may serve on the committee during a fourth Congress in a period of five successive Congresses only as either the chair or the ranking minority member of the committee.

(4)(A) At the beginning of a Congress, the Speaker or a designee and the Minority Leader or a designee each shall name 10 Members, Delegates, or the Resident Commissioner from the respective party of such individual who are not members of the Committee on Ethics to be available to serve on investigative subcommittees of that committee during that Congress. The lists of Members, Delegates, or the Resident Commissioner so named shall be announced to the House.

(B) Whenever the chair and the ranking minority member of the Committee on Ethics jointly determine that Members, Delegates, or the Resident Commissioner named under subdivision (A) should be assigned to serve on an investigative subcommittee of that committee, each of them shall select an equal number of such Members, Delegates, or Resident Commissioner from the respective party of such individual to serve on that subcommittee.

(b)(1) Membership on a standing committee during the course of a Congress shall be contingent on continuing membership in the party caucus or conference that nominated the Member, Delegate, or Resident Commissioner concerned for election to such committee. Should a Member, Delegate, or Resident Commissioner cease to be a member of a particular party caucus or conference, that Member, Delegate, or Resident Commissioner shall automatically cease to be a member of each standing committee to which elected on the basis of nomination by that caucus or conference. The chair of the relevant party caucus or conference shall notify the Speaker whenever a Member, Delegate, or Resident Commissioner ceases to be a member of that caucus or conference. The Speaker shall notify the chair of each affected committee that the election of such Member, Delegate, or Resident Commissioner to the committee is automatically vacated under this subparagraph.

(2)(A) Except as specified in subdivision (B), a Member, Delegate, or Resident Commissioner may not serve simultaneously as a member of more than two standing committees or more

than four subcommittees of the standing committees.

(B)(i) Ex officio service by a chair or ranking minority member of a committee on each of its subcommittees under a committee rule does not count against the limitation on subcommittee service.

(ii) Service on an investigative subcommittee of the Committee on Ethics under paragraph (a)(4) does not count against the limitation on subcommittee service.

(iii) Any other exception to the limitations in subdivision (A) may be approved by the House on the recommendation of the relevant party caucus or conference.

(C) In this subparagraph the term "subcommittee" includes a panel (other than a special oversight panel of the Committee on Armed Services), task force, special subcommittee, or other subunit of a standing committee that is established for a cumulative period longer than six months in a Congress.

(c)(1) One of the members of each standing committee shall be elected by the House, on the nomination of the majority party caucus or conference, as chair thereof. In the absence of the member serving as chair, the member next in rank (and so on, as often as the case shall happen) shall act as chair. Rank shall be determined by the order members are named in resolutions electing them to the committee. In the case of a vacancy in the elected chair of a committee, the House shall elect another chair.

(2) Except in the case of the Committee on Rules, a member of a standing committee may not serve as chair of the same standing committee, or of the same subcommittee of a standing committee, during more than three consecutive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(d)(1) Except as permitted by subparagraph (2), a committee may have not more than five subcommittees.

(2)(A) A committee that maintains a subcommittee on oversight may have not more than six subcommittees.

(B) The Committee on Appropriations may have not more than 13 subcommittees.

(C) The Committee on Armed Services may have not more than seven subcommittees.

(D) The Committee on Foreign Affairs may have not more than seven subcommittees.

(E) The Committee on Oversight and Government Reform may have not more than seven subcommittees.

(F) The Committee on Transportation and Infrastructure may have not more than six subcommittees.

(e) The House shall fill a vacancy on a standing committee by election on the nomination of the respective party caucus or conference.

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Expense resolutions

6. (a) Whenever a committee, commission, or other entity (other than the Committee on Appropriations) is granted authorization for the payment of its expenses (including staff salaries) for a Congress, such authorization initially shall be procured by one primary expense resolution reported by the Committee on House Administration. A primary expense resolution may include a reserve fund for unanticipated expenses of committees. An amount from such a reserve fund may be allocated to a committee only by the approval of the Committee on House Administration. A primary expense resolution reported to the House may not be considered in the House unless a printed report thereon was available on the previous calendar day. For the information of the House, such report shall—

(1) state the total amount of the funds to be provided to the committee, commission, or other entity under the primary expense resolution for all anticipated activities and programs of the committee, commission, or other entity; and

(2) to the extent practicable, contain such general statements regarding the estimated foreseeable expenditures for the respective anticipated activities and programs of the committee, commission, or other entity as may be appropriate to provide the House with basic estimates of the expenditures contemplated by the primary expense resolution.

(b) After the date of adoption by the House of a primary expense resolution for a committee, commission, or other entity for a Congress, authorization for the payment of additional expenses (including staff salaries) in that Congress may be procured by one or more supplemental expense resolutions reported by the Committee on House Administration, as necessary. A supplemental expense resolution reported to the House may not be considered in the House unless a printed report thereon was available on the previous calendar day. For the information of the House, such report shall—

(1) state the total amount of additional funds to be provided to the committee, commission, or other entity under the supplemental expense resolution and the purposes for which those additional funds are available; and

(2) state the reasons for the failure to procure the additional funds for the committee, commission, or other entity by means of the primary expense resolution.

(c) The preceding provisions of this clause do not apply to—

(1) a resolution providing for the payment from committee salary and expense accounts of the House of sums necessary to pay compensation for staff services performed for, or to pay other expenses of, a committee, commission, or other entity at any time after the beginning of an odd-

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numbered year and before the date of adoption by the House of the primary expense resolution described in paragraph (a) for that year; or

(2) a resolution providing each of the standing committees in a Congress additional office equipment, airmail and special-delivery postage stamps, supplies, staff personnel, or any other specific item for the operation of the standing committees, and containing an authorization for the payment from committee salary and expense accounts of the House of the expenses of any of the foregoing items provided by that resolution, subject to and until enactment of the provisions of the resolution as permanent law.

(d) From the funds made available for the appointment of committee staff by a primary or additional expense resolution, the chair of each committee shall ensure that sufficient staff is made available to each subcommittee to carry out its responsibilities under the rules of the committee and that the minority party is treated fairly in the appointment of such staff.

(e) Funds authorized for a committee under this clause and clauses 7 and 8 are for expenses incurred in the activities of the committee.

Interim funding

7. (a) For the period beginning at noon on January 3 and ending at midnight on March 31 in each odd-numbered year, such sums as may be necessary shall be paid out of the committee salary and expense accounts of the House for continuance of necessary investigations and studies by—

(1) each standing and select committee established by these rules; and

(2) except as specified in paragraph (b), each select committee established by resolution.

(b) In the case of the first session of a Congress, amounts shall be made available for a select committee established by resolution in the preceding Congress only if—

(1) a resolution proposing to reestablish such select committee is introduced in the present Congress; and

(2) the House has not adopted a resolution of the preceding Congress providing for termination of funding for investigations and studies by such select committee.

(c) Each committee described in paragraph (a) shall be entitled for each month during the period specified in paragraph (a) to 9 percent (or such lesser percentage as may be determined by the Committee on House Administration) of the total annualized amount made available under expense resolutions for such committee in the preceding session of Congress.

(d) Payments under this clause shall be made on vouchers authorized by the committee involved, signed by the chair of the committee, except as provided in paragraph (e), and approved by

the Committee on House Administration.

(e) Notwithstanding any provision of law, rule of the House, or other authority, from noon on January 3 of the first session of a Congress until the election by the House of the committee concerned in that Congress, payments under this clause shall be made on vouchers signed by the ranking member of the committee as it was constituted at the expiration of the preceding Congress who is a member of the majority party in the present Congress.

(f)(1) The authority of a committee to incur expenses under this clause shall expire upon adoption by the House of a primary expense resolution for the committee.

(2) Amounts made available under this clause shall be expended in accordance with regulations prescribed by the Committee on House Administration.

(3) This clause shall be effective only insofar as it is not inconsistent with a resolution reported by the Committee on House Administration and adopted by the House after the adoption of these rules.

Travel

8. (a) Local currencies owned by the United States shall be made available to the committee and its employees engaged in carrying out their official duties outside the United States or its territories or possessions. Appropriated funds, including those authorized under this clause and clause 6, may not be expended for the purpose of defraying expenses of members of a committee or its employees in a country where local currencies are available for this purpose.

(b) The following conditions shall apply with respect to travel outside the United States or its territories or possessions:

(1) A member or employee of a committee may not receive or expend local currencies for subsistence in a country for a day at a rate in excess of the maximum per diem set forth in applicable Federal law.

(2) A member or employee shall be reimbursed for the expenses of such individual for a day at the lesser of—

(A) the per diem set forth in applicable Federal law; or

(B) the actual, unreimbursed expenses (other than for transportation) incurred during that day.

(3) Each member or employee of a committee shall make to the chair of the committee an itemized report showing the dates each country was visited, the amount of per diem furnished, the cost of transportation furnished, and funds expended for any other official purpose and shall summarize in these categories the total foreign currencies or appropriated funds expended. Each report shall be filed with the chair of the committee not later than 60 days following the completion of travel for use in complying with reporting requirements

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in applicable Federal law and shall be open for public inspection.

(c)(1) In carrying out the activities of a committee outside the United States in a country where local currencies are unavailable, a member or employee of a committee may not receive reimbursement for expenses (other than for transportation) in excess of the maximum per diem set forth in applicable Federal law.

(2) A member or employee shall be reimbursed for the expenses of such individual for a day, at the lesser of—

(A) the per diem set forth in applicable Federal law; or

(B) the actual unreimbursed expenses (other than for transportation) incurred during that day.

(3) A member or employee of a committee may not receive reimbursement for the cost of any transportation in connection with travel outside the United States unless the member or employee actually paid for the transportation.

(d) The restrictions respecting travel outside the United States set forth in paragraph (c) also shall apply to travel outside the United States by a Member, Delegate, Resident Commissioner, officer, or employee of the House authorized under any standing rule.

Committee staffs

9. (a)(1) Subject to subparagraph (2) and paragraph (f), each standing committee may appoint, by majority vote, not more than 30 professional staff members to be compensated from the funds provided for the appointment of committee staff by primary and additional expense resolutions. Each professional staff member appointed under this subparagraph shall be assigned to the chair and the ranking minority member of the committee, as the committee considers advisable.

(2) Subject to paragraph (f) whenever a majority of the minority party members of a standing committee (other than the Committee on Ethics or the Permanent Select Committee on Intelligence) so request, not more than 10 persons (or one-third of the total professional committee staff appointed under this clause, whichever is fewer) may be selected, by majority vote of the minority party members, for appointment by the committee as professional staff members under subparagraph (1). The committee shall appoint persons so selected whose character and qualifications are acceptable to a majority of the committee. If the committee determines that the character and qualifications of a person so selected are unacceptable, a majority of the minority party members may select another person for appointment by the committee to the professional staff until such appointment is made. Each professional staff member appointed under this subparagraph shall be assigned to such committee business as the minority party members of the committee consider advisable.

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(b)(1) The professional staff members of each standing committee—

(A) may not engage in any work other than committee business during congressional working hours; and

(B) may not be assigned a duty other than one pertaining to committee business.

(2)(A) Subparagraph (1) does not apply to staff designated by a committee as “associate” or “shared” staff who are not paid exclusively by the committee, provided that the chair certifies that the compensation paid by the committee for any such staff is commensurate with the work performed for the committee in accordance with clause 8 of rule XXIII.

(B) The use of any “associate” or “shared” staff by a committee other than the Committee on Appropriations shall be subject to the review of, and to any terms, conditions, or limitations established by, the Committee on House Administration in connection with the reporting of any primary or additional expense resolution.

(c) Each employee on the professional or investigative staff of a standing committee shall be entitled to pay at a single gross per annum rate, to be fixed by the chair and that does not exceed the maximum rate of pay as in effect from time to time under applicable provisions of law.

(d) Subject to appropriations hereby authorized, the Committee on Appropriations may appoint by majority vote such staff as it determines to be necessary (in addition to the clerk of the committee and assistants for the minority). The staff appointed under this paragraph, other than minority assistants, shall possess such qualifications as the committee may prescribe.

(e) A committee may not appoint to its staff an expert or other personnel detailed or assigned from a department or agency of the Government except with the written permission of the Committee on House Administration.

(f) If a request for the appointment of a minority professional staff member under paragraph (a) is made when no vacancy exists for such an appointment, the committee nevertheless may appoint under paragraph (a) a person selected by the minority and acceptable to the committee. A person so appointed shall serve as an additional member of the professional staff of the committee until such a vacancy occurs (other than a vacancy in the position of head of the professional staff, by whatever title designated), at which time that person is considered as appointed to that vacancy. Such a person shall be paid from the applicable accounts of the House described in clause 1(k)(1) of rule X. If such a vacancy occurs on the professional staff when seven or more persons have been so appointed who are eligible to fill that vacancy, a majority of the minority party members shall designate which of those persons shall fill the vacancy.

(g) Each staff member appointed pursuant to a request by minority party

members under paragraph (a), and each staff member appointed to assist minority members of a committee pursuant to an expense resolution described in clause 6(a), shall be accorded equitable treatment with respect to the fixing of the rate of pay, the assignment of work facilities, and the accessibility of committee records.

(h) Paragraph (a) may not be construed to authorize the appointment of additional professional staff members of a committee pursuant to a request under paragraph (a) by the minority party members of that committee if 10 or more professional staff members provided for in paragraph (a)(1) who are satisfactory to a majority of the minority party members are otherwise assigned to assist the minority party members.

(i) Notwithstanding paragraph (a)(2), a committee may employ nonpartisan staff, in lieu of or in addition to committee staff designated exclusively for the majority or minority party, by an affirmative vote of a majority of the members of the majority party and of a majority of the members of the minority party.

Select and joint committees

10. (a) Membership on a select or joint committee appointed by the Speaker under clause 11 of rule I during the course of a Congress shall be contingent on continuing membership in the party caucus or conference of which the Member, Delegate, or Resident Commissioner concerned was a member at the time of appointment. Should a Member, Delegate, or Resident Commissioner cease to be a member of that caucus or conference, that Member, Delegate, or Resident Commissioner shall automatically cease to be a member of any select or joint committee to which assigned. The chair of the relevant party caucus or conference shall notify the Speaker whenever a Member, Delegate, or Resident Commissioner ceases to be a member of a party caucus or conference. The Speaker shall notify the chair of each affected select or joint committee that the appointment of such Member, Delegate, or Resident Commissioner to the select or joint committee is automatically vacated under this paragraph.

(b) Each select or joint committee, other than a conference committee, shall comply with clause 2(a) of rule XI unless specifically exempted by law.

Permanent Select Committee on Intelligence

11. (a)(1) There is established a Permanent Select Committee on Intelligence (hereafter in this clause referred to as the “select committee”). The select committee shall be composed of not more than 22 Members, Delegates, or the Resident Commissioner, of whom not more than 13 may be from the same party. The select committee shall include at least one Member, Delegate, or the Resident

Commissioner from each of the following committees:

(A) the Committee on Appropriations;

(B) the Committee on Armed Services;

(C) the Committee on Foreign Affairs; and

(D) the Committee on the Judiciary.

(2) The Speaker and the Minority Leader shall be ex officio members of the select committee but shall have no vote in the select committee and may not be counted for purposes of determining a quorum thereof.

(3) The Speaker and Minority Leader each may designate a respective leadership staff member to assist in the capacity of the Speaker or Minority Leader as ex officio member, with the same access to committee meetings, hearings, briefings, and materials as employees of the select committee and subject to the same security clearance and confidentiality requirements as employees of the select committee under this clause.

(4)(A) Except as permitted by subdivision (B), a Member, Delegate, or Resident Commissioner, other than the Speaker or the Minority Leader, may not serve as a member of the select committee during more than four Congresses in a period of six successive Congresses (disregarding for this purpose any service for less than a full session in a Congress).

(B) In the case of a Member, Delegate, or Resident Commissioner appointed to serve as the chair or the ranking minority member of the select committee, tenure on the select committee shall not be limited.

(b)(1) There shall be referred to the select committee proposed legislation, messages, petitions, memorials, and other matters relating to the following:

(A) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program as defined in section 3(6) of the National Security Act of 1947.

(B) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(C) The organization or reorganization of a department or agency of the Government to the extent that the organization or reorganization relates to a function or activity involving intelligence or intelligence-related activities.

(D) Authorizations for appropriations, both direct and indirect, for the following:

(i) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program as defined in section 3(6) of the National Security Act of 1947.

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(ii) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(iii) A department, agency, subdivision, or program that is a successor to an agency or program named or referred to in (i) or (ii).

(2) Proposed legislation initially reported by the select committee (other than provisions solely involving matters specified in subparagraph (1)(A) or subparagraph (1)(D)(i)) containing any matter otherwise within the jurisdiction of a standing committee shall be referred by the Speaker to that standing committee. Proposed legislation initially reported by another committee that contains matter within the jurisdiction of the select committee shall be referred by the Speaker to the select committee if requested by the chair of the select committee.

(3) Nothing in this clause shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee.

(4) Nothing in this clause shall be construed as amending, limiting, or otherwise changing the authority of a standing committee to obtain full and prompt access to the product of the intelligence and intelligence-related activities of a department or agency of the Government relevant to a matter otherwise within the jurisdiction of that committee.

(c)(1) For purposes of accountability to the House, the select committee shall make regular and periodic reports to the House on the nature and extent of the intelligence and intelligence-related activities of the various departments and agencies of the United States. The select committee shall promptly call to the attention of the House, or to any other appropriate committee, a matter requiring the attention of the House or another committee. In making such report, the select committee shall proceed in a manner consistent with paragraph (g) to protect national security.

(2) The select committee shall obtain annual reports from the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, the Secretary of State, and the Director of the Federal Bureau of Investigation. Such reports shall review the intelligence and intelligence-related activities of the agency or department concerned and the intelligence and intelligence-related activities of foreign countries directed at the United States or its interests. An unclassified version of each report may be made available to the public at the discretion of the select committee. Nothing herein shall be construed as requiring the public disclosure in such re-

ports of the names of persons engaged in intelligence or intelligence-related activities for the United States or the divulging of intelligence methods employed or the sources of information on which the reports are based or the amount of funds authorized to be appropriated for intelligence and intelligence-related activities.

(3) Within six weeks after the President submits a budget under section 1105(a) of title 31, United States Code, or at such time as the Committee on the Budget may request, the select committee shall submit to the Committee on the Budget the views and estimates described in section 301(d) of the Congressional Budget Act of 1974 regarding matters within the jurisdiction of the select committee.

(d)(1) Except as specified in subparagraph (2), clauses 8(a), (b), and (c) and 9(a), (b), and (c) of this rule, and clauses 1, 2, and 4 of rule XI shall apply to the select committee to the extent not inconsistent with this clause.

(2) Notwithstanding the requirements of the first sentence of clause 2(g)(2) of rule XI, in the presence of the number of members required under the rules of the select committee for the purpose of taking testimony or receiving evidence, the select committee may vote to close a hearing whenever a majority of those present determines that the testimony or evidence would endanger the national security.

(e) An employee of the select committee, or a person engaged by contract or otherwise to perform services for or at the request of the select committee, may not be given access to any classified information by the select committee unless such employee or person has—

(1) agreed in writing and under oath to be bound by the Rules of the House, including the jurisdiction of the Committee on Ethics and of the select committee concerning the security of classified information during and after the period of the employment or contractual agreement of such employee or person with the select committee; and

(2) received an appropriate security clearance, as determined by the select committee in consultation with the Director of National Intelligence, that is commensurate with the sensitivity of the classified information to which such employee or person will be given access by the select committee.

(f) The select committee shall formulate and carry out such rules and procedures as it considers necessary to prevent the disclosure, without the consent of each person concerned, of information in the possession of the select committee that unduly infringes on the privacy or that violates the constitutional rights of such person. Nothing herein shall be construed to prevent the select committee from publicly disclosing classified information in a case in which it determines that national interest in the disclosure of

classified information clearly outweighs any infringement on the privacy of a person.

(g)(1) The select committee may disclose publicly any information in its possession after a determination by the select committee that the public interest would be served by such disclosure. With respect to the disclosure of information for which this paragraph requires action by the select committee—

(A) the select committee shall meet to vote on the matter within five days after a member of the select committee requests a vote; and

(B) a member of the select committee may not make such a disclosure before a vote by the select committee on the matter, or after a vote by the select committee on the matter except in accordance with this paragraph.

(2)(A) In a case in which the select committee votes to disclose publicly any information that has been classified under established security procedures, that has been submitted to it by the executive branch, and that the executive branch requests be kept secret, the select committee shall notify the President of such vote.

(B) The select committee may disclose publicly such information after the expiration of a five-day period following the day on which notice of the vote to disclose is transmitted to the President unless, before the expiration of the five-day period, the President, personally in writing, notifies the select committee that the President objects to the disclosure of such information, provides reasons therefor, and certifies that the threat to the national interest of the United States posed by the disclosure is of such gravity that it outweighs any public interest in the disclosure.

(C) If the President, personally in writing, notifies the select committee of objections to the disclosure of information as provided in subdivision (B), the select committee may, by majority vote, refer the question of the disclosure of such information, with a recommendation thereon, to the House. The select committee may not publicly disclose such information without leave of the House.

(D) Whenever the select committee votes to refer the question of disclosure of any information to the House under subdivision (C), the chair shall, not later than the first day on which the House is in session following the day on which the vote occurs, report the matter to the House for its consideration.

(E) If the chair of the select committee does not offer in the House a motion to consider in closed session a matter reported under subdivision (D) within four calendar days on which the House is in session after the recommendation described in subdivision (C) is reported, then such a motion shall be privileged when offered by a Member, Delegate, or Resident Com-

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missioner. In either case such a motion shall be decided without debate or intervening motion except one that the House adjourn.

(F) Upon adoption by the House of a motion to resolve into closed session as described in subdivision (E), the Speaker may declare a recess subject to the call of the Chair. At the expiration of the recess, the pending question, in closed session, shall be, "Shall the House approve the recommendation of the select committee?"

(G) Debate on the question described in subdivision (F) shall be limited to two hours equally divided and controlled by the chair and ranking minority member of the select committee. After such debate the previous question shall be considered as ordered on the question of approving the recommendation without intervening motion except one motion that the House adjourn. The House shall vote on the question in open session but without divulging the information with respect to which the vote is taken. If the recommendation of the select committee is not approved, then the question is considered as recommitted to the select committee for further recommendation.

(3)(A) Information in the possession of the select committee relating to the lawful intelligence or intelligence-related activities of a department or agency of the United States that has been classified under established security procedures, and that the select committee has determined should not be disclosed under subparagraph (1) or (2), may not be made available to any person by a Member, Delegate, Resident Commissioner, officer, or employee of the House except as provided in subdivision (B).

(B) The select committee shall, under such regulations as it may prescribe, make information described in subdivision (A) available to a committee or a Member, Delegate, or Resident Commissioner, and permit a Member, Delegate, or Resident Commissioner to attend a hearing of the select committee that is closed to the public. Whenever the select committee makes such information available, it shall keep a written record showing, in the case of particular information, which committee or which Member, Delegate, or Resident Commissioner received the information. A Member, Delegate, or Resident Commissioner who, and a committee that, receives information under this subdivision may not disclose the information except in a closed session of the House.

(4) The Committee on Ethics shall investigate any unauthorized disclosure of intelligence or intelligence-related information by a Member, Delegate, Resident Commissioner, officer, or employee of the House in violation of subparagraph (3) and report to the House concerning any allegation that it finds to be substantiated.

(5) Upon the request of a person who is subject to an investigation described

in subparagraph (4), the Committee on Ethics shall release to such person at the conclusion of its investigation a summary of its investigation, together with its findings. If, at the conclusion of its investigation, the Committee on Ethics determines that there has been a significant breach of confidentiality or unauthorized disclosure by a Member, Delegate, Resident Commissioner, officer, or employee of the House, it shall report its findings to the House and recommend appropriate action. Recommendations may include censure, removal from committee membership, or expulsion from the House, in the case of a Member, or removal from office or employment or punishment for contempt, in the case of an officer or employee.

(h) The select committee may permit a personal representative of the President, designated by the President to serve as a liaison to the select committee, to attend any closed meeting of the select committee.

(i) Subject to the Rules of the House, funds may not be appropriated for a fiscal year, with the exception of a bill or joint resolution continuing appropriations, or an amendment thereto, or a conference report thereon, to, or for use of, a department or agency of the United States to carry out any of the following activities, unless the funds shall previously have been authorized by a bill or joint resolution passed by the House during the same or preceding fiscal year to carry out such activity for such fiscal year:

(1) The activities of the Director of National Intelligence and the Office of the Director of National Intelligence.

(2) The activities of the Central Intelligence Agency.

(3) The activities of the Defense Intelligence Agency.

(4) The activities of the National Security Agency.

(5) The intelligence and intelligence-related activities of other agencies and subdivisions of the Department of Defense.

(6) The intelligence and intelligence-related activities of the Department of State.

(7) The intelligence and intelligence-related activities of the Federal Bureau of Investigation.

(8) The intelligence and intelligence-related activities of all other departments and agencies of the executive branch.

(j)(1) In this clause the term "intelligence and intelligence-related activities" includes—

(A) the collection, analysis, production, dissemination, or use of information that relates to a foreign country, or a government, political group, party, military force, movement, or other association in a foreign country, and that relates to the defense, foreign policy, national security, or related policies of the United States and other activity in support of the collection, analysis,

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production, dissemination, or use of such information;

(B) activities taken to counter similar activities directed against the United States;

(C) covert or clandestine activities affecting the relations of the United States with a foreign government, political group, party, military force, movement, or other association;

(D) the collection, analysis, production, dissemination, or use of information about activities of persons within the United States, its territories and possessions, or nationals of the United States abroad whose political and related activities pose, or may be considered by a department, agency, bureau, office, division, instrumentality, or employee of the United States to pose, a threat to the internal security of the United States; and

(E) covert or clandestine activities directed against persons described in subdivision (D).

(2) In this clause the term "department or agency" includes any organization, committee, council, establishment, or office within the Federal Government.

(3) For purposes of this clause, reference to a department, agency, bureau, or subdivision shall include a reference to any successor department, agency, bureau, or subdivision to the extent that a successor engages in intelligence or intelligence-related activities now conducted by the department, agency, bureau, or subdivision referred to in this clause.

(k) Clause 12(a) of rule XXII does not apply to meetings of a conference committee respecting legislation (or any part thereof) reported by the Permanent Select Committee on Intelligence.

RULE XI

PROCEDURES OF COMMITTEES AND UNFINISHED BUSINESS

In general

1. (a)(1)(A) The Rules of the House are the rules of its committees and subcommittees so far as applicable.

(B) Each subcommittee is a part of its committee and is subject to the authority and direction of that committee and to its rules, so far as applicable.

(2)(A) In a committee or subcommittee—

(i) a motion to recess from day to day, or to recess subject to the call of the Chair (within 24 hours), shall be privileged; and

(ii) a motion to dispense with the first reading (in full) of a bill or resolution shall be privileged if printed copies are available.

(B) A motion accorded privilege under this subparagraph shall be decided without debate.

(b)(1) Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X. Subject to the adoption of expense resolutions as re-

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quired by clause 6 of rule X, each committee may incur expenses, including travel expenses, in connection with such investigations and studies.

(2) A proposed investigative or oversight report shall be considered as read in committee if it has been available to the members for at least 24 hours (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day).

(3) A report of an investigation or study conducted jointly by more than one committee may be filed jointly, provided that each of the committees complies independently with all requirements for approval and filing of the report.

(4) After an adjournment sine die of the last regular session of a Congress, an investigative or oversight report may be filed with the Clerk at any time, provided that a member who gives timely notice of intention to file supplemental, minority, additional, or dissenting views shall be entitled to not less than seven calendar days in which to submit such views for inclusion in the report.

(c) Each committee may have printed and bound such testimony and other data as may be presented at hearings held by the committee or its subcommittees. All costs of stenographic services and transcripts in connection with a meeting or hearing of a committee shall be paid from the applicable accounts of the House described in clause 1(k)(1) of rule X.

(d)(1) Not later than January 2 of each odd-numbered year, a committee shall submit to the House a report on the activities of that committee.

(2) Such report shall include—

(A) separate sections summarizing the legislative and oversight activities of that committee under this rule and rule X during the Congress;

(B) a summary of the authorization and oversight plans submitted by the committee under clause 2(d) of rule X;

(C) a summary of the actions taken and recommendations made with respect to the authorization and oversight plans specified in subdivision (B);

(D) a summary of any additional oversight activities undertaken by that committee and any recommendations made or actions taken thereon; and

(E) a delineation of any hearings held pursuant to clauses 2(n), (o), or (p) of this rule.

(3) After an adjournment sine die of the last regular session of a Congress, or after December 15 of an even-numbered year, whichever occurs first, the chair of a committee may file the report described in subparagraph (1) with the Clerk at any time and without approval of the committee, provided that—

(A) a copy of the report has been available to each member of the committee for at least seven calendar days; and

(B) the report includes any supplemental, minority, additional, or dissenting views submitted by a member of the committee.

Adoption of written rules

2. (a)(1) Each standing committee shall adopt written rules governing its procedure. Such rules—

(A) shall be adopted in a meeting that is open to the public unless the committee, in open session and with a quorum present, determines by record vote that all or part of the meeting on that day shall be closed to the public;

(B) may not be inconsistent with the Rules of the House or with those provisions of law having the force and effect of Rules of the House;

(C) shall in any event incorporate all of the succeeding provisions of this clause to the extent applicable; and

(D) shall include provisions to govern the implementation of clause 4 as provided in paragraph (f) of such clause.

(2) Each committee shall make its rules publicly available in electronic form and submit such rules for publication in the Congressional Record not later than 30 days after the chair of the committee is elected in each odd-numbered year.

(3) A committee may adopt a rule providing that the chair be directed to offer a motion under clause 1 of rule XXII whenever the chair considers it appropriate.

Regular meeting days

(b) Each standing committee shall establish regular meeting days for the conduct of its business, which shall be not less frequent than monthly. Each such committee shall meet for the consideration of a bill or resolution pending before the committee or the trans-action of other committee business on all regular meeting days fixed by the committee if notice is given pursuant to paragraph (g)(3).

Additional and special meetings

(c)(1) The chair of each standing committee may call and convene, as the chair considers necessary, additional and special meetings of the committee for the consideration of a bill or resolution pending before the committee or for the conduct of other committee business, subject to such rules as the committee may adopt. The committee shall meet for such purpose under that call of the chair.

(2) Three or more members of a standing committee may file in the offices of the committee a written request that the chair call a special meeting of the committee. Such request shall specify the measure or matter to be considered. Immediately upon the filing of the request, the clerk of the committee shall notify the chair of the filing of the request. If the chair does not call the requested special meeting within three calendar days after the filing of the request (to be

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held within seven calendar days after the filing of the request) a majority of the members of the committee may file in the offices of the committee their written notice that a special meeting of the committee will be held. The written notice shall specify the date and hour of the special meeting and the measure or matter to be considered. The committee shall meet on that date and hour. Immediately upon the filing of the notice, the clerk of the committee shall notify all members of the committee that such special meeting will be held and inform them of its date and hour and the measure or matter to be considered. Such notice shall also be made publicly available in electronic form and shall be deemed to satisfy paragraph (g)(3)(A)(ii). Only the measure or matter specified in that notice may be considered at that special meeting.

Temporary absence of chair

(d) A member of the majority party on each standing committee or subcommittee thereof shall be designated by the chair of the full committee as the vice chair of the committee or subcommittee, as the case may be, and shall preside during the absence of the chair from any meeting. If the chair and vice chair of a committee or subcommittee are not present at any meeting of the committee or subcommittee, the ranking majority member who is present shall preside at that meeting.

Committee records

(e)(1)(A) Each committee shall keep a complete record of all committee action which shall include—

(i) in the case of a meeting or hearing transcript, a substantially verbatim account of remarks actually made during the proceedings, subject only to technical, grammatical, and typographical corrections authorized by the person making the remarks involved; and

(ii) a record of the votes on any question on which a record vote is taken.

(B)(i) Except as provided in subdivision (B)(ii) and subject to paragraph (k)(7), the result of each such record vote shall be made available by the committee for inspection by the public at reasonable times in its offices and also made publicly available in electronic form within 48 hours of such record vote. Information so available shall include a description of the amendment, motion, order, or other proposition, the name of each member voting for and each member voting against such amendment, motion, order, or proposition, and the names of those members of the committee present but not voting.

(ii) The result of any record vote taken in executive session in the Committee on Ethics may not be made available for inspection by the public without an affirmative vote of a majority of the members of the committee.

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(2)(A) Except as provided in subdivision (B), all committee records (including hearings, data, charts, and files) shall be kept separate and distinct from the congressional office records of the member serving as its chair. Such records shall be the property of the House, and each Member, Delegate, and the Resident Commissioner shall have access thereto.

(B) A Member, Delegate, or Resident Commissioner, other than members of the Committee on Ethics, may not have access to the records of that committee respecting the conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House without the specific prior permission of that committee.

(3) Each committee shall include in its rules standards for availability of records of the committee delivered to the Archivist of the United States under rule VII. Such standards shall specify procedures for orders of the committee under clause 3(b)(3) and clause 4(b) of rule VII, including a requirement that nonavailability of a record for a period longer than the period otherwise applicable under that rule shall be approved by vote of the committee.

(4) Each committee shall make its publications available in electronic form to the maximum extent feasible.

(5) To the maximum extent practicable, each committee shall—

(A) provide audio and video coverage of each hearing or meeting for the transaction of business in a manner that allows the public to easily listen to and view the proceedings; and

(B) maintain the recordings of such coverage in a manner that is easily accessible to the public.

(6) Not later than 24 hours after the adoption of any amendment to a measure or matter considered by a committee, the chair of such committee shall cause the text of each such amendment to be made publicly available in electronic form.

Prohibition against proxy voting

(f) A vote by a member of a committee or subcommittee with respect to any measure or matter may not be cast by proxy.

Open meetings and hearings

(g)(1) Each meeting for the transaction of business, including the markup of legislation, by a standing committee or subcommittee thereof (other than the Committee on Ethics or its subcommittees) shall be open to the public, including to radio, television, and still photography coverage, except when the committee or subcommittee, in open session and with a majority present, determines by record vote that all or part of the remainder of the meeting on that day shall be in executive session because disclosure of matters to be considered would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade, or in-

criminate any person, or otherwise would violate a law or rule of the House. Persons, other than members of the committee and such noncommittee Members, Delegates, Resident Commissioner, congressional staff, or departmental representatives as the committee may authorize, may not be present at a business or markup session that is held in executive session. This subparagraph does not apply to open committee hearings, which are governed by clause 4(a)(1) of rule X or by subparagraph (2).

(2)(A) Each hearing conducted by a committee or subcommittee (other than the Committee on Ethics or its subcommittees) shall be open to the public, including to radio, television, and still photography coverage, except when the committee or subcommittee, in open session and with a majority present, determines by record vote that all or part of the remainder of that hearing on that day shall be closed to the public because disclosure of testimony, evidence, or other matters to be considered would endanger national security, would compromise sensitive law enforcement information, or would violate a law or rule of the House.

(B) Notwithstanding the requirements of subdivision (A), in the presence of the number of members required under the rules of the committee for the purpose of taking testimony, a majority of those present may—

(i) agree to close the hearing for the sole purpose of discussing whether testimony or evidence to be received would endanger national security, would compromise sensitive law enforcement information, or would violate clause 2(k)(5); or

(ii) agree to close the hearing as provided in clause 2(k)(5).

(C) A Member, Delegate, or Resident Commissioner may not be excluded from nonparticipatory attendance at a hearing of a committee or subcommittee (other than the Committee on Ethics or its subcommittees) unless the House by majority vote authorizes a particular committee or subcommittee, for purposes of a particular series of hearings on a particular article of legislation or on a particular subject of investigation, to close its hearings to Members, Delegates, and the Resident Commissioner by the same procedures specified in this subparagraph for closing hearings to the public.

(D) The committee or subcommittee may vote by the same procedure described in this subparagraph to close one subsequent day of hearing, except that the Committee on Appropriations, the Committee on Armed Services, the Committee on Homeland Security, and the Permanent Select Committee on Intelligence, and the subcommittees thereof, may vote by the same procedure to close up to five additional, consecutive days of hearings.

(3)(A) The chair of a committee shall announce the date, place, and subject matter of—

(i) a committee hearing, which may not commence earlier than one week after such notice; or

(ii) a committee meeting, which may not commence earlier than the third day on which members have notice thereof.

(B) A hearing or meeting may begin sooner than specified in subdivision (A) in either of the following circumstances (in which case the chair shall make the announcement specified in subdivision (A) at the earliest possible time):

(i) the chair of the committee, with the concurrence of the ranking minority member, determines that there is good cause; or

(ii) the committee so determines by majority vote in the presence of the number of members required under the rules of the committee for the transaction of business.

(C) An announcement made under this subparagraph shall be published promptly in the Daily Digest and made publicly available in electronic form.

(D) This subparagraph and subparagraph (4) shall not apply to the Committee on Rules.

(4) At least 24 hours prior to the commencement of a meeting for the markup of legislation, or at the time of an announcement under subparagraph (3)(B) made within 24 hours before such meeting, the chair of the committee shall cause the text of such legislation to be made publicly available in electronic form.

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in elec-

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tronic form not later than one day after the witness appears.

(6)(A) Except as provided in subdivision (B), a point of order does not lie with respect to a measure reported by a committee on the ground that hearings on such measure were not conducted in accordance with this clause.

(B) A point of order on the ground described in subdivision (A) may be made by a member of the committee that reported the measure if such point of order was timely made and improperly disposed of in the committee.

(7) This paragraph does not apply to hearings of the Committee on Appropriations under clause 4(a)(1) of rule X.

Quorum requirements

(h)(1) A measure or recommendation may not be reported by a committee unless a majority of the committee is actually present.

(2) Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which may not be less than two.

(3) Each committee (other than the Committee on Appropriations, the Committee on the Budget, and the Committee on Ways and Means) may fix the number of its members to constitute a quorum for taking any action other than one for which the presence of a majority of the committee is otherwise required, which may not be less than one-third of the members.

(4)(A) Each committee may adopt a rule authorizing the chair of a committee or subcommittee—

(i) to postpone further proceedings when a record vote is ordered on the question of approving a measure or matter or on adopting an amendment; and

(ii) to resume proceedings on a postponed question at any time after reasonable notice.

(B) A rule adopted pursuant to this subparagraph shall provide that when proceedings resume on a postponed question, notwithstanding any intervening order for the previous question, an underlying proposition shall remain subject to further debate or amendment to the same extent as when the question was postponed.

Limitation on committee sittings

(i) A committee may not sit during a joint session of the House and Senate or during a recess when a joint meeting of the House and Senate is in progress.

Calling and questioning of witnesses

(j)(1) Whenever a hearing is conducted by a committee on a measure or matter, the minority members of the committee shall be entitled, upon request to the chair by a majority of them before the completion of the hearing, to call witnesses selected by the minority to testify with respect to that measure or matter during at least one day of hearing thereon.

(2)(A) Subject to subdivisions (B) and (C), each committee shall apply the

five-minute rule during the questioning of witnesses in a hearing until such time as each member of the committee who so desires has had an opportunity to question each witness.

(B) A committee may adopt a rule or motion permitting a specified number of its members to question a witness for longer than five minutes. The time for extended questioning of a witness under this subdivision shall be equal for the majority party and the minority party and may not exceed one hour in the aggregate.

(C) A committee may adopt a rule or motion permitting committee staff for its majority and minority party members to question a witness for equal specified periods. The time for extended questioning of a witness under this subdivision shall be equal for the majority party and the minority party and may not exceed one hour in the aggregate.

Hearing procedures

(k)(1) The chair at a hearing shall announce in an opening statement the subject of the hearing.

(2) A copy of the committee rules and of this clause shall be made available to each witness on request.

(3) Witnesses at hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(4) The chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.

(5) Whenever it is asserted by a member of the committee that the evidence or testimony at a hearing may tend to defame, degrade, or incriminate any person, or it is asserted by a witness that the evidence or testimony that the witness would give at a hearing may tend to defame, degrade, or incriminate the witness—

(A) notwithstanding paragraph (g)(2), such testimony or evidence shall be presented in executive session if, in the presence of the number of members required under the rules of the committee for the purpose of taking testimony, the committee determines by vote of a majority of those present that such evidence or testimony may tend to defame, degrade, or incriminate any person; and

(B) the committee shall proceed to receive such testimony in open session only if the committee, a majority being present, determines that such evidence or testimony will not tend to defame, degrade, or incriminate any person.

In either case the committee shall afford such person an opportunity voluntarily to appear as a witness, and receive and dispose of requests from such person to subpoena additional witnesses.

(6) Except as provided in subparagraph (5), the chair shall receive and

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the committee shall dispose of requests to subpoena additional witnesses.

(7) Evidence or testimony taken in executive session, and proceedings conducted in executive session, may be released or used in public sessions only when authorized by the committee, a majority being present.

(8) In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinence of testimony and evidence adduced at its hearing.

(9) A witness may obtain a transcript copy of the testimony of such witness given at a public session or, if given at an executive session, when authorized by the committee.

Supplemental, minority, additional, or dissenting views

(1) If at the time of approval of a measure or matter by a committee (other than the Committee on Rules) a member of the committee gives notice of intention to file supplemental, minority, additional, or dissenting views for inclusion in the report to the House thereon, all members shall be entitled to not less than two additional calendar days after the day of such notice (excluding Saturdays, Sundays, and legal holidays except when the House is in session on such a day) to file such written and signed views with the clerk of the committee.

Power to sit and act; subpoena power

(m)(1) For the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII), a committee or subcommittee is authorized (subject to subparagraph (3)(A))—

(A) to sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, and to hold such hearings as it considers necessary; and

(B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.

(2) The chair of the committee, or a member designated by the chair, may administer oaths to witnesses.

(3)(A)(i) Except as provided in subdivision (A)(ii), a subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of an investigation or series of investigations or activities only when authorized by the committee or subcommittee, a majority being present. The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chair of the committee or by a member designated by the committee.

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(ii) In the case of a subcommittee of the Committee on Ethics, a subpoena may be authorized and issued only by an affirmative vote of a majority of its members.

(B) A subpoena duces tecum may specify terms of return other than at a meeting or hearing of the committee or subcommittee authorizing the subpoena.

(C) Compliance with a subpoena issued by a committee or subcommittee under subparagraph (1)(B) may be enforced only as authorized or directed by the House.

(n)(1) Each standing committee, or a subcommittee thereof, shall hold at least one hearing during each 120-day period following the establishment of the committee on the topic of waste, fraud, abuse, or mismanagement in Government programs which that committee may authorize.

(2) A hearing described in subparagraph (1) shall include a focus on the most egregious instances of waste, fraud, abuse, or mismanagement as documented by any report the committee has received from a Federal Office of the Inspector General or the Comptroller General of the United States.

(o) Each committee, or a subcommittee thereof, shall hold at least one hearing in any session in which the committee has received disclaimers of agency financial statements from auditors of any Federal agency that the committee may authorize to hear testimony on such disclaimers from representatives of any such agency.

(p) Each standing committee, or a subcommittee thereof, shall hold at least one hearing on issues raised by reports issued by the Comptroller General of the United States indicating that Federal programs or operations are at high risk for waste, fraud, and mismanagement, known as the "high-risk list" or the "high-risk series."

Committee on Ethics

3. (a) The Committee on Ethics has the following functions:

(1) The committee may recommend to the House from time to time such administrative actions as it may consider appropriate to establish or enforce standards of official conduct for Members, Delegates, the Resident Commissioner, officers, and employees of the House. A letter of reproof or other administrative action of the committee pursuant to an investigation under subparagraph (2) shall only be issued or implemented as a part of a report required by such subparagraph.

(2) The committee may investigate, subject to paragraph (b), an alleged violation by a Member, Delegate, Resident Commissioner, officer, or employee of the House of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, Delegate, Resident

Commissioner, officer, or employee in the performance of the duties or the discharge of the responsibilities of such individual. After notice and hearing (unless the right to a hearing is waived by the Member, Delegate, Resident Commissioner, officer, or employee), the committee shall report to the House its findings of fact and recommendations, if any, for the final disposition of any such investigation and such action as the committee may consider appropriate in the circumstances.

(3) The committee may report to the appropriate Federal or State authorities, either with the approval of the House or by an affirmative vote of two-thirds of the members of the committee, any substantial evidence of a violation by a Member, Delegate, Resident Commissioner, officer, or employee of the House, of a law applicable to the performance of the duties or the discharge of the responsibilities of such individual that may have been disclosed in a committee investigation.

(4) The committee may consider the request of a Member, Delegate, Resident Commissioner, officer, or employee of the House for an advisory opinion with respect to the general propriety of any current or proposed conduct of such Member, Delegate, Resident Commissioner, officer, or employee. With appropriate deletions to ensure the privacy of the person concerned, the committee may publish such opinion for the guidance of other Members, Delegates, the Resident Commissioner, officers, and employees of the House.

(5) The committee may consider the request of a Member, Delegate, Resident Commissioner, officer, or employee of the House for a written waiver in exceptional circumstances with respect to clause 4 of rule XXIII.

(6)(A) The committee shall offer annual ethics training to each Member, Delegate, Resident Commissioner, officer, and employee of the House. Such training shall—

(i) involve the classes of employees for whom the committee determines such training to be appropriate; and

(ii) include such knowledge of the Code of Official Conduct and related House rules as may be determined appropriate by the committee.

(B)(i) A new Member, Delegate, Resident Commissioner, officer, or employee of the House shall receive training under this paragraph not later than 60 days after beginning service to the House.

(ii) Not later than January 31 of each year, each officer and employee of the House shall file a certification with the committee that the officer or employee attended ethics training in the last year as established by this subparagraph.

(b)(1)(A) Unless approved by an affirmative vote of a majority of its

members, the Committee on Ethics may not report a resolution, report, recommendation, or advisory opinion relating to the official conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House, or, except as provided in subparagraph (2), undertake an investigation of such conduct.

(B)(i) Upon the receipt of information offered as a complaint that is in compliance with this rule and the rules of the committee, the chair and ranking minority member jointly may appoint members to serve as an investigative subcommittee.

(ii) The chair and ranking minority member of the committee jointly may gather additional information concerning alleged conduct that is the basis of a complaint or of information offered as a complaint until they have established an investigative subcommittee or either of them has placed on the agenda of the committee the issue of whether to establish an investigative subcommittee.

(2) Except in the case of an investigation undertaken by the committee on its own initiative, the committee may undertake an investigation relating to the official conduct of an individual Member, Delegate, Resident Commissioner, officer, or employee of the House only—

(A) upon receipt of information offered as a complaint, in writing and under oath, from a Member, Delegate, or Resident Commissioner and transmitted to the committee by such Member, Delegate, or Resident Commissioner;

(B) upon receipt of information offered as a complaint, in writing and under oath, from a person not a Member, Delegate, or Resident Commissioner provided that a Member, Delegate, or Resident Commissioner certifies in writing to the committee that such Member, Delegate, or Resident Commissioner believes the information is submitted in good faith and warrants the review and consideration of the committee; or

(C) upon receipt of a report regarding a referral from the board of the Office of Congressional Ethics.

If a complaint is not disposed of within the applicable periods set forth in the rules of the Committee on Ethics, the chair and ranking minority member shall establish jointly an investigative subcommittee and forward the complaint, or any portion thereof, to that subcommittee for its consideration. However, if at any time during those periods either the chair or ranking minority member places on the agenda the issue of whether to establish an investigative subcommittee, then an investigative subcommittee may be established only by an affirmative vote of a majority of the members of the committee.

(3) The committee may not undertake an investigation of an alleged violation of a law, rule, regulation, or standard of conduct that was not in ef-

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fect at the time of the alleged violation. The committee may not undertake an investigation of such an alleged violation that occurred before the third previous Congress unless the committee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress.

(4) A member of the committee shall be ineligible to participate as a member of the committee in a committee proceeding relating to the member's official conduct. Whenever a member of the committee is ineligible to act as a member of the committee under the preceding sentence, the Speaker shall designate a Member, Delegate, or Resident Commissioner from the same political party as the ineligible member to act in any proceeding of the committee relating to that conduct.

(5) A member of the committee may seek disqualification from participating in an investigation of the conduct of a Member, Delegate, Resident Commissioner, officer, or employee of the House upon the submission in writing and under oath of an affidavit of disqualification stating that the member cannot render an impartial and unbiased decision in the case in which the member seeks to be disqualified. If the committee approves and accepts such affidavit of disqualification, the chair shall so notify the Speaker and request the Speaker to designate a Member, Delegate, or Resident Commissioner from the same political party as the disqualifying member to act in any proceeding of the committee relating to that case.

(6) Information or testimony received, or the contents of a complaint or the fact of its filing, may not be publicly disclosed by any committee or staff member unless specifically authorized in each instance by a vote of the full committee.

(7) The committee shall have the functions designated in titles I and V of the Ethics in Government Act of 1978, in sections 7342, 7351, and 7353 of title 5, United States Code, and in clause 11(g)(4) of rule X.

(8)(A) Except as provided by subdivisions (B), (C), and (D), not later than 45 calendar days or 5 legislative days, whichever is later, after receipt of a written report and any findings and supporting documentation regarding a referral from the board of the Office of Congressional Ethics or of a referral of the matter from the board pursuant to a request under paragraph (r), the chair of the Committee on Ethics shall make public the written report and findings of the board unless the chair and ranking member, acting jointly, decide or the committee votes to withhold such information for not more than one additional period of the same duration, in which case the chair shall—

(i) upon the termination of such additional period, make public the written report and findings; and

(ii) upon the day of such decision or vote, make a public statement that

the matter, relating to the referral made by the board of the Office of Congressional Ethics regarding the Member, officer, or employee of the House who is the subject of the applicable referral, has been extended.

At least one calendar day before the committee makes public any written report and findings of the board, the chair shall notify such board and the applicable Member, officer, or employee of that fact and transmit to such individual a copy of the statement on the committee's disposition of, and any committee report on, the matter.

(B)(i) Notwithstanding subdivision (A)(i), if the committee votes to dismiss a matter which is the subject of a referral from the board of the Office of Congressional Ethics, the committee is not required to make public the written report and findings described in such subdivision unless the committee's vote is inconsistent with the recommendation of the board. For purposes of the previous sentence, a vote by the committee to dismiss a matter is not inconsistent with a report from the board respecting the matter as unresolved due to a tie vote.

(ii) Notwithstanding subdivision (A)(ii), if the board transmits a report respecting any matter with a recommendation to dismiss or as unresolved due to a tie vote, and the matter is extended for an additional period as provided in subdivision (A), the committee is not required to make a public statement that the matter has been extended.

(iii) Except as provided by subdivision (E), if the committee establishes an investigative subcommittee respecting any such matter, then the report and findings of the board shall not be made public until the conclusion of the investigative subcommittee process and the committee shall issue a public statement of the establishment of an investigative subcommittee, which statement shall include the name of the applicable Member, officer, or employee, and shall set forth the alleged violation. If any such investigative subcommittee does not conclude its review within one year after the board transmits a report respecting any matter, then the committee shall make public the report and upon the expiration of the Congress in which the report is made public, the committee shall make public any findings.

(C)(i) If, after receipt of a written report and any findings and supporting documentation regarding a referral from the board of the Office of Congressional Ethics or of a referral of the matter from the board pursuant to a request under paragraph (r), the committee agrees to a request from an appropriate law enforcement or regulatory authority to defer taking action on the matter—

(I) notwithstanding subdivision (A)(i), the committee is not required to make public the written report and findings described in such subdivision, except that if the rec-

ommendation of the board with respect to the report is that the matter requires further review, the committee shall make public the written report but not the findings; and

(II) before the end of the first day (excluding Saturdays, Sundays, and public holidays) after the day that the committee agrees to the request, the committee shall make a public statement that it is deferring taking action on the matter at the request of such authority.

(ii) If, upon the expiration of the one-year period that begins on the date the committee makes the public statement described in item (i)(II), the committee has not acted on the matter, the committee shall make a new public statement that it is still deferring taking action on the matter, and shall make a new statement upon the expiration of each succeeding one-year period during which the committee has not acted on the matter.

(D) The committee may not receive any referral from the board of the Office of Congressional Ethics within 60 days before a Federal, State, or local election in which the subject of the referral is a candidate. The committee may delay any reporting requirement under this subparagraph that falls within that 60-day period until the end of such period and in that case, for purposes of subdivision (A), days within the 60-day period shall not be counted.

(E) If, at the close of any applicable period for a reporting requirement under this subparagraph with respect to a referral from the board of the Office of Congressional Ethics, the vote of the committee is a tie or the committee fails to act, the report and the findings of the board shall be made public by the committee, along with a public statement by the chair explaining the status of the matter.

(c)(1) Notwithstanding clause 2(g)(1) of rule XI, each meeting of the Committee on Ethics or a subcommittee thereof shall occur in executive session unless the committee or subcommittee, by an affirmative vote of a majority of its members, opens the meeting to the public.

(2) Notwithstanding clause 2(g)(2) of rule XI, each hearing of an adjudicatory subcommittee or sanction hearing of the Committee on Ethics shall be held in open session unless the committee or subcommittee, in open session by an affirmative vote of a majority of its members, closes all or part of the remainder of the hearing on that day to the public.

(d) Before a member, officer, or employee of the Committee on Ethics, including members of a subcommittee of the committee selected under clause 5(a)(4) of rule X and shared staff, may have access to information that is confidential under the rules of the committee, the following oath (or affirmation) shall be executed:

"I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on

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Ethics, any information received in the course of my service with the committee, except as authorized by the committee or in accordance with its rules.”

Copies of the executed oath shall be retained by the Clerk as part of the records of the House. This paragraph establishes a standard of conduct within the meaning of paragraph (a)(2). Breaches of confidentiality shall be investigated by the Committee on Ethics and appropriate action shall be taken.

(e)(1) If a complaint or information offered as a complaint is deemed frivolous by an affirmative vote of a majority of the members of the Committee on Ethics, the committee may take such action as it, by an affirmative vote of a majority of its members, considers appropriate in the circumstances.

(2) Complaints filed before the One Hundred Fifth Congress may not be deemed frivolous by the Committee on Ethics.

Committee agendas

(f) The committee shall adopt rules providing that the chair shall establish the agenda for meetings of the committee, but shall not preclude the ranking minority member from placing any item on the agenda.

Committee staff

(g)(1) The committee shall adopt rules providing that—

(A) the staff be assembled and retained as a professional, nonpartisan staff;

(B) each member of the staff shall be professional and demonstrably qualified for the position for which hired;

(C) the staff as a whole and each member of the staff shall perform all official duties in a nonpartisan manner;

(D) no member of the staff shall engage in any partisan political activity directly affecting any congressional or presidential election;

(E) no member of the staff or outside counsel may accept public speaking engagements or write for publication on any subject that is in any way related to the employment or duties with the committee of such individual without specific prior approval from the chair and ranking minority member; and

(F) no member of the staff or outside counsel may make public, unless approved by an affirmative vote of a majority of the members of the committee, any information, document, or other material that is confidential, derived from executive session, or classified and that is obtained during the course of employment with the committee.

(2) Only subdivisions (C), (E), and (F) of subparagraph (1) shall apply to shared staff.

(3)(A) All staff members shall be appointed by an affirmative vote of a majority of the members of the committee. Such vote shall occur at the

first meeting of the membership of the committee during each Congress and as necessary during the Congress.

(B) Subject to the approval of the Committee on House Administration, the committee may retain counsel not employed by the House of Representatives whenever the committee determines, by an affirmative vote of a majority of the members of the committee, that the retention of outside counsel is necessary and appropriate.

(C) If the committee determines that it is necessary to retain staff members for the purpose of a particular investigation or other proceeding, then such staff shall be retained only for the duration of that particular investigation or proceeding.

(D) Outside counsel may be dismissed before the end of a contract between the committee and such counsel only by an affirmative vote of a majority of the members of the committee.

(4) In addition to any other staff provided for by law, rule, or other authority, with respect to the committee, the chair and ranking minority member each may appoint one individual as a shared staff member from the respective personal staff of the chair or ranking minority member to perform service for the committee. Such shared staff may assist the chair or ranking minority member on any subcommittee on which the chair or ranking minority member serves.

Meetings and hearings

(h) The committee shall adopt rules providing that—

(1) all meetings or hearings of the committee or any subcommittee thereof, other than any hearing held by an adjudicatory subcommittee or any sanction hearing held by the committee, shall occur in executive session unless the committee or subcommittee by an affirmative vote of a majority of its members opens the meeting or hearing to the public; and

(2) any hearing held by an adjudicatory subcommittee or any sanction hearing held by the committee shall be open to the public unless the committee or subcommittee by an affirmative vote of a majority of its members closes the hearing to the public.

Public disclosure

(i) The committee shall adopt rules providing that, unless otherwise determined by a vote of the committee, only the chair or ranking minority member, after consultation with each other, may make public statements regarding matters before the committee or any subcommittee thereof.

Requirements to constitute a complaint

(j) The committee shall adopt rules regarding complaints to provide that whenever information offered as a complaint is submitted to the committee, the chair and ranking minority member shall have 14 calendar days or five legislative days, whichever is sooner, to determine whether the information

meets the requirements of the rules of the committee for what constitutes a complaint.

Duties of chair and ranking minority member regarding properly filed complaints

(k)(1) The committee shall adopt rules providing that whenever the chair and ranking minority member jointly determine that information submitted to the committee meets the requirements of the rules of the committee for what constitutes a complaint, they shall have 45 calendar days or five legislative days, whichever is later, after that determination (unless the committee by an affirmative vote of a majority of its members votes otherwise) to—

(A) recommend to the committee that it dispose of the complaint, or any portion thereof, in any manner that does not require action by the House, which may include dismissal of the complaint or resolution of the complaint by a letter to the Member, officer, or employee of the House against whom the complaint is made;

(B) establish an investigative subcommittee; or

(C) request that the committee extend the applicable 45-calendar day or five-legislative day period by one additional 45-calendar day period when they determine more time is necessary in order to make a recommendation under subdivision (A).

(2) The committee shall adopt rules providing that if the chair and ranking minority member jointly determine that information submitted to the committee meets the requirements of the rules of the committee for what constitutes a complaint, and the complaint is not disposed of within the applicable time periods under subparagraph (1), then they shall establish an investigative subcommittee and forward the complaint, or any portion thereof, to that subcommittee for its consideration. However, if, at any time during those periods, either the chair or ranking minority member places on the agenda the issue of whether to establish an investigative subcommittee, then an investigative subcommittee may be established only by an affirmative vote of a majority of the members of the committee.

Duties of chair and ranking minority member regarding information not constituting a complaint

(1) The committee shall adopt rules providing that whenever the chair and ranking minority member jointly determine that information submitted to the committee does not meet the requirements of the rules of the committee for what constitutes a complaint, they may—

(1) return the information to the complainant with a statement that it fails to meet the requirements of the rules of the committee for what constitutes a complaint; or

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(2) recommend to the committee that it authorize the establishment of an investigative subcommittee.

Investigative and adjudicatory subcommittees

(m) The committee shall adopt rules providing that—

(1)(A) an investigative subcommittee shall be composed of four Members (with equal representation from the majority and minority parties) whenever such a subcommittee is established pursuant to the rules of the committee;

(B) an adjudicatory subcommittee shall be composed of the members of the committee who did not serve on the pertinent investigative subcommittee (with equal representation from the majority and minority parties) whenever such a subcommittee is established pursuant to the rules of the committee; and

(C) notwithstanding any other provision of this clause, the chair and ranking minority member of the committee may consult with an investigative subcommittee either on their own initiative or on the initiative of the subcommittee, shall have access to information before a subcommittee with which they so consult, and shall not thereby be precluded from serving as full, voting members of any adjudicatory subcommittee;

(2) at the time of appointment, the chair shall designate one member of a subcommittee to serve as chair and the ranking minority member shall designate one member of the subcommittee to serve as the ranking minority member; and

(3) the chair and ranking minority member of the committee may serve as members of an investigative subcommittee, but may not serve as non-voting, ex officio members.

Standard of proof for adoption of statement of alleged violation

(n) The committee shall adopt rules to provide that an investigative subcommittee may adopt a statement of alleged violation only if it determines by an affirmative vote of a majority of the members of the subcommittee that there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member, officer, or employee of the House of Representatives, has occurred.

Subcommittee powers

(o)(1) The committee shall adopt rules providing that an investigative subcommittee or an adjudicatory subcommittee may authorize and issue subpoenas only when authorized by an affirmative vote of a majority of the members of the subcommittee.

(2) The committee shall adopt rules providing that an investigative subcommittee may, upon an affirmative

vote of a majority of its members, expand the scope of its investigation when approved by an affirmative vote of a majority of the members of the committee.

(3) The committee shall adopt rules to provide that—

(A) an investigative subcommittee may, upon an affirmative vote of a majority of its members, amend its statement of alleged violation anytime before the statement of alleged violation is transmitted to the committee; and

(B) if an investigative subcommittee amends its statement of alleged violation, the respondent shall be notified in writing and shall have 30 calendar days from the date of that notification to file an answer to the amended statement of alleged violation.

Due process rights of respondents

(p) The committee shall adopt rules to provide that—

(1) not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a statement of alleged violation, the subcommittee shall provide the respondent with a copy of the statement of alleged violation it intends to adopt together with all evidence it intends to use to prove those charges which it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, unless the subcommittee by an affirmative vote of a majority of its members decides to withhold certain evidence in order to protect a witness; but if such evidence is withheld, the subcommittee shall inform the respondent that evidence is being withheld and of the count to which such evidence relates;

(2) neither the respondent nor the counsel of the respondent shall, directly or indirectly, contact the subcommittee or any member thereof during the period of time set forth in paragraph (1) except for the sole purpose of settlement discussions where counsel for the respondent and the subcommittee are present;

(3) if, at any time after the issuance of a statement of alleged violation, the committee or any subcommittee thereof determines that it intends to use evidence not provided to a respondent under paragraph (1) to prove the charges contained in the statement of alleged violation (or any amendment thereof), such evidence shall be made immediately available to the respondent, and it may be used in any further proceeding under the rules of the committee;

(4) evidence provided pursuant to paragraph (1) or (3) shall be made available to the respondent and the counsel of the respondent only after each agrees, in writing, that no document, information, or other mate-

rials obtained pursuant to that paragraph shall be made public until—

(A) such time as a statement of alleged violation is made public by the committee if the respondent has waived the adjudicatory hearing; or

(B) the commencement of an adjudicatory hearing if the respondent has not waived an adjudicatory hearing;

but the failure of respondent and the counsel of the respondent to so agree in writing, and their consequent failure to receive the evidence, shall not preclude the issuance of a statement of alleged violation at the end of the period referred to in paragraph (1);

(5) a respondent shall receive written notice whenever—

(A) the chair and ranking minority member determine that information the committee has received constitutes a complaint;

(B) a complaint or allegation is transmitted to an investigative subcommittee;

(C) an investigative subcommittee votes to authorize its first subpoena or to take testimony under oath, whichever occurs first; or

(D) an investigative subcommittee votes to expand the scope of its investigation;

(6) whenever an investigative subcommittee adopts a statement of alleged violation and a respondent enters into an agreement with that subcommittee to settle a complaint on which that statement is based, that agreement, unless the respondent requests otherwise, shall be in writing and signed by the respondent and respondent's counsel, the chair and ranking minority member of the subcommittee, and the outside counsel, if any;

(7) statements or information derived solely from a respondent or the counsel of a respondent during any settlement discussions between the committee or a subcommittee thereof and the respondent shall not be included in any report of the subcommittee or the committee or otherwise publicly disclosed without the consent of the respondent; and

(8) whenever a motion to establish an investigative subcommittee does not prevail, the committee shall promptly send a letter to the respondent informing the respondent of such vote.

Committee reporting requirements

(q) The committee shall adopt rules to provide that—

(1) whenever an investigative subcommittee does not adopt a statement of alleged violation and transmits a report to that effect to the committee, the committee may by an affirmative vote of a majority of its members transmit such report to the House of Representatives;

(2) whenever an investigative subcommittee adopts a statement of al-

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leged violation, the respondent admits to the violations set forth in such statement, the respondent waives the right to an adjudicatory hearing, and the respondent's waiver is approved by the committee—

(A) the subcommittee shall prepare a report for transmittal to the committee, a final draft of which shall be provided to the respondent not less than 15 calendar days before the subcommittee votes on whether to adopt the report;

(B) the respondent may submit views in writing regarding the final draft to the subcommittee within seven calendar days of receipt of that draft;

(C) the subcommittee shall transmit a report to the committee regarding the statement of alleged violation together with any views submitted by the respondent pursuant to subdivision (B), and the committee shall make the report together with the respondent's views available to the public before the commencement of any sanction hearing; and

(D) the committee shall by an affirmative vote of a majority of its members issue a report and transmit such report to the House of Representatives, together with the respondent's views previously submitted pursuant to subdivision (B) and any additional views respondent may submit for attachment to the final report; and

(3) members of the committee shall have not less than 72 hours to review any report transmitted to the committee by an investigative subcommittee before both the commencement of a sanction hearing and the committee vote on whether to adopt the report.

(r) Upon receipt of any written notification from the board of the Office of Congressional Ethics that the board is undertaking a review of any alleged conduct of any Member, officer, or employee of the House and if the committee is investigating such matter, the committee may at any time so notify the board and request that the board cease its review and refer the matter to the committee for its consideration. If at the end of the applicable time period (including any permissible extension) the committee has not reached a final resolution of the matter or has not referred the matter to the appropriate Federal or State authorities, the committee shall so notify the board of the Office of Congressional Ethics in writing. The committee may not request the same matter from the board more than one time.

(s) The committee may not take any action that would deny any person any right or protection provided under the Constitution of the United States.

Audio and visual coverage of committee proceedings

4. (a) The purpose of this clause is to provide a means, in conformity with

acceptable standards of dignity, propriety, and decorum, by which committee hearings or committee meetings that are open to the public may be covered by audio and visual means—

(1) for the education, enlightenment, and information of the general public, on the basis of accurate and impartial news coverage, regarding the operations, procedures, and practices of the House as a legislative and representative body, and regarding the measures, public issues, and other matters before the House and its committees, the consideration thereof, and the action taken thereon; and

(2) for the development of the perspective and understanding of the general public with respect to the role and function of the House under the Constitution as an institution of the Federal Government.

(b) In addition, it is the intent of this clause that radio and television tapes and television film of any coverage under this clause may not be used for any partisan political campaign purpose or be made available for such use.

(c) It is, further, the intent of this clause that the general conduct of each meeting (whether of a hearing or otherwise) covered under authority of this clause by audio or visual means, and the personal behavior of the committee members and staff, other Government officials and personnel, witnesses, television, radio, and press media personnel, and the general public at the hearing or other meeting, shall be in strict conformity with and observance of the acceptable standards of dignity, propriety, courtesy, and decorum traditionally observed by the House in its operations, and may not be such as to—

(1) distort the objects and purposes of the hearing or other meeting or the activities of committee members in connection with that hearing or meeting or in connection with the general work of the committee or of the House; or

(2) cast discredit or dishonor on the House, the committee, or a Member, Delegate, or Resident Commissioner or bring the House, the committee, or a Member, Delegate, or Resident Commissioner into disrepute.

(d) The coverage of committee hearings and meetings by audio and visual means shall be permitted and conducted only in strict conformity with the purposes, provisions, and requirements of this clause.

(e) Whenever a hearing or meeting conducted by a committee or subcommittee is open to the public, those proceedings shall be open to coverage by audio and visual means. A committee or subcommittee chair may not limit the number of television or still cameras to fewer than two representatives from each medium (except for legitimate space or safety considerations, in which case pool coverage shall be authorized).

(f) Written rules adopted by each committee pursuant to clause

2(a)(1)(D) shall contain provisions to the following effect:

(1) If audio or visual coverage of the hearing or meeting is to be presented to the public as live coverage, that coverage shall be conducted and presented without commercial sponsorship.

(2) The allocation among the television media of the positions or the number of television cameras permitted by a committee or subcommittee chair in a hearing or meeting room shall be in accordance with fair and equitable procedures devised by the Executive Committee of the Radio and Television Correspondents' Galleries.

(3) Television cameras shall be placed so as not to obstruct in any way the space between a witness giving evidence or testimony and any member of the committee or the visibility of that witness and that member to each other.

(4) Television cameras shall operate from fixed positions but may not be placed in positions that obstruct unnecessarily the coverage of the hearing or meeting by the other media.

(5) Equipment necessary for coverage by the television and radio media may not be installed in, or removed from, the hearing or meeting room while the committee is in session.

(6)(A) Except as provided in subdivision (B), floodlights, spotlights, strobelights, and flashguns may not be used in providing any method of coverage of the hearing or meeting.

(B) The television media may install additional lighting in a hearing or meeting room, without cost to the Government, in order to raise the ambient lighting level in a hearing or meeting room to the lowest level necessary to provide adequate television coverage of a hearing or meeting at the current state of the art of television coverage.

(7) If requests are made by more of the media than will be permitted by a committee or subcommittee chair for coverage of a hearing or meeting by still photography, that coverage shall be permitted on the basis of a fair and equitable pool arrangement devised by the Standing Committee of Press Photographers.

(8) Photographers may not position themselves between the witness table and the members of the committee at any time during the course of a hearing or meeting.

(9) Photographers may not place themselves in positions that obstruct unnecessarily the coverage of the hearing by the other media.

(10) Personnel providing coverage by the television and radio media shall be currently accredited to the Radio and Television Correspondents' Galleries.

(11) Personnel providing coverage by still photography shall be cur-

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rently accredited to the Press Photographers' Gallery.

(12) Personnel providing coverage by the television and radio media and by still photography shall conduct themselves and their coverage activities in an orderly and unobtrusive manner.

Pay of witnesses

5. Witnesses appearing before the House or any of its committees shall be paid the same per diem rate as established, authorized, and regulated by the Committee on House Administration for Members, Delegates, the Resident Commissioner, and employees of the House, plus actual expenses of travel to or from the place of examination. Such per diem may not be paid when a witness has been summoned at the place of examination.

Unfinished business of the session

6. All business of the House at the end of one session shall be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place.

RULE XII

RECEIPT AND REFERRAL OF MEASURES AND MATTERS

Messages

1. Messages received from the Senate, or from the President, shall be entered on the Journal and published in the Congressional Record of the proceedings of that day.

Referral

2. (a) The Speaker shall refer each bill, resolution, or other matter that relates to a subject listed under a standing committee named in clause 1 of rule X in accordance with the provisions of this clause.

(b) The Speaker shall refer matters under paragraph (a) in such manner as to ensure to the maximum extent feasible that each committee that has jurisdiction under clause 1 of rule X over the subject matter of a provision thereof may consider such provision and report to the House thereon. Precedents, rulings, or procedures in effect before the Ninety-Fourth Congress shall be applied to referrals under this clause only to the extent that they will contribute to the achievement of the objectives of this clause.

(c) In carrying out paragraphs (a) and (b) with respect to the referral of a matter, the Speaker—

(1) shall designate a committee of primary jurisdiction (except where the Speaker determines that extraordinary circumstances justify review by more than one committee as though primary);

(2) may refer the matter to one or more additional committees for consideration in sequence, either initially or after the matter has been reported by the committee of primary jurisdiction;

(3) may refer portions of the matter reflecting different subjects and ju-

risdictions to one or more additional committees;

(4) may refer the matter to a special, ad hoc committee appointed by the Speaker with the approval of the House, and including members of the committees of jurisdiction, for the specific purpose of considering that matter and reporting to the House thereon;

(5) may subject a referral to appropriate time limitations; and

(6) may make such other provision as may be considered appropriate.

(d) A bill for the payment or adjudication of a private claim against the Government may not be referred to a committee other than the Committee on Foreign Affairs or the Committee on the Judiciary, except by unanimous consent.

Petitions, memorials, and private bills

3. If a Member, Delegate, or Resident Commissioner has a petition, memorial, or private bill to present, the Member, Delegate, or Resident Commissioner shall sign it, deliver it to the Clerk, and may specify the reference or disposition to be made thereof. Such petition, memorial, or private bill (except when judged by the Speaker to be obscene or insulting) shall be entered on the Journal with the name of the Member, Delegate, or Resident Commissioner presenting it and shall be printed in the Congressional Record.

4. A private bill or private resolution (including an omnibus claim or pension bill), or amendment thereto, may not be received or considered in the House if it authorizes or directs—

(a) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Tort Claims Procedure provided in title 28, United States Code, or for a pension (other than to carry out a provision of law or treaty stipulation);

(b) the construction of a bridge across a navigable stream; or

(c) the correction of a military or naval record.

Prohibition on commemorations

5. (a) A bill or resolution, or an amendment thereto, may not be introduced or considered in the House if it establishes or expresses a commemoration.

(b) In this clause the term "commemoration" means a remembrance, celebration, or recognition for any purpose through the designation of a specified period of time.

Excluded matters

6. A petition, memorial, bill, or resolution excluded under this rule shall be returned to the Member, Delegate, or Resident Commissioner from whom it was received. A petition or private bill that has been inappropriately referred may, by direction of the committee having possession of it, be properly referred in the manner originally presented. An erroneous reference of a petition or private bill under this clause

does not confer jurisdiction on a committee to consider or report it.

Sponsorship

7. (a) Bills, memorials, petitions, and resolutions, endorsed with the names of Members, Delegates, or the Resident Commissioner introducing them, may be delivered to the Speaker to be referred. The titles and references of all bills, memorials, petitions, resolutions, and other documents referred under this rule shall be entered on the Journal and printed in the Congressional Record. An erroneous reference may be corrected by the House in accordance with rule X on any day immediately after the Pledge of Allegiance to the Flag by unanimous consent or motion. Such a motion shall be privileged if offered by direction of a committee to which the bill has been erroneously referred or by direction of a committee claiming jurisdiction and shall be decided without debate.

(b)(1) The sponsor of a public bill or public resolution may name cosponsors. The name of a cosponsor added after the initial printing of a bill or resolution shall appear in the next printing of the bill or resolution on the written request of the sponsor. Such a request may be submitted to the Speaker at any time until the last committee authorized to consider and report the bill or resolution reports it to the House or is discharged from its consideration.

(2) The name of a cosponsor of a bill or resolution may be deleted by unanimous consent. The Speaker may entertain such a request only by the Member, Delegate, or Resident Commissioner whose name is to be deleted or by the sponsor of the bill or resolution, and only until the last committee authorized to consider and report the bill or resolution reports it to the House or is discharged from its consideration. The Speaker may not entertain a request to delete the name of the sponsor of a bill or resolution. A deletion shall be indicated by date in the next printing of the bill or resolution.

(3) The addition or deletion of the name of a cosponsor of a bill or resolution shall be entered on the Journal and printed in the Congressional Record of that day.

(4) A bill or resolution shall be reprinted on the written request of the sponsor. Such a request may be submitted to the Speaker only when 20 or more cosponsors have been added since the last printing of the bill or resolution.

(5) When a bill or resolution is introduced "by request," those words shall be entered on the Journal and printed in the Congressional Record.

(c)(1) A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a

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portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

(2) Before consideration of a Senate bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under subparagraph (1) as though the chair were the sponsor of the Senate bill or joint resolution.

Executive communications

8. Estimates of appropriations and all other communications from the executive departments intended for the consideration of any committees of the House shall be addressed to the Speaker for referral as provided in clause 2 of rule XIV.

RULE XIII

CALENDARS AND COMMITTEE REPORTS

Calendars

1. (a) All business reported by committees shall be referred to one of the following three calendars:

(1) A Calendar of the Committee of the Whole House on the state of the Union, to which shall be referred public bills and public resolutions raising revenue, involving a tax or charge on the people, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, or releasing any liability to the United States for money or property.

(2) A House Calendar, to which shall be referred all public bills and public resolutions not requiring referral to the Calendar of the Committee of the Whole House on the state of the Union.

(3) A Private Calendar as provided in clause 5 of rule XV, to which shall be referred all private bills and private resolutions.

(b) There is established a Calendar of Motions to Discharge Committees as provided in clause 2 of rule XV.

Filing and printing of reports

2. (a)(1) Except as provided in subparagraph (2), all reports of committees (other than those filed from the floor) shall be delivered to the Clerk for printing and reference to the proper calendar under the direction of the Speaker in accordance with clause 1. The title or subject of each report shall be entered on the Journal and printed in the Congressional Record.

(2) A bill or resolution reported adversely (other than those filed as privileged) shall be laid on the table unless a committee to which the bill or resolution was referred requests at the time of the report its referral to an appropriate calendar under clause 1 or unless, within three days thereafter, a Member, Delegate, or Resident Commissioner makes such a request.

(b)(1) It shall be the duty of the chair of each committee to report or cause to be reported promptly to the House a

measure or matter approved by the committee and to take or cause to be taken steps necessary to bring the measure or matter to a vote.

(2) In any event, the report of a committee on a measure that has been approved by the committee shall be filed within seven calendar days (exclusive of days on which the House is not in session) after the day on which a written request for the filing of the report, signed by a majority of the members of the committee, has been filed with the clerk of the committee. The clerk of the committee shall immediately notify the chair of the filing of such a request. This subparagraph does not apply to a report of the Committee on Rules with respect to a rule, joint rule, or order of business of the House, or to the reporting of a resolution of inquiry addressed to the head of an executive department.

(c) All supplemental, minority, additional, or dissenting views filed under clause 2(1) of rule XI by one or more members of a committee shall be included in, and shall be a part of, the report filed by the committee with respect to a measure or matter. When time guaranteed by clause 2(1) of rule XI has expired (or, if sooner, when all separate views have been received), the committee may arrange to file its report with the Clerk not later than one hour after the expiration of such time. This clause and provisions of clause 2(1) of rule XI do not preclude the immediate filing or printing of a committee report in the absence of a timely request for the opportunity to file supplemental, minority, additional, or dissenting views as provided in clause 2(1) of rule XI.

Content of reports

3. (a)(1) Except as provided in subparagraph (2), the report of a committee on a measure or matter shall be printed in a single volume that—

(A) shall include all supplemental, minority, additional, or dissenting views that have been submitted by the time of the filing of the report; and

(B) shall bear on its cover a recital that any such supplemental, minority, additional, or dissenting views (and any material submitted under paragraph (c)(3)) are included as part of the report.

(2) A committee may file a supplemental report for the correction of a technical error in its previous report on a measure or matter. A supplemental report only correcting errors in the depiction of record votes under paragraph (b) may be filed under this subparagraph and shall not be subject to the requirement in clause 4 or clause 6 concerning the availability of reports.

(b) With respect to each record vote on a motion to report a measure or matter of a public nature, and on any amendment offered to the measure or matter, the total number of votes cast for and against, and the names of mem-

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bers voting for and against, shall be included in the committee report. The preceding sentence does not apply to votes taken in executive session by the Committee on Ethics.

(c) The report of a committee on a measure that has been approved by the committee shall include, separately set out and clearly identified, the following:

(1) Oversight findings and recommendations under clause 2(b)(1) of rule X.

(2) The statement required by section 308(a) of the Congressional Budget Act of 1974, except that an estimate of new budget authority shall include, when practicable, a comparison of the total estimated funding level for the relevant programs to the appropriate levels under current law.

(3) An estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 if timely submitted to the committee before the filing of the report.

(4) A statement of general performance goals and objectives, including outcome-related goals and objectives, for which the measure authorizes funding.

(5) On a bill or joint resolution that establishes or reauthorizes a Federal program, a statement indicating whether any such program is known to be duplicative of another such program, including at a minimum an explanation of whether any such program was included in a report to Congress pursuant to section 21 of Public Law 111-139 or whether the most recent Catalog of Federal Domestic Assistance (published pursuant to section 6104 of title 31, United States Code) identified other programs related to the program established or reauthorized by the measure.

(d) Each report of a committee on a public bill or public joint resolution shall contain the following:

(1)(A) An estimate by the committee of the costs that would be incurred in carrying out the bill or joint resolution in the fiscal year in which it is reported and in each of the five fiscal years following that fiscal year (or for the authorized duration of any program authorized by the bill or joint resolution if less than five years);

(B) a comparison of the estimate of costs described in subdivision (A) made by the committee with any estimate of such costs made by a Government agency and submitted to such committee; and

(C) when practicable, a comparison of the total estimated funding level for the relevant programs with the appropriate levels under current law.

(2)(A) In subparagraph (1) the term "Government agency" includes any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Fed-

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eral Government or the government of the District of Columbia.

(B) Subparagraph (1) does not apply to the Committee on Appropriations, the Committee on House Administration, the Committee on Rules, or the Committee on Ethics, and does not apply when a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been included in the report under paragraph (c)(3).

(e)(1) Whenever a committee reports a bill or joint resolution proposing to repeal or amend a statute or part thereof, it shall include in its report or in an accompanying document (showing by appropriate typographical devices the omissions and insertions proposed)—

(A) the entire text of each section of a statute that is proposed to be repealed; and

(B) a comparative print of each amendment to the entire text of a section of a statute that the bill or joint resolution proposes to make.

(2) If a committee reports a bill or joint resolution proposing to repeal or amend a statute or part thereof with a recommendation that the bill or joint resolution be amended, the comparative print required by subparagraph (1) shall reflect the changes in existing law proposed to be made by the bill or joint resolution as proposed to be amended.

(f)(1) A report of the Committee on Appropriations on a general appropriation bill shall include—

(A) a concise statement describing the effect of any provision of the accompanying bill that directly or indirectly changes the application of existing law; and

(B) a list of all appropriations contained in the bill for expenditures not currently authorized by law for the period concerned (excepting classified intelligence or national security programs, projects, or activities), along with a statement of the last year for which such expenditures were authorized, the level of expenditures authorized for that year, the actual level of expenditures for that year, and the level of appropriations in the bill for such expenditures.

(2) Whenever the Committee on Appropriations reports a bill or joint resolution including matter specified in clause 1(b)(2) or (3) of rule X, it shall include—

(A) in the bill or joint resolution, separate headings for “Rescissions” and “Transfers of Unexpended Balances”; and

(B) in the report of the committee, a separate section listing such rescissions and transfers.

(g) Whenever the Committee on Rules reports a resolution proposing to repeal or amend a standing rule of the House, it shall include in its report or in an accompanying document—

(1) the text of any rule or part thereof that is proposed to be repealed; and

(2) a comparative print of any part of the resolution proposing to amend the rule and of the rule or part thereof proposed to be amended, showing by appropriate typographical devices the omissions and insertions proposed.

(h) It shall not be in order to consider a bill or joint resolution reported by the Committee on Ways and Means that proposes to amend the Internal Revenue Code of 1986 unless—

(1) the report includes a tax complexity analysis prepared by the Joint Committee on Taxation in accordance with section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998; or

(2) the chair of the Committee on Ways and Means causes such a tax complexity analysis to be printed in the Congressional Record before consideration of the bill or joint resolution.

Availability of reports

4. (a)(1) Except as specified in subparagraph (2), it shall not be in order to consider in the House a measure or matter reported by a committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which each report of a committee on that measure or matter has been available to Members, Delegates, and the Resident Commissioner.

(2) Subparagraph (1) does not apply to—

(A) a resolution providing a rule, joint rule, or order of business reported by the Committee on Rules considered under clause 6;

(B) a resolution providing amounts from the applicable accounts described in clause 1(k)(1) of rule X reported by the Committee on House Administration considered under clause 6 of rule X;

(C) a resolution presenting a question of the privileges of the House reported by any committee;

(D) a measure for the declaration of war, or the declaration of a national emergency, by Congress; and

(E) a measure providing for the disapproval of a decision, determination, or action by a Government agency that would become, or continue to be, effective unless disapproved or otherwise invalidated by one or both Houses of Congress. In this subdivision the term “Government agency” includes any department, agency, establishment, wholly owned Government corporation, or instrumentality of the Federal Government or of the government of the District of Columbia.

(b) A committee that reports a measure or matter shall make every reasonable effort to have its hearings thereon (if any) printed and available for distribution to Members, Delegates, and the Resident Commissioner before the

consideration of the measure or matter in the House.

Privileged reports, generally

5. (a) The following committees shall have leave to report at any time on the following matters, respectively:

(1) The Committee on Appropriations, on general appropriation bills and on joint resolutions continuing appropriations for a fiscal year after September 15 in the preceding fiscal year.

(2) The Committee on the Budget, on the matters required to be reported by such committee under titles III and IV of the Congressional Budget Act of 1974.

(3) The Committee on House Administration, on enrolled bills, on contested elections, on matters referred to it concerning printing for the use of the House or the two Houses, on expenditure of the applicable accounts of the House described in clause 1(k)(1) of rule X, and on matters relating to preservation and availability of noncurrent records of the House under rule VII.

(4) The Committee on Rules, on rules, joint rules, and the order of business.

(5) The Committee on Ethics, on resolutions recommending action by the House with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House as a result of an investigation by the committee relating to the official conduct of such Member, Delegate, Resident Commissioner, officer, or employee.

(b) A report filed from the floor as privileged under paragraph (a) may be called up as a privileged question by direction of the reporting committee, subject to any requirement concerning its availability to Members, Delegates, and the Resident Commissioner under clause 4 or concerning the timing of its consideration under clause 6.

Privileged reports by the Committee on Rules

6. (a) A report by the Committee on Rules on a rule, joint rule, or the order of business may not be called up for consideration on the same day it is presented to the House except—

(1) when so determined by a vote of two-thirds of the Members voting, a quorum being present;

(2) in the case of a resolution proposing only to waive a requirement of clause 4 or of clause 8 of rule XXII concerning the availability of reports; or

(3) during the last three days of a session of Congress.

(b) Pending the consideration of a report by the Committee on Rules on a rule, joint rule, or the order of business, the Speaker may entertain one motion that the House adjourn but may not entertain any other dilatory motion until the report shall have been disposed of.

(c) The Committee on Rules may not report a rule or order that would pre-

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vent the motion to recommit a bill or joint resolution from being made as provided in clause 2(b) of rule XIX, including a motion to recommit with instructions to report back an amendment otherwise in order, if offered by the Minority Leader or a designee, except with respect to a Senate bill or joint resolution for which the text of a House-passed measure has been substituted.

(d) The Committee on Rules shall present to the House reports concerning rules, joint rules, and the order of business, within three legislative days of the time when they are ordered. If such a report is not considered immediately, it shall be referred to the calendar. If such a report on the calendar is not called up by the member of the committee who filed the report within seven legislative days, any member of the committee may call it up as a privileged question on the day after the calendar day on which the member announces to the House intention to do so. The Speaker shall recognize a member of the committee who seeks recognition for that purpose.

(e) An adverse report by the Committee on Rules on a resolution proposing a special order of business for the consideration of a public bill or public joint resolution may be called up as a privileged question by a Member, Delegate, or Resident Commissioner on a day when it is in order to consider a motion to discharge committees under clause 2 of rule XV.

(f) If the House has adopted a resolution making in order a motion to consider a bill or resolution, and such a motion has not been offered within seven calendar days thereafter, such a motion shall be privileged if offered by direction of all reporting committees having initial jurisdiction of the bill or resolution.

(g) Whenever the Committee on Rules reports a resolution providing for the consideration of a measure, it shall to the maximum extent possible specify in the accompanying report any waiver of a point of order against the measure or against its consideration.

Resolutions of inquiry

7. A report on a resolution of inquiry addressed to the head of an executive department may be filed from the floor as privileged. If such a resolution is not reported to the House within 14 legislative days after its introduction, a motion to discharge a committee from its consideration shall be privileged.

Estimates of major legislation

8. (a) An estimate provided by the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 for any major legislation shall, to the extent practicable, incorporate the budgetary effects of changes in economic output, employment, capital stock, and other macroeconomic variables resulting from such legislation.

(b) An estimate provided by the Joint Committee on Taxation to the Director

of the Congressional Budget Office under section 201(f) of the Congressional Budget Act of 1974 for any major legislation shall, to the extent practicable, incorporate the budgetary effects of changes in economic output, employment, capital stock, and other macroeconomic variables resulting from such legislation.

(c) An estimate referred to in this clause shall, to the extent practicable, include—

(1) a qualitative assessment of the budgetary effects (including macroeconomic variables described in paragraphs (a) and (b)) of such legislation in the 20-fiscal year period beginning after the last fiscal year of the most recently agreed to concurrent resolution on the budget that set forth appropriate levels required by section 301 of the Congressional Budget Act of 1974; and

(2) an identification of the critical assumptions and the source of data underlying that estimate.

(d) As used in this clause—

(1) the term “major legislation” means any bill or joint resolution—

(A) for which an estimate is required to be prepared pursuant to section 402 of the Congressional Budget Act of 1974 and that causes a gross budgetary effect (before incorporating macroeconomic effects) in any fiscal year over the years of the most recently agreed to concurrent resolution on the budget equal to or greater than 0.25 percent of the current projected gross domestic product of the United States for that fiscal year; or

(B) designated as such by the chair of the Committee on the Budget for all direct spending legislation other than revenue legislation or the Member who is chair or vice chair, as applicable, of the Joint Committee on Taxation for revenue legislation; and

(2) the term “budgetary effects” means changes in revenues, outlays, and deficits.

RULE XIV

ORDER AND PRIORITY OF BUSINESS

1. The daily order of business (unless varied by the application of other rules and except for the disposition of matters of higher precedence) shall be as follows:

First. Prayer by the Chaplain.

Second. Reading and approval of the Journal, unless postponed under clause 8 of rule XX.

Third. The Pledge of Allegiance to the Flag.

Fourth. Correction of reference of public bills.

Fifth. Disposal of business on the Speaker's table as provided in clause 2.

Sixth. Unfinished business as provided in clause 3.

Seventh. The morning hour for the consideration of bills called up by committees as provided in clause 4.

Eighth. Motions that the House resolve into the Committee of the

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Whole House on the state of the Union subject to clause 5.

Ninth. Orders of the day.

2. Business on the Speaker's table shall be disposed of as follows:

(a) Messages from the President shall be referred to the appropriate committees without debate.

(b) Communications addressed to the House, including reports and communications from heads of departments and bills, resolutions, and messages from the Senate, may be referred to the appropriate committees in the same manner and with the same right of correction as public bills and public resolutions presented by Members, Delegates, or the Resident Commissioner.

(c) Motions to dispose of Senate amendments on the Speaker's table may be entertained as provided in clauses 1, 2, and 4 of rule XXII.

(d) Senate bills and resolutions substantially the same as House measures already favorably reported and not required to be considered in the Committee of the Whole House on the state of the Union may be disposed of by motion. Such a motion shall be privileged if offered by direction of all reporting committees having initial jurisdiction of the House measure.

3. Consideration of unfinished business in which the House may have been engaged at an adjournment, except business in the morning hour and proceedings postponed under clause 8 of rule XX, shall be resumed as soon as the business on the Speaker's table is finished, and at the same time each day thereafter until disposed of. The consideration of all other unfinished business shall be resumed whenever the class of business to which it belongs shall be in order under the rules.

4. After the unfinished business has been disposed of, the Speaker shall call each standing committee in regular order and then select committees. Each committee when named may call up for consideration a bill or resolution reported by it on a previous day and on the House Calendar. If the Speaker does not complete the call of the committees before the House passes to other business, the next call shall resume at the point it left off, giving preference to the last bill or resolution under consideration. A committee that has occupied the call for two days may not call up another bill or resolution until the other committees have been called in their turn.

5. After consideration of bills or resolutions under clause 4 for one hour, it shall be in order, pending consideration thereof, to entertain a motion that the House resolve into the Committee of the Whole House on the state of the Union or, when authorized by a committee, that the House resolve into the Committee of the Whole House on the state of the Union to consider a particular bill. Such a motion shall be subject to only one amendment designating another bill. If such a motion is

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decided in the negative, another such motion may not be considered until the matter that was pending when such motion was offered is disposed of.

6. All questions relating to the priority of business shall be decided by a majority without debate.

RULE XV

BUSINESS IN ORDER ON SPECIAL DAYS

Suspensions

1. (a) A rule may not be suspended except by a vote of two-thirds of the Members voting, a quorum being present. The Speaker may not entertain a motion that the House suspend the rules except on Mondays, Tuesdays, and Wednesdays and during the last six days of a session of Congress.

(b) Pending a motion that the House suspend the rules, the Speaker may entertain one motion that the House adjourn but may not entertain any other motion until the vote is taken on the suspension.

(c) A motion that the House suspend the rules is debatable for 40 minutes, one-half in favor of the motion and one-half in opposition thereto.

Discharge motions, second and fourth Mondays

2. (a) Motions to discharge committees shall be in order on the second and fourth Mondays of a month.

(b)(1) A Member may present to the Clerk a motion in writing to discharge—

(A) a committee from consideration of a public bill or public resolution that has been referred to it for 30 legislative days; or

(B) the Committee on Rules from consideration of a resolution that has been referred to it for seven legislative days and that proposes a special order of business for the consideration of a public bill or public resolution that has been reported by a committee or has been referred to a committee for 30 legislative days.

(2) Only one motion may be presented for a bill or resolution. A Member may not file a motion to discharge the Committee on Rules from consideration of a resolution providing for the consideration of more than one public bill or public resolution or admitting or effecting a nongermane amendment to a public bill or public resolution.

(c) A motion presented under paragraph (b) shall be placed in the custody of the Clerk, who shall arrange a convenient place for the signatures of Members. A signature may be withdrawn by a Member in writing at any time before a motion is entered on the Journal. The Clerk shall make the signatories a matter of public record, causing the names of the Members who have signed a discharge motion during a week to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspection in an appropriate office of the House. The Clerk

shall devise a means for making such lists available to offices of the House and to the public in electronic form. When a majority of the total membership of the House shall have signed the motion, it shall be entered on the Journal, published with the signatories thereto in the Record, and referred to the Calendar of Motions to Discharge Committees.

(d)(1) On the second and fourth Mondays of a month (except during the last six days of a session of Congress), immediately after the Pledge of Allegiance to the Flag, a motion to discharge that has been on the calendar for at least seven legislative days shall be privileged if called up by a Member whose signature appears thereon. When such a motion is called up, the House shall proceed to its consideration under this paragraph without intervening motion except one motion to adjourn. Privileged motions to discharge shall have precedence in the order of their entry on the Journal.

(2) When a motion to discharge is called up, the bill or resolution to which it relates shall be read by title only. The motion is debatable for 20 minutes, one-half in favor of the motion and one-half in opposition thereto.

(e)(1) If a motion prevails to discharge the Committee on Rules from consideration of a resolution, the House shall immediately consider the resolution, pending which the Speaker may entertain one motion that the House adjourn but may not entertain any other dilatory motion until the resolution has been disposed of. If the resolution is adopted, the House shall immediately proceed to its execution.

(2) If a motion prevails to discharge a committee from consideration of a public bill or public resolution, a motion that the House proceed to the immediate consideration of such bill or resolution shall be privileged if offered by a Member whose signature appeared on the motion to discharge. The motion to proceed is not debatable. If the motion to proceed is adopted, the bill or resolution shall be considered immediately under the general rules of the House. If unfinished before adjournment of the day on which it is called up, the bill or resolution shall remain the unfinished business until it is disposed of. If the motion to proceed is rejected, the bill or resolution shall be referred to the appropriate calendar, where it shall have the same status as if the committee from which it was discharged had duly reported it to the House.

(f)(1) When a motion to discharge originated under this clause has once been acted on by the House, it shall not be in order to entertain during the same session of Congress—

(A) a motion to discharge a committee from consideration of that bill or resolution or of any other bill or resolution that, by relating in substance to or dealing with the same subject matter, is substantially the same; or

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(B) a motion to discharge the Committee on Rules from consideration of a resolution providing a special order of business for the consideration of that bill or resolution or of any other bill or resolution that, by relating in substance to or dealing with the same subject matter, is substantially the same.

(2) A motion to discharge on the Calendar of Motions to Discharge Committees that is rendered out of order under subparagraph (1) shall be stricken from that calendar.

Adverse report by the Committee on Rules, second and fourth Mondays

3. An adverse report by the Committee on Rules on a resolution proposing a special order of business for the consideration of a public bill or public joint resolution may be called up under clause 6(e) of rule XIII as a privileged question by a Member, Delegate, or Resident Commissioner on a day when it is in order to consider a motion to discharge committees under clause 2.

District of Columbia business, second and fourth Mondays

4. The second and fourth Mondays of a month shall be set apart for the consideration of such District of Columbia business as may be called up by the Committee on Oversight and Government Reform after the disposition of motions to discharge committees and after the disposal of such business on the Speaker's table as requires reference only.

Private Calendar, first and third Tuesdays

5. (a) On the first Tuesday of a month, the Speaker shall direct the Clerk to call the bills and resolutions on the Private Calendar after disposal of such business on the Speaker's table as requires reference only. If two or more Members, Delegates, or the Resident Commissioner object to the consideration of a bill or resolution so called, it shall be recommitted to the committee that reported it. No other business shall be in order before completion of the call of the Private Calendar on this day unless two-thirds of the Members voting, a quorum being present, agree to a motion that the House dispense with the call.

(b)(1) On the third Tuesday of a month, after the disposal of such business on the Speaker's table as requires reference only, the Speaker may direct the Clerk to call the bills and resolutions on the Private Calendar. Preference shall be given to omnibus bills containing the texts of bills or resolutions that have previously been objected to on a call of the Private Calendar. If two or more Members, Delegates, or the Resident Commissioner object to the consideration of a bill or resolution so called (other than an omnibus bill), it shall be recommitted to the committee that reported it. Two-thirds of the Members voting, a quorum being present, may adopt a

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motion that the House dispense with the call on this day.

(2) Omnibus bills shall be read for amendment by paragraph. No amendment shall be in order except to strike or to reduce amounts of money or to provide limitations. An item or matter stricken from an omnibus bill may not thereafter during the same session of Congress be included in an omnibus bill. Upon passage such an omnibus bill shall be resolved into the several bills and resolutions of which it is composed. The several bills and resolutions, with any amendments adopted by the House, shall be engrossed, when necessary, and otherwise considered as passed severally by the House as distinct bills and resolutions.

(c) The Speaker may not entertain a reservation of the right to object to the consideration of a bill or resolution under this clause. A bill or resolution considered under this clause shall be considered in the House as in the Committee of the Whole. A motion to dispense with the call of the Private Calendar under this clause shall be privileged. Debate on such a motion shall be limited to five minutes in support and five minutes in opposition.

Calendar Call of Committees, Wednesdays

6. (a) On Wednesday of each week, business shall not be in order before completion of the call of those committees (except as provided by clause 4 of rule XIV) whose chair, or other member authorized by the committee, has announced to the House a request for such call on the preceding legislative day.

(b) A bill or resolution on either the House or the Union Calendar, except bills or resolutions that are privileged under the Rules of the House, may be called under this clause. A bill or resolution called up from the Union Calendar shall be considered in the Committee of the Whole House on the state of the Union without motion, subject to clause 3 of rule XVI. General debate on a measure considered under this clause shall be confined to the measure and may not exceed two hours equally divided between a proponent and an opponent.

(c) This clause does not apply during the last two weeks of a session of Congress.

(d) Precedents, rulings, or procedures in effect before the One Hundred Eleventh Congress regarding the priority of business and the availability of other business on Wednesday shall be applied only to the extent consistent with this clause.

RULE XVI

MOTIONS AND AMENDMENTS

Motions

1. Every motion entertained by the Speaker shall be reduced to writing on the demand of a Member, Delegate, or Resident Commissioner and, unless it is withdrawn the same day, shall be entered on the Journal with the name of

the Member, Delegate, or Resident Commissioner offering it. A dilatory motion may not be entertained by the Speaker.

Withdrawal

2. When a motion is entertained, the Speaker shall state it or cause it to be read aloud by the Clerk before it is debated. The motion then shall be in the possession of the House but may be withdrawn at any time before a decision or amendment thereon.

Question of consideration

3. When a motion or proposition is entertained, the question, "Will the House now consider it?" may not be put unless demanded by a Member, Delegate, or Resident Commissioner.

Precedence of motions

4. (a) When a question is under debate, only the following motions may be entertained (which shall have precedence in the following order):

- (1) To adjourn.
- (2) To lay on the table.
- (3) For the previous question.
- (4) To postpone to a day certain.
- (5) To refer.
- (6) To amend.
- (7) To postpone indefinitely.

(b) A motion to adjourn, to lay on the table, or for the previous question shall be decided without debate. A motion to postpone to a day certain, to refer, or to postpone indefinitely, being decided, may not be allowed again on the same day at the same stage of the question.

(c)(1) It shall be in order at any time for the Speaker, in the discretion of the Speaker, to entertain a motion—

(A) that the Speaker be authorized to declare a recess; or

(B) that when the House adjourns it stand adjourned to a day and time certain.

(2) Either motion shall be of equal privilege with the motion to adjourn and shall be decided without debate.

Divisibility

5. (a) Except as provided in paragraph (b), a question shall be divided on the demand of a Member, Delegate, or Resident Commissioner before the question is put if it includes propositions so distinct in substance that, one being taken away, a substantive proposition remains.

(b)(1) A motion or resolution to elect members to a standing committee of the House, or to a joint standing committee, is not divisible.

(2) A resolution or order reported by the Committee on Rules providing a special order of business is not divisible.

(c) A motion to strike and insert is not divisible, but rejection of a motion to strike does not preclude another motion to amend.

Amendments

6. When an amendable proposition is under consideration, a motion to amend and a motion to amend that amendment shall be in order, and it

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also shall be in order to offer a further amendment by way of substitute for the original motion to amend, to which one amendment may be offered but which may not be voted on until the original amendment is perfected. An amendment may be withdrawn in the House at any time before a decision or amendment thereon. An amendment to the title of a bill or resolution shall not be in order until after its passage or adoption and shall be decided without debate.

Germaneness

7. No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.

Readings

8. Bills and joint resolutions are subject to readings as follows:

(a) A first reading is in full when the bill or joint resolution is first considered.

(b) A second reading occurs only when the bill or joint resolution is read for amendment in a Committee of the Whole House on the state of the Union under clause 5 of rule XVIII.

(c) A third reading precedes passage when the Speaker states the question: "Shall the bill [or joint resolution] be engrossed [when applicable] and read a third time?" If that question is decided in the affirmative, then the bill or joint resolution shall be read the final time by title and then the question shall be put on its passage.

RULE XVII

DECORUM AND DEBATE

Decorum

1. (a) A Member, Delegate, or Resident Commissioner who desires to speak or deliver a matter to the House shall respectfully address the Speaker and, on being recognized, may address the House from any place on the floor. When invited by the Chair, a Member, Delegate, or Resident Commissioner may speak from the Clerk's desk.

(b) Remarks in debate (which may include references to the Senate or its Members) shall be confined to the question under debate, avoiding personality.

Recognition

2. When two or more Members, Delegates, or the Resident Commissioner seek recognition, the Speaker shall name the Member, Delegate, or Resident Commissioner who is first to speak. A Member, Delegate, or Resident Commissioner may not occupy more than one hour in debate on a question in the House or in the Committee of the Whole House on the state of the Union except as otherwise provided in this rule.

Managing debate

3. (a) The Member, Delegate, or Resident Commissioner who calls up a measure may open and close debate

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thereon. When general debate extends beyond one day, that Member, Delegate, or Resident Commissioner shall be entitled to one hour to close without regard to the time used in opening.

(b) Except as provided in paragraph (a), a Member, Delegate, or Resident Commissioner may not speak more than once to the same question without leave of the House.

(c) A manager of a measure who opposes an amendment thereto is entitled to close controlled debate thereon.

Call to order

4. (a) If a Member, Delegate, or Resident Commissioner, in speaking or otherwise, transgresses the Rules of the House, the Speaker shall, or a Member, Delegate, or Resident Commissioner may, call to order the offending Member, Delegate, or Resident Commissioner, who shall immediately sit down unless permitted on motion of another Member, Delegate, or the Resident Commissioner to explain. If a Member, Delegate, or Resident Commissioner is called to order, the Member, Delegate, or Resident Commissioner making the call to order shall indicate the words excepted to, which shall be taken down in writing at the Clerk's desk and read aloud to the House.

(b) The Speaker shall decide the validity of a call to order. The House, if appealed to, shall decide the question without debate. If the decision is in favor of the Member, Delegate, or Resident Commissioner called to order, the Member, Delegate, or Resident Commissioner shall be at liberty to proceed, but not otherwise. If the case requires it, an offending Member, Delegate, or Resident Commissioner shall be liable to censure or such other punishment as the House may consider proper. A Member, Delegate, or Resident Commissioner may not be held to answer a call to order, and may not be subject to the censure of the House therefor, if further debate or other business has intervened.

Comportment

5. When the Speaker is putting a question or addressing the House, a Member, Delegate, or Resident Commissioner may not exit or cross the Hall. When a Member, Delegate, or Resident Commissioner is speaking, a Member, Delegate, or Resident Commissioner may not pass between the person speaking and the Chair. During the session of the House, a Member, Delegate, or Resident Commissioner may not wear a hat or remain by the Clerk's desk during the call of the roll or the counting of ballots. A person on the floor of the House may not smoke or use a mobile electronic device that impairs decorum. The Sergeant-at-Arms is charged with the strict enforcement of this clause.

Exhibits

6. When the use of an exhibit in debate is objected to by a Member, Delegate, or Resident Commissioner, the Chair, in the discretion of the Chair,

may submit the question of its use to the House without debate.

Galleries

7. During a session of the House, it shall not be in order for a Member, Delegate, or Resident Commissioner to introduce to or to bring to the attention of the House an occupant in the galleries of the House. The Speaker may not entertain a request for the suspension of this rule by unanimous consent or otherwise.

Congressional Record

8. (a) The Congressional Record shall be a substantially verbatim account of remarks made during the proceedings of the House, subject only to technical, grammatical, and typographical corrections authorized by the Member, Delegate, or Resident Commissioner making the remarks.

(b) Unparliamentary remarks may be deleted only by permission or order of the House.

(c) This clause establishes a standard of conduct within the meaning of clause 3(a)(2) of rule XI.

Legislative Proceedings

9.(a) A Member, Delegate, the Resident Commissioner, officer, or employee of the House may not engage in disorderly or disruptive conduct in the Chamber, including—

(1) intentionally obstructing or impeding the passage of others in the Chamber;

(2) the use of an exhibit to impede, disrupt, or disturb the proceedings of the House; and

(3) the denial of legislative instruments to others seeking to engage in legislative proceedings.

(b) This clause establishes a standard of conduct within the meaning of clause 3(a)(2) of rule XI.

Secret sessions

10. When confidential communications are received from the President, or when the Speaker or a Member, Delegate, or Resident Commissioner informs the House that such individual has communications that such individual believes ought to be kept secret for the present, the House shall be cleared of all persons except the Members, Delegates, Resident Commissioner, and officers of the House for the reading of such communications, and debates and proceedings thereon, unless otherwise ordered by the House.

RULE XVIII

THE COMMITTEE OF THE WHOLE HOUSE ON THE STATE OF THE UNION

Resolving into the Committee of the Whole

1. Whenever the House resolves into the Committee of the Whole House on the state of the Union, the Speaker shall leave the chair after appointing a Member, Delegate, or the Resident Commissioner as Chair to preside. In case of disturbance or disorderly conduct in the galleries or lobby, the Chair may cause the same to be cleared.

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2. (a) Except as provided in paragraph (b) and in clause 6 of rule XV, the House resolves into the Committee of the Whole House on the state of the Union by motion. When such a motion is entertained, the Speaker shall put the question without debate: "Shall the House resolve itself into the Committee of the Whole House on the state of the Union for consideration of this matter?"; naming it.

(b) After the House has adopted a resolution reported by the Committee on Rules providing a special order of business for the consideration of a measure in the Committee of the Whole House on the state of the Union, the Speaker may at any time, when no question is pending before the House, declare the House resolved into the Committee of the Whole for the consideration of that measure without intervening motion, unless the special order of business provides otherwise.

Measures requiring initial consideration in the Committee of the Whole

3. All public bills, resolutions, or Senate amendments (as provided in clause 3 of rule XXII) involving a tax or charge on the people, raising revenue, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, or releasing any liability to the United States for money or property, shall be first considered in the Committee of the Whole House on the state of the Union. A bill, resolution, or Senate amendment that fails to comply with this clause is subject to a point of order against its consideration.

Order of business

4. (a) Subject to subparagraph (b) business on the calendar of the Committee of the Whole House on the state of the Union may be taken up in regular order, or in such order as the Committee may determine, unless the measure to be considered was determined by the House at the time of resolving into the Committee of the Whole.

(b) Motions to resolve into the Committee of the Whole for consideration of bills and joint resolutions making general appropriations have precedence under this clause.

Reading for amendment

5. (a) Before general debate commences on a measure in the Committee of the Whole House on the state of the Union, it shall be read in full. When general debate is concluded or closed by order of the House, the measure under consideration shall be read for amendment. A Member, Delegate, or Resident Commissioner who offers an amendment shall be allowed five minutes to explain it, after which the Member, Delegate, or Resident Commissioner who shall first obtain the floor shall be allowed five minutes to speak in opposition to it. There shall

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be no further debate thereon, but the same privilege of debate shall be allowed in favor of and against any amendment that may be offered to an amendment. An amendment, or an amendment to an amendment, may be withdrawn by its proponent only by the unanimous consent of the Committee of the Whole.

(b) When a Member, Delegate, or Resident Commissioner offers an amendment in the Committee of the Whole House on the state of the Union, the Clerk shall promptly transmit five copies of the amendment to the majority committee table and five copies to the minority committee table. The Clerk also shall deliver at least one copy of the amendment to the majority cloakroom and at least one copy to the minority cloakroom.

Quorum and voting

6. (a) A quorum of a Committee of the Whole House on the state of the Union is 100 Members. The first time that a Committee of the Whole finds itself without a quorum during a day, the Chair shall invoke the procedure for a quorum call set forth in clause 2 of rule XX, unless the Chair elects to invoke an alternate procedure set forth in clause 3 or clause 4(a) of rule XX. If a quorum appears, the Committee of the Whole shall continue its business. If a quorum does not appear, the Committee of the Whole shall rise, and the Chair shall report the names of absentees to the House.

(b)(1) The Chair may refuse to entertain a point of order that a quorum is not present during general debate.

(2) After a quorum has once been established on a day, the Chair may entertain a point of order that a quorum is not present only when the Committee of the Whole House on the state of the Union is operating under the five-minute rule and the Chair has put the pending proposition to a vote.

(3) Upon sustaining a point of order that a quorum is not present, the Chair may announce that, following a regular quorum call under paragraph (a), the minimum time for electronic voting on the pending question shall be not less than two minutes.

(c) When ordering a quorum call in the Committee of the Whole House on the state of the Union, the Chair may announce an intention to declare that a quorum is constituted at any time during the quorum call when the Chair determines that a quorum has appeared. If the Chair interrupts the quorum call by declaring that a quorum is constituted, proceedings under the quorum call shall be considered as vacated, and the Committee of the Whole shall continue its sitting and resume its business.

(d) A quorum is not required in the Committee of the Whole House on the state of the Union for adoption of a motion that the Committee rise.

(e) In the Committee of the Whole House on the state of the Union, the Chair shall order a recorded vote on a

request supported by at least 25 Members.

(f) In the Committee of the Whole House on the state of the Union, the Chair may reduce to not less than two minutes the minimum time for electronic voting without any intervening business or debate on any or all pending amendments after a record vote has been taken on the first pending amendment.

(g) The Chair may postpone a request for a recorded vote on any amendment. The Chair may resume proceedings on a postponed request at any time. The Chair may reduce to not less than two minutes the minimum time for electronic voting—

(1) on any postponed question that follows another electronic vote without intervening business, provided that the minimum time for electronic voting on the first in any series of questions shall be 15 minutes; or

(2) on any postponed question taken without intervening debate or motion after the Committee of the Whole resumes its sitting if in the discretion of the Chair Members would be afforded an adequate opportunity to vote.

Dispensing with the reading of an amendment

7. It shall be in order in the Committee of the Whole House on the state of the Union to move that the Committee of the Whole dispense with the reading of an amendment that has been printed in the bill or resolution as reported by a committee, or an amendment that a Member, Delegate, or Resident Commissioner has caused to be printed in the Congressional Record. Such a motion shall be decided without debate.

Closing debate

8. (a) Subject to paragraph (b) at any time after the Committee of the Whole House on the state of the Union has begun five-minute debate on amendments to any portion of a bill or resolution, it shall be in order to move that the Committee of the Whole close all debate on that portion of the bill or resolution or on the pending amendments only. Such a motion shall be decided without debate. The adoption of such a motion does not preclude further amendment, to be decided without debate.

(b) If the Committee of the Whole House on the state of the Union closes debate on any portion of a bill or resolution before there has been debate on an amendment that a Member, Delegate, or Resident Commissioner has caused to be printed in the Congressional Record at least one day before its consideration, the Member, Delegate, or Resident Commissioner who caused the amendment to be printed in the Record shall be allowed five minutes to explain it, after which the Member, Delegate, or Resident Commissioner who shall first obtain the floor shall be allowed five minutes to

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speak in opposition to it. There shall be no further debate thereon.

(c) Material submitted for printing in the Congressional Record under this clause shall indicate the full text of the proposed amendment, the name of the Member, Delegate, or Resident Commissioner proposing it, the number of the bill or resolution to which it will be offered, and the point in the bill or resolution or amendment thereto where the amendment is intended to be offered. The amendment shall appear in a portion of the Record designated for that purpose. Amendments to a specified measure submitted for printing in that portion of the Record shall be numbered in the order printed.

Striking the enacting clause

9. A motion that the Committee of the Whole House on the state of the Union rise and report a bill or resolution to the House with the recommendation that the enacting or resolving clause be stricken shall have precedence of a motion to amend, and, if carried in the House, shall constitute a rejection of the bill or resolution. Whenever a bill or resolution is reported from the Committee of the Whole with such adverse recommendation and the recommendation is rejected by the House, the bill or resolution shall stand recommitted to the Committee of the Whole without further action by the House. Before the question of concurrence is submitted, it shall be in order to move that the House refer the bill or resolution to a committee, with or without instructions. If a bill or resolution is so referred, then when it is again reported to the House it shall be referred to the Committee of the Whole without debate.

Concurrent resolution on the budget

10. (a) At the conclusion of general debate in the Committee of the Whole House on the state of the Union on a concurrent resolution on the budget under section 305(a) of the Congressional Budget Act of 1974, the concurrent resolution shall be considered as read for amendment.

(b) It shall not be in order in the House or in the Committee of the Whole House on the state of the Union to consider an amendment to a concurrent resolution on the budget, or an amendment thereto, unless the concurrent resolution, as amended by such amendment or amendments—

(1) would be mathematically consistent except as limited by paragraph (c); and

(2) would contain all the matter set forth in paragraphs (1) through (5) of section 301(a) of the Congressional Budget Act of 1974.

(c)(1) Except as specified in subparagraph (2), it shall not be in order in the House or in the Committee of the Whole House on the state of the Union to consider an amendment to a concurrent resolution on the budget, or an amendment thereto, that proposes to change the amount of the appropriate

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level of the public debt set forth in the concurrent resolution, as reported.

(2) Amendments to achieve mathematical consistency under section 305(a)(5) of the Congressional Budget Act of 1974, if offered by direction of the Committee on the Budget, may propose to adjust the amount of the appropriate level of the public debt set forth in the concurrent resolution, as reported, to reflect changes made in other figures contained in the concurrent resolution.

Applicability of Rules of the House

11. The Rules of the House are the rules of the Committee of the Whole House on the state of the Union so far as applicable.

RULE XIX

MOTIONS FOLLOWING THE AMENDMENT STAGE

Previous question

1. (a) There shall be a motion for the previous question, which, being ordered, shall have the effect of cutting off all debate and bringing the House to a direct vote on the immediate question or questions on which it has been ordered. Whenever the previous question has been ordered on an otherwise debatable question on which there has been no debate, it shall be in order to debate that question for 40 minutes, equally divided and controlled by a proponent of the question and an opponent. The previous question may be moved and ordered on a single question, on a series of questions allowable under the rules, or on an amendment or amendments, or may embrace all authorized motions or amendments and include the bill or resolution to its passage, adoption, or rejection.

(b) Incidental questions of order arising during the pendency of a motion for the previous question shall be decided, whether on appeal or otherwise, without debate.

(c) Notwithstanding paragraph (a), when the previous question is operating to adoption or passage of a measure pursuant to a special order of business, the Chair may postpone further consideration of such measure in the House to such time as may be designated by the Speaker.

Recommit

2. (a) After the previous question has been ordered on passage or adoption of a measure, or pending a motion to that end, it shall be in order to move that the House recommit (or commit, as the case may be) the measure, with or without instructions, to a standing or select committee. For such a motion to recommit, the Speaker shall give preference in recognition to a Member, Delegate, or Resident Commissioner who is opposed to the measure.

(b)(1) Except as provided in paragraph (c), a motion that the House recommit a bill or joint resolution on which the previous question has been ordered to passage shall be debatable for 10 minutes equally divided between the proponent and an opponent.

(2) A motion to recommit a bill or joint resolution may include instructions only in the form of a direction to report an amendment or amendments back to the House forthwith.

(c) On demand of the floor manager for the majority, it shall be in order to debate the motion for one hour equally divided and controlled by the proponent and an opponent.

Reconsideration

3. When a motion has been carried or lost, it shall be in order on the same or succeeding day for a Member on the prevailing side of the question to enter a motion for the reconsideration thereof. The entry of such a motion shall take precedence over all other questions except the consideration of a conference report or a motion to adjourn, and may not be withdrawn after such succeeding day without the consent of the House. Once entered, a motion may be called up for consideration by any Member. During the last six days of a session of Congress, such a motion shall be disposed of when entered.

4. A bill, petition, memorial, or resolution referred to a committee, or reported therefrom for printing and recommitment, may not be brought back to the House on a motion to reconsider.

RULE XX

VOTING AND QUORUM CALLS

1. (a) The House shall divide after the Speaker has put a question to a vote by voice as provided in clause 6 of rule I if the Speaker is in doubt or division is demanded. Those in favor of the question shall first rise or otherwise indicate from their seats and be counted, and then those opposed.

(b) If a Member, Delegate, or Resident Commissioner requests a recorded vote, and that request is supported by at least one-fifth of a quorum, the vote shall be taken by electronic device unless the Speaker invokes another procedure for recording votes provided in this rule. A recorded vote taken in the House under this paragraph shall be considered a vote by the yeas and nays.

(c) In case of a tie vote, a question shall be lost.

2. (a) Unless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device. In such a case the Clerk shall enter on the Journal and publish in the Congressional Record, in alphabetical order in each category, the names of Members recorded as voting in the affirmative, the names of Members recorded as voting in the negative, and the names of Members answering present as if they had been called in the manner provided in clause 3. Except as otherwise permitted under clause 8 or 9 of this rule or under clause 6 of rule XVIII, the minimum time for a record vote or quorum call by electronic device shall be 15 minutes.

(b) When the electronic voting system is inoperable or is not used, the Speaker or Chair may direct the Clerk

to conduct a record vote or quorum call as provided in clause 3 or 4.

3. The Speaker may direct the Clerk to conduct a record vote or quorum call by call of the roll. In such a case the Clerk shall call the names of Members, alphabetically by surname. When two or more have the same surname, the name of the State (and, if necessary to distinguish among Members from the same State, the given names of the Members) shall be added. After the roll has been called once, the Clerk shall call the names of those not recorded, alphabetically by surname. Members appearing after the second call, but before the result is announced, may vote or announce a pair.

4. (a) The Speaker may direct a record vote or quorum call to be conducted by tellers. In such a case the tellers named by the Speaker shall record the names of the Members voting on each side of the question or record their presence, as the case may be, which the Clerk shall enter on the Journal and publish in the Congressional Record. Absentees shall be noted, but the doors may not be closed except when ordered by the Speaker. The minimum time for a record vote or quorum call by tellers shall be 15 minutes.

(b) On the demand of a Member, or at the suggestion of the Speaker, the names of Members sufficient to make a quorum in the Hall of the House who do not vote shall be noted by the Clerk, entered on the Journal, reported to the Speaker with the names of the Members voting, and be counted and announced in determining the presence of a quorum to do business.

5. (a) In the absence of a quorum, a majority comprising at least 15 Members, which may include the Speaker, may compel the attendance of absent Members.

(b) Subject to clause 7(b) a majority described in paragraph (a) may order the Sergeant-at-Arms to send officers appointed by the Sergeant-at-Arms to arrest those Members for whom no sufficient excuse is made and shall secure and retain their attendance. The House shall determine on what condition they shall be discharged. Unless the House otherwise directs, the Members who voluntarily appear shall be admitted immediately to the Hall of the House and shall report their names to the Clerk to be entered on the Journal as present.

(c)(1) If the House should be without a quorum due to catastrophic circumstances, then—

(A) until there appear in the House a sufficient number of Representatives to constitute a quorum among the whole number of the House, a quorum in the House shall be determined based upon the provisional number of the House; and

(B) the provisional number of the House, as of the close of the call of the House described in subparagraph (3)(C), shall be the number of Rep-

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representatives responding to that call of the House.

(2) If a Representative counted in determining the provisional number of the House thereafter ceases to be a Representative, or if a Representative not counted in determining the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.

(3) For the purposes of subparagraph (1), the House shall be considered to be without a quorum due to catastrophic circumstances if, after a motion under paragraph (a) has been disposed of and without intervening adjournment, each of the following occurs in the stated sequence:

(A) A call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 72 hours (excluding time the House is in recess) without producing a quorum.

(B) The Speaker—

(i) with the Majority Leader and the Minority Leader (or their respective designees), receives from the Sergeant-at-Arms (or a designee) a catastrophic quorum failure report, as described in subparagraph (4);

(ii) consults with the Majority Leader and the Minority Leader (or their respective designees) on the content of that report; and

(iii) announces the content of that report to the House.

(C) A further call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 24 hours (excluding time the House is in recess) without producing a quorum.

(4)(A) For purposes of subparagraph (3), a catastrophic quorum failure report is a report advising that the inability of the House to establish a quorum is attributable to catastrophic circumstances involving natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House.

(B) Such report shall specify the following:

(i) The number of vacancies in the House and the names of former Representatives whose seats are vacant.

(ii) The names of Representatives considered incapacitated.

(iii) The names of Representatives not incapacitated but otherwise incapable of attending the proceedings of the House.

(iv) The names of Representatives unaccounted for.

(C) Such report shall be prepared on the basis of the most authoritative information available after consultation with the Attending Physician to the Congress and the Clerk (or their respective designees) and pertinent public health and law enforcement officials.

(D) Such report shall be updated every legislative day for the duration of any proceedings under or in reliance

on this paragraph. The Speaker shall make such updates available to the House.

(5) An announcement by the Speaker under subparagraph (3)(B)(iii) shall not be subject to appeal.

(6) Subparagraph (1) does not apply to a proposal to create a vacancy in the representation from any State in respect of a Representative not incapacitated but otherwise incapable of attending the proceedings of the House.

(7) For purposes of this paragraph:

(A) The term “provisional number of the House” means the number of Representatives upon which a quorum will be computed in the House until Representatives sufficient in number to constitute a quorum among the whole number of the House appear in the House.

(B) The term “whole number of the House” means the number of Representatives chosen, sworn, and living whose membership in the House has not been terminated by resignation or by the action of the House.

(d) Upon the death, resignation, expulsion, disqualification, removal, or swearing of a Member, the whole number of the House shall be adjusted accordingly. The Speaker shall announce the adjustment to the House. Such an announcement shall not be subject to appeal. In the case of a death, the Speaker may lay before the House such documentation from Federal, State, or local officials as the Speaker deems pertinent.

6. (a) When a quorum fails to vote on a question, a quorum is not present, and objection is made for that cause (unless the House shall adjourn)—

(1) there shall be a call of the House;

(2) the Sergeant-at-Arms shall proceed forthwith to bring in absent Members; and

(3) the yeas and nays on the pending question shall at the same time be considered as ordered.

(b) The Clerk shall record Members by the yeas and nays on the pending question, using such procedure as the Speaker may invoke under clause 2, 3, or 4. Each Member arrested under this clause shall be brought by the Sergeant-at-Arms before the House, whereupon the Member shall be noted as present, discharged from arrest, and given an opportunity to vote; and such vote shall be recorded. If those voting on the question and those who are present and decline to vote together make a majority of the House, the Speaker shall declare that a quorum is constituted, and the pending question shall be decided as the requisite majority of those voting shall have determined. Thereupon further proceedings under the call shall be considered as dispensed with.

(c) At any time after Members have had the requisite opportunity to respond by the yeas and nays ordered under this clause, but before a result has been announced, a motion that the House adjourn shall be in order if sec-

onded by a majority of those present, to be ascertained by actual count by the Speaker. If the House adjourns on such a motion, all proceedings under this clause shall be considered as vacated.

7. (a) The Speaker may not entertain a point of order that a quorum is not present unless a question has been put to a vote.

(b) Subject to paragraph (c) the Speaker may recognize a Member, Delegate, or Resident Commissioner to move a call of the House at any time. When a quorum is established pursuant to a call of the House, further proceedings under the call shall be considered as dispensed with unless the Speaker recognizes for a motion to compel attendance of Members under clause 5(b).

(c) A call of the House shall not be in order after the previous question is ordered unless the Speaker determines by actual count that a quorum is not present.

Postponement of proceedings

8. (a)(1) When a recorded vote is ordered, or the yeas and nays are ordered, or a vote is objected to under clause 6—

(A) on any of the questions specified in subparagraph (2), the Speaker may postpone further proceedings to a designated place in the legislative schedule within two additional legislative days; and

(B) on the question of agreeing to the Speaker's approval of the Journal, the Speaker may postpone further proceedings to a designated place in the legislative schedule on that legislative day.

(2) The questions described in subparagraph (1) are as follows:

(A) The question of passing a bill or joint resolution.

(B) The question of adopting a resolution or concurrent resolution.

(C) The question of agreeing to a motion to instruct managers on the part of the House (except that proceedings may not resume on such a motion under clause 7(c) of rule XXII if the managers have filed a report in the House).

(D) The question of agreeing to a conference report.

(E) The question of adopting a motion to recommit.

(F) The question of adopting a motion to concur in a Senate amendment, with or without amendment.

(G) The question of ordering the previous question on a question described in subdivisions (A) through (F).

(H) The question of agreeing to a motion to suspend the rules.

(I) The question of agreeing to a motion to reconsider or the question of agreeing to a motion to lay on the table a motion to reconsider.

(J) The question of agreeing to an amendment reported from the Committee of the Whole.

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(b) At the time designated by the Speaker for further proceedings on questions postponed under paragraph (a), the Speaker shall resume proceedings on each postponed question.

(c) The Speaker may reduce to five minutes the minimum time for electronic voting on a question postponed under this clause, or on a question incidental thereto, that—

(1) follows another electronic vote without intervening business, so long as the minimum time for electronic voting on the first in any series of questions is 15 minutes; or

(2) follows a report from the Committee of the Whole without intervening debate or motion if in the discretion of the Speaker Members would be afforded an adequate opportunity to vote.

(d) If the House adjourns on a legislative day designated for further proceedings on questions postponed under this clause without disposing of such questions, then on the next legislative day the unfinished business is the disposition of such questions.

Five-minute votes

9. The Speaker may reduce to five minutes the minimum time for electronic voting—

(a) on any question arising without intervening business after an electronic vote on another question if notice of possible five-minute voting for a given series of votes was issued before the preceding electronic vote; or

(b) if in the discretion of the Speaker Members would be afforded an adequate opportunity to vote—

(1) on any question arising after a report from the Committee of the Whole without debate or intervening motion; or

(2) on the question of adoption of a motion to recommit (or ordering the previous question thereon) arising without intervening motion or debate other than debate on the motion.

Automatic yeas and nays

10. The yeas and nays shall be considered as ordered when the Speaker puts the question on passage of a bill or joint resolution, or on adoption of a conference report, making general appropriations, or increasing Federal income tax rates (within the meaning of clause 5 of rule XXI), or on final adoption of a concurrent resolution on the budget or conference report thereon.

Ballot votes

11. In a case of ballot for election, a majority of the votes shall be necessary to an election. When there is not such a majority on the first ballot, the process shall be repeated until a majority is obtained. In all balloting blanks shall be rejected, may not be counted in the enumeration of votes, and may not be reported by the tellers.

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RULE XXI

RESTRICTIONS ON CERTAIN BILLS

Reservation of certain points of order

1. At the time a general appropriation bill is reported, all points of order against provisions therein shall be considered as reserved.

General appropriation bills and amendments

2. (a)(1) An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress.

(2) A reappropriation of unexpended balances of appropriations may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, except to continue appropriations for public works and objects that are already in progress. This subparagraph does not apply to transfers of unexpended balances within the department or agency for which they were originally appropriated that are reported by the Committee on Appropriations.

(b) A provision changing existing law may not be reported in a general appropriation bill, including a provision making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation, except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill (which may include those recommended to the Committee on Appropriations by direction of a legislative committee having jurisdiction over the subject matter) and except rescissions of appropriations contained in appropriation Acts.

(c) An amendment to a general appropriation bill shall not be in order if changing existing law, including an amendment making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation. Except as provided in paragraph (d), an amendment proposing a limitation not specifically contained or authorized in existing law for the period of the limitation shall not be in order during consideration of a general appropriation bill.

(d) After a general appropriation bill has been read for amendment, a motion that the Committee of the Whole House on the state of the Union rise and report the bill to the House with such amendments as may have been adopted shall, if offered by the Majority Leader or a designee, have precedence over motions to amend the bill. If such a motion to rise and report is rejected or not offered, amendments proposing limitations not specifically contained or authorized in existing law for the period of the limitation or proposing germane amendments that re-

trench expenditures by reductions of amounts of money covered by the bill may be considered.

(e) A provision other than an appropriation designated an emergency under section 251(b)(2) or section 252(e) of the Balanced Budget and Emergency Deficit Control Act, a rescission of budget authority, or a reduction in direct spending or an amount for a designated emergency may not be reported in an appropriation bill or joint resolution containing an emergency designation under section 251(b)(2) or section 252(e) of such Act and may not be in order as an amendment thereto.

(f) During the reading of an appropriation bill for amendment in the Committee of the Whole House on the state of the Union, it shall be in order to consider en bloc amendments proposing only to transfer appropriations among objects in the bill without increasing the levels of budget authority or outlays in the bill. When considered en bloc under this paragraph, such amendments may amend portions of the bill not yet read for amendment (following disposition of any points of order against such portions) and are not subject to a demand for division of the question in the House or in the Committee of the Whole.

(g) An amendment to a general appropriation bill shall not be in order if proposing a net increase in the level of budget authority in the bill.

3. It shall not be in order to consider a general appropriation bill or joint resolution, or conference report thereon, that—

(a) provides spending authority derived from receipts deposited in the Highway Trust Fund (excluding any transfers from the General Fund of the Treasury); or

(b) reduces or otherwise limits the accruing balances of the Highway Trust Fund,

for any purpose other than for those activities authorized for the highway or mass transit categories.

Appropriations on legislative bills

4. A bill or joint resolution carrying an appropriation may not be reported by a committee not having jurisdiction to report appropriations, and an amendment proposing an appropriation shall not be in order during the consideration of a bill or joint resolution reported by a committee not having that jurisdiction. A point of order against an appropriation in such a bill, joint resolution, or amendment thereto may be raised at any time during pendency of that measure for amendment.

Tax and tariff measures and amendments

5. (a)(1) A bill or joint resolution carrying a tax or tariff measure may not be reported by a committee not having jurisdiction to report tax or tariff measures, and an amendment in the House or proposed by the Senate carrying a tax or tariff measure shall not be in order during the consideration of a bill or joint resolution reported by a

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committee not having that jurisdiction. A point of order against a tax or tariff measure in such a bill, joint resolution, or amendment thereto may be raised at any time during pendency of that measure for amendment.

(2) For purposes of paragraph (1), a tax or tariff measure includes an amendment proposing a limitation on funds in a general appropriation bill for the administration of a tax or tariff.

Passage of tax rate increases

(b) A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present. In this paragraph the term "Federal income tax rate increase" means any amendment to subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b), of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and thereby increases the amount of tax imposed by any such section.

Consideration of retroactive tax rate increases

(c) It shall not be in order to consider a bill, joint resolution, amendment, or conference report carrying a retroactive Federal income tax rate increase. In this paragraph—

(1) the term "Federal income tax rate increase" means any amendment to subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b), of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and thereby increases the amount of tax imposed by any such section; and

(2) a Federal income tax rate increase is retroactive if it applies to a period beginning before the enactment of the provision.

Designation of public works

6. It shall not be in order to consider a bill, joint resolution, amendment, or conference report that provides for the designation or redesignation of a public work in honor of an individual then serving as a Member, Delegate, Resident Commissioner, or Senator.

7. It shall not be in order to consider a concurrent resolution on the budget, or an amendment thereto, or a conference report thereon that contains reconciliation directives under section 310 of the Congressional Budget Act of 1974 that specify changes in law such that the reconciliation legislation reported pursuant to such directives would cause an increase in net direct spending (as such term is defined in clause 10) for the period covered by such concurrent resolution.

8. With respect to measures considered pursuant to a special order of business, points of order under title III of the Congressional Budget Act of 1974 shall operate without regard to whether the measure concerned has been reported from committee. Such points of

order shall operate with respect to (as the case may be)—

(a) the form of a measure recommended by the reporting committee where the statute uses the term "as reported" (in the case of a measure that has been so reported);

(b) the form of the measure made in order as an original bill or joint resolution for the purpose of amendment; or

(c) the form of the measure on which the previous question is ordered directly to passage.

9. (a) It shall not be in order to consider—

(1) a bill or joint resolution reported by a committee unless the report includes a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the bill or in the report (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the committee for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits;

(2) a bill or joint resolution not reported by a committee unless the chair of each committee of initial referral has caused a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the bill (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the committee for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits to be printed in the Congressional Record prior to its consideration;

(3) an amendment to a bill or joint resolution to be offered at the outset of its consideration for amendment by a member of a committee of initial referral as designated in a report of the Committee on Rules to accompany a resolution prescribing a special order of business unless the proponent has caused a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the amendment (and the name of any Member, Delegate, or Resident Commissioner who submitted a request to the proponent for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits to be printed in the Congressional Record prior to its consideration; or

(4) a conference report to accompany a bill or joint resolution unless the joint explanatory statement prepared by the managers on the part of the House and the managers on the part of the Senate includes a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the conference report or joint statement (and the name of any Member, Delegate, Resident Commis-

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sioner, or Senator who submitted a request to the House or Senate committees of jurisdiction for each respective item included in such list) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits.

(b) It shall not be in order to consider a conference report to accompany a regular general appropriation bill unless the joint explanatory statement prepared by the managers on the part of the House and the managers on the part of the Senate includes—

(1) a list of congressional earmarks, limited tax benefits, and limited tariff benefits in the conference report or joint statement (and the name of any Member, Delegate, Resident Commissioner, or Senator who submitted a request to the House or Senate committees of jurisdiction for each respective item included in such list) that were neither committed to the conference committee by either House nor in a report of a committee of either House on such bill or on a companion measure; or

(2) a statement that the proposition contains no such congressional earmarks, limited tax benefits, or limited tariff benefits.

(c) It shall not be in order to consider a rule or order that waives the application of paragraph (a) or (b). As disposition of a point of order under this paragraph or paragraph (b), the Chair shall put the question of consideration with respect to the rule or order or conference report, as applicable. The question of consideration shall be debatable for 10 minutes by the Member initiating the point of order and for 10 minutes by an opponent, but shall otherwise be decided without intervening motion except one that the House adjourn.

(d) In order to be cognizable by the Chair, a point of order raised under paragraph (a) may be based only on the failure of a report, submission to the Congressional Record, or joint explanatory statement to include a list required by paragraph (a) or a statement that the proposition contains no congressional earmarks, limited tax benefits, or limited tariff benefits.

(e) For the purpose of this clause, the term "congressional earmark" means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.

(f) For the purpose of this clause, the term "limited tax benefit" means—

(1) any revenue-losing provision that—

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(A) provides a Federal tax deduction, credit, exclusion, or preference to 10 or fewer beneficiaries under the Internal Revenue Code of 1986, and

(B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision; or

(2) any Federal tax provision which provides one beneficiary temporary or permanent transition relief from a change to the Internal Revenue Code of 1986.

(g) For the purpose of this clause, the term "limited tariff benefit" means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.

10. (a)(1) Except as provided in paragraphs (b) and (c), it shall not be in order to consider a bill or joint resolution, or an amendment thereto or a conference report thereon, if the provisions of such measure have the net effect of increasing mandatory spending for the period of either—

(A) the current year, the budget year, and the four fiscal years following that budget year; or

(B) the current year, the budget year, and the nine fiscal years following that budget year.

(2) For the purpose of this clause, the terms "budget year" and "current year" have the meanings specified in section 250 of the Balanced Budget and Emergency Deficit Control Act of 1985, and the term "mandatory spending" has the meaning of "direct spending" specified in such section 250 except that such term shall also include provisions in appropriation Acts that make outyear modifications to substantive law as described in section 3(4)(C) of the Statutory Pay-As-You-Go Act of 2010.

(b) If a bill or joint resolution, or an amendment thereto, is considered pursuant to a special order of the House directing the Clerk to add as new matter at the end of such bill or joint resolution the entire text of a separate measure or measures as passed by the House, the new matter proposed to be added shall be included in the evaluation under paragraph (a) of the bill, joint resolution, or amendment.

(c)(1) Except as provided in subparagraph (2), the evaluation under paragraph (a) shall exclude a provision expressly designated as an emergency for the Statutory Pay-As-You-Go Act of 2010, in the case of a point of order under this clause against consideration of—

(A) a bill or joint resolution;

(B) an amendment made in order as original text by a special order of business;

(C) a conference report; or

(D) an amendment between the Houses.

(2) In the case of an amendment (other than one specified in subparagraph (1)) to a bill or joint resolution, the evaluation under paragraph (a)

shall give no cognizance to any designation of emergency.

11. It shall not be in order to consider a bill or joint resolution which has not been reported by a committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which such measure has been available to Members, Delegates, and the Resident Commissioner.

12. (a)(1) Before a bill or joint resolution proposing to repeal or amend a statute or part thereof may be considered, there shall be made available on a publicly available website of the House an easily searchable electronic comparative print that shows how the bill or joint resolution proposes to change current law, showing (to the greatest extent practicable) by appropriate typographical devices the omissions and insertions proposed.

(2) Before an amendment in the nature of a substitute may be considered if the amendment proposes to repeal or amend a statute or part thereof, there shall be made available on a publicly available website of the House an easily searchable electronic comparative print that shows (to the greatest extent practicable) how the amendment proposes to change current law, showing by appropriate typographical devices the omissions and insertions proposed.

(b) If a committee reports a bill or joint resolution, before the bill or joint resolution may be considered with text different from the text reported, there shall be made available on a publicly available website of the House a document that shows, by appropriate typographical devices, the differences between the text of the bill or joint resolution as proposed to be considered and the text of the bill or joint resolution as reported.¹

RULE XXII

HOUSE AND SENATE RELATIONS

Senate amendments

1. A motion to disagree to Senate amendments to a House proposition and to request or agree to a conference with the Senate, or a motion to insist on House amendments to a Senate proposition and to request or agree to a conference with the Senate, shall be privileged in the discretion of the Speaker if offered by direction of the primary committee and of all reporting committees that had initial referral of the proposition.

2. A motion to dispose of House bills with Senate amendments not requiring consideration in the Committee of the Whole House on the state of the Union shall be privileged.

3. Except as permitted by clause 1, before the stage of disagreement, a Senate amendment to a House bill or resolution shall be subject to the point of order that it must first be considered in the Committee of the Whole

House on the state of the Union if, originating in the House, it would be subject to such a point under clause 3 of rule XVIII.

4. When the stage of disagreement has been reached on a bill or resolution with House or Senate amendments, a motion to dispose of any amendment shall be privileged.

5. (a) Managers on the part of the House may not agree to a Senate amendment described in paragraph (b) unless specific authority to agree to the amendment first is given by the House by a separate vote with respect thereto. If specific authority is not granted, the Senate amendment shall be reported in disagreement by the conference committee back to the two Houses for disposition by separate motion.

(b) The managers on the part of the House may not agree to a Senate amendment described in paragraph (a) that—

(1) would violate clause 2(a)(1) or (c) of rule XXI if originating in the House; or

(2) proposes an appropriation on a bill other than a general appropriation bill.

6. A Senate amendment carrying a tax or tariff measure in violation of clause 5(a) of rule XXI may not be agreed to.

Conference reports; amendments reported in disagreement

7. (a) The presentation of a conference report shall be in order at any time except during a reading of the Journal or the conduct of a record vote, a vote by division, or a quorum call.

(b)(1) Subject to subparagraph (2) the time allotted for debate on a motion to instruct managers on the part of the House shall be equally divided between the majority and minority parties.

(2) If the proponent of a motion to instruct managers on the part of the House and the Member, Delegate, or Resident Commissioner of the other party identified under subparagraph (1) both support the motion, one-third of the time for debate thereon shall be allotted to a Member, Delegate, or Resident Commissioner who opposes the motion on demand of that Member, Delegate, or Resident Commissioner.

(c)(1) A motion to instruct managers on the part of the House, or a motion to discharge all managers on the part of the House and to appoint new conferees, shall be privileged after a conference committee has been appointed for 45 calendar days and 25 legislative days without making a report, but only on the day after the calendar day on which the Member, Delegate, or Resident Commissioner offering the motion announces to the House intention to do so and the form of the motion.

(2) The Speaker may designate a time in the legislative schedule on that legislative day for consideration of a motion described in subparagraph (1).

¹The effective date of clause 12 is December 31, 2017.

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(3) During the last six days of a session of Congress, a motion under subparagraph (1) shall be privileged after a conference committee has been appointed for 36 hours without making a report and the proponent meets the notice requirement in subparagraph (1).

(d) Instructions to conferees in a motion to instruct or in a motion to recommit to conference may not include argument.

(e) Each conference report to the House shall be printed as a report of the House. Each such report shall be accompanied by a joint explanatory statement prepared jointly by the managers on the part of the House and the managers on the part of the Senate. The joint explanatory statement shall be sufficiently detailed and explicit to inform the House of the effects of the report on the matters committed to conference.

8. (a)(1) Except as specified in subparagraph (2), it shall not be in order to consider a conference report until—

(A) the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which the conference report and the accompanying joint explanatory statement have been available to Members, Delegates, and the Resident Commissioner in the Congressional Record or pursuant to clause 3 of rule XXIX; and

(B) printed or electronic copies of the conference report and the accompanying joint explanatory statement have been available to Members, Delegates, and the Resident Commissioner for at least two hours.

(2) Subparagraph (1)(A) does not apply during the last six days of a session of Congress.

(b)(1) Except as specified in subparagraph (2), it shall not be in order to consider a motion to dispose of a Senate amendment reported in disagreement by a conference committee until—

(A) the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which the report in disagreement and any accompanying statement have been available to Members, Delegates, and the Resident Commissioner in the Congressional Record; and

(B) copies of the report in disagreement and any accompanying statement, together with the text of the Senate amendment, have been available to Members, Delegates, and the Resident Commissioner for at least two hours.

(2) Subparagraph (1)(A) does not apply during the last six days of a session of Congress.

(3) During consideration of a Senate amendment reported in disagreement by a conference committee on a general appropriation bill, a motion to insist on disagreement to the Senate amendment shall be preferential to any other motion to dispose of that amend-

ment if the original motion offered by the floor manager proposes to change existing law and the motion to insist is offered before debate on the original motion by the chair of the committee having jurisdiction of the subject matter of the amendment or a designee. Such a preferential motion shall be separately debatable for one hour equally divided between its proponent and the proponent of the original motion. The previous question shall be considered as ordered on the preferential motion to its adoption without intervening motion.

(c) A conference report or a Senate amendment reported in disagreement by a conference committee that has been available as provided in paragraph (a) or (b) shall be considered as read when called up.

(d)(1) Subject to subparagraph (2), the time allotted for debate on a conference report or on a motion to dispose of a Senate amendment reported in disagreement by a conference committee shall be equally divided between the majority and minority parties.

(2) If the floor manager for the majority and the floor manager for the minority both support the conference report or motion, one-third of the time for debate thereon shall be allotted to a Member, Delegate, or Resident Commissioner who opposes the conference report or motion on demand of that Member, Delegate, or Resident Commissioner.

(e) Under clause 6(a)(2) of rule XIII, a resolution proposing only to waive a requirement of this clause concerning the availability of reports to Members, Delegates, and the Resident Commissioner may be considered by the House on the same day it is reported by the Committee on Rules.

9. Whenever a disagreement to an amendment has been committed to a conference committee, the managers on the part of the House may propose a substitute that is a germane modification of the matter in disagreement. The introduction of any language presenting specific additional matter not committed to the conference committee by either House does not constitute a germane modification of the matter in disagreement. Moreover, a conference report may not include matter not committed to the conference committee by either House and may not include a modification of specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific matter as committed to the conference committee.

10. (a)(1) A Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter, as specified in subparagraph (2), before the commencement of debate on—

(A) a conference report;

(B) a motion that the House recede from its disagreement to a Senate amendment reported in disagreement

by a conference committee and concur therein, with or without amendment; or

(C) a motion that the House recede from its disagreement to a Senate amendment on which the stage of disagreement has been reached and concur therein, with or without amendment.

(2) A point of order against nongermane matter is one asserting that a proposition described in subparagraph (1) contains specified matter that would violate clause 7 of rule XVI if it were offered in the House as an amendment to the underlying measure in the form it was passed by the House.

(b) If a point of order under paragraph (a) is sustained, a motion that the House reject the nongermane matter identified by the point of order shall be privileged. Such a motion is debatable for 40 minutes, one-half in favor of the motion and one-half in opposition thereto.

(c) After disposition of a point of order under paragraph (a) or a motion to reject under paragraph (b), any further points of order under paragraph (a) not covered by a previous point of order, and any consequent motions to reject under paragraph (b), shall be likewise disposed of.

(d)(1) If a motion to reject under paragraph (b) is adopted, then after disposition of all points of order under paragraph (a) and any consequent motions to reject under paragraph (b), the conference report or motion, as the case may be, shall be considered as rejected and the matter remaining in disagreement shall be disposed of under subparagraph (2) or (3), as the case may be.

(2) After the House has adopted one or more motions to reject nongermane matter contained in a conference report under the preceding provisions of this clause—

(A) if the conference report accompanied a House measure amended by the Senate, the pending question shall be whether the House shall recede and concur in the Senate amendment with an amendment consisting of so much of the conference report as was not rejected; and

(B) if the conference report accompanied a Senate measure amended by the House, the pending question shall be whether the House shall insist further on the House amendment.

(3) After the House has adopted one or more motions to reject nongermane matter contained in a motion that the House recede and concur in a Senate amendment, with or without amendment, the following motions shall be privileged and shall have precedence in the order stated:

(A) A motion that the House recede and concur in the Senate amendment with an amendment in writing then available on the floor.

(B) A motion that the House insist on its disagreement to the Senate amendment and request a further conference with the Senate.

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(C) A motion that the House insist on its disagreement to the Senate amendment.

(e) If, on a division of the question on a motion described in paragraph (a)(1)(B) or (C), the House agrees to recede, then a Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter, as specified in paragraph (a)(2), before the commencement of debate on concurring in the Senate amendment, with or without amendment. A point of order under this paragraph shall be disposed of according to the preceding provisions of this clause in the same manner as a point of order under paragraph (a).

11. It shall not be in order to consider a conference report to accompany a bill or joint resolution that proposes to amend the Internal Revenue Code of 1986 unless—

(a) the joint explanatory statement of the managers includes a tax complexity analysis prepared by the Joint Committee on Taxation in accordance with section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998; or

(b) the chair of the Committee on Ways and Means causes such a tax complexity analysis to be printed in the Congressional Record before consideration of the conference report.

12. (a)(1) Subject to subparagraph (2), a meeting of each conference committee shall be open to the public.

(2) In open session of the House, a motion that managers on the part of the House be permitted to close to the public a meeting or meetings of their conference committee shall be privileged, shall be decided without debate, and shall be decided by the yeas and nays.

(3) In conducting conferences with the Senate, managers on the part of the House should endeavor to ensure—

(A) that meetings for the resolution of differences between the two Houses occur only under circumstances in which every manager on the part of the House has notice of the meeting and a reasonable opportunity to attend;

(B) that all provisions on which the two Houses disagree are considered as open to discussion at any meeting of a conference committee; and

(C) that papers reflecting a conference agreement are held inviolate to change without renewal of the opportunity of all managers on the part of the House to reconsider their decisions to sign or not to sign the agreement.

(4) Managers on the part of the House shall be provided a unitary time and place with access to at least one complete copy of the final conference agreement for the purpose of recording their approval (or not) of the final conference agreement by placing their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

(b) A point of order that a conference committee failed to comply with paragraph (a) may be raised immediately after the conference report is read or considered as read. If such a point of order is sustained, the conference report shall be considered as rejected, the House shall be considered to have insisted on its amendments or on disagreement to the Senate amendments, as the case may be, and to have requested a further conference with the Senate, and the Speaker may appoint new conferees without intervening motion.

13. It shall not be in order to consider a conference report the text of which differs in any way, other than clerical, from the text that reflects the action of the conferees on all of the differences between the two Houses, as recorded by their placement of their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

RULE XXIII

CODE OF OFFICIAL CONDUCT

There is hereby established by and for the House the following code of conduct, to be known as the "Code of Official Conduct":

1. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof.

3. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.

4. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept gifts except as provided by clause 5 of rule XXV.

5. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept an honorarium for a speech, a writing for publication, or other similar activity, except as otherwise provided under rule XXV.

6. A Member, Delegate, or Resident Commissioner—

(a) shall keep the campaign funds of such individual separate from the personal funds of such individual;

(b) may not convert campaign funds to personal use in excess of an amount representing reimbursement for legitimate and verifiable campaign expenditures; and

(c) except as provided in clause 1(b) of rule XXIV, may not expend funds from a campaign account of such individual that are not attributable to bona fide campaign or political purposes.

7. A Member, Delegate, or Resident Commissioner shall treat as campaign contributions all proceeds from testimonial dinners or other fund-raising events.

8. (a) A Member, Delegate, Resident Commissioner, or officer of the House may not retain an employee who does not perform duties for the offices of the employing authority commensurate with the compensation such employee receives.

(b) In the case of a committee employee who works under the direct supervision of a member of the committee other than a chair, the chair may require that such member affirm in writing that the employee has complied with clause 8(a) (subject to clause 9 of rule X) as evidence of compliance by the chair with this clause and with clause 9 of rule X.

(c)(1) Except as specified in subparagraph (2)—

(A) a Member, Delegate, or Resident Commissioner may not retain the relative of such individual in a paid position; and

(B) an employee of the House may not accept compensation for work for a committee on which the relative of such employee serves as a member.

(2) Subparagraph (1) shall not apply in the case of a relative whose pertinent employment predates the One Hundred Thirteenth Congress.

(3) As used in this paragraph, the term "relative" means an individual who is related to the Member, Delegate, or Resident Commissioner as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, grandson, or granddaughter.

9. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not discharge and may not refuse to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, religion, sex (including marital or parental status), disability, age, or national origin of such individual, but may take into consideration the domicile or political affiliation of such individual.

10. A Member, Delegate, or Resident Commissioner who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which

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such individual is a member, and a Member should refrain from voting on any question at a meeting of the House or of the Committee of the Whole House on the state of the Union, unless or until judicial or executive proceedings result in reinstatement of the presumption of the innocence of such Member or until the Member is reelected to the House after the date of such conviction.

11. A Member, Delegate, or Resident Commissioner may not authorize or otherwise allow an individual, group, or organization not under the direction and control of the House to use the words "Congress of the United States," "House of Representatives," or "Official Business," or any combination of words thereof, on any letterhead or envelope.

12. (a) Except as provided in paragraph (b), an employee of the House who is required to file a report under rule XXVI may not participate personally and substantially as an employee of the House in a contact with an agency of the executive or judicial branches of Government with respect to nonlegislative matters affecting any nongovernmental person in which the employee has a significant financial interest.

(b) Paragraph (a) does not apply if an employee first advises the employing authority of such employee of a significant financial interest described in paragraph (a) and obtains from such employing authority a written waiver stating that the participation of the employee in the activity described in paragraph (a) is necessary. A copy of each such waiver shall be filed with the Committee on Ethics.

13. Before a Member, Delegate, Resident Commissioner, officer, or employee of the House may have access to classified information, the following oath (or affirmation) shall be executed:

"I do solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorized by the House of Representatives or in accordance with its Rules."

Copies of the executed oath (or affirmation) shall be retained as part of the records of the House, in the case of a Member, Delegate, or the Resident Commissioner, by the Clerk, and in the case of an officer or employee of the House, by the Sergeant-at-Arms. The Clerk shall make the signatories a matter of public record, causing the names of each Member, Delegate, or Resident Commissioner who has signed the oath during a week (if any) to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspec-

tion in an appropriate office of the House.

14. A Member, Delegate, or Resident Commissioner may not, with the intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity—

(a) take or withhold, or offer or threaten to take or withhold, an official act; or

(b) influence, or offer or threaten to influence, the official act of another.

15. (a) Except as provided in paragraphs (b) and (c), a Member, Delegate, or Resident Commissioner may not use personal funds, official funds, or campaign funds for a flight on an aircraft.

(b) Paragraph (a) does not apply if—

(1) the aircraft is operated by an air carrier or commercial operator certificated by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules;

(2) the aircraft is owned or leased by a Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner (including an aircraft owned by an entity that is not a public corporation in which the Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner has an ownership interest, provided that such Member, Delegate, or Resident Commissioner does not use the aircraft any more than the Member, Delegate, Resident Commissioner, or family member's proportionate share of ownership allows);

(3) the flight consists of the personal use of an aircraft by a Member, Delegate, or the Resident Commissioner that is supplied by—

(A) an individual on the basis of personal friendship; or

(B) another Member, Delegate, or the Resident Commissioner;

(4) the aircraft is operated by an entity of the Federal government or an entity of the government of any State; or

(5) the owner or operator of the aircraft is paid a pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size as determined by dividing such cost by the number of Members, Delegates, or the Resident Commissioner, officers, or employees of Congress on the flight.

(c) An advance written request for a waiver of the restriction in para-

graph (a) may be granted jointly by the chair and ranking minority member of the Committee on Ethics, subject to such conditions as they may prescribe.

(d) In this clause—

(1) the term "campaign funds" includes funds of any political committee under the Federal Election Campaign Act of 1971, without regard to whether the committee is an authorized committee of the Member, Delegate, or Resident Commissioner involved under such Act;

(2) the term "family member" means an individual who is related to the Member, Delegate, or Resident Commissioner, as father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law; and

(3) the term "on the basis of personal friendship" has the same meaning as in clause 5 of rule XXV and shall be determined as under clause 5(a)(3)(D)(ii) of rule XXV.

16. A Member, Delegate, or Resident Commissioner may not condition the inclusion of language to provide funding for a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (including an accompanying joint explanatory statement of managers) on any vote cast by another Member, Delegate, or Resident Commissioner. For purposes of this clause and clause 17, the terms "congressional earmark," "limited tax benefit," and "limited tariff benefit" shall have the meanings given them in clause 9 of rule XXI.

17. (a) A Member, Delegate, or Resident Commissioner who requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers) shall provide a written statement to the chair and ranking minority member of the committee of jurisdiction, including—

(1) the name of the Member, Delegate, or Resident Commissioner;

(2) in the case of a congressional earmark, the name and address of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity;

(3) in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Member, Delegate, or Resident Commissioner;

(4) the purpose of such congressional earmark or limited tax or tariff benefit; and

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(5) a certification that the Member, Delegate, or Resident Commissioner or spouse has no financial interest in such congressional earmark or limited tax or tariff benefit.

(b) Each committee shall maintain the information transmitted under paragraph (a), and the written disclosures for any congressional earmarks, limited tax benefits, or limited tariff benefits included in any measure reported by the committee or conference report filed by the chair of the committee or any subcommittee thereof shall be open for public inspection.

18. (a) In this Code of Official Conduct, the term "officer or employee of the House" means an individual whose compensation is disbursed by the Chief Administrative Officer.

(b) An individual whose services are compensated by the House pursuant to a consultant contract shall be considered an employee of the House for purposes of clauses 1, 2, 3, 4, 8, 9, and 13 of this rule. An individual whose services are compensated by the House pursuant to a consultant contract may not lobby the contracting committee or the members or staff of the contracting committee on any matter. Such an individual may lobby other Members, Delegates, or the Resident Commissioner or staff of the House on matters outside the jurisdiction of the contracting committee. In the case of such an individual who is a member or employee of a firm, partnership, or other business organization, the other members and employees of the firm, partnership, or other business organization shall be subject to the same restrictions on lobbying that apply to the individual under this paragraph.

RULE XXIV

LIMITATIONS ON USE OF OFFICIAL FUNDS

Limitations on use of official and unofficial accounts

1. (a) Except as provided in paragraph (b), a Member, Delegate, or Resident Commissioner may not maintain, or have maintained for the use of such individual, an unofficial office account. Funds may not be paid into an unofficial office account.

(b)(1) Except as provided in subparagraph (2), a Member, Delegate, or Resident Commissioner may defray official expenses with funds of the principal campaign committee of such individual under the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

(2) The funds specified in subparagraph (1) may not be used to defray official expenses for mail or other communications, compensation for services, office space, office furniture, office equipment, or any associated information technology services (excluding handheld communications devices).

2. Notwithstanding any other provision of this rule, if an amount from the Official Expenses Allowance of a Member, Delegate, or Resident Commis-

sioner is paid into the House Recording Studio revolving fund for telecommunications satellite services, the Member, Delegate, or Resident Commissioner may accept reimbursement from nonpolitical entities in that amount for transmission to the Chief Administrative Officer for credit to the Official Expenses Allowance.

3. In this rule the term "unofficial office account" means an account or repository in which funds are received for the purpose of defraying otherwise unreimbursed expenses allowable under section 162(a) of the Internal Revenue Code of 1986 as ordinary and necessary in the operation of a congressional office, and includes a newsletter fund referred to in section 527(g) of the Internal Revenue Code of 1986.

Limitations on use of the frank

4. A Member, Delegate, or Resident Commissioner shall mail franked mail under section 3210(d) of title 39, United States Code at the most economical rate of postage practicable.

5. Before making a mass mailing, a Member, Delegate, or Resident Commissioner shall submit a sample or description of the mail matter involved to the House Commission on Congressional Mailing Standards for an advisory opinion as to whether the proposed mailing is in compliance with applicable provisions of law, rule, or regulation.

6. A mass mailing that is otherwise frankable by a Member, Delegate, or Resident Commissioner under the provisions of section 3210(e) of title 39, United States Code, is not frankable unless the cost of preparing and printing it is defrayed exclusively from funds made available in an appropriation Act.

7. A Member, Delegate, or Resident Commissioner may not send a mass mailing outside the congressional district from which elected.

8. In the case of a Member, Delegate, or Resident Commissioner, a mass mailing is not frankable under section 3210 of title 39, United States Code, when it is postmarked less than 90 days before the date of a primary or general election (whether regular, special, or runoff) in which such individual is a candidate for public office. If the mail matter is of a type that is not customarily postmarked, the date on which it would have been postmarked, if it were of a type customarily postmarked, applies.

9. In this rule the term "mass mailing" means, with respect to a session of Congress, a mailing of newsletters or other pieces of mail with substantially identical content (whether such pieces of mail are deposited singly or in bulk, or at the same time or different times), totaling more than 500 pieces of mail in that session, except that such term does not include a mailing—

(a) of matter in direct response to a communication from a person to whom the matter is mailed;

(b) from a Member, Delegate, or Resident Commissioner to other Members, Delegates, the Resident Commissioner, or Senators, or to Federal, State, or local government officials; or

(c) of a news release to the communications media.

Prohibition on use of funds by Members not elected to succeeding Congress

10. Funds from the applicable accounts described in clause 1(k)(1) of rule X, including funds from committee expense resolutions, and funds in any local currencies owned by the United States may not be made available for travel by a Member, Delegate, Resident Commissioner, or Senator after the date of a general election in which such individual was not elected to the succeeding Congress or, in the case of a Member, Delegate, or Resident Commissioner who is not a candidate in a general election, after the earlier of the date of such general election or the adjournment sine die of the last regular session of the Congress.

RULE XXV

LIMITATIONS ON OUTSIDE EARNED INCOME AND ACCEPTANCE OF GIFTS

Outside earned income; honoraria

1. (a) Except as provided by paragraph (b), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(1) have outside earned income attributable to a calendar year that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year; or

(2) receive any honorarium, except that an officer or employee of the House who is paid at a rate less than 120 percent of the minimum rate of basic pay for GS-15 of the General Schedule may receive an honorarium unless the subject matter is directly related to the official duties of the individual, the payment is made because of the status of the individual with the House, or the person offering the honorarium has interests that may be substantially affected by the performance or nonperformance of the official duties of the individual.

(b) In the case of an individual who becomes a Member, Delegate, Resident Commissioner, officer, or employee of the House, such individual may not have outside earned income attributable to the portion of a calendar year that occurs after such individual becomes a Member, Delegate, Resident Commissioner, officer, or employee that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year multiplied by a fraction, the numerator of which is the number of days the individual is a Member, Delegate, Resident Commis-

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sioner, officer, or employee during that calendar year and the denominator of which is 365.

(c) A payment in lieu of an honorarium that is made to a charitable organization on behalf of a Member, Delegate, Resident Commissioner, officer, or employee of the House may not be received by that Member, Delegate, Resident Commissioner, officer, or employee. Such a payment may not exceed \$2,000 or be made to a charitable organization from which the Member, Delegate, Resident Commissioner, officer, or employee or a parent, sibling, spouse, child, or dependent relative of the Member, Delegate, Resident Commissioner, officer, or employee, derives a financial benefit.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(a) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship except for the practice of medicine;

(b) permit the name of such individual to be used by such a firm, partnership, association, corporation, or other entity;

(c) receive compensation for practicing a profession that involves a fiduciary relationship except for the practice of medicine;

(d) serve for compensation as an officer or member of the board of an association, corporation, or other entity; or

(e) receive compensation for teaching, without the prior notification and approval of the Committee on Ethics.

Copyright royalties

3. (a) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive an advance payment on copyright royalties. This paragraph does not prohibit a literary agent, researcher, or other individual (other than an individual employed by the House or a relative of a Member, Delegate, Resident Commissioner, officer, or employee) working on behalf of a Member, Delegate, Resident Commissioner, officer, or employee with respect to a publication from receiving an advance payment of a copyright royalty directly from a publisher and solely for the benefit of that literary agent, researcher, or other individual.

(b) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive copyright royalties under a contract entered into on or after January 1, 1996, unless that contract is first approved by the Committee on Ethics as complying with the requirement of clause 4(d)(1)(E) (that royalties are received from an established publisher under usual and customary contractual terms).

Definitions

4. (a)(1) In this rule, except as provided in subparagraph (2), the term “of-

ficer or employee of the House” means an individual (other than a Member, Delegate, or Resident Commissioner) whose pay is disbursed by the Chief Administrative Officer, who is paid at a rate equal to or greater than 120 percent of the minimum rate of basic pay for GS-15 of the General Schedule, and who is so employed for more than 90 days in a calendar year.

(2)(A) When used with respect to an honorarium, the term “officer or employee of the House” means an individual (other than a Member, Delegate, or Resident Commissioner) whose salary is disbursed by the Chief Administrative Officer.

(B) When used in clause 5 of this rule, the terms “officer” and “employee” have the same meanings as in rule XXIII.

(b) In this rule the term “honorarium” means a payment of money or a thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles) by a Member, Delegate, Resident Commissioner, officer, or employee of the House, excluding any actual and necessary travel expenses incurred by that Member, Delegate, Resident Commissioner, officer, or employee (and one relative) to the extent that such expenses are paid or reimbursed by any other person. The amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not so paid or reimbursed.

(c) In this rule the term “travel expenses” means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a relative of such Member, Delegate, Resident Commissioner, officer, or employee, the cost of transportation, and the cost of lodging and meals while away from the residence or principal place of employment of such individual.

(d)(1) In this rule the term “outside earned income” means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered, but does not include —

(A) the salary of a Member, Delegate, Resident Commissioner, officer, or employee;

(B) any compensation derived by a Member, Delegate, Resident Commissioner, officer, or employee of the House for personal services actually rendered before the adoption of this rule or before such individual became a Member, Delegate, Resident Commissioner, officer, or employee;

(C) any amount paid by, or on behalf of, a Member, Delegate, Resident Commissioner, officer, or employee of the House to a tax-qualified pension, profit-sharing, or stock bonus plan and received by such individual from such a plan;

(D) in the case of a Member, Delegate, Resident Commissioner, officer,

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or employee of the House engaged in a trade or business in which such individual or the family of such individual holds a controlling interest and in which both personal services and capital are income-producing factors, any amount received by the Member, Delegate, Resident Commissioner, officer, or employee, so long as the personal services actually rendered by such individual in the trade or business do not generate a significant amount of income; or

(E) copyright royalties received from established publishers under usual and customary contractual terms; and

(2) outside earned income shall be determined without regard to community property law.

(e) In this rule the term “charitable organization” means an organization described in section 170(c) of the Internal Revenue Code of 1986.

Gifts

5. (a)(1)(A)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift except as provided in this clause.

(ii) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift from a registered lobbyist or agent of a foreign principal or from a private entity that retains or employs registered lobbyists or agents of a foreign principal except as provided in subparagraph (3) of this paragraph.

(B)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept a gift (other than cash or cash equivalent) not prohibited by subdivision (A)(ii) that the Member, Delegate, Resident Commissioner, officer, or employee reasonably and in good faith believes to have a value of less than \$50 and a cumulative value from one source during a calendar year of less than \$100. A gift having a value of less than \$10 does not count toward the \$100 annual limit. The value of perishable food sent to an office shall be allocated among the individual recipients and not to the Member, Delegate, or Resident Commissioner. Formal recordkeeping is not required by this subdivision, but a Member, Delegate, Resident Commissioner, officer, or employee of the House shall make a good faith effort to comply with this subdivision.

(ii) A gift of a ticket to a sporting or entertainment event shall be valued at the face value of the ticket or, in the case of a ticket without a face value, at the highest cost of a ticket with a face value for the event. The price printed on a ticket to an event shall be deemed its face value only if it also is the price at which the issuer offers that ticket for sale to the public.

(2)(A) In this clause the term “gift” means a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of serv-

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ices, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(B)(i) A gift to a family member of a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a gift to any other individual based on that individual's relationship with the Member, Delegate, Resident Commissioner, officer, or employee, shall be considered a gift to the Member, Delegate, Resident Commissioner, officer, or employee if it is given with the knowledge and acquiescence of the Member, Delegate, Resident Commissioner, officer, or employee and the Member, Delegate, Resident Commissioner, officer, or employee has reason to believe the gift was given because of the official position of such individual.

(ii) If food or refreshment is provided at the same time and place to both a Member, Delegate, Resident Commissioner, officer, or employee of the House and the spouse or dependent thereof, only the food or refreshment provided to the Member, Delegate, Resident Commissioner, officer, or employee shall be treated as a gift for purposes of this clause.

(3) The restrictions in subparagraph (1) do not apply to the following:

(A) Anything for which the Member, Delegate, Resident Commissioner, officer, or employee of the House pays the market value, or does not use and promptly returns to the donor.

(B) A contribution, as defined in section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) that is lawfully made under that Act, a lawful contribution for election to a State or local government office, or attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(C) A gift from a relative as described in section 109(16) of title I of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(16)).

(D)(i) Anything provided by an individual on the basis of a personal friendship unless the Member, Delegate, Resident Commissioner, officer, or employee of the House has reason to believe that, under the circumstances, the gift was provided because of the official position of such individual and not because of the personal friendship.

(ii) In determining whether a gift is provided on the basis of personal friendship, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall consider the circumstances under which the gift was offered, such as:

(I) The history of the relationship of such individual with the individual giving the gift, including any previous exchange of gifts between them.

(II) Whether to the actual knowledge of such individual the indi-

vidual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

(III) Whether to the actual knowledge of such individual the individual who gave the gift also gave the same or similar gifts to other Members, Delegates, the Resident Commissioners, officers, or employees of the House.

(E) Except as provided in paragraph (e)(3), a contribution or other payment to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Ethics.

(F) A gift from another Member, Delegate, Resident Commissioner, officer, or employee of the House or Senate.

(G) Food, refreshments, lodging, transportation, and other benefits—

(i) resulting from the outside business or employment activities of the Member, Delegate, Resident Commissioner, officer, or employee of the House (or other outside activities that are not connected to the duties of such individual as an officeholder), or of the spouse of such individual, if such benefits have not been offered or enhanced because of the official position of such individual and are customarily provided to others in similar circumstances;

(ii) customarily provided by a prospective employer in connection with bona fide employment discussions; or

(iii) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such organization.

(H) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.

(I) Informational materials that are sent to the office of the Member, Delegate, Resident Commissioner, officer, or employee of the House in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.

(J) Awards or prizes that are given to competitors in contests or events open to the public, including random drawings.

(K) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).

(L) Training (including food and refreshments furnished to all attendees

as an integral part of the training) if such training is in the interest of the House.

(M) Bequests, inheritances, and other transfers at death.

(N) An item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(O) Anything that is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(P) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act) of an individual other than a registered lobbyist or agent of a foreign principal.

(Q) Free attendance at an event permitted under subparagraph (4).

(R) Opportunities and benefits that are—

(i) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(ii) offered to members of a group or class in which membership is unrelated to congressional employment;

(iii) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(iv) offered to a group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(v) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(vi) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(S) A plaque, trophy, or other item that is substantially commemorative in nature and that is intended for presentation.

(T) Anything for which, in an unusual case, a waiver is granted by the Committee on Ethics.

(U) Food or refreshments of a nominal value offered other than as a part of a meal.

(V) Donations of products from the district or State that the Member, Delegate, or Resident Commissioner represents that are intended primarily for promotional purposes,

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Rule XXV, clause 5

Rule XXV, clause 5

such as display or free distribution, and are of minimal value to any single recipient.

(W) An item of nominal value such as a greeting card, baseball cap, or a T-shirt.

(4)(A) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(i) the Member, Delegate, Resident Commissioner, officer, or employee of the House participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the official position of such individual; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, Delegate, Resident Commissioner, officer, or employee of the House.

(B) A Member, Delegate, Resident Commissioner, officer, or employee of the House who attends an event described in subdivision (A) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual.

(C) A Member, Delegate, Resident Commissioner, officer, or employee of the House, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with the event unless—

(i) all of the net proceeds of the event are for the benefit of an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code;

(ii) reimbursement for the transportation and lodging in connection with the event is paid by such organization; and

(iii) the offer of free attendance at the event is made by such organization.

(D) In this paragraph the term "free attendance" may include waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception in subparagraph (3)(D) unless the Committee on Ethics issues a written de-

termination that such exception applies. A determination under this subparagraph is not required for gifts given on the basis of the family relationship exception in subparagraph (3)(C).

(6) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(b)(1)(A) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event in connection with the duties of such individual as an officeholder shall be considered as a reimbursement to the House and not a gift prohibited by this clause when it is from a private source other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs registered lobbyists or agents of a foreign principal (except as provided in subdivision (C)), if the Member, Delegate, Resident Commissioner, officer, or employee—

(i) in the case of an employee, receives advance authorization, from the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works, to accept reimbursement; and

(ii) discloses the expenses reimbursed or to be reimbursed and the authorization to the Clerk within 15 days after the travel is completed.

(B) For purposes of subdivision (A), events, the activities of which are substantially recreational in nature, are not considered to be in connection with the duties of a Member, Delegate, Resident Commissioner, officer, or employee of the House as an officeholder.

(C) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for any purpose described in subdivision (A) also shall be considered as a reimbursement to the House and not a gift prohibited by this clause (without regard to whether the source retains or employs registered lobbyists or agents of a foreign principal) if it is, under regulations prescribed by the Committee on Ethics to implement this provision—

(i) directly from an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(ii) provided only for attendance at or participation in a one-day event (exclusive of travel time and an overnight stay).

Regulations prescribed to implement this provision may permit a two-night stay when determined by the committee on a case-by-case basis to be practically required to participate in the one-day event.

(2) Each advance authorization to accept reimbursement shall be signed by the Member, Delegate, Resident Com-

missioner, or officer of the House under whose direct supervision the employee works and shall include—

(A) the name of the employee;

(B) the name of the person who will make the reimbursement;

(C) the time, place, and purpose of the travel; and

(D) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

(3) Each disclosure made under subparagraph (1)(A) shall be signed by the Member, Delegate, Resident Commissioner, or officer (in the case of travel by that Member, Delegate, Resident Commissioner, or officer) or by the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include—

(A) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;

(B) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;

(C) a good faith estimate of total meal expenses reimbursed or to be reimbursed;

(D) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;

(E) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in subparagraph (4);

(F) a description of meetings and events attended; and

(G) in the case of a reimbursement to a Member, Delegate, Resident Commissioner, or officer, a determination that the travel was in connection with the duties of such individual as an officeholder and would not create the appearance that the Member, Delegate, Resident Commissioner, or officer is using public office for private gain.

(4) In this paragraph the term "necessary transportation, lodging, and related expenses"—

(A) includes reasonable expenses that are necessary for travel for a period not exceeding four days within the United States or seven days exclusive of travel time outside of the United States unless approved in advance by the Committee on Ethics;

(B) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in subdivision (A);

(C) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this clause; and

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(D) may include travel expenses incurred on behalf of a relative of the Member, Delegate, Resident Commissioner, officer, or employee.

(5) The Clerk of the House shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received.

(c)(1)(A) Except as provided in subdivision (B), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip on which the traveler is accompanied on any segment by a registered lobbyist or agent of a foreign principal.

(B) Subdivision (A) does not apply to a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965.

(2) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under the exception in paragraph (b)(1)(C)(ii) of this clause for a trip that is financed in whole or in part by a private entity that retains or employs registered lobbyists or agents of a foreign principal unless any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip is de minimis under rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C) of this clause.

(3) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip (other than a trip permitted under paragraph (b)(1)(C) of this clause) if such trip is in any part planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal.

(d) A Member, Delegate, Resident Commissioner, officer, or employee of the House shall, before accepting travel otherwise permissible under paragraph (b)(1) of this clause from any private source—

(1) provide to the Committee on Ethics before such trip a written certification signed by the source or (in the case of a corporate person) by an officer of the source—

(A) that the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) that the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal; or

(ii) is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(iii) certifies that the trip meets the requirements specified in rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C)(ii) of this clause and specifically details the extent of any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip considered to qualify as de minimis under such rules;

(C) that the source will not accept from another source any funds earmarked directly or indirectly for the purpose of financing any aspect of the trip;

(D) that the traveler will not be accompanied on any segment of the trip by a registered lobbyist or agent of a foreign principal (except in the case of a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965); and

(E) that (except as permitted in paragraph (b)(1)(C) of this clause) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal; and

(2) after the Committee on Ethics has promulgated the regulations mandated in paragraph (i)(1)(B) of this clause, obtain the prior approval of the committee for such trip.

(e) A gift prohibited by paragraph (a)(1) includes the following:

(1) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(2) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, Delegate, Resident Commissioner, officer, or employee of the House (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph (f).

(3) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(4) A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, Delegates, the Resident Commissioner, officers, or employees of the House.

(f)(1) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Member, Delegate, Resident Commissioner, officer, or employee of the House is not considered a gift under this clause if it is reported as provided in subparagraph (2).

(2) A Member, Delegate, Resident Commissioner, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of an honorarium described in subparagraph (1) shall report within 30 days after such designation or recommendation to the Clerk—

(A) the name and address of the registered lobbyist who is making the contribution in lieu of an honorarium;

(B) the date and amount of the contribution; and

(C) the name and address of the charitable organization designated or recommended by the Member, Delegate, or Resident Commissioner.

The Clerk shall make public information received under this subparagraph as soon as possible after it is received.

(g) In this clause—

(1) the term “registered lobbyist” means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute;

(2) the term “agent of a foreign principal” means an agent of a foreign principal registered under the Foreign Agents Registration Act; and

(3) the terms “officer” and “employee” have the same meanings as in rule XXIII.

(h) All the provisions of this clause shall be interpreted and enforced solely by the Committee on Ethics. The Committee on Ethics is authorized to issue guidance on any matter contained in this clause.

(i)(1) Not later than 45 days after the date of adoption of this paragraph and at annual intervals thereafter, the Committee on Ethics shall develop and revise, as necessary—

(A) guidelines on judging the reasonableness of an expense or expenditure for purposes of this clause, including the factors that tend to establish—

(i) a connection between a trip and official duties;

(ii) the reasonableness of an amount spent by a sponsor;

(iii) a relationship between an event and an officially connected purpose; and

(iv) a direct and immediate relationship between a source of funding and an event; and

(B) regulations describing the information it will require individuals subject to this clause to submit to the committee in order to obtain the prior approval of the committee for any travel covered by this clause, including any required certifications.

(2) In developing and revising guidelines under subparagraph (1)(A), the

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Rule XXIX, clause 4

committee shall take into account the maximum per diem rates for official Government travel published annually by the General Services Administration, the Department of State, and the Department of Defense.

Claims against the Government

6. A person may not be an officer or employee of the House, or continue in its employment, if acting as an agent for the prosecution of a claim against the Government or if interested in such claim, except as an original claimant or in the proper discharge of official duties.

7. A Member, Delegate, or Resident Commissioner shall prohibit all staff employed by that Member, Delegate, or Resident Commissioner (including staff in personal, committee, and leadership offices) from making any lobbying contact (as defined in section 3 of the Lobbying Disclosure Act of 1995) with that individual's spouse if that spouse is a lobbyist under the Lobbying Disclosure Act of 1995 or is employed or retained by such a lobbyist for the purpose of influencing legislation.

8. During the dates on which the national political party to which a Member (including a Delegate or Resident Commissioner) belongs holds its convention to nominate a candidate for the office of President or Vice President, the Member may not participate in an event honoring that Member, other than in the capacity as a candidate for such office, if such event is directly paid for by a registered lobbyist under the Lobbying Disclosure Act of 1995 or a private entity that retains or employs such a registered lobbyist.

RULE XXVI

FINANCIAL DISCLOSURE

1. The Clerk shall send a copy of each report filed with the Clerk under title I of the Ethics in Government Act of 1978 within the seven-day period beginning on the date on which the report is filed to the Committee on Ethics.

2. For the purposes of this rule, the provisions of title I of the Ethics in

Government Act of 1978 shall be considered Rules of the House as they pertain to Members, Delegates, the Resident Commissioner, officers, and employees of the House.

3. Members of the board of the Office of Congressional Ethics shall file annual financial disclosure reports with the Clerk of the House on or before May 15 of each calendar year after any year in which they perform the duties of that position. Such reports shall be on a form prepared by the Clerk that is substantially similar to form 450 of the Office of Government Ethics. The Clerk shall send a copy of each such report filed with the Clerk within the seven-day period beginning on the date on which the report is filed to the Committee on Ethics and shall have them printed as a House document and made available to the public by August 1 of each year.

RULE XXVII

DISCLOSURE BY MEMBERS AND STAFF OF EMPLOYMENT NEGOTIATIONS

1. A Member, Delegate, or Resident Commissioner shall not directly negotiate or have any agreement of future employment or compensation unless such Member, Delegate, or Resident Commissioner, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the Committee on Ethics a statement, which must be signed by the Member, Delegate, or Resident Commissioner, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.

2. An officer or an employee of the House earning in excess of 75 percent of the salary paid to a Member shall notify the Committee on Ethics that such individual is negotiating or has any agreement of future employment or compensation.

3. The disclosure and notification under this rule shall be made within 3

Rule XXIX, clause 4

business days after the commencement of such negotiation or agreement of future employment or compensation.

4. A Member, Delegate, or Resident Commissioner, and an officer or employee to whom this rule applies, shall recuse himself or herself from any matter in which there is a conflict of interest or an appearance of a conflict for that Member, Delegate, Resident Commissioner, officer, or employee under this rule and shall notify the Committee on Ethics of such recusal. A Member, Delegate, or Resident Commissioner making such recusal shall, upon such recusal, submit to the Clerk for public disclosure the statement of disclosure under clause 1 with respect to which the recusal was made.

RULE XXVIII

(RESERVED.)

RULE XXIX

GENERAL PROVISIONS

1. The provisions of law that constituted the Rules of the House at the end of the previous Congress shall govern the House in all cases to which they are applicable, and the rules of parliamentary practice comprised by Jefferson's Manual shall govern the House in all cases to which they are applicable and in which they are not inconsistent with the Rules and orders of the House.

2. In these rules words importing one gender include the other as well.

3. If a measure or matter is publicly available at an electronic document repository operated by the Clerk, it shall be considered as having been available to Members, Delegates, and the Resident Commissioner for purposes of these rules.

4. Authoritative guidance from the Committee on the Budget concerning the impact of a legislative proposition on the levels of new budget authority, outlays, direct spending, new entitlement authority and revenues may be provided by the chair of the committee.

○

113th Congress }
1st Session }

SENATE

{ Document
{ 113-18

STANDING RULES OF THE SENATE

REVISED TO JANUARY 24, 2013



November 4, 2013.—Ordered to be printed

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113th Congress }
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SENATE

{ Document
113-18 }

STANDING RULES OF THE SENATE

REVISED TO JANUARY 24, 2013



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JEAN PARVIN BORDEWICH, *Staff Director*
MARY SUIT JONES, *Republican Staff Director*

S. RES. 285

Authorizing the Committee on Rules and Administration to prepare a revised edition of the Standing Rules of the Senate as a Senate document.

IN THE SENATE OF THE UNITED STATES

Mr. Schumer submitted the following resolution; which was referred to the Committee on Rules and Administration

November 4, 2013

RESOLUTION

Authorizing the Committee on Rules and Administration to prepare a revised edition of the Standing Rules of the Senate as a Senate document.

Resolved,

SECTION 1. PRINTING THE STANDING RULES OF THE SENATE.

(a) **AUTHORIZATIONS.**—The Committee on Rules and Administration shall prepare a revised edition of the Standing Rules of the Senate and such standing rules shall be printed as a Senate document.

(b) **ADDITIONAL COPIES.**—In addition to the usual number, 1,750 additional copies shall be printed for use by the Committee on Rules and Administration.

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STANDING RULES OF THE SENATE

[The 1979 general revision of the rules was accomplished by the adoption of S. Res. 274 on Nov. 14, 1979, a resolution submitted by Mr. Robert C. Byrd for himself and Mr. Baker; the preparation of the proposed revision was pursuant to the adoption of S. Res. 156 on May 10, 1976, a resolution by Mr. Robert C. Byrd; the general revision of the rules set forth in S. Res. 274 was somewhat altered in form by the adoption of S. Res. 389 on Mar. 25, 1980, to consolidate and renumber certain standing rules of the Senate.

[Changes to Senate rules since the last general revision in 1979 are indicated by footnotes in each succeeding edition of the Senate Manual.

[For the origin of various changes in Senate procedure between 1884 and 1979, as set forth in rules changes, adopted resolutions, and Legislative Reorganization Acts, see the table on p. XVI of *Riddick's Senate Procedure*, 1992.]

RULE I

APPOINTMENT OF A SENATOR TO THE CHAIR

1. In the absence of the Vice President, the Senate shall choose a President pro tempore, who shall hold the office and execute the duties thereof during the pleasure of the Senate and until another is elected or his term of office as a Senator expires.

2. In the absence of the Vice President, and pending the election of a President pro tempore, the Acting President pro tempore or the Secretary of the Senate, or in his absence the Assistant Secretary, shall perform the duties of the Chair.

3. The President pro tempore shall have the right to name in open Senate or, if absent, in writing, a Senator to perform the duties of the Chair, including the signing of duly enrolled bills and joint resolutions but such substitution shall not extend beyond an adjournment, except by unanimous consent; and the Senator so named shall have the right to name in open session, or, if absent, in writing, a Senator to perform the duties of the Chair, but not to extend beyond an adjournment, except by unanimous consent.

RULE II

PRESENTATION OF CREDENTIALS AND QUESTIONS OF PRIVILEGE

1. The presentation of the credentials of Senators elect or of Senators designate and other questions of privilege shall always be in order, except during the reading and correction of the Journal, while a question of order or a motion to adjourn is pending, or

while the Senate is voting or ascertaining the presence of a quorum; and all questions and motions arising or made upon the presentation of such credentials shall be proceeded with until disposed of.

2. The Secretary shall keep a record of the certificates of election and certificates of appointment of Senators by entering in a well-bound book kept for that purpose the date of the election or appointment, the name of the person elected or appointed, the date of the certificate, the name of the governor and the secretary of state signing and counter-signing the same, and the State from which such Senator is elected or appointed.

3. The Secretary of the Senate shall send copies of the following recommended forms to the governor and secretary of state of each State wherein an election is about to take place or an appointment is to be made so that they may use such forms if they see fit.

THE RECOMMENDED FORMS FOR CERTIFICATES OF ELECTION AND CERTIFICATE OF APPOINTMENT ARE AS FOLLOWS:¹

“CERTIFICATE OF ELECTION FOR SIX-YEAR TERM

“To the President of the Senate of the United States:

“This is to certify that on the day of —, 20—, A— B— was duly chosen by the qualified electors of the State of — a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 3d day of January, 20—.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“C— D—,
“Governor.

“E— F—,
“Secretary of State.”

“CERTIFICATE OF ELECTION FOR UNEXPIRED TERM

“To the President of the Senate of the United States:

“This is to certify that on the — day of —, 20—, A— B— was duly chosen by the qualified electors of the State of — a Senator for the unexpired term ending at noon on the 3d day of January, 20—, to fill the vacancy in the representation from said State in the Senate of the United States caused by the — of C— D—.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“E— F—,
“Governor.

“G— H—,
“Secretary of State.”

¹All year designations within the following certificates were changed from 19 to 20 by S. Res. 99, 106-2, Apr. 27, 2000.

“CERTIFICATE OF APPOINTMENT

“To the President of the Senate of the United States:

“This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of —, I, A— B—, the governor of said State, do hereby appoint C— D— a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the — of E— F—, is filled by election as provided by law.

“Witness: His excellency our governor —, and our seal hereto affixed at — this — day of —, in the year of our Lord 20—.

“By the governor:

“G— H—, “Governor.

“I— J—,
“Secretary of State.”

RULE III

OATHS

The oaths or affirmations required by the Constitution and prescribed by law shall be taken and subscribed by each Senator, in open Senate, before entering upon his duties.

OATH REQUIRED BY THE CONSTITUTION AND BY LAW TO BE
TAKEN BY SENATORS

“I, A— B— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.” (5 U.S.C. 3331.)

RULE IV

COMMENCEMENT OF DAILY SESSIONS

1. (a)² The Presiding Officer having taken the chair, following the prayer by the Chaplain, and after the Presiding Officer, or a Senator designated by the Presiding Officer, leads the Senate from the dais in reciting the Pledge of Allegiance to the Flag of the United States, and a Quorum being present, the Journal of the preceding day shall be read unless by nondebatable motion the reading shall be waived, the question being, “Shall the Journal stand approved to date?”, and any mistake made in the entries corrected. Except as provided in subparagraph (b) the reading of the Journal shall not be suspended unless by unanimous consent; and when any motion shall be made to amend or correct the same, it shall be deemed a privileged question, and proceeded with until disposed of.

²As amended by S. Res. 28, 99–2, Feb. 27, 1986; S. Res. 113, 106–1, June 23, 1999.

(b) Whenever the Senate is proceeding under paragraph 2 of rule XXII, the reading of the Journal shall be dispensed with and shall be considered approved to date.

(c) The proceedings of the Senate shall be briefly and accurately stated on the Journal. Messages of the President in full; titles of bills and resolutions, and such parts as shall be affected by proposed amendments; every vote, and a brief statement of the contents of each petition, memorial, or paper presented to the Senate, shall be entered.

(d) The legislative, the executive, the confidential legislative proceedings, and the proceedings when sitting as a Court of Impeachment, shall each be recorded in a separate book.

2. During a session of the Senate when that body is in continuous session, the Presiding Officer shall temporarily suspend the business of the Senate at noon each day for the purpose of having the customary daily prayer by the Chaplain.

RULE V

SUSPENSION AND AMENDMENT OF THE RULES

1. No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.

2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

RULE VI

QUORUM—ABSENT SENATORS MAY BE SENT FOR

1. A quorum shall consist of a majority of the Senators duly chosen and sworn.

2. No Senator shall absent himself from the service of the Senate without leave.

3. If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result, and these proceedings shall be without debate.

4. Whenever upon such roll call it shall be ascertained that a quorum is not present, a majority of the Senators present may direct the Sergeant at Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution, and until a quorum shall be present, no debate nor motion, except to adjourn, or to recess pursuant to a previous order entered by unanimous consent, shall be in order.

RULE VII

MORNING BUSINESS

1. On each legislative day after the Journal is read, the Presiding Officer on demand of any Senator shall lay before the Senate messages from the President, reports and communications from the heads of Departments, and other communications addressed to the Senate, and such bills, joint resolutions, and other messages from the House of Representatives as may remain upon his table from any previous day's session undisposed of. The Presiding Officer on demand of any Senator shall then call for, in the following order:

The presentation of petitions and memorials.

Reports of committees.

The introduction of bills and joint resolutions.

The submission of other resolutions.

All of which shall be received and disposed of in such order, unless unanimous consent shall be otherwise given, with newly offered resolutions being called for before resolutions coming over from a previous legislative day are laid before the Senate.

2. Until the morning business shall have been concluded, and so announced from the Chair, or until one hour after the Senate convenes at the beginning of a new legislative day, no motion to proceed to the consideration of any bill, resolution, report of a committee, or other subject upon the Calendar shall be entertained by the Presiding Officer, unless by unanimous consent: *Provided, however,* That on Mondays which are the beginning of a legislative day the Calendar shall be called under rule VIII, and until two hours after the Senate convenes no motion shall be entertained to proceed to the consideration of any bill, resolution, or other subject upon the Calendar except the motion to continue the consideration of a bill, resolution, or other subject against objection as provided in rule VIII, or until the call of the Calendar has been completed.

3. The Presiding Officer may at any time lay, and it shall be in order at any time for a Senator to move to lay, before the Senate, any bill or other matter sent to the Senate by the President or the House of Representatives for appropriate action allowed under the rules and any question pending at that time shall be suspended for this purpose. Any motion so made shall be determined without debate.

4. Petitions or memorials shall be referred, without debate, to the appropriate committee according to subject matter on the same basis as bills and resolutions, if signed by the petitioner or memorialist. A question of receiving or reference may be raised and determined without debate. But no petition or memorial or other paper signed by citizens or subjects of a foreign power shall be received, unless the same be transmitted to the Senate by the President.

5. Only a brief statement of the contents of petitions and memorials shall be printed in the Congressional Record; and no other portion of any petition or memorial shall be printed in the Record unless specifically so ordered by vote of the Senate, as provided for in paragraph 4 of rule XI, in which case the order shall be deemed to apply to the body of the petition or memorial only; and names attached to the petition or memorial shall not be printed unless

specially ordered, except that petitions and memorials from the legislatures or conventions, lawfully called, of the respective States, Territories, and insular possessions shall be printed in full in the Record whenever presented.

6. Senators having petitions, memorials, bills, or resolutions to present after the morning hour may deliver them in the absence of objection to the Presiding Officer's desk, endorsing upon them their names, and with the approval of the Presiding Officer, they shall be entered on the Journal with the names of the Senators presenting them and in the absence of objection shall be considered as having been read twice and referred to the appropriate committees, and a transcript of such entries shall be furnished to the official reporter of debates for publication in the Congressional Record, under the direction of the Secretary of the Senate.

RULE VIII

ORDER OF BUSINESS

1. At the conclusion of the morning business at the beginning of a new legislative day, unless upon motion the Senate shall at any time otherwise order, the Senate shall proceed to the consideration of the Calendar of Bills and Resolutions, and shall continue such consideration until 2 hours after the Senate convenes on such day (the end of the morning hour); and bills and resolutions that are not objected to shall be taken up in their order, and each Senator shall be entitled to speak once and for five minutes only upon any question; and an objection may be interposed at any stage of the proceedings, but upon motion the Senate may continue such consideration; and this order shall commence immediately after the call for "other resolutions", or after disposition of resolutions coming "over under the rule", and shall take precedence of the unfinished business and other special orders. But if the Senate shall proceed on motion with the consideration of any matter notwithstanding an objection, the foregoing provisions touching debate shall not apply.

2. All motions made during the first two hours of a new legislative day to proceed to the consideration of any matter shall be determined without debate, except motions to proceed to the consideration of any motion, resolution, or proposal to change any of the Standing Rules of the Senate shall be debatable. Motions made after the first two hours of a new legislative day to proceed to the consideration of bills and resolutions are debatable.

RULE IX

MESSAGES

1. Messages from the President of the United States or from the House of Representatives may be received at any stage of proceedings, except while the Senate is voting or ascertaining the presence of a quorum, or while the Journal is being read, or while a question of order or a motion to adjourn is pending.

2. Messages shall be sent to the House of Representatives by the Secretary, who shall previously certify the determination of the Senate upon all bills, joint resolutions, and other resolutions which may be communicated to the House, or in which its concurrence

may be requested; and the Secretary shall also certify and deliver to the President of the United States all resolutions and other communications which may be directed to him by the Senate.

RULE X

SPECIAL ORDERS

1. Any subject may, by a vote of two-thirds of the Senators present, be made a special order of business for consideration and when the time so fixed for its consideration arrives the Presiding Officer shall lay it before the Senate, unless there be unfinished business in which case it takes its place on the Calendar of Special Orders in the order of time at which it was made special, to be considered in that order when there is no unfinished business.

2. All motions to change such order, or to proceed to the consideration of other business, shall be decided without debate.

RULE XI

PAPERS—WITHDRAWAL, PRINTING, READING OF, AND REFERENCE

1. No memorial or other paper presented to the Senate, except original treaties finally acted upon, shall be withdrawn from its files except by order of the Senate.

2. The Secretary of the Senate shall obtain at the close of each Congress all the noncurrent records of the Senate and of each Senate committee and transfer them to the General Services Administration for preservation, subject to the orders of the Senate.

3. When the reading of a paper is called for, and objected to, it shall be determined by a vote of the Senate, without debate.

4. Every motion or resolution to print documents, reports, and other matter transmitted by the executive departments, or to print memorials, petitions, accompanying documents, or any other paper, except bills of the Senate or House of Representatives, resolutions submitted by a Senator, communications from the legislatures or conventions, lawfully called, of the respective States, shall, unless the Senate otherwise order, be referred to the Committee on Rules and Administration. When a motion is made to commit with instructions, it shall be in order to add thereto a motion to print.

5. Motions or resolutions to print additional numbers shall also be referred to the Committee on Rules and Administration; and when the committee shall report favorably, the report shall be accompanied by an estimate of the probable cost thereof; and when the cost of printing such additional numbers shall exceed the sum established by law, the concurrence of the House of Representatives shall be necessary for an order to print the same.

6. Every bill and joint resolution introduced or reported from a committee, and all bills and joint resolutions received from the House of Representatives, and all reports of committees, shall be printed, unless, for the dispatch of the business of the Senate, such printing may be dispensed with.

RULE XII

VOTING PROCEDURE

1. When the yeas and nays are ordered, the names of Senators shall be called alphabetically; and each Senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate; and no Senator shall be permitted to vote after the decision shall have been announced by the Presiding Officer, but may for sufficient reasons, with unanimous consent, change or withdraw his vote. No motion to suspend this rule shall be in order, nor shall the Presiding Officer entertain any request to suspend it by unanimous consent.

2. When a Senator declines to vote on call of his name, he shall be required to assign his reasons therefor, and having assigned them, the Presiding Officer shall submit the question to the Senate: "Shall the Senator for the reasons assigned by him, be excused from voting?" which shall be decided without debate; and these proceedings shall be had after the rollcall and before the result is announced; and any further proceedings in reference thereto shall be after such announcement.

3. A Member, notwithstanding any other provisions of this rule, may decline to vote, in committee or on the floor, on any matter when he believes that his voting on such a matter would be a conflict of interest.

4. No request by a Senator for unanimous consent for the taking of a final vote on a specified date upon the passage of a bill or joint resolution shall be submitted to the Senate for agreement thereto until after a quorum call ordered for the purpose by the Presiding Officer, it shall be disclosed that a quorum of the Senate is present; and when a unanimous consent is thus given the same shall operate as the order of the Senate, but any unanimous consent may be revoked by another unanimous consent granted in the manner prescribed above upon one day's notice.

RULE XIII

RECONSIDERATION

1. When a question has been decided by the Senate, any Senator voting with the prevailing side or who has not voted may, on the same day or on either of the next two days of actual session thereafter, move a reconsideration; and if the Senate shall refuse to reconsider such a motion entered, or if such a motion is withdrawn by leave of the Senate, or if upon reconsideration the Senate shall affirm its first decision, no further motion to reconsider shall be in order unless by unanimous consent. Every motion to reconsider shall be decided by a majority vote, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion.

2. When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if deter-

mined in the negative shall be a final disposition of the motion to reconsider.

RULE XIV

BILLS, JOINT RESOLUTIONS, RESOLUTIONS, AND PREAMBLES THERETO

1. Whenever a bill or joint resolution shall be offered, its introduction shall, if objected to, be postponed for one day.

2. Every bill and joint resolution shall receive three readings previous to its passage which readings on demand of any Senator shall be on three different legislative days, and the Presiding Officer shall give notice at each reading whether it be the first, second, or third: *Provided*, That each reading may be by title only, unless the Senate in any case shall otherwise order.

3. No bill or joint resolution shall be committed or amended until it shall have been twice read, after which it may be referred to a committee; bills and joint resolutions introduced on leave, and bills and joint resolutions from the House of Representatives, shall be read once, and may be read twice, if not objected to, on the same day for reference, but shall not be considered on that day nor debated, except for reference, unless by unanimous consent.

4. Every bill and joint resolution reported from a committee, not having previously been read, shall be read once, and twice, if not objected to, on the same day, and placed on the Calendar in the order in which the same may be reported; and every bill and joint resolution introduced on leave, and every bill and joint resolution of the House of Representatives which shall have received a first and second reading without being referred to a committee, shall, if objection be made to further proceeding thereon, be placed on the Calendar.

5. All bills, amendments, and joint resolutions shall be examined under the supervision of the Secretary of the Senate before they go out of the possession of the Senate, and all bills and joint resolutions which shall have passed both Houses shall be examined under the supervision of the Secretary of the Senate, to see that the same are correctly enrolled, and, when signed by the Speaker of the House and the President of the Senate, the Secretary of the Senate shall forthwith present the same, when they shall have originated in the Senate, to the President of the United States and report the fact and date of such presentation to the Senate.

6. All other resolutions shall lie over one day for consideration, if not referred, unless by unanimous consent the Senate shall otherwise direct. When objection is heard to the immediate consideration of a resolution or motion when it is submitted, it shall be placed on the Calendar under the heading of "Resolutions and Motions over, under the Rule," to be laid before the Senate on the next legislative day when there is no further morning business but before the close of morning business and before the termination of the morning hour.

7. When a bill or joint resolution shall have been ordered to be read a third time, it shall not be in order to propose amendments, unless by unanimous consent, but it shall be in order at any time before the passage of any bill or resolution to move its commit-

ment; and when the bill or resolution shall again be reported from the committee it shall be placed on the Calendar.

8. When a bill or resolution is accompanied by a preamble, the question shall first be put on the bill or resolution and then on the preamble, which may be withdrawn by a mover before an amendment of the same, or ordering of the yeas and nays; or it may be laid on the table without prejudice to the bill or resolution, and shall be a final disposition of such preamble.

9. Whenever a private bill, except a bill for a pension, is under consideration, it shall be in order to move the adoption of a resolution to refer the bill to the Chief Commissioner of the Court of Claims for a report in conformity with section 2509 of Title 28, United States Code.

10. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing (1) the payment of money for property damages, personal injuries, or death, for which a claim may be filed under chapter 171 of Title 28, United States Code, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record, shall be received or considered.

RULE XV

AMENDMENTS AND MOTIONS

1. (a)³ An amendment and any instruction accompanying a motion to recommit shall be reduced to writing and read and identical copies shall be provided by the Senator offering the amendment or instruction to the desks of the Majority Leader and the Minority Leader before being debated.

(b) A motion shall be reduced to writing, if desired by the Presiding Officer or by any Senator, and shall be read before being debated.

2. Any motion, amendment, or resolution may be withdrawn or modified by the mover at any time before a decision, amendment, or ordering of the yeas and nays, except a motion to reconsider, which shall not be withdrawn without leave.

3. If the question in debate contains several propositions, any Senator may have the same divided, except a motion to strike out and insert, which shall not be divided; but the rejection of a motion to strike out and insert one proposition shall not prevent a motion to strike out and insert a different proposition; nor shall it prevent a motion simply to strike out; nor shall the rejection of a motion to strike out prevent a motion to strike out and insert. But pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for the purpose of amendment as a question, and motions to amend the part to be stricken out shall have precedence.

4. When an amendment proposed to any pending measure is laid on the table, it shall not carry with it, or prejudice, such measure.

³Pursuant to Pub. L. 110-81, Sep. 14, 2007, paragraph 1 was amended.

5. It shall not be in order to consider any proposed committee amendment (other than a technical, clerical, or conforming amendment) which contains any significant matter not within the jurisdiction of the committee proposing such amendment.

RULE XVI

APPROPRIATIONS AND AMENDMENTS TO GENERAL APPROPRIATIONS BILLS

1. On a point of order made by any Senator, no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or of a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.

2. The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation or any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law if such restriction is to take effect or cease to be effective upon the happening of a contingency, and if an appropriation bill is reported to the Senate containing amendments to such bill proposing new or general legislation or any such restriction, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations.

3. All amendments to general appropriation bills moved by direction of a committee having legislative jurisdiction of the subject matter proposing to increase an appropriation already contained in the bill, or to add new items of appropriation, shall, at least one day before they are considered, be referred to the Committee on Appropriations, and when actually proposed to the bill no amendment proposing to increase the amount stated in such amendment shall be received on a point of order made by any Senator.

4. On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.

5. On a point of order made by any Senator, no amendment, the object of which is to provide for a private claim, shall be received to any general appropriation bill, unless it be to carry out the pro-

visions of an existing law or a treaty stipulation, which shall be cited on the face of the amendment.

6. When a point of order is made against any restriction on the expenditure of funds appropriated in a general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.

7. Every report on general appropriation bills filed by the Committee on Appropriations shall identify with particularity each recommended amendment which proposes an item of appropriation which is not made to carry out the provisions of an existing law, a treaty stipulation, or an act or resolution previously passed by the Senate during that session.

8. On a point of order made by any Senator, no general appropriation bill or amendment thereto shall be received or considered if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuation of appropriations for public works on which work has commenced.

RULE XVII

REFERENCE TO COMMITTEES; MOTIONS TO DISCHARGE; REPORTS OF COMMITTEES; AND HEARINGS AVAILABLE

1. Except as provided in paragraph 3, in any case in which a controversy arises as to the jurisdiction of any committee with respect to any proposed legislation, the question of jurisdiction shall be decided by the presiding officer, without debate, in favor of the committee which has jurisdiction over the subject matter which predominates in such proposed legislation; but such decision shall be subject to an appeal.

2. A motion simply to refer shall not be open to amendment, except to add instructions.

3. (a) Upon motion by both the majority leader or his designee and the minority leader or his designee, proposed legislation may be referred to two or more committees jointly or sequentially. Notice of such motion and the proposed legislation to which it relates shall be printed in the Congressional Record. The motion shall be privileged, but it shall not be in order until the Congressional Record in which the notice is printed has been available to Senators for at least twenty-four hours. No amendment to any such motion shall be in order except amendments to any instructions contained therein. Debate on any such motion, and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than two hours, the time to be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(b) Proposed legislation which is referred to two or more committees jointly may be reported only by such committees jointly and only one report may accompany any proposed legislation so jointly reported.

(c) A motion to refer any proposed legislation to two or more committees sequentially shall specify the order of referral.

(d) Any motion under this paragraph may specify the portion or portions of proposed legislation to be considered by the committees, or any of them, to which such proposed legislation is referred, and such committees or committee shall be limited, in the consideration of such proposed legislation, to the portion or portions so specified.

(e) Any motion under this subparagraph may contain instructions with respect to the time allowed for consideration by the committees, or any of them, to which proposed legislation is referred and the discharge of such committees, or any of them, from further consideration of such proposed legislation.

4. (a) All reports of committees and motions to discharge a committee from the consideration of a subject, and all subjects from which a committee shall be discharged, shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct.

(b) Whenever any committee (except the Committee on Appropriations) has reported any measure, by action taken in conformity with the requirements of paragraph 7 of rule XXVI, no point of order shall lie with respect to that measure on the ground that hearings upon that measure by the committee were not conducted in accordance with the provisions of paragraph 4 of rule XXVI.

5.⁴ Any measure or matter reported by any standing committee shall not be considered in the Senate unless the report of that committee upon that measure or matter has been available to Members for at least two calendar days (excluding Sundays and legal holidays) prior to the consideration of that measure or matter. If hearings have been held on any such measure or matter so reported, the committee reporting the measure or matter shall make every reasonable effort to have such hearings printed and available for distribution to the Members of the Senate prior to the consideration of such measure or matter in the Senate. This paragraph—

(1) may be waived by joint agreement of the majority leader and the minority leader of the Senate; and

(2) shall not apply to—

(A) any measure for the declaration of war, or the declaration of a national emergency, by the Congress, and

(B) any executive decision, determination, or action which would become, or continue to be, effective unless disapproved or otherwise invalidated by one or both Houses of Congress.

RULE XVIII

BUSINESS CONTINUED FROM SESSION TO SESSION

At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.

⁴As amended by S. Res. 28, 99-2, Feb. 27, 1986.

RULE XIX

DEBATE

1. (a) When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, and no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.

(b) At the conclusion of the morning hour at the beginning of a new legislative day or after the unfinished business or any pending business has first been laid before the Senate on any calendar day, and until after the duration of three hours of actual session after such business is laid down except as determined to the contrary by unanimous consent or on motion without debate, all debate shall be germane and confined to the specific question then pending before the Senate.

2. No Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.

3. No Senator in debate shall refer offensively to any State of the Union.

4. If any Senator, in speaking or otherwise, in the opinion of the Presiding Officer transgress the rules of the Senate the Presiding Officer shall, either on his own motion or at the request of any other Senator, call him to order; and when a Senator shall be called to order he shall take his seat, and may not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order, which motion shall be determined without debate. Any Senator directed by the Presiding Officer to take his seat, and any Senator requesting the Presiding Officer to require a Senator to take his seat, may appeal from the ruling of the Chair, which appeal shall be open to debate.

5. If a Senator be called to order for words spoken in debate, upon the demand of the Senator or of any other Senator, the exceptionable words shall be taken down in writing, and read at the table for the information of the Senate.

6. Whenever confusion arises in the Chamber or the galleries, or demonstrations of approval or disapproval are indulged in by the occupants of the galleries, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator.

7. No Senator shall introduce to or bring to the attention of the Senate during its sessions any occupant in the galleries of the Senate. No motion to suspend this rule shall be in order, nor may the Presiding Officer entertain any request to suspend it by unanimous consent.

8. Former Presidents of the United States shall be entitled to address the Senate upon appropriate notice to the Presiding Officer who shall thereupon make the necessary arrangements.

RULE XX

QUESTIONS OF ORDER

1. A question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate. When an appeal is taken, any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer without debate; and every appeal therefrom shall be decided at once, and without debate; and any appeal may be laid on the table without prejudice to the pending proposition, and thereupon shall be held as affirming the decision of the Presiding Officer.

2. The Presiding Officer may submit any question of order for the decision of the Senate.

RULE XXI

SESSION WITH CLOSED DOORS

1. On a motion made and seconded to close the doors of the Senate, on the discussion of any business which may, in the opinion of a Senator, require secrecy, the Presiding Officer shall direct the galleries to be cleared; and during the discussion of such motion the doors shall remain closed.

2. When the Senate meets in closed session, any applicable provisions of rules XXIX and XXXI, including the confidentiality of information shall apply to any information and to the conduct of any debate transacted.

RULE XXII

PRECEDENCE OF MOTIONS

1. When a question is pending, no motion shall be received but—
 - To adjourn.
 - To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.
 - To take a recess.
 - To proceed to the consideration of executive business.
 - To lay on the table.
 - To postpone indefinitely.
 - To postpone to a day certain.
 - To commit.
 - To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

2.⁵ Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business,

⁵As amended by S. Res. 28, 99-2, Feb. 27, 1986.

is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?” And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

If, for any reason, a measure or matter is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination.

No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise.

Notwithstanding other provisions of this rule, a Senator may yield all or part of his one hour to the majority or minority floor managers of the measure, motion, or matter or to the Majority or Minority Leader, but each Senator specified shall not have more than two hours so yielded to him and may in turn yield such time to other Senators.

Notwithstanding any other provision of this rule, any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only.

After cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty-four hours.

3.⁶ If a cloture motion on a motion to proceed to a measure or matter is presented in accordance with this rule and is signed by 16 Senators, including the Majority Leader, the Minority Leader, 7 additional Senators not affiliated with the majority, and 7 additional Senators not affiliated with the minority, one hour after the Senate meets on the following calendar day, the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion to proceed, the question shall be on the motion to proceed, without further debate.

RULE XXIII

PRIVILEGE OF THE FLOOR

1.⁷ Other than the Vice President and Senators, no person shall be admitted to the floor of the Senate while in session, except as follows:

The President of the United States and his private secretary.
The President elect and Vice President elect of the United States.

Ex-Presidents and ex-Vice Presidents of the United States.

Judges of the Supreme Court.

Ex-Senators and Senators elect, except as provided in paragraph 2.⁸

The officers and employees of the Senate in the discharge of their official duties.

Ex-Secretaries and ex-Sergeants at Arms of the Senate, except as provided in paragraph 2.⁹

Members of the House of Representatives and Members elect.

Ex-Speakers of the House of Representatives, except as provided in paragraph 2.¹⁰

The Sergeant at Arms of the House and his chief deputy and the Clerk of the House and his deputy.

Heads of the Executive Departments.

⁶ As amended by S. Res. 16, 113-1, Jan. 24, 2013.

⁷ Paragraph numbered pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁸ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁹ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

¹⁰ As amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

Ambassadors and Ministers of the United States.
 Governors of States and Territories.
 Members of the Joint Chiefs of Staff.
 The General Commanding the Army.
 The Senior Admiral of the Navy on the active list.
 Members of National Legislatures of foreign countries and
 Members of the European Parliament.
 Judges of the Court of Claims.
 The Mayor of the District of Columbia.
 The Librarian of Congress and the Assistant Librarian in
 charge of the Law Library.
 The Architect of the Capitol.
 The Chaplain of the House of Representatives.
 The Secretary of the Smithsonian Institution.
 The Parliamentarian Emeritus of the Senate.

Members of the staffs of committees of the Senate and joint committees of the Congress when in the discharge of their official duties and employees in the office of a Senator when in the discharge of their official duties (but in each case subject to such rules or regulations as may be prescribed by the Committee on Rules and Administration). Senate committee staff members and employees in the office of a Senator must be on the payroll of the Senate and members of joint committee staffs must be on the payroll of the Senate or the House of Representatives.

2.(a)¹¹ The floor privilege provided in paragraph 1 shall not apply, when the Senate is in session, to an individual covered by this paragraph who is—

- (1) a registered lobbyist or agent of a foreign principal; or
- (2) in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any Federal legislative proposal.

(b) The Committee on Rules and Administration may promulgate regulations to allow individuals covered by this paragraph floor privileges for ceremonial functions and events designated by the Majority Leader and the Minority Leader.

3. A former Member of the Senate may not exercise privileges to use Senate athletic facilities or Member-only parking spaces if such Member is—

- (a) a registered lobbyist or agent of a foreign principal; or
- (b) in the employ of or represents any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any Federal legislative proposal.

RULE XXIV

APPOINTMENT OF COMMITTEES

1. In the appointment of the standing committees, or to fill vacancies thereon, the Senate, unless otherwise ordered, shall by resolution appoint the chairman of each such committee and the other members thereof. On demand of any Senator, a separate vote shall be had on the appointment of the chairman of any such committee

¹¹ Paragraphs 2 and 3 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

and on the appointment of the other members thereof. Each such resolution shall be subject to amendment and to division of the question.

2. On demand of one-fifth of the Senators present, a quorum being present, any vote taken pursuant to paragraph 1 shall be by ballot.

3. Except as otherwise provided or unless otherwise ordered, all other committees, and the chairmen thereof, shall be appointed in the same manner as standing committees.

4. When a chairman of a committee shall resign or cease to serve on a committee, action by the Senate to fill the vacancy in such committee, unless specially otherwise ordered, shall be only to fill up the number of members of the committee, and the election of a new chairman.

RULE XXV

STANDING COMMITTEES

1. The following standing committees shall be appointed at the commencement of each Congress, and shall continue and have the power to act until their successors are appointed, with leave to report by bill or otherwise on matters within their respective jurisdictions:

(a)(1) **Committee on Agriculture, Nutrition, and Forestry**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating primarily to the following subjects:

1. Agricultural economics and research.
2. Agricultural extension services and experiment stations.
3. Agricultural production, marketing, and stabilization of prices.
4. Agriculture and agricultural commodities.
5. Animal industry and diseases.
6. Crop insurance and soil conservation.
7. Farm credit and farm security.
8. Food from fresh waters.
9. Food stamp programs.
10. Forestry, and forest reserves and wilderness areas other than those created from the public domain.
11. Home economics.
12. Human nutrition.
13. Inspection of livestock, meat, and agricultural products.
14. Pests and pesticides.
15. Plant industry, soils, and agricultural engineering.
16. Rural development, rural electrification, and watersheds.
17. School nutrition programs.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to food, nutrition, and hunger, both in the United States and in foreign countries, and rural affairs, and report thereon from time to time.

(b) **Committee on Appropriations**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Appropriation of the revenue for the support of the Government, except as provided in subparagraph (e).

2. Rescission of appropriations contained in appropriation Acts (referred to in section 105 of Title 1, United States Code).

3. The amount of new spending authority described in section 401(c)(2) (A) and (B) of the Congressional Budget Act of 1974 which is to be effective for a fiscal year.

4. New spending authority described in section 401(c)(2)(C) of the Congressional Budget Act of 1974 provided in bills and resolutions referred to the committee under section 401(b)(2) of that Act (but subject to the provisions of section 401(b)(3) of that Act).

(c)(1) **Committee on Armed Services**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Aeronautical and space activities peculiar to or primarily associated with the development of weapons systems or military operations.

2. Common defense.

3. Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force, generally.

4. Maintenance and operation of the Panama Canal, including administration, sanitation, and government of the Canal Zone.

5. Military research and development.

6. National security aspects of nuclear energy.

7. Naval petroleum reserves, except those in Alaska.

8. Pay, promotion, retirement, and other benefits and privileges of members of the Armed Forces, including overseas education of civilian and military dependents.

9. Selective service system.

10. Strategic and critical materials necessary for the common defense.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to the common defense policy of the United States, and report thereon from time to time.

(d)(1) **Committee on Banking, Housing, and Urban Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Banks, banking, and financial institutions.

2. Control of prices of commodities, rents, and services.

3. Deposit insurance.

4. Economic stabilization and defense production.

5. Export and foreign trade promotion.

6. Export controls.

7. Federal monetary policy, including Federal Reserve System.

8. Financial aid to commerce and industry.

9. Issuance and redemption of notes.

10. Money and credit, including currency and coinage.

11. Nursing home construction.

12. Public and private housing (including veterans' housing).

13. Renegotiation of Government contracts.

14. Urban development and urban mass transit.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to international economic policy as it affects United States monetary affairs, credit, and financial institutions; economic growth, urban affairs, and credit, and report thereon from time to time.

(e)(1)¹² **Committee on the Budget**, to which committee shall be referred all concurrent resolutions on the budget (as defined in section 3(a)(4) of the Congressional Budget Act of 1974) and all other matters required to be referred to that committee under Titles III and IV of that Act, and messages, petitions, memorials, and other matters relating thereto.

(2) Such committee shall have the duty—

(A) to report the matters required to be reported by it under titles III and IV of the Congressional Budget Act of 1974;

(B) to make continuing studies of the effect on budget outlays of relevant existing and proposed legislation and to report the results of such studies to the Senate on a recurring basis;

(C) to request and evaluate continuing studies of tax expenditures, to devise methods of coordinating tax expenditures, policies, and programs with direct budget outlays, and to report the results of such studies to the Senate on a recurring basis; and

(D) to review, on a continuing basis, the conduct by the Congressional Budget Office of its functions and duties.

(f)(1) **Committee on Commerce, Science, and Transportation**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Coast Guard.
2. Coastal zone management.
3. Communications.
4. Highway safety.
5. Inland waterways, except construction.
6. Interstate commerce.
7. Marine and ocean navigation, safety, and transportation, including navigational aspects of deepwater ports.
8. Marine fisheries.
9. Merchant marine and navigation.
10. Nonmilitary aeronautical and space sciences.
11. Oceans, weather, and atmospheric activities.
12. Panama Canal and interoceanic canals generally, except as provided in subparagraph (c).
13. Regulation of consumer products and services, including testing related to toxic substances, other than pesticides, and except for credit, financial services, and housing.
14. Regulation of interstate common carriers, including railroads, buses, trucks, vessels, pipelines, and civil aviation.
15. Science, engineering, and technology research and development and policy.

¹²Pursuant to S. Res. 445, 108–2, Oct. 9, 2004, the Committee on Budget's jurisdiction was amended although the Standing Rules were not modified. (See appendix for Titles I, III and V of S. Res. 445, 108–2).

16. Sports.
17. Standards and measurement.
18. Transportation.
19. Transportation and commerce aspects of Outer Continental Shelf lands.

(2) Such committee shall also study and review, on a comprehensive basis, all matters relating to science and technology, oceans policy, transportation, communications, and consumer affairs, and report thereon from time to time.

(g)(1) **Committee on Energy and Natural Resources**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Coal production, distribution, and utilization.
2. Energy policy.
3. Energy regulation and conservation.
4. Energy related aspects of deepwater ports.
5. Energy research and development.
6. Extraction of minerals from oceans and Outer Continental Shelf lands.
7. Hydroelectric power, irrigation, and reclamation.
8. Mining education and research.
9. Mining, mineral lands, mining claims, and mineral conservation.
10. National parks, recreation areas, wilderness areas, wild and scenic rivers, historical sites, military parks and battlefields, and on the public domain, preservation of prehistoric ruins and objects of interest.
11. Naval petroleum reserves in Alaska.
12. Nonmilitary development of nuclear energy.
13. Oil and gas production and distribution.
14. Public lands and forests, including farming and grazing thereon, and mineral extraction therefrom.
15. Solar energy systems.
16. Territorial possessions of the United States, including trusteeships.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to energy and resources development, and report thereon from time to time.

(h)(1) **Committee on Environment and Public Works**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Air pollution.
2. Construction and maintenance of highways.
3. Environmental aspects of Outer Continental Shelf lands.
4. Environmental effects of toxic substances, other than pesticides.
5. Environmental policy.
6. Environmental research and development.
7. Fisheries and wildlife.
8. Flood control and improvements of rivers and harbors, including environmental aspects of deepwater ports.
9. Noise pollution.

10. Nonmilitary environmental regulation and control of nuclear energy.
11. Ocean dumping.
12. Public buildings and improved grounds of the United States generally, including Federal buildings in the District of Columbia.
13. Public works, bridges, and dams.
14. Regional economic development.
15. Solid waste disposal and recycling.
16. Water pollution.
17. Water resources.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to environmental protection and resource utilization and conservation, and report thereon from time to time.

(i) **Committee on Finance**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Bonded debt of the United States, except as provided in the Congressional Budget Act of 1974.
2. Customs, collection districts, and ports of entry and delivery.
3. Deposit of public moneys.
4. General revenue sharing.
5. Health programs under the Social Security Act and health programs financed by a specific tax or trust fund.
6. National social security.
7. Reciprocal trade agreements.
8. Revenue measures generally, except as provided in the Congressional Budget Act of 1974.
9. Revenue measures relating to the insular possessions.
10. Tariffs and import quotas, and matters related thereto.
11. Transportation of dutiable goods.

(j)(1) **Committee on Foreign Relations**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Acquisition of land and buildings for embassies and legations in foreign countries.
2. Boundaries of the United States.
3. Diplomatic service.
4. Foreign economic, military, technical, and humanitarian assistance.
5. Foreign loans.
6. International activities of the American National Red Cross and the International Committee of the Red Cross.
7. International aspects of nuclear energy, including nuclear transfer policy.
8. International conferences and congresses.
9. International law as it relates to foreign policy.
10. International Monetary Fund and other international organizations established primarily for international monetary purposes (except that, at the request of the Committee on Banking, Housing, and Urban Affairs, any proposed legislation relating to such subjects reported by the Committee on Foreign

Relations shall be referred to the Committee on Banking, Housing, and Urban Affairs).

11. Intervention abroad and declarations of war.
12. Measures to foster commercial intercourse with foreign nations and to safeguard American business interests abroad.
13. National security and international aspects of trusteeships of the United States.
14. Oceans and international environmental and scientific affairs as they relate to foreign policy.
15. Protection of United States citizens abroad and expatriation.
16. Relations of the United States with foreign nations generally.
17. Treaties and executive agreements, except reciprocal trade agreements.
18. United Nations and its affiliated organizations.
19. World Bank group, the regional development banks, and other international organizations established primarily for development assistance purposes.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to the national security policy, foreign policy, and international economic policy as it relates to foreign policy of the United States, and matters relating to food, hunger, and nutrition in foreign countries, and report thereon from time to time.

(k)(1)¹³ **Committee on Governmental Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Archives of the United States.
2. Budget and accounting measures, other than appropriations, except as provided in the Congressional Budget Act of 1974.
3. Census and collection of statistics, including economic and social statistics.
4. Congressional organization, except for any part of the matter that amends the rules or orders of the Senate.
5. Federal Civil Service.
6. Government information.
7. Intergovernmental relations.
8. Municipal affairs of the District of Columbia, except appropriations therefor.
9. Organization and management of United States nuclear export policy.
10. Organization and reorganization of the executive branch of the Government.
11. Postal Service.
12. Status of officers and employees of the United States, including their classification, compensation, and benefits.

¹³Pursuant to S. Res. 445, 108-2, Oct. 9, 2004, the Committee on Homeland Security and Governmental Affairs shall be treated as the Committee on Governmental Affairs listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate. The resolution also amended the jurisdiction of the Committee although the Standing Rules were not modified. (See appendix for Titles I, III and V of S. Res. 445, 108-2).

(2) Such committee shall have the duty of—

(A) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

(B) studying the efficiency, economy, and effectiveness of all agencies and departments of the Government;

(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government; and

(D) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.

(1)(1)¹⁴ **Committee on Health, Education, Labor, and Pensions**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Measures relating to education, labor, health, and public welfare.

2. Aging.

3. Agricultural colleges.

4. Arts and humanities.

5. Biomedical research and development.

6. Child labor.

7. Convict labor and the entry of goods made by convicts into interstate commerce.

8. Domestic activities of the American National Red Cross.

9. Equal employment opportunity.

10. Gallaudet College, Howard University, and Saint Elizabeths Hospital.

11. Individuals with disabilities.¹⁵

12. Labor standards and labor statistics.

13. Mediation and arbitration of labor disputes.

14. Occupational safety and health, including the welfare of miners.

15. Private pension plans.

16. Public health.

17. Railway labor and retirement.

18. Regulation of foreign laborers.

19. Student loans.

20. Wages and hours of labor.

(2) Such committee shall also study and review, on a comprehensive basis, matters relating to health, education and training, and public welfare, and report thereon from time to time.

(m)¹⁶ **Committee on the Judiciary**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Apportionment of Representatives.

2. Bankruptcy, mutiny, espionage, and counterfeiting.

3. Civil liberties.

¹⁴Name changed pursuant to S. Res. 28, 106-1, Jan. 21, 1999; redesignated as subparagraph (1) by S. Res. 299, 106-2, Apr. 27, 2000.

¹⁵As amended, S. Res. 28, 106-1, Jan. 21, 1999.

¹⁶Redesignated as subparagraph (m) by S. Res. 299, 106-2, Apr. 27, 2000.

4. Constitutional amendments.
5. Federal courts and judges.
6. Government information.
7. Holidays and celebrations.
8. Immigration and naturalization.
9. Interstate compacts generally.
10. Judicial proceedings, civil and criminal, generally.
11. Local courts in the territories and possessions.
12. Measures relating to claims against the United States.
13. National penitentiaries.
14. Patent Office.
15. Patents, copyrights, and trademarks.
16. Protection of trade and commerce against unlawful restraints and monopolies.
17. Revision and codification of the statutes of the United States.
18. State and territorial boundary lines.

(n)(1) **Committee on Rules and Administration**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Administration of the Senate Office Buildings and the Senate wing of the Capitol, including the assignment of office space.
 2. Congressional organization relative to rules and procedures, and Senate rules and regulations, including floor and gallery rules.
 3. Corrupt practices.
 4. Credentials and qualifications of Members of the Senate, contested elections, and acceptance of incompatible offices.
 5. Federal elections generally, including the election of the President, Vice President, and Members of the Congress.
 6. Government Printing Office, and the printing and correction of the Congressional Record, as well as those matters provided for under rule XI.
 7. Meetings of the Congress and attendance of Members.
 8. Payment of money out of the contingent fund of the Senate or creating a charge upon the same (except that any resolution relating to substantive matter within the jurisdiction of any other standing committee of the Senate shall be first referred to such committee).
 9. Presidential succession.
 10. Purchase of books and manuscripts and erection of monuments to the memory of individuals.
 11. Senate Library and statuary, art, and pictures in the Capitol and Senate Office Buildings.
 12. Services to the Senate, including the Senate restaurant.
 13. United States Capitol and congressional office buildings, the Library of Congress, the Smithsonian Institution (and the incorporation of similar institutions), and the Botanic Gardens.
- (2) Such committee shall also—

(A) make a continuing study of the organization and operation of the Congress of the United States and shall recommend improvements in such organization and operation

with a view toward strengthening the Congress, simplifying its operations, improving its relationships with other branches of the United States Government, and enabling it better to meet its responsibilities under the Constitution of the United States;

(B) identify any court proceeding or action which, in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the Senate; and

(C)¹⁷ develop, implement, and update as necessary a strategy planning process and a strategic plan for the functional and technical infrastructure support of the Senate and provide oversight over plans developed by Senate officers and others in accordance with the strategic planning process.

(o)(1)¹⁸ **Committee on Small Business and Entrepreneurship**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the Small Business Administration.

(2) Any proposed legislation reported by such committee which relates to matters other than the functions of the Small Business Administration shall, at the request of the chairman of any standing committee having jurisdiction over the subject matter extraneous to the functions of the Small Business Administration, be considered and reported by such standing committee prior to its consideration by the Senate; and likewise measures reported by other committees directly relating to the Small Business Administration shall, at the request of the chairman of the Committee on Small Business, be referred to the Committee on Small Business and Entrepreneurship for its consideration of any portions of the measure dealing with the Small Business Administration, and be reported by this committee prior to its consideration by the Senate.

(3) Such committee shall also study and survey by means of research and investigation all problems of American small business enterprises, and report thereon from time to time.

(p)¹⁹ **Committee on Veterans' Affairs**, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Compensation of veterans.
2. Life insurance issued by the Government on account of service in the Armed Forces.
3. National cemeteries.
4. Pensions of all wars of the United States, general and special.
5. Readjustment of servicemen to civil life.
6. Soldiers' and sailors' civil relief.
7. Veterans' hospitals, medical care and treatment of veterans.
8. Veterans' measures generally.
9. Vocational rehabilitation and education of veterans.

¹⁷ As added, S. Res. 151, 105-1, Nov. 9, 1997.

¹⁸ As added, S. Res. 101, 97-1, Mar. 25, 1981; name changed pursuant to S. Res. 123, 107-1, June 29, 2001.

¹⁹ Redesignated as subparagraph (p) by S. Res. 101, 97-1, Mar. 25, 1981.

2.²⁰ Except as otherwise provided by paragraph 4 of this rule, each of the following standing committees shall consist of the number of Senators set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Agriculture, Nutrition, and Forestry	20
Appropriations	28
Armed Services	18
Banking, Housing, and Urban Affairs	22
Commerce, Science, and Transportation	20
Energy and Natural Resources	20
Environment and Public Works	18
Finance	20
Foreign Relations	18
Health, Education, Labor, and Pensions	18
Homeland Security and Governmental Affairs	16
Judiciary	18

3. (a)²¹ Except as otherwise provided by paragraph 4 of this rule, each of the following standing committees shall consist of the number of Senators set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Budget	22
Rules and Administration	16
Veterans' Affairs	14
Small Business and Entrepreneurship	18

(b)²² Each of the following committees and joint committees shall consist of the number of Senators (or Senate members, in the case of a joint committee) set forth in the following table on the line on which the name of that committee appears:

Committee: ²³	Members
Aging	18
Intelligence	19
Joint Economic Committee	10

²⁰As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 365, 97-2, Apr. 20, 1982; S. Res. 380, 97-2, Apr. 27, 1982; S. Res. 6, 98-1, Jan. 3, 1983; S. Res. 20, 98-1, Jan. 27, 1983; S. Res. 53, 98-1, Feb. 3, 1983; S. Res. 338, 98-2, Feb. 9, 1984; S. Res. 74, 99-1, Feb. 21, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 43, 102-1, Feb. 5, 1991; S. Res. 135, 102-1, June 4, 1991; S. Res. 4, 103-1, Jan. 7, 1993; S. Res. 130, 103-1, July 1, 1993; S. Res. 132, 103-1, July 15, 1993; S. Res. 14, 104-1, Jan. 5, 1995; S. Res. 92, 104-1, Mar. 24, 1995; S. Res. 9, 105-1, Jan. 9, 1997; HELP/Judiciary reversed pursuant to S. Res. 299, 106-2, Apr. 27, 2000; S. Res. 354, 106-2, Sept. 12, 2000.

²¹As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 101, 97-1, Mar. 25, 1981; S. Res. 6, 98-1, Jan. 3, 1983; S. Res. 88, 99-1, Mar. 5, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 85, 102-1, Mar. 19, 1991; S. Res. 135, 102-1, June 4, 1991; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 130, 103-1, July 1, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 9, 105-1, Jan. 9, 1997; S. Res. 354, 106-2, Sept. 12, 2000; S. Res. 123, 107-1, June 29, 2001.

²²As amended, S. Res. 13, 97-1, Jan. 5, 1981; S. Res. 24, 97-1, Jan. 19, 1981; S. Res. 101, 97-1, Mar. 25, 1981; S. Res. 338, 98-2, Feb. 9, 1984; S. Res. 85, 102-1, Mar. 19, 1991; S. Res. 211, 100-1, May 12, 1987; S. Res. 43, 101-1, Feb. 2, 1989; S. Res. 85, 102-1, Mar. 19, 1991; S. Res. 135, 102-1, June 4, 1991; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 9, 105-1, Jan. 9, 1997.

(c)²⁴ Each of the following committees and joint committees shall consist of the number of Senators (or Senate members, in the case of a joint committee) set forth in the following table on the line on which the name of that committee appears:

Committee:	Members
Ethics	6
Indian Affairs	14
Joint Committee on Taxation	5

4. (a) Except as otherwise provided by this paragraph—

(1) each Senator shall serve on two and no more committees listed in paragraph 2; and

(2) each Senator may serve on only one committee listed in paragraph 3 (a) or (b).

(b)(1) Each Senator may serve on not more than three subcommittees of each committee (other than the Committee on Appropriations) listed in paragraph 2 of which he is a member.

(2) Each Senator may serve on not more than two subcommittees of a committee listed in paragraph 3 (a) or (b) of which he is a member.

(3) Notwithstanding subparagraphs (1) and (2), a Senator serving as chairman or ranking minority member of a standing, select, or special committee of the Senate or joint committee of the Congress may serve ex officio, without vote, as a member of any subcommittee of such committee or joint committee.

(4) No committee of the Senate may establish any sub-unit of that committee other than a subcommittee, unless the Senate by resolution has given permission therefor. For purposes of this subparagraph, any subunit of a joint committee shall be treated as a subcommittee.

(c) By agreement entered into by the majority leader and the minority leader, the membership of one or more standing committees may be increased temporarily from time to time by such number or numbers as may be required to accord to the majority party a majority of the membership of all standing committees. When any such temporary increase is necessary to accord to the majority party a majority of the membership of all standing committees, members of the majority party in such number as may be required for that purpose may serve as members of three standing committees listed in paragraph 2. No such temporary increase in the membership of any standing committee under this subparagraph shall be continued in effect after the need therefor has ended. No standing committee may be increased in membership under this subparagraph by more than two members in excess of the number prescribed for that committee by paragraph 2 or 3(a).

(d) A Senator may serve as a member of any joint committee of the Congress the Senate members of which are required by law to

²³ Pursuant to S. Res. 445, 108-2, Oct. 9, 2004, the Select Committee on Intelligence shall be treated as a committee listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate. However, the resolution did not modify the Standing Rules of the Senate. (See appendix for Titles I, III and V of S. Res. 445, 108-2).

²⁴ As amended, S. Res. 448, 96-2, Dec. 11, 1980; S. Res. 88, 99-1, Mar. 5, 1985; S. Res. 14, 100-1, Jan. 6, 1987; S. Res. 100, 101-1, Apr. 11, 1989; S. Res. 44, 102-1, Feb. 5, 1991; S. Res. 18, 103-1, Jan. 21, 1993; S. Res. 34, 104-1, Jan. 6, 1995; S. Res. 92, 104-1, Mar. 24, 1995; S. Res. 9, 105-1, Jan. 9, 1997.

be appointed from a standing committee of the Senate of which he is a member, and service as a member of any such joint committee shall not be taken into account for purposes of subparagraph (a)(2).

(e)(1) No Senator shall serve at any time as chairman of more than one standing, select, or special committee of the Senate or joint committee of the Congress, except that a Senator may serve as chairman of any joint committee of the Congress having jurisdiction with respect to a subject matter which is directly related to the jurisdiction of a standing committee of which he is chairman.

(2) No Senator shall serve at any time as chairman of more than one subcommittee of each standing, select, or special committee of the Senate or joint committee of the Congress of which he is a member.

(3) A Senator who is serving as the chairman of a committee listed in paragraph 2 may serve at any time as the chairman of only one subcommittee of all committees listed in paragraph 2 of which he is a member and may serve at any time as the chairman of only one subcommittee of each committee listed in paragraph 3 (a) or (b) of which he is a member. A Senator who is serving as the chairman of a committee listed in paragraph 3 (a) or (b) may not serve as the chairman of any subcommittee of that committee, and may serve at any time as the chairman of only one subcommittee of each committee listed in paragraph 2 of which he is a member. Any other Senator may serve as the chairman of only one subcommittee of each committee listed in paragraph 2, 3(a), or 3(b) of which he is a member.

(f) A Senator serving on the Committee on Rules and Administration may not serve on any joint committee of the Congress unless the Senate members thereof are required by law to be appointed from the Committee on Rules and Administration, or unless such Senator served on the Committee on Rules and Administration and the Joint Committee on Taxation on the last day of the Ninety-eighth Congress.²⁵

(g) A Senator who on the day preceding the effective date of Title I of the Committee System Reorganization Amendments of 1977 was serving as the chairman or ranking minority member of the Committee on the District of Columbia or the Committee on Post Office and Civil Service may serve on the Committee on Governmental Affairs in addition to serving on two other standing committees listed in paragraph 2. At the request of any such Senator, he shall be appointed to serve on such committee but, while serving on such committee and two other standing committees listed in paragraph 2, he may not serve on any committee listed in paragraph 3 (a) or (b) other than the Committee on Rules and Administration. The preceding provisions of this subparagraph shall apply with respect to any Senator only so long as his service as a member of the Committee on Governmental Affairs is continuous after the date on which the appointment of the majority and minority mem-

²⁵ As amended, S. Res. 76, 99-1, Feb. 21, 1985.

bers of the Committee on Governmental Affairs is initially completed.²⁶

* * * * *

RULE XXVI

COMMITTEE PROCEDURE

1.²⁷ Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding the amount prescribed by the Committee on Rules and Administration.²⁸ The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

2.²⁹ Each committee³⁰ shall adopt rules (not inconsistent with the Rules of the Senate) governing the procedure of such committee. The rules of each committee shall be published in the Congressional Record not later than March 1 of the first year of each Congress, except that if any such committee is established on or after February 1 of a year, the rules of that committee during the year of establishment shall be published in the Congressional Record not later than sixty days after such establishment. Any amendment to the rules of a committee shall not take effect until the amendment is published in the Congressional Record.

3. Each standing committee (except the Committee on Appropriations) shall fix regular weekly, biweekly, or monthly meeting days for the transaction of business before the committee and additional meetings may be called by the chairman as he may deem necessary. If at least three members of any such committee desire that a special meeting of the committee be called by the chairman, those members may file in the offices of the committee their written request to the chairman for that special meeting. Immediately upon the filing of the request, the clerk of the committee shall notify the chairman of the filing of the request. If, within three calendar days after the filing of the request, the chairman does not call the requested special meeting, to be held within seven calendar days

²⁶ As amended, S. Res. 12, 97-1, Jan. 5, 1981; Subpara. (h), omitted here, pertains to committee service of Senators during the 103rd Congress. Provisions for the 104th Congress were established by S. Res. 13 and 17, Jan. 4, 1995, and S. Res. 27 and 29, Jan. 5, 1995. In subsequent Congresses, committee assignments made notwithstanding Rule XXV.

²⁷ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Feb. 28, 1981.

²⁸ Pursuant to 2 U.S.C. 68c (See Senate Manual Sec. 440, S. Doc. 112-1), the Committee on Rules and Administration issues "Regulations Governing Rates Payable to Commercial Reporting Firms for Reporting Committee Hearings in the Senate." Copies of the regulations currently in effect may be obtained from the Committee.

²⁹ As amended, S. Res. 250, 101-2, Mar. 1, 1990.

³⁰ The term "each committee" when used in these rules includes standing, select, and special committees unless otherwise specified.

after the filing of the request, a majority of the members of the committee may file in the offices of the committee their written notice that a special meeting of the committee will be held, specifying the date and hour of that special meeting. The committee shall meet on that date and hour. Immediately upon the filing of the notice, the clerk of the committee shall notify all members of the committee that such special meeting will be held and inform them of its date and hour. If the chairman of any such committee is not present at any regular, additional, or special meeting of the committee, the ranking member of the majority party on the committee who is present shall preside at that meeting.

4. (a) Each committee (except the Committee on Appropriations and the Committee on the Budget) shall make public announcement of the date, place, and subject matter of any hearing to be conducted by the committee on any measure or matter at least one week before the commencement of that hearing unless the committee determines that there is good cause to begin such hearing at an earlier date.

(b) Each committee (except the Committee on Appropriations) shall require each witness who is to appear before the committee in any hearing to file with the clerk of the committee, at least one day before the date of the appearance of that witness, a written statement of his proposed testimony unless the committee chairman and the ranking minority member determine that there is good cause for noncompliance. If so requested by any committee, the staff of the committee shall prepare for the use of the members of the committee before each day of hearing before the committee a digest of the statements which have been so filed by witnesses who are to appear before the committee on that day.

(c) After the conclusion of each day of hearing, if so requested by any committee, the staff shall prepare for the use of the members of the committee a summary of the testimony given before the committee on that day. After approval by the chairman and the ranking minority member of the committee, each such summary may be printed as a part of the committee hearings if such hearings are ordered by the committee to be printed.

(d) Whenever any hearing is conducted by a committee (except the Committee on Appropriations) upon any measure or matter, the minority on the committee shall be entitled, upon request made by a majority of the minority members to the chairman before the completion of such hearing, to call witnesses selected by the minority to testify with respect to the measure or matter during at least one day of hearing thereon.

5. (a) Notwithstanding any other provision of the rules, when the Senate is in session, no committee of the Senate or any subcommittee thereof may meet, without special leave, after the conclusion of the first two hours after the meeting of the Senate commenced and in no case after two o'clock postmeridian unless consent therefor has been obtained from the majority leader and the minority leader (or in the event of the absence of either of such leaders, from his designee). The prohibition contained in the preceding sentence shall not apply to the Committee on Appropriations or the Committee on the Budget. The majority leader or his designee shall announce to the Senate whenever consent has been

given under this subparagraph and shall state the time and place of such meeting. The right to make such announcement of consent shall have the same priority as the filing of a cloture motion.

(b) Each meeting of a committee, or any subcommittee thereof, including meetings to conduct hearings, shall be open to the public, except that a meeting or series of meetings by a committee or a subcommittee thereof on the same subject for a period of no more than fourteen calendar days may be closed to the public on a motion made and seconded to go into closed session to discuss only whether the matters enumerated in clauses (1) through (6) would require the meeting to be closed, followed immediately by a record vote in open session by a majority of the members of the committee or subcommittee when it is determined that the matters to be discussed or the testimony to be taken at such meeting or meetings—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement;

(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, other than through an application by such person for a specific Government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person; or

(6) may divulge matters required to be kept confidential under other provisions of law or Government regulations.

(c) Whenever any hearing conducted by any such committee or subcommittee is open to the public, that hearing may be broadcast by radio or television, or both, under such rules as the committee or subcommittee may adopt.

(d) Whenever disorder arises during a committee meeting that is open to the public, or any demonstration of approval or disapproval is indulged in by any person in attendance at any such meeting, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator. When the Chair finds it necessary to maintain order, he shall have the power to clear the room, and the committee may act in closed session for so long as there is doubt of the assurance of order.

(e)(1)³¹ Each committee shall prepare and keep a complete transcript or electronic recording adequate to fully record the proceeding of each meeting or conference whether or not such meeting or any part thereof is closed under this paragraph, unless a majority of its members vote to forgo such a record.

(2)(A)³² Except with respect to meetings closed in accordance with this rule, each committee and subcommittee shall make publicly available through the Internet a video recording, audio recording, or transcript of any meeting not later than 21 business days after the meeting occurs.

(B) Information required by subclause (A) shall be available until the end of the Congress following the date of the meeting.

(C) The Committee on Rules and Administration may waive this clause upon request based on the inability of a committee or subcommittee to comply with this clause due to technical or logistical reasons.

6. Morning meetings of committees and subcommittees thereof shall be scheduled for one or both of the periods prescribed in this paragraph. The first period shall end at eleven o'clock antemeridian. The second period shall begin at eleven o'clock antemeridian and end at two o'clock postmeridian.

7. (a)(1) Except as provided in this paragraph, each committee, and each subcommittee thereof is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee, except that no measure or matter or recommendation shall be reported from any committee unless a majority of the committee were physically present.

(2) Each such committee, or subcommittee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

(3) The vote of any committee to report a measure or matter shall require the concurrence of a majority of the members of the committee who are present. No vote of any member of any committee to report a measure or matter may be cast by proxy if rules adopted by such committee forbid the casting of votes for that purpose by proxy; however, proxies may not be voted when the absent committee member has not been informed of the matter on which he is being recorded and has not affirmatively requested that he be so recorded. Action by any committee in reporting any measure or matter in accordance with the requirements of this subparagraph shall constitute the ratification by the committee of all action theretofore taken by the committee with respect to that measure or matter, including votes taken upon the measure or matter or any amendment thereto, and no point of order shall lie with respect to that measure or matter on the ground that such previous action with respect thereto by such committee was not taken in compliance with such requirements.

³¹ Subparagraph (e)(1) numbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

³² Clause (2) added pursuant to Pub. L. 110–81, Sep. 14, 2007, and takes effect Dec. 13, 2007.

(b) Each committee (except the Committee on Appropriations) shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. The results of rollcall votes taken in any meeting of any committee upon any measure, or any amendment thereto, shall be announced in the committee report on that measure unless previously announced by the committee, and such announcement shall include a tabulation of the votes cast in favor of and the votes cast in opposition to each such measure and amendment by each member of the committee who was present at that meeting.

(c) Whenever any committee by rollcall vote reports any measure or matter, the report of the committee upon such measure or matter shall include a tabulation of the votes cast by each member of the committee in favor of and in opposition to such measure or matter. Nothing contained in this subparagraph shall abrogate the power of any committee to adopt rules—

(1) providing for proxy voting on all matters other than the reporting of a measure or matter, or

(2) providing in accordance with subparagraph (a) for a lesser number as a quorum for any action other than the reporting of a measure or matter.

8. (a) In order to assist the Senate in—

(1) its analysis, appraisal, and evaluation of the application, administration, and execution of the laws enacted by the Congress, and

(2) its formulation, consideration, and enactment of such modifications of or changes in those laws, and of such additional legislation, as may be necessary or appropriate, each standing committee (except the Committees on Appropriations and the Budget), shall review and study, on a continuing basis the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the legislative jurisdiction of that committee. Such committees may carry out the required analysis, appraisal, and evaluation themselves, or by contract, or may require a government agency to do so and furnish a report thereon to the Senate. Such committees may rely on such techniques as pilot testing, analysis of costs in comparison with benefits, or provision for evaluation after a defined period of time.

(b) In each odd-numbered year, each such committee shall submit, not later than March 31, to the Senate, a report on the activities of that committee under this paragraph during the Congress ending at noon on January 3 of such year.

9.³³ (a) Except as provided in subparagraph (b), each committee shall report one authorization resolution each year authorizing the committee to make expenditures out of the contingent fund of the Senate to defray its expenses, including the compensation of members of its staff and agency contributions related to such compensation, during the period beginning on March 1 of such year and ending on the last day of February of the following year. Such annual

³³ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Jan. 1, 1981; S. Res. 479, 100-2, Sept. 30, 1988.

authorization resolution shall be reported not later than January 31 of each year, except that, whenever the designation of members of standing committees of the Senate occurs during the first session of a Congress at a date later than January 20, such resolution may be reported at any time within thirty days after the date on which the designation of such members is completed. After the annual authorization resolution of a committee for a year has been agreed to, such committee may procure authorization to make additional expenditures out of the contingent fund of the Senate during that year only by reporting a supplemental authorization resolution. Each supplemental authorization resolution reported by a committee shall amend the annual authorization resolution of such committee for that year and shall be accompanied by a report specifying with particularity the purpose for which such authorization is sought and the reason why such authorization could not have been sought at the time of the submission by such committee of its annual authorization resolution for that year.

(b) In lieu of the procedure provided in subparagraph (a), the Committee on Rules and Administration may—

(1) direct each committee to report an authorization resolution for a two year budget period beginning on March 1 of the first session of a Congress; and

(2) report one authorization resolution containing more than one committee authorization for a one year or two year budget period.

10. (a) All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; and such records shall be the property of the Senate and all members of the committee and the Senate shall have access to such records. Each committee is authorized to have printed and bound such testimony and other data presented at hearings held by the committee.

(b) It shall be the duty of the chairman of each committee to report or cause to be reported promptly to the Senate any measure approved by his committee and to take or cause to be taken necessary steps to bring the matter to a vote. In any event, the report of any committee upon a measure which has been approved by the committee shall be filed within seven calendar days (exclusive of days on which the Senate is not in session) after the day on which there has been filed with the clerk of the committee a written and signed request of a majority of the committee for the reporting of that measure. Upon the filing of any such request, the clerk of the committee shall transmit immediately to the chairman of the committee notice of the filing of that request. This subparagraph does not apply to the Committee on Appropriations.

(c) If at the time of approval of a measure or matter by any committee (except for the Committee on Appropriations), any member of the committee gives notice of intention to file supplemental, minority, or additional views, that member shall be entitled to not less than three calendar days in which to file such views, in writing, with the clerk of the committee. All such views so filed by one or more members of the committee shall be included within, and shall be a part of, the report filed by the committee with respect

to that measure or matter. The report of the committee upon that measure or matter shall be printed in a single volume which—

(1) shall include all supplemental, minority, or additional views which have been submitted by the time of the filing of the report, and

(2) shall bear upon its cover a recital that supplemental, minority, or additional views are included as part of the report. This subparagraph does not preclude—

(A) the immediate filing and printing of a committee report unless timely request for the opportunity to file supplemental, minority, or additional views has been made as provided by this subparagraph; or

(B) the filing by any such committee of any supplemental report upon any measure or matter which may be required for the correction of any technical error in a previous report made by that committee upon that measure or matter.

11. (a) The report accompanying each bill or joint resolution of a public character reported by any committee (except the Committee on Appropriations and the Committee on the Budget) shall contain—

(1) an estimate, made by such committee, of the costs which would be incurred in carrying out such bill or joint resolution in the fiscal year in which it is reported and in each of the five fiscal years following such fiscal year (or for the authorized duration of any program authorized by such bill or joint resolution, if less than five years), except that, in the case of measures affecting the revenues, such reports shall require only an estimate of the gain or loss in revenues for a one-year period; and

(2) a comparison of the estimate of costs described in subparagraph (1) made by such committee with any estimate of costs made by any Federal agency; or

(3) in lieu of such estimate or comparison, or both, a statement of the reasons why compliance by the committee with the requirements of subparagraph (1) or (2), or both, is impracticable.

(b) Each such report (except those by the Committee on Appropriations) shall also contain—

(1) an evaluation, made by such committee, of the regulatory impact which would be incurred in carrying out the bill or joint resolution. The evaluation shall include (A) an estimate of the numbers of individuals and businesses who would be regulated and a determination of the groups and classes of such individuals and businesses, (B) a determination of the economic impact of such regulation on the individuals, consumers, and businesses affected, (C) a determination of the impact on the personal privacy of the individuals affected, and (D) a determination of the amount of additional paperwork that will re-

NOTE.—Each report accompanying any bill or joint resolution relating to terms and conditions of employment or access to public services or accommodations reported by a committee of the House of Representatives or the Senate shall describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch; or in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply. (Pub. L. 104-1, Title I, Sec. 102, Jan. 23, 1995, 109 Stat. 5.) See Senate Manual Sec. 1302, S. Doc. 112-1.

sult from the regulations to be promulgated pursuant to the bill or joint resolution, which determination may include, but need not be limited to, estimates of the amount of time and financial costs required of affected parties, showing whether the effects of the bill or joint resolution could be substantial, as well as reasonable estimates of the recordkeeping requirements that may be associated with the bill or joint resolution; or

(2) in lieu of such evaluation, a statement of the reasons why compliance by the committee with the requirements of clause (1) is impracticable.

(c) It shall not be in order for the Senate to consider any such bill or joint resolution if the report of the committee on such bill or joint resolution does not comply with the provisions of subparagraphs (a) and (b) on the objection of any Senator.

12. Whenever a committee reports a bill or a joint resolution repealing or amending any statute or part thereof it shall make a report thereon and shall include in such report or in an accompanying document (to be prepared by the staff of such committee) (a) the text of the statute or part thereof which is proposed to be repealed; and (b) a comparative print of that part of the bill or joint resolution making the amendment and of the statute or part thereof proposed to be amended, showing by stricken-through type and italics, parallel columns, or other appropriate typographical devices the omissions and insertions which would be made by the bill or joint resolution if enacted in the form recommended by the committee. This paragraph shall not apply to any such report in which it is stated that, in the opinion of the committee, it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

13. (a) Each committee (except the Committee on Appropriations) which has legislative jurisdiction shall, in its consideration of all bills and joint resolutions of a public character within its jurisdiction, endeavor to insure that—

(1) all continuing programs of the Federal Government and of the government of the District of Columbia, within the jurisdiction of such committee or joint committee, are designed; and

(2) all continuing activities of Federal agencies, within the jurisdiction of such committee or joint committee, are carried on; so that, to the extent consistent with the nature, requirements, and objectives of those programs and activities, appropriations therefor will be made annually.

(b) Each committee (except the Committee on Appropriations) shall with respect to any continuing program within its jurisdiction for which appropriations are not made annually, review such program, from time to time, in order to ascertain whether such program could be modified so that appropriations therefor would be made annually.

RULE XXVII

COMMITTEE STAFF

1.³⁴ Staff members appointed to assist minority members of committees pursuant to authority of a resolution described in paragraph 9 of rule XXVI or other Senate resolution shall be accorded equitable treatment with respect to the fixing of salary rates, the assignment of facilities, and the accessibility of committee records.

2. The minority shall receive fair consideration in the appointment of staff personnel pursuant to authority of a resolution described in paragraph 9 of rule XXVI.

3. The staffs of committees (including personnel appointed pursuant to authority of a resolution described in paragraph 9 of rule XXVI or other Senate resolution) should reflect the relative number of majority and minority members of committees. A majority of the minority members of any committee may, by resolution, request that at least one-third of all funds of the committee for personnel (other than those funds determined by the chairman and ranking minority member to be allocated for the administrative and clerical functions of the committee as a whole) be allocated to the minority members of such committee for compensation of minority staff as the minority members may decide. The committee shall thereafter adjust its budget to comply with such resolution. Such adjustment shall be equitably made over a four-year period, commencing July 1, 1977, with not less than one-half being made in two years. Upon request by a majority of the minority members of any committee by resolution, proportionate space, equipment, and facilities shall be provided for such minority staff.

4. No committee shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of the Committee on Rules and Administration.

RULE XXVIII

CONFERENCE COMMITTEES; REPORTS; OPEN MEETINGS

1.³⁵ The presentation of reports of committees of conference shall always be in order when available on each Senator's desk except when the Journal is being read or a question of order or a motion to adjourn is pending, or while the Senate is voting or ascertaining the presence of a quorum; and when received the question of proceeding to the consideration of the report, if raised, shall be immediately put, and shall be determined without debate.

2.³⁶ (a) When a message from the House of Representatives is laid before the Senate, it shall be in order for a single, non-divisible motion to be made that includes—

- (1) a motion to disagree to a House amendment or insist upon a Senate amendment;

³⁴ As amended, S. Res. 281, 96-2, Mar. 11, 1980, effective Feb. 28, 1981.

NOTE.—Pursuant to S. Res. 281, paragraph 1 of rule XXVII was repealed. Accordingly, subparagraphs (a), (b), (c), and (d) of paragraph 2 were renumbered as paragraphs 1, 2, 3, and 4, respectively.

³⁵ As amended by S. Res. 28, 99-2, Feb. 27, 1986.

³⁶ Paragraph 2 added pursuant to S. Res. 16, 113-1, Jan. 24, 2013.

(2) a motion to request a committee of conference with the House or to agree to a request by the House for a committee of conference; and

(3) a motion to authorize the Presiding Officer to appoint conferees (or a motion to appoint conferees).

(b) If a cloture motion is presented on a motion made pursuant to subparagraph (a), the motion shall be debatable for no more than 2 hours, equally divided in the usual form, after which the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion, the question shall be on the motion, without further debate.

3.³⁷ (a) Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.

(b) If matter which was agreed to by both Houses is stricken from the bill a point of order may be made against the report, and if the point of order is sustained, the report is rejected or shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon.

(c) If new matter is inserted in the report, a point of order may be made against the conference report and it shall be disposed of as provided under paragraph 5.

4. (a) In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees—

(1) it shall be in order for the conferees to report a substitute on the same subject matter;

(2) the conferees may not include in the report matter not committed to them by either House; and

(3) the conferees may include in their report in any such case matter which is a germane modification of subjects in disagreement.

(b) In any case in which the conferees violate subparagraph (a), a point of order may be made against the conference report and it shall be disposed of as provided under paragraph 5.

5. (a) A Senator may raise a point of order that one or more provisions of a conference report violates paragraph 3 or paragraph 4, as the case may be. The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order.

(b) If the Presiding Officer sustains the point of order as to any of the provisions against which the Senator raised the point of order, then those provisions against which the Presiding Officer sustains the point of order shall be stricken. After all other points of order under this paragraph have been disposed of—

(1) the Senate shall proceed to consider the question of whether the Senate should recede from its amendment to the House bill, or its disagreement to the amendment of the House, and concur with a further amendment, which further amendment shall consist of only that portion of the conference report that has not been stricken;

³⁷ Paragraphs 3 and 4 amended pursuant to Pub. L. 110-81, Sep. 14, 2007, and paragraphs 5-6 were added. Paragraphs 3 through 6 renumbered and amended pursuant to S. Res. 16, 113-1, Jan. 24, 2013.

(2) the question in clause (1) shall be decided under the same debate limitation as the conference report; and

(3) no further amendment shall be in order.

6. (a) Any Senator may move to waive any or all points of order under paragraph 3 or paragraph 4 with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. All motions to waive under this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order under this paragraph shall not be amendable.

(b) All appeals from rulings of the Chair under paragraph 5 shall be debatable collectively for not to exceed 1 hour, equally divided between the Majority and the Minority Leader or their designees. An affirmative vote of three-fifths of the Members of the Senate, duly chosen and sworn, shall be required in the Senate to sustain an appeal of the ruling of the Chair under paragraph 5.

7.³⁸ Each report made by a committee of conference to the Senate shall be printed as a report of the Senate. As so printed, such report shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate. Such statement shall be sufficiently detailed and explicit to inform the Senate as to the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate.

8. If time for debate in the consideration of any report of a committee of conference upon the floor of the Senate is limited, the time allotted for debate shall be equally divided between the majority party and the minority party.

9. Each conference committee between the Senate and the House of Representatives shall be open to the public except when managers of either the Senate or the House of Representatives in open session determine by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.

10. (a)(1) It shall not be in order to vote on the adoption of a report of a committee of conference unless such report has been available to Members and to the general public for at least 48 hours before such vote. If a point of order is sustained under this paragraph, then the conference report shall be set aside.

(2) For purposes of this paragraph, a report of a committee of conference is made available to the general public as of the time it is posted on a publicly accessible website controlled by a Member, committee, Library of Congress, or other office of Congress, or the Government Printing Office, as reported to the Presiding Officer by the Secretary of the Senate.

(b)(1) This paragraph may be waived in the Senate with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. A motion to waive this paragraph shall be debatable for not to exceed 1 hour equally

³⁸ Paragraphs 7 through 9 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007, and paragraph 10 was added. Paragraph 7 through 10 renumbered pursuant to S. Res. 16, 113–1, Jan. 24, 2013.

divided between the Majority Leader and the Minority Leader or their designees.

(2) An affirmative vote of three-fifths of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under this paragraph. An appeal of the ruling of the Chair shall be debatable for not to exceed 1 hour equally divided between the Majority and the Minority Leader or their designees.

(c) This paragraph may be waived by joint agreement of the Majority Leader and the Minority Leader of the Senate, upon their certification that such waiver is necessary as a result of a significant disruption to Senate facilities or to the availability of the Internet.

RULE XXIX

EXECUTIVE SESSIONS

1. When the President of the United States shall meet the Senate in the Senate Chamber for the consideration of Executive business, he shall have a seat on the right of the Presiding Officer. When the Senate shall be convened by the President of the United States to any other place, the Presiding Officer of the Senate and the Senators shall attend at the place appointed, with the necessary officers of the Senate.

2. When acting upon confidential or Executive business, unless the same shall be considered in open Executive session, the Senate Chamber shall be cleared of all persons except the Secretary, the Assistant Secretary, the Principal Legislative Clerk, the Parliamentarian, the Executive Clerk, the Minute and Journal Clerk, the Sergeant at Arms, the Secretaries to the Majority and the Minority, and such other officers as the Presiding Officer shall think necessary; and all such officers shall be sworn to secrecy.

3. All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy.

4. Whenever the injunction of secrecy shall be removed from any part of the proceedings of the Senate in closed Executive or legislative session, the order of the Senate removing the same shall be entered in the Legislative Journal as well as in the Executive Journal, and shall be published in the Congressional Record under the direction of the Secretary of the Senate.

5.³⁹ Any Senator, officer or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees and offices of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.

³⁹ As amended by S. Res. 363, 102-2, Oct. 8, 1992.

6. Whenever, by the request of the Senate or any committee thereof, any documents or papers shall be communicated to the Senate by the President or the head of any department relating to any matter pending in the Senate, the proceedings in regard to which are secret or confidential under the rules, said documents and papers shall be considered as confidential, and shall not be disclosed without leave of the Senate.

RULE XXX

EXECUTIVE SESSION—PROCEEDINGS ON TREATIES

1. (a) When a treaty shall be laid before the Senate for ratification, it shall be read a first time; and no motion in respect to it shall be in order, except to refer it to a committee, to print it in confidence for the use of the Senate, or to remove the injunction of secrecy.

(b)⁴⁰ When a treaty is reported from a committee with or without amendment, it shall, unless the Senate unanimously otherwise directs, lie over one day for consideration; after which it may be read a second time, after which amendments may be proposed. At any stage of such proceedings the Senate may remove the injunction of secrecy from the treaty.

(c) The decisions thus made shall be reduced to the form of a resolution of ratification, with or without amendments, as the case may be, which shall be proposed on a subsequent day, unless, by unanimous consent, the Senate determine otherwise, at which stage no amendment to the treaty shall be received unless by unanimous consent; but the resolution of ratification when pending shall be open to amendment in the form of reservations, declarations, statements, or understandings.

(d) On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.

2. Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.

RULE XXXI

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day

⁴⁰As amended by S. Res. 28, 99-2, Feb. 27, 1986.

on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. All business in the Senate shall be transacted in open session, unless the Senate as provided in rule XXI by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: Provided further, That any Senator may make public his vote in closed executive session.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

7. (a) The Official Reporters shall be furnished with a list of nominations to office after the proceedings of the day on which they are received, and a like list of all confirmations and rejections.

(b) All nominations to office shall be prepared for the printer by the Official Reporter, and printed in the Congressional Record, after the proceedings of the day in which they are received, also nominations recalled, and confirmed.

(c) The Secretary shall furnish to the press, and to the public upon request, the names of nominees confirmed or rejected on the day on which a final vote shall be had, except when otherwise ordered by the Senate.

RULE XXXII

THE PRESIDENT FURNISHED WITH COPIES OF RECORDS
OF EXECUTIVE SESSIONS

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the public executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

RULE XXXIII

SENATE CHAMBER—SENATE WING OF THE CAPITOL

1. The Senate Chamber shall not be granted for any other purpose than for the use of the Senate; no smoking shall be permitted at any time on the floor of the Senate, or lighted cigars, cigarettes, or pipes be brought into the Chamber.

2. It shall be the duty of the Committee on Rules and Administration to make all rules and regulations respecting such parts of the Capitol, its passages and galleries, including the restaurant and the Senate Office Buildings, as are or may be set apart for the use of the Senate and its officers, to be enforced under the direction of the Presiding Officer. The Committee shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters of newspapers and periodicals, and of news or press associations for daily news dissemination through radio, television, wires, and cables, and similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination.

RULE XXXIV

PUBLIC FINANCIAL DISCLOSURE

1. For purposes of this rule, the provisions of Title I of the Ethics in Government Act of 1978 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

2. (a)⁴¹ The Select Committee on Ethics shall transmit a copy of each report filed with it under Title I of the Ethics in Government Act of 1978 (other than a report filed by a Member of Congress) to the head of the employing office of the individual filing the report.

(b) For purposes of this rule, the head of the employing office shall be—

(1) in the case of an employee of a Member, the Member by whom that person is employed;

NOTE.—Financial disclosure requirements contained in the Ethics in Government Act as amended are codified at 5 U.S.C. App. 6. See Senate Manual Sec. 1172, S. Doc. 112-1.

⁴¹ Paragraph 2 added pursuant to S. Res. 236, 101-2, Jan. 30, 1990.

(2) in the case of an employee of a Committee, the chairman and ranking minority member of such Committee;

(3) in the case of an employee on the leadership staff, the Member of the leadership on whose staff such person serves; and

(4) in the case of any other employee of the legislative branch, the head of the office in which such individual serves.

3.⁴² In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1⁴³ the following additional information:

(a) For purposes of section 102(a)(1)(B) of the Ethics in Government Act of 1978 additional categories of income as follows:

- (1) greater than \$1,000,000 but not more than \$5,000,000, or
- (2) greater than \$5,000,000.

(b) For purposes of section 102(d)(1) of the Ethics in Government Act of 1978 additional categories of value⁴⁴ as follows:

- (1) greater than \$1,000,000 but not more than \$5,000,000;
- (2) greater than \$5,000,000 but not more than \$25,000,000;
- (3) greater than \$25,000,000 but not more than \$50,000,000;

and

- (4) greater than \$50,000,000.

(c) For purposes of this paragraph and section 102 of the Ethics in Government Act of 1978, additional categories with amounts or values greater than \$1,000,000 set forth in section 102(a)(1)(B) and 102(d)(1) shall apply to the income, assets, or liabilities of spouses and dependent children only if the income, assets, or liabilities are held jointly with the reporting individual. All other income, assets, or liabilities of the spouse or dependent children required to be reported under section 102 and this paragraph in an amount of value greater than \$1,000,000 shall be categorized only as an amount or value greater than \$1,000,000.

4.⁴⁵ In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1⁴⁶ an additional statement under section 102(a) of the Ethics in Government Act of 1978 listing the category of the total cash value of any interest of the reporting individual in a qualified blind trust as provided in section 102(d)(1) of the Ethics in Government Act of 1978, unless the trust instrument was executed prior to July 24, 1995 and precludes the beneficiary from receiving information on the total cash value of any interest in the qualified blind trust.

RULE XXXV

GIFTS⁴⁷

1. (a)(1) No Member, officer, or employee of the Senate shall knowingly accept a gift except as provided in this rule.

⁴² Paragraphs 3 and 4 added pursuant to S. Res. 158, 104-1, July 28, 1995, effective Jan. 1, 1996, as amended by S. Res. 198, 104-1, Dec. 7, 1995.

⁴³ Renumbered pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁴ The word "value" replaced the word "income" pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁵ Effective with respect to reports filed under Title I of the Ethics in Government Act of 1978 for calendar year 1996 and thereafter.

⁴⁶ Renumbered pursuant to S. Res. 198, 104-1, Dec. 7, 1995.

⁴⁷ Amended pursuant to S. Res. 158, 104-1, July 28, 1995, effective Jan. 1, 1996.

(2)(A)⁴⁸ A Member, officer, or employee may accept a gift (other than cash or cash equivalent) which the Member, officer, or employee reasonably and in good faith believes to have a value of less than \$50, and a cumulative value from one source during a calendar year of less than \$100. No gift with a value below \$10 shall count toward the \$100 annual limit. No formal recordkeeping is required by this paragraph, but a Member, officer, or employee shall make a good faith effort to comply with this paragraph.

(B) A Member, officer, or employee may not knowingly accept a gift from a registered lobbyist, an agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or an agent of a foreign principal, except as provided in subparagraphs (c) and (d).

(b)(1) For the purpose of this rule, the term “gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(2)(A) A gift to a family member of a Member, officer, or employee, or a gift to any other individual based on that individual’s relationship with the Member, officer, or employee, shall be considered a gift to the Member, officer, or employee if it is given with the knowledge and acquiescence of the Member, officer, or employee and the Member, officer, or employee has reason to believe the gift was given because of the official position of the Member, officer, or employee.

(B) If food or refreshment is provided at the same time and place to both a Member, officer, or employee and the spouse or dependent thereof, only the food or refreshment provided to the Member, officer, or employee shall be treated as a gift for purposes of this rule.

(c) The restrictions in subparagraph (a) shall not apply to the following:

(1)(A)⁴⁹ Anything for which the Member, officer, or employee pays the market value, or does not use and promptly returns to the donor.

(B) The market value of a ticket to an entertainment or sporting event shall be the face value of the ticket or, in the case of a ticket without a face value, the value of the ticket with the highest face value for the event, except that if a ticket holder can establish in advance of the event to the Select Committee on Ethics that the ticket at issue is equivalent to another ticket with a face value, then the market value shall be set at the face value of the equivalent ticket. In establishing equivalency, the ticket holder shall provide written and independently verifiable information related to the primary features of the ticket, including, at a minimum, the seat location, access to parking, availability of food and refreshments, and access to venue areas not open to the public. The Select Committee on Ethics may make a determination of equivalency only if such information is provided in advance of the event.

⁴⁸ Subparagraph (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁴⁹ Subclause (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

(C)(i)⁵⁰ Fair market value for a flight on an aircraft described in item (ii) shall be the pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size, as determined by dividing such cost by the number of Members, officers, or employees of Congress on the flight.

(ii) A flight on an aircraft described in this item is any flight on an aircraft that is not—

(I) operated or paid for by an air carrier or commercial operator certificated by the Federal Aviation Administration and required to be conducted under air carrier safety rules; or

(II) in the case of travel which is abroad, an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules.

(iii) This subclause shall not apply to an aircraft owned or leased by a governmental entity or by a Member of Congress or a Member's immediate family member (including an aircraft owned by an entity that is not a public corporation in which the Member or Member's immediate family member has an ownership interest), provided that the Member does not use the aircraft anymore than the Member's or immediate family member's proportionate share of ownership allows.

(2) A contribution, as defined in the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) that is lawfully made under that Act, or attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(3) A gift from a relative as described in section 109(16) of Title I of the Ethics Reform Act of 1989 (5 U.S.C. App. 6).⁵¹

(4)(A) Anything, including personal hospitality,⁵² provided by an individual on the basis of a personal friendship unless the Member, officer, or employee has reason to believe that, under the circumstances, the gift was provided because of the official position of the Member, officer, or employee and not because of the personal friendship.

(B) In determining whether a gift is provided on the basis of personal friendship, the Member, officer, or employee shall consider the circumstances under which the gift was offered, such as:

(i) The history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between such individuals.

(ii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

⁵⁰ Subparagraph C added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁵¹ As amended, S. Res. 198, 104–1, Dec. 7, 1995. See Senate Manual Sec. 1180, S. Doc. 112–1, for definitions.

⁵² The phrase “including personal hospitality” inserted pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

- (iii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift also at the same time gave the same or similar gifts to other Members, officers, or employees.
- (5) A contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee, that is otherwise lawfully made, subject to the disclosure requirements of the Select Committee on Ethics, except as provided in paragraph 3(c).
- (6) Any gift from another Member, officer, or employee of the Senate or the House of Representatives.
- (7) Food, refreshments, lodging, and other benefits—
- (A) resulting from the outside business or employment activities (or other outside activities that are not connected to the duties of the Member, officer, or employee as an officeholder) of the Member, officer or employee, or the spouse of the Member, officer, or employee, if such benefits have not been offered or enhanced because of the official position of the Member, officer, or employee and are customarily provided to others in similar circumstances;
- (B) customarily provided by a prospective employer in connection with bona fide employment discussions; or
- (C) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such an organization.
- (8) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.
- (9) Informational materials that are sent to the office of the Member, officer, or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.
- (10) Awards or prizes which are given to competitors in contests or events open to the public, including random drawings.
- (11) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).
- (12) Donations of products from the State that the Member represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any individual recipient.
- (13) Training (including food and refreshments furnished to all attendees as an integral part of the training) provided to a Member, officer, or employee, if such training is in the interest of the Senate.
- (14) Bequests, inheritances, and other transfers at death.
- (15) Any item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(16) Anything which is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(17) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act)⁵³ of an individual other than a registered lobbyist or agent of a foreign principal.

(18) Free attendance at a widely attended event permitted pursuant to subparagraph (d).

(19) Opportunities and benefits which are—

(A) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(B) offered to members of a group or class in which membership is unrelated to congressional employment;

(C) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(D) offered to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(E) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(F) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(20) A plaque, trophy, or other item that is substantially commemorative in nature and which is intended solely for presentation.

(21) Anything for which, in an unusual case, a waiver is granted by the Select Committee on Ethics.

(22) Food or refreshments of a nominal value offered other than as a part of a meal.

(23) An item of little intrinsic value such as a greeting card, baseball cap, or a T-shirt.

(24)⁵⁴ Subject to the restrictions in subparagraph (a)(2)(A), free attendance at a constituent event permitted pursuant to subparagraph (g).

(d)(1) A Member, officer, or employee may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(A) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by

⁵³ See Senate Manual Sec. 1180, S. Doc. 112-1, for definitions.

⁵⁴ Clause (24) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(B) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) A Member, officer, or employee, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with an event that does not meet the standards provided in paragraph 2.

(4) For purposes of this paragraph, the term "free attendance" may include waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5)⁵⁵ During the dates of the national party convention for the political party to which a Member belongs, a Member may not participate in an event honoring that Member, other than in his or her capacity as the party's presidential or vice presidential nominee or presumptive nominee, if such event is directly paid for by a registered lobbyist or a private entity that retains or employs a registered lobbyist.

(e) No Member, officer, or employee may accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception in subparagraph (c)(4) unless the Select Committee on Ethics issues a written determination that such exception applies. No determination under this subparagraph is required for gifts given on the basis of the family relationship exception.

(f) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(g)(1)⁵⁶ A Member, officer, or employee may accept an offer of free attendance in the Member's home State at a conference, symposium, forum, panel discussion, dinner event, site visit, viewing, reception, or similar event, provided by a sponsor of the event, if—

(A) the cost of meals provided the Member, officer, or employee is less than \$50;

(B)(i) the event is sponsored by constituents of, or a group that consists primarily of constituents of, the Member (or the Member by whom the officer or employee is employed); and

(ii) the event will be attended primarily by a group of at least 5 constituents of the Member (or the Member by whom

⁵⁵ Clause (5) was added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁵⁶ Subparagraph (g) was added pursuant to Pub. L. 110–81, Sep. 14, 2007.

the officer or employee is employed) provided that a registered lobbyist shall not attend the event; and

(C)(i) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) For purposes of this subparagraph, the term 'free attendance' has the same meaning given such term in subparagraph (d).

2.⁵⁷(a)(1)⁵⁸ A reimbursement (including payment in kind) to a Member, officer, or employee from an individual other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal for necessary transportation, lodging and related expenses for travel to a meeting, speaking engagement, factfinding trip or similar event in connection with the duties of the Member, officer, or employee as an officeholder shall be deemed to be a reimbursement to the Senate and not a gift prohibited by this rule, if the Member, officer, or employee complies with the requirements of this paragraph.

(2)(A)⁵⁹ Notwithstanding clause (1), a reimbursement (including payment in kind) to a Member, officer, or employee of the Senate from an individual, other than a registered lobbyist or agent of a foreign principal, that is a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal shall be deemed to be a reimbursement to the Senate under clause (1) if—

(i) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is provided only for attendance at or participation for 1 day (exclusive of travel time and an overnight stay) at an event described in clause (1); or

(ii) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is from an organization des-

⁵⁷(Note: amendments to paragraph (2) pursuant to Pub. L. 110-81, Sep. 14, 2007, take effect 60 days after enactment or the date that the Select Committee on Ethics issues new guidelines pertaining to this paragraph.)

⁵⁸Subparagraph (a)(1) was amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

⁵⁹Clause (2) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

ignated under section 501(c)(3) of the Internal Revenue Code of 1986.

(B) When deciding whether to preapprove a trip under this clause, the Select Committee on Ethics shall make a determination consistent with regulations issued pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007. The committee through regulations to implement subclause (A)(i) may permit a longer stay when determined by the committee to be practically required to participate in the event, but in no event may the stay exceed 2 nights.

(3)⁶⁰ For purposes of clauses (1) and (2), events, the activities of which are substantially recreational in nature, shall not be considered to be in connection with duties of a Member, officer, or employee as an officeholder.

(b)⁶¹ Before an employee may accept reimbursement pursuant to subparagraph (a), the employee shall receive advance written authorization from the Member or officer under whose direct supervision the employee works. Each advance authorization to accept reimbursement shall be signed by the Member or officer under whose direct supervision the employee works and shall include—

- (1) the name of the employee;
- (2) the name of the person who will make the reimbursement;
- (3) the time, place, and purpose of the travel; and
- (4) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

(c)⁶² Each Member, officer, or employee that receives reimbursement under this paragraph shall disclose the expenses reimbursed or to be reimbursed, the authorization under subparagraph (b) (for an employee), and a copy of the certification in subparagraph (e)(1) to the Secretary of the Senate not later than 30 days after the travel is completed. Each disclosure made under this subparagraph of expenses reimbursed or to be reimbursed shall be signed by the Member or officer (in the case of travel by that Member or officer) or by the Member or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include—

- (1) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;
- (2) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;
- (3) a good faith estimate of total meal expenses reimbursed or to be reimbursed;
- (4) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;
- (5) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in this paragraph;

⁶⁰ Clause (3) was renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶¹ Subparagraph (b) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶² Subparagraph (c) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

(6)⁶³ a description of meetings and events attended; and

(7)⁶⁴ in the case of a reimbursement to a Member or officer, a determination that the travel was in connection with the duties of the Member or officer as an officeholder and would not create the appearance that the Member or officer is using public office for private gain.

(d)(1)⁶⁵ A Member, officer, or employee of the Senate may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under subparagraph (a) for a trip that was—

(A) planned, organized, or arranged by or at the request of a registered lobbyist or agent of a foreign principal; or

(B)(i) for trips described under subparagraph (a)(2)(A)(i) on which a registered lobbyist accompanies the Member, officer, or employee on any segment of the trip; or

(ii) for all other trips allowed under this paragraph, on which a registered lobbyist accompanies the Member, officer, or employee at any point throughout the trip.

(2) The Select Committee on Ethics shall issue regulations identifying de minimis activities by registered lobbyists or foreign agents that would not violate this subparagraph.

(e)⁶⁶ A Member, officer, or employee shall, before accepting travel otherwise permissible under this paragraph from any source—

(1) provide to the Select Committee on Ethics a written certification from such source that—

(A) the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal and is not itself a registered lobbyist or agent of a foreign principal; or

(ii) certifies that the trip meets the requirements of subclause (i) or (ii) of subparagraph (a)(2)(A);

(C) the source will not accept from a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal, funds earmarked directly or indirectly for the purpose of financing the specific trip; and

(D) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal and the traveler will not be accompanied on the trip consistent with the applicable requirements of subparagraph (d)(1)(B) by a registered lobbyist or agent of a foreign principal, except as permitted by regulations issued under subparagraph (d)(2); and

(2) after the Select Committee on Ethics has promulgated regulations pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007, obtain the prior approval of the committee for such reimbursement.

⁶³ Clause (6) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁴ Clause (7) renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁵ Subparagraph (d) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁶⁶ Subparagraph (e) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

(f)⁶⁷ For the purposes of this paragraph, the term “necessary transportation, lodging, and related expenses”—

(1) includes reasonable expenses that are necessary for travel for a period not exceeding 3 days exclusive of travel time within the United States or 7 days exclusive of travel time outside of the United States unless approved in advance by the Select Committee on Ethics;

(2) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in clause (1);

(3) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this rule; and

(4) may include travel expenses incurred on behalf of either the spouse or a child of the Member, officer, or employee, subject to a determination signed by the Member or officer (or in the case of an employee, the Member or officer under whose direct supervision the employee works) that the attendance of the spouse or child is appropriate to assist in the representation of the Senate.

(g) The Secretary of the Senate shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received, but in no event prior to the completion of the relevant travel.

3. A gift prohibited by paragraph 1(a) includes the following:

(a) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, officer, or employee.

(b) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, officer, or employee (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph 4.

(c) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, officer, or employee.

(d) A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, officers, or employees.

4. (a) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Mem-

⁶⁷ Subparagraph (f) renumbered and subparagraph (g) renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

ber, officer, or employee shall not be considered a gift under this rule if it is reported as provided in subparagraph (b).

(b) A Member, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of honoraria described in subparagraph (a) shall report within 30 days after such designation or recommendation to the Secretary of the Senate—

- (1) the name and address of the registered lobbyist who is making the contribution in lieu of honoraria;
- (2) the date and amount of the contribution; and
- (3) the name and address of the charitable organization designated or recommended by the Member.

The Secretary of the Senate shall make public information received pursuant to this subparagraph as soon as possible after it is received.

5. For purposes of this rule—

(a) the term “registered lobbyist” means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute; and

(b) the term “agent of a foreign principal” means an agent of a foreign principal registered under the Foreign Agents Registration Act.

6. All the provisions of this rule shall be interpreted and enforced solely by the Select Committee on Ethics. The Select Committee on Ethics is authorized to issue guidance on any matter contained in this rule.

RULE XXXVI⁶⁸

OUTSIDE EARNED INCOME

For purposes of this rule, the provisions of section 501 of the Ethics in Government Act of 1978 (5 U.S.C. App. 7 501) shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

RULE XXXVII

CONFLICT OF INTEREST

1. A Member, officer, or employee of the Senate shall not receive any compensation, nor shall he permit any compensation to accrue to his beneficial interest from any source, the receipt or accrual of which would occur by virtue of influence improperly exerted from his position as a Member, officer, or employee.

2. No Member, officer, or employee shall engage in any outside business or professional activity or employment for compensation which is inconsistent or in conflict with the conscientious performance of official duties.

3. No officer or employee shall engage in any outside business or professional activity or employment for compensation unless he has reported in writing when such activity or employment commences

⁶⁸ Previous provisions of Rule XXXVI were repealed by S. Res. 512, 97-2, Dec. 14, 1982, effective Jan. 1, 1983. New Rule XXXVI language established by S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991. See Senate Manual Secs. 1184-1188, S. Doc. 112-1, for provisions of 5 U.S.C. App. 7.

and on May 15 of each year thereafter so long as such activity or employment continues, the nature of such activity or employment to his supervisor. The supervisor shall then, in the discharge of his duties, take such action as he considers necessary for the avoidance of conflict of interest or interference with duties to the Senate.

4. No Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class.

5. (a)⁶⁹ No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall (1) affiliate with a firm, partnership, association, or corporation for the purpose of providing professional services for compensation; (2) permit that individual's name to be used by such a firm, partnership, association or corporation; or (3) practice a profession for compensation to any extent during regular office hours of the Senate office in which employed. For the purposes of this paragraph, "professional services" shall include but not be limited to those which involve a fiduciary relationship.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not—

(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship; or

(4) receive compensation for teaching, without the prior notification and approval of the Select⁷⁰ Committee on Ethics.

6. (a)⁷¹ No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall serve as an officer or member of the board of any publicly held or publicly regulated corporation, financial institution, or business entity. The preceding sentence shall not apply to service of a Member, officer, or employee as—

(1) an officer or member of the board of an organization which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, if such service is performed without compensation;

⁶⁹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 5 renumbered 5(a) and subparagraph (b) added.

⁷⁰ Added pursuant to S. Res. 299, 106-2, Apr. 27, 2000.

⁷¹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 6 renumbered 6(a) and subparagraph (b) added.

(2) an officer or member of the board of an institution or organization which is principally available to Members, officers, or employees of the Senate, or their families, if such service is performed without compensation; or

(3) a member of the board of a corporation, institution, or other business entity, if (A) the Member, officer, or employee had served continuously as a member of the board thereof for at least two years prior to his election or appointment as a Member, officer, or employee of the Senate, (B) the amount of time required to perform such service is minimal, and (C) the Member, officer, or employee is not a member of, or a member of the staff of any Senate committee which has legislative jurisdiction over any agency of the Government charged with regulating the activities of the corporation, institution, or other business entity.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not serve for compensation as an officer or member of the board of any association, corporation, or other entity.

7. An employee on the staff of a committee who is compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall divest himself of any substantial holdings which may be directly affected by the actions of the committee for which he works, unless the Select Committee, after consultation with the employee's supervisor, grants permission in writing to retain such holdings or the employee makes other arrangements acceptable to the Select Committee and the employee's supervisor to avoid participation in committee actions where there is a conflict of interest, or the appearance thereof.

8.⁷² If a Member, upon leaving office, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, he shall not lobby Members, officers, or employees of the Senate for a period of two years after leaving office.

9. (a) If an employee on the staff of a Member, upon leaving that position, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the Member for whom he worked or that Member's staff for a period of one year after leaving that position.

(b) If an employee on the staff of a committee, upon leaving his position, becomes such a registered lobbyist or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the members of the committee for which he worked, or the staff of that committee, for a period of one year after leaving his position.

⁷² Paragraphs 8 and 9 amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

(c)⁷³ If an officer of the Senate or an employee on the staff of a Member or on the staff of a committee whose rate of pay is equal to or greater than 75 percent of the rate of pay of a Member and employed at such rate for more than 60 days in a calendar year, upon leaving that position, becomes a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby any Member, officer, or employee of the Senate for a period of 1 year after leaving that position.

10. ⁷⁴ Paragraphs 8 and 9 shall not apply to contacts with the staff of the Secretary of the Senate regarding compliance with the lobbying disclosure requirements of the Lobbying Disclosure Act of 1995.

11. (a) If a Member's spouse or immediate family member is a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that hires or retains a registered lobbyist for the purpose of influencing legislation, the Member shall prohibit all staff employed or supervised by that Member (including staff in personal, committee, and leadership offices) from having any contact with the Member's spouse or immediate family member that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by such person.

(b) Members and employees on the staff of a Member (including staff in personal, committee, and leadership offices) shall be prohibited from having any contact that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by any spouse of a Member who is a registered lobbyist, or is employed or retained by such a registered lobbyist.

(c) The prohibition in subparagraph (b) shall not apply to the spouse of a Member who was serving as a registered lobbyist at least 1 year prior to the most recent election of that Member to office or at least 1 year prior to his or her marriage to that Member.

12. (a)⁷⁵ Except as provided by subparagraph (b), any employee of the Senate who is required to file a report pursuant to rule XXXIV shall refrain from participating personally and substantially as an employee of the Senate in any contact with any agency of the executive or judicial branch of Government with respect to non-legislative matters affecting any non-governmental person in which the employee has a significant financial interest.

(b) Subparagraph (a) shall not apply if an employee first advises his supervising authority of his significant financial interest and obtains from his employing authority a written waiver stating that the participation of the employee is necessary. A copy of each such waiver shall be filed with the Select Committee.

13. ⁷⁶ For purposes of this rule—

⁷³(Note: paragraph 9(c) shall apply to individuals who leave the office or employment to which such paragraph applies on or after the date of adjournment of the 1st session of the 110th Congress sine die or Dec. 31, 2007, whichever date is earlier.)

⁷⁴ Paragraphs 10 and 11 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁵ Pursuant to S. Res. 236, 101–2, Jan. 30, 1990, paragraphs 10. and 11. were renumbered as 11. and 12. respectively and paragraph 10. was added. Paragraph renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁶ Paragraph 13 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

(a) “employee of the Senate” includes an employee or individual described in paragraphs 2, 3, and 4(c) of rule XLI;

(b) an individual who is an employee on the staff of a subcommittee of a committee shall be treated as an employee on the staff of such committee; and

(c) the term “lobbying” means any oral or written communication to influence the content or disposition of any issue before Congress, including any pending or future bill, resolution, treaty, nomination, hearing, report, or investigation; but does not include—

(1) a communication (i) made in the form of testimony given before a committee or office of the Congress, or (ii) submitted for inclusion in the public record, public docket, or public file of a hearing; or

(2) a communication by an individual, acting solely on his own behalf, for redress of personal grievances, or to express his personal opinion.

14.⁷⁷ (a) A Member shall not negotiate or have any arrangement concerning prospective private employment until after his or her successor has been elected, unless such Member files a signed statement with the Secretary of the Senate, for public disclosure, regarding such negotiations or arrangements not later than 3 business days after the commencement of such negotiation or arrangement, including the name of the private entity or entities involved in such negotiations or arrangements, and the date such negotiations or arrangements commenced.

(b) A Member shall not negotiate or have any arrangement concerning prospective employment for a job involving lobbying activities as defined by the Lobbying Disclosure Act of 1995 until after his or her successor has been elected.

(c)(1) An employee of the Senate earning in excess of 75 percent of the salary paid to a Senator shall notify the Select Committee on Ethics that he or she is negotiating or has any arrangement concerning prospective private employment.

(2) The notification under this subparagraph shall be made not later than 3 business days after the commencement of such negotiation or arrangement.

(3) An employee to whom this subparagraph applies shall—

(A) recuse himself or herself from—

(i) any contact or communication with the prospective employer on issues of legislative interest to the prospective employer; and

(ii) any legislative matter in which there is a conflict of interest or an appearance of a conflict for that employee under this subparagraph; and

(B) notify the Select Committee on Ethics of such recusal.

15.⁷⁸ For purposes of this rule—

(a) a Senator or the Vice President is the supervisor of his administrative, clerical, or other assistants;

(b) a Senator who is the chairman of a committee is the supervisor of the professional, clerical, or other assistants to the

⁷⁷ Paragraph 14 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁷⁸ Paragraph 15 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

committee except that minority staff members shall be under the supervision of the ranking minority Senator on the committee;

(c) a Senator who is a chairman of a subcommittee which has its own staff and financial authorization is the supervisor of the professional, clerical, or other assistants to the subcommittee except that minority staff members shall be under the supervision of the ranking minority Senator on the subcommittee;

(d) the President pro tempore is the supervisor of the Secretary of the Senate, Sergeant at Arms and Doorkeeper, the Chaplain, the Legislative Counsel, and the employees of the Office of the Legislative Counsel;

(e) the Secretary of the Senate is the supervisor of the employees of his office;

(f) the Sergeant at Arms and Doorkeeper is the supervisor of the employees of his office;

(g) the Majority and Minority Leaders and the Majority and Minority Whips are the supervisors of the research, clerical, or other assistants assigned to their respective offices;

(h) the Majority Leader is the supervisor of the Secretary for the Majority and the Secretary for the Majority is the supervisor of the employees of his office; and

(i) the Minority Leader is the supervisor of the Secretary for the Minority and the Secretary for the Minority is the supervisor of the employees of his office.

RULE XXXVIII

PROHIBITION OF UNOFFICIAL OFFICE ACCOUNTS

1. (a) ⁷⁹ No Member may maintain or have maintained for his use an unofficial office account. The term “unofficial office account” means an account or repository into which funds are received for the purpose, at least in part, of defraying otherwise unreimbursed expenses allowable in connection with the operation of a Member’s office. An unofficial office account does not include, and expenses incurred by a Member in connection with his official duties shall be defrayed only from—

- (1) personal funds of the Member;
- (2) official funds specifically appropriated for that purpose;
- (3) funds derived from a political committee (as defined in section 301(d) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)); and
- (4) funds received as reasonable reimbursements for expenses incurred by a Member in connection with personal services provided by the Member to the organization making the reimbursement.

⁷⁹ Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, paragraph 1 was renumbered 1(a) and subparagraph (b) was added. Effective date revised to May 1, 1992, by a provision of Pub. L. 102-229, Dec. 12, 1991. Provisions of 2 U.S.C. 431 are contained in the Senate Manual at Sec. 586, S. Doc. 112-1.

(b) Notwithstanding subparagraph (a), official expenses may be defrayed only as provided by subsections (d) and (i) of section 311 of the Legislative Appropriations Act, 1991 (Public Law 101–520).⁸⁰

(c)⁸¹ For purposes of reimbursement under this rule, fair market value of a flight on an aircraft shall be determined as provided in paragraph 1(c)(1)(C) of rule XXXV.

2. No contribution (as defined in section 301(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) shall be converted to the personal use of any Member or any former Member. For the purposes of this rule “personal use” does not include reimbursement of expenses incurred by a Member in connection with his official duties.

RULE XXXIX

FOREIGN TRAVEL

1. (a) Unless authorized by the Senate (or by the President of the United States after an adjournment sine die), no funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) shall be received for the purpose of travel outside the United States by any Member of the Senate whose term will expire at the end of a Congress after—

(1) the date of the general election in which his successor is elected; or

(2) in the case of a Member who is not a candidate in such general election, the earlier of the date of such general election or the adjournment sine die of the second regular session of that Congress.

(b)⁸² The travel restrictions provided by subparagraph (a) with respect to a Member of the Senate whose term will expire at the end of a Congress shall apply to travel by—

(1) any employee of the Member;

(2) any elected officer of the Senate whose employment will terminate at the end of a Congress; and

(3) any employee of a committee whose employment will terminate at the end of a Congress.

2. No Member, officer, or employee engaged in foreign travel may claim payment or accept funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) for any expense for which the individual has received reimbursement from any other source; nor may such Member, officer, or employee receive reimbursement for the same expense more than once from the United States Government. No Member, officer, or employee shall use any funds furnished to him to defray ordinary and necessary expenses of foreign travel for any purpose other than the purpose or purposes for which such funds were furnished.

⁸⁰ Section 311(d) of the Legislative Branch Appropriations Act, 1991, (2 U.S.C. 59e(d)), was amended by the Legislative Appropriations Act, 2002 (Pub. Law 107–68). 2 U.S.C. 59e—Senate Manual Sec. 349, S. Doc. 112–1.

⁸¹ Subparagraph (c) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁸² Pursuant to S. Res. 80, 100–1, Jan. 28, 1987, paragraph 1 was renumbered as 1. (a) and subparagraph (b) was added.

3. A per diem allowance provided a Member, officer, or employee in connection with foreign travel shall be used solely for lodging, food, and related expenses and it is the responsibility of the Member, officer, or employee receiving such an allowance to return to the United States Government that portion of the allowance received which is not actually used for necessary lodging, food, and related expenses.

RULE XL

FRANKING PRIVILEGE AND RADIO AND TELEVISION STUDIOS⁸³

1. A Senator or an individual who is a candidate for nomination for election, or election, to the Senate may not use the frank for any mass mailing (as defined in section 3210(a)(6)(E)⁸⁴ of Title 39, United States Code) if such mass mailing is mailed at or delivered to any postal facility less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which the Senator is a candidate for public office or the individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.⁸⁵

2. A Senator shall use only official funds of the Senate, including his official Senate allowances, to purchase paper, to print, or to prepare any mass mailing material which is to be sent out under the frank.

3. (a) When a Senator disseminates information under the frank by a mass mailing (as defined in section 3210(a)(6)(E) of Title 39, United States Code), the Senator shall register quarterly⁸⁶ with the Secretary of the Senate such mass mailings. Such registration shall be made by filing with the Secretary a copy of the matter mailed and providing, on a form supplied by the Secretary, a description of the group or groups of persons to whom the mass mailing was mailed.

(b) The Secretary of the Senate shall promptly make available for public inspection and copying a copy of the mail matter registered, and a description of the group or groups of persons to whom the mass mailing was mailed.

4. Nothing in this rule shall apply to any mailing under the frank which is (a) in direct response to inquiries or requests from persons to whom the matter is mailed; (b) addressed to colleagues in Congress or to government officials (whether Federal, State, or local); or (c) consists entirely of news releases to the communications media.

5. The Senate computer facilities shall not be used (a) to store, maintain, or otherwise process any lists or categories of lists of names and addresses identifying the individuals included in such lists as campaign workers or contributors, as members of a political party, or by any other partisan political designation, (b) to produce

⁸³Section 3210 of Title 39, U.S.C., contains statutory provisions that are parallel to certain provisions of rule XL relating to the franking privilege. See Senate Manual Sec. 1481, S. Doc. 112-1.

⁸⁴Citation corrected by S. Res. 187, 101-1, Oct. 2, 1989, pursuant to Pub. L. 97-69, Oct. 26, 1981.

⁸⁵As amended, S. Res. 224, 103-2, June 21, 1994.

⁸⁶Pursuant to Pub. L. 101-520, Nov. 5, 1990, 2 U.S.C. 59g, See Senate Manual Sec. 351. S. Doc. 112-1.

computer printouts except as authorized by user guides approved by the Committee on Rules and Administration, or (c) to produce mailing labels for mass mailings, or computer tapes and discs, for use other than in service facilities maintained and operated by the Senate or under contract to the Senate. The Committee on Rules and Administration shall prescribe such regulations not inconsistent with the purposes of this paragraph as it determines necessary to carry out such purposes.

6. (a) The radio and television studios provided by the Senate or by the House of Representatives may not be used by a Senator or an individual who is a candidate for nomination for election, or election, to the Senate less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which that Senator is a candidate for public office or that individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.⁸⁷

(b) This paragraph shall not apply if the facilities are to be used at the request of, and at the expense of, a licensed broadcast organization or an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954.

RULE XLI

POLITICAL FUND ACTIVITY; DEFINITIONS

1. No officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be a Member of the Senate or to any other Federal office. This prohibition does not apply to three⁸⁸ assistants to a Senator, at least one of whom is in Washington, District of Columbia, who have been designated by that Senator to perform any of the functions described in the first sentence of this paragraph and who are compensated at an annual rate in excess of \$10,000 if such designation has been made in writing and filed with the Secretary of the Senate and if each such assistant files a financial statement in the form provided under rule XXXIV for each year during which he is designated under this rule. The Majority Leader and the Minority Leader may each designate an employee of their respective leadership office staff as one of the 3 designees referred to in the second sentence.⁸⁹ The Secretary of the Senate shall make the designation available for public inspection.

2. For purposes of the Senate Code of Official Conduct—

(a) an employee of the Senate includes any employee whose salary is disbursed by the Secretary of the Senate; and

(b) the compensation of an officer or employee of the Senate who is a reemployed annuitant shall include amounts received by such officer or employee as an annuity, and such amounts shall be treated as disbursed by the Secretary of the Senate.

3. Before approving the utilization by any committee of the Senate of the services of an officer or employee of the Government in

⁸⁷ As amended, S. Res. 224, 103-2, June 21, 1994.

⁸⁸ As amended by S. Res. 258, 100-1, Oct. 1, 1987.

⁸⁹ Pursuant to S. Res. 236, 101-2, Jan. 30, 1990.

accordance with paragraph 4⁹⁰ of rule XXVII or with an authorization provided by Senate resolution, the Committee on Rules and Administration shall require such officer or employee to agree in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate. Any such officer or employee shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation he is receiving as an officer or employee of the Government.

4. No Member, officer, or employee of the Senate shall utilize the full-time services of an individual for more than ninety days in a calendar year in the conduct of official duties of any committee or office of the Senate (including a Member's office) unless such individual—

- (a) is an officer or employee of the Senate,
- (b) is an officer or employee of the Government (other than the Senate), or
- (c) agrees in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate.

Any individual to whom subparagraph (c) applies shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation which such individual is receiving from any source for performing such services.

5. In exceptional circumstances for good cause shown, the Select Committee on Ethics may waive the applicability of any provision of the Senate Code of Official Conduct to an employee hired on a per diem basis.

6. (a) The supervisor of an individual who performs services for any Member, committee, or office of the Senate for a period in excess of four weeks and who receives compensation therefor from any source other than the United States Government shall report to the Select Committee on Ethics with respect to the utilization of the services of such individual.

(b) A report under subparagraph (a) shall be made with respect to an individual—

- (1) when such individual begins performing services described in such subparagraph;
- (2) at the close of each calendar quarter while such individual is performing such services; and
- (3) when such individual ceases to perform such services.

Each such report shall include the identity of the source of the compensation received by such individual and the amount or rate of compensation paid by such source.

(c) No report shall be required under subparagraph (a) with respect to an individual who normally performs services for a Member, committee, or office for less than eight hours a week.

⁹⁰Reference corrected by S. Res. 192, 102-1, Oct. 31, 1991.

(d) For purposes of this paragraph, the supervisor of an individual shall be determined under paragraph 12 of rule XXXVII.⁹¹

RULE XLII

EMPLOYMENT PRACTICES

1. No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

- (a) fail or refuse to hire an individual;
- (b) discharge an individual; or
- (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

2.⁹² For purposes of this rule, the provisions of section 509(a) of the Americans With Disabilities Act of 1990 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

RULE XLIII

REPRESENTATION BY MEMBERS⁹³

1. In responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies.

2. At the request of a petitioner, a Member of the Senate, or a Senate employee, may communicate with an executive or independent government official or agency on any matter to—

- (a) request information or a status report;
- (b) urge prompt consideration;
- (c) arrange for interviews or appointments;
- (d) express judgments;
- (e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or
- (f) perform any other service of a similar nature consistent with the provisions of this rule.

3. The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest.

4. A Member shall make a reasonable effort to assure that representations made in the Member's name by any Senate employee

⁹¹Redesignated pursuant to S. Res. 236, 101-2, Jan. 30, 1990 and S. Res. 299, 106-2, Apr. 27, 2000.

⁹²Added by S. Res. 192, 102-1, Oct. 31, 1991, effective July 26, 1990. ADA was subsequently amended by the Government Employee Rights Act of 1991 (Title 3, Civil Rights Act of 1991, Pub. L. 102-166, codified at 2 U.S.C. 1201 et seq.). See Senate Manual Secs. 751, 752, S. Doc. 112-1.

⁹³Rule established by S. Res. 273, 102-2, July 2, 1992.

are accurate and conform to the Member's instructions and to this rule.

5. Nothing in this rule shall be construed to limit the authority of Members, and Senate employees, to perform legislative, including committee, responsibilities.

6.⁹⁴ No Member, with the intent to influence solely on the basis of partisan political affiliation an employment decision or employment practice of any private entity, shall—

(a) take or withhold, or offer or threaten to take or withhold, an official act; or

(b) influence, or offer or threaten to influence the official act of another.

RULE XLIV⁹⁵

CONGRESSIONALLY DIRECTED SPENDING AND RELATED ITEMS

1. (a) It shall not be in order to vote on a motion to proceed to consider a bill or joint resolution reported by any committee unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, or in the committee report accompanying the bill or joint resolution, has been identified through lists, charts, or other similar means including the name of each Senator who submitted a request to the committee for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website in a searchable format at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, the motion to proceed shall be suspended until the sponsor of the motion or his or her designee has requested resumption and compliance with this paragraph has been achieved.

2. (a) It shall not be in order to vote on a motion to proceed to consider a Senate bill or joint resolution not reported by committee unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, has been identified through lists, charts, or other similar means, including the name of each Senator who submitted a request to the sponsor of the bill or joint resolution for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website in a searchable format at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, the motion to proceed shall be suspended until the sponsor of the motion or his or her designee has requested resumption and compliance with this paragraph has been achieved.

⁹⁴ Paragraph 6 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

⁹⁵ Rule XLIV added pursuant to Pub. L. 110–81, Sep. 14, 2007.

3. (a) It shall not be in order to vote on the adoption of a report of a committee of conference unless the chairman of the committee of jurisdiction or the Majority Leader or his or her designee certifies—

(1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the conference report, or in the joint statement of managers accompanying the conference report, has been identified through lists, charts, or other means, including the name of each Senator who submitted a request to the committee of jurisdiction for each item so identified; and

(2) that the information in clause (1) has been available on a publicly accessible congressional website at least 48 hours before such vote.

(b) If a point of order is sustained under this paragraph, then the conference report shall be set aside.

4. (a) If during consideration of a bill or joint resolution, a Senator proposes an amendment containing a congressionally directed spending item, limited tax benefit, or limited tariff benefit which was not included in the bill or joint resolution as placed on the calendar or as reported by any committee, in a committee report on such bill or joint resolution, or a committee report of the Senate on a companion measure, then as soon as practicable, the Senator shall ensure that a list of such items (and the name of any Senator who submitted a request to the Senator for each respective item included in the list) is printed in the Congressional Record.

(b) If a committee reports a bill or joint resolution that includes congressionally directed spending items, limited tax benefits, or limited tariff benefits in the bill or joint resolution, or in the committee report accompanying the bill or joint resolution, the committee shall as soon as practicable identify on a publicly accessible congressional website each such item through lists, charts, or other similar means, including the name of each Senator who submitted a request to the committee for each item so identified. Availability on the Internet of a committee report that contains the information described in this subparagraph shall satisfy the requirements of this subparagraph.

(c) To the extent technically feasible, information made available on publicly accessible congressional websites under paragraphs 3 and 4 shall be provided in a searchable format.

5. For the purpose of this rule—

(a) the term “congressionally directed spending item” means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process;

(b) the term “limited tax benefit” means—

(1) any revenue provision that—

(A) provides a Federal tax deduction, credit, exclusion, or preference to a particular beneficiary or lim-

ited group of beneficiaries under the Internal Revenue Code of 1986; and

(B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision;

(c) the term “limited tariff benefit” means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities; and

(d) except as used in subparagraph 8(e), the term “item” when not preceded by “congressionally directed spending” means any provision that is a congressionally directed spending item, a limited tax benefit, or a limited tariff benefit.

6. (a) A Senator who requests a congressionally directed spending item, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report (or an accompanying joint statement of managers) shall provide a written statement to the chairman and ranking member of the committee of jurisdiction, including—

(1) the name of the Senator;

(2) in the case of a congressionally directed spending item, the name and location of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity;

(3) in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Senator;

(4) the purpose of such congressionally directed spending item or limited tax or tariff benefit; and

(5) a certification that neither the Senator nor the Senator’s immediate family has a pecuniary interest in the item, consistent with the requirements of paragraph 9.

(b) With respect to each item included in a Senate bill or joint resolution (or accompanying report) reported by committee or considered by the Senate, or included in a conference report (or joint statement of managers accompanying the conference report) considered by the Senate, each committee of jurisdiction shall make available for public inspection on the Internet the certifications under subparagraph (a)(5) as soon as practicable.

7. In the case of a bill, joint resolution, or conference report that contains congressionally directed spending items in any classified portion of a report accompanying the measure, the committee of jurisdiction shall, to the greatest extent practicable, consistent with the need to protect national security (including intelligence sources and methods), include on the list required by paragraph 1, 2, or 3 as the case may be, a general program description in unclassified language, funding level, and the name of the sponsor of that congressionally directed spending item.

8. (a) A Senator may raise a point of order against one or more provisions of a conference report if they constitute new directed spending provisions. The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order.

(b) If the Presiding Officer sustains the point of order as to any of the provisions against which the Senator raised the point of

order, then those provisions against which the Presiding Officer sustains the point of order shall be stricken. After all other points of order under this paragraph have been disposed of—

(1) the Senate shall proceed to consider the question of whether the Senate should recede from its amendment to the House bill, or its disagreement to the amendment of the House, and concur with a further amendment, which further amendment shall consist of only that portion of the conference report that has not been stricken; and

(2) the question in clause (1) shall be decided under the same debate limitation as the conference report and no further amendment shall be in order.

(c) Any Senator may move to waive any or all points of order under this paragraph with respect to the pending conference report by an affirmative vote of three-fifths of the Members, duly chosen and sworn. All motions to waive under this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order under this paragraph shall not be amendable.

(d) All appeals from rulings of the Chair under this paragraph shall be debatable collectively for not to exceed 1 hour, equally divided between the Majority and the Minority Leader or their designees. An affirmative vote of three-fifths of the Members of the Senate, duly chosen and sworn, shall be required in the Senate to sustain an appeal of the ruling of the Chair under this paragraph.

(e) The term 'new directed spending provision' as used in this paragraph means any item that consists of a specific provision containing a specific level of funding for any specific account, specific program, specific project, or specific activity, when no specific funding was provided for such specific account, specific program, specific project, or specific activity in the measure originally committed to the conferees by either House.

9. No Member, officer, or employee of the Senate shall knowingly use his official position to introduce, request, or otherwise aid the progress or passage of congressionally directed spending items, limited tax benefits, or limited tariff benefits a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he or his immediate family, or enterprises controlled by them, are members of the affected class.

10. Any Senator may move to waive application of paragraph 1, 2, or 3 with respect to a measure by an affirmative vote of three-fifths of the Members, duly chosen and sworn. A motion to waive under this paragraph with respect to a measure shall be debatable for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. With respect to points of order raised under paragraphs 1, 2, or 3, only one appeal from a ruling of the Chair shall be in order, and debate on such an appeal from a ruling of the Chair on such point of order shall be limited to one hour.

11. Any Senator may move to waive all points of order under this rule with respect to the pending measure or motion by an affirma-

tive vote of three-fifths of the Members, duly chosen and sworn. All motions to waive all points of order with respect to a measure or motion as provided by this paragraph shall be debatable collectively for not to exceed 1 hour equally divided between the Majority Leader and the Minority Leader or their designees. A motion to waive all points of order with respect to a measure or motion as provided by this paragraph shall not be amendable.

12. Paragraph 1, 2, or 3 of this rule may be waived by joint agreement of the Majority Leader and the Minority Leader of the Senate upon their certification that such waiver is necessary as a result of a significant disruption to Senate facilities or to the availability of the Internet.

APPENDIX

NOTE.—S. Res. 445, 108–2, a resolution to eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence, passed the Senate Oct. 9, 2004. The resolution made several changes to the jurisdiction, treatment and name of Senate Committees. However, the provisions of S. Res. 445 did not modify the Standing Rules of the Senate and therefore could not be included in this document except as an appendix. The effective date for the provisions of the resolution was the convening of the 109th Congress. Titles I, III and V of S. Res. 445 are printed in this appendix.

S. Res. 28, 112–1, a resolution to establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter, passed the Senate Jan. 27, 2011. S. Res. 29, 112–1, a resolution to permit the waiving of the reading of an amendment if the text and adequate notice are provided, passed the Senate Jan. 27, 2011. S. Res. 15, 113–1, a resolution to improve procedures for the consideration of legislation and nominations in the Senate, passed the Senate Jan. 24, 2013. These resolutions made changes to Senate procedure but did not modify the Standing Rules of the Senate and therefore could not be included in this document except as an appendix. S. Res. 28, S. Res. 29 and S. Res. 15 are printed in this appendix.

S. RES. 445

To eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence.

IN THE SENATE OF THE UNITED STATES

October 1, 2004

Mr. Lott submitted the following resolution; which was referred to the Committee on Rules and Administration

October 5, 2004

Reported by Mr. Lott, without amendment

October 9, 2004

Considered, amended, and agreed to

RESOLUTION

To eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence.

Resolved,

SEC. 100. PURPOSE.

It is the purpose of titles I through V of this resolution to improve the effectiveness of the Senate Select Committee on Intelligence, especially with regard to its oversight of the Intelligence Community of the United States Government, and to improve the Senate's oversight of homeland security.

TITLE I—HOMELAND SECURITY OVERSIGHT REFORM**SEC. 101. HOMELAND SECURITY.**

(a) COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS.—The Committee on Governmental Affairs is renamed as the Committee on Homeland Security and Governmental Affairs.

(b) JURISDICTION.—There shall be referred to the committee all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

- (1) Department of Homeland Security, except matters relating to—
 - (A) the Coast Guard, the Transportation Security Administration, the Federal Law Enforcement Training Center or the Secret Service; and
 - (B)(i) the United States Citizenship and Immigration Service; or
 - (ii) the immigration functions of the United States Customs and Border Protection or the United States Immigration and Custom Enforcement or the Directorate of Border and Transportation Security; and
 - (C) the following functions performed by any employee of the Department of Homeland Security—
 - (i) any customs revenue function including any function provided for in section 415 of the Homeland Security Act of 2002 (Public Law 107–296);
 - (ii) any commercial function or commercial operation of the Bureau of Customs and Border Protection or Bureau of Immigration and Customs Enforcement, including matters relating to trade facilitation and trade regulation; or
 - (iii) any other function related to clause (i) or (ii) that was exercised by the United States Customs Service on the day before the effective date of the Homeland Security Act of 2002 (Public Law 107–296).

The jurisdiction of the Committee on Homeland Security and Governmental Affairs in this paragraph shall supersede the jurisdiction of any other committee of the Senate provided in the rules of the Senate: *Provided*, That the jurisdiction pro-

vided under section 101(b)(1) shall not include the National Flood Insurance Act of 1968, or functions of the Federal Emergency Management Agency related thereto.

- (2) Archives of the United States.
 - (3) Budget and accounting measures, other than appropriations, except as provided in the Congressional Budget Act of 1974.
 - (4) Census and collection of statistics, including economic and social statistics.
 - (5) Congressional organization, except for any part of the matter that amends the rules or orders of the Senate.
 - (6) Federal Civil Service.
 - (7) Government information.
 - (8) Intergovernmental relations.
 - (9) Municipal affairs of the District of Columbia, except appropriations therefor.
 - (10) Organization and management of United States nuclear export policy.
 - (11) Organization and reorganization of the executive branch of the Government.
 - (12) Postal Service.
 - (13) Status of officers and employees of the United States, including their classification, compensation, and benefits.
- (c) ADDITIONAL DUTIES.—The committee shall have the duty of—
- (1) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;
 - (2) studying the efficiency, economy, and effectiveness of all agencies and departments of the Government;
 - (3) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government; and
 - (4) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.
- (d) JURISDICTION OF BUDGET COMMITTEE.—Notwithstanding paragraph (b)(3) of this section, and except as otherwise provided in the Congressional Budget Act of 1974, the Committee on the Budget shall have exclusive jurisdiction over measures affecting the congressional budget process, which are—
- (1) the functions, duties, and powers of the Budget Committee;
 - (2) the functions, duties, and powers of the Congressional Budget Office;
 - (3) the process by which Congress annually establishes the appropriate levels of budget authority, outlays, revenues, deficits or surpluses, and public debt—including subdivisions thereof—and including the establishment of mandatory ceilings on spending and appropriations, a floor on revenues, timetables for congressional action on concurrent resolutions, on the reporting of authorization bills, and on the enactment of appropriation bills, and enforcement mechanisms for budgetary limits and timetables;
 - (4) the limiting of backdoor spending devices;
 - (5) the timetables for Presidential submission of appropriations and authorization requests;
 - (6) the definitions of what constitutes impoundment—such as “rescissions” and “deferrals”;
 - (7) the process and determination by which impoundments must be reported to and considered by Congress;
 - (8) the mechanisms to insure Executive compliance with the provisions of the Impoundment Control Act, title X—such as GAO review and lawsuits; and
 - (9) the provisions which affect the content or determination of amounts included in or excluded from the congressional budget or the calculation of such amounts, including the definition of terms provided by the Budget Act.
- (e) OMB NOMINEES.—The Committee on the Budget and the Committee on Homeland Security and Governmental Affairs shall have joint jurisdiction over the nominations of persons nominated by the President to fill the positions of Director and Deputy Director for Budget within the Office of Management and Budget, and if one committee votes to order reported such a nomination, the other must report within 30 calendar days session, or be automatically discharged.

TITLE III—COMMITTEE STATUS

SEC. 301. COMMITTEE STATUS.

(a) **HOMELAND SECURITY.**—The Committee on Homeland Security and Governmental Affairs shall be treated as the Committee on Governmental Affairs listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate.

(b) **INTELLIGENCE.**—The Select Committee on Intelligence shall be treated as a committee listed under paragraph 2 of rule XXV of the Standing Rules of the Senate for purposes of the Standing Rules of the Senate.

TITLE V—EFFECTIVE DATE

SEC. 501. EFFECTIVE DATE.

This resolution shall take effect on the convening of the 109th Congress.

S. RES. 28

To establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter.

IN THE SENATE OF THE UNITED STATES

January 27, 2011

Mr. WYDEN (for himself, Mr. GRASSLEY, Mrs. MCCASKILL, Mr. BROWN of Ohio, Mr. BINGAMAN, Mr. INHOFE, Mrs. MURRAY, Mrs. SHAHEEN, Mr. UDALL of Colorado, Mr. WHITEHOUSE, Ms. KLOBUCHAR, Ms. COLLINS, Mr. DURBIN, Mrs. GILLIBRAND, Mr. TESTER, Mr. JOHANNIS, Mr. MERKLEY, Mr. BEGICH, and Mr. MANCHIN) submitted the following resolution; which was considered and agreed to

RESOLUTION

To establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter.

Resolved,

SECTION 1. ELIMINATING SECRET SENATE HOLDS.

(a) In General—

(1) COVERED REQUEST—This standing order shall apply to a notice of intent to object to the following covered requests:

(A) A unanimous consent request to proceed to a bill, resolution, joint resolution, concurrent resolution, conference report, or amendment between the Houses.

(B) A unanimous consent request to pass a bill or joint resolution or adopt a resolution, concurrent resolution, conference report, or the disposition of an amendment between the Houses.

(C) A unanimous consent request for disposition of a nomination.

(2) RECOGNITION OF NOTICE OF INTENT—The majority and minority leaders of the Senate or their designees shall recognize a notice of intent to object to a covered request of a Senator who is a member of their caucus if the Senator--

(A) submits the notice of intent to object in writing to the appropriate leader and grants in the notice of intent to object permission for the leader or designee to object in the Senator's name; and

(B) not later than 2 session days after submitting the notice of intent to object to the appropriate leader, submits a copy of the notice of intent to object to the Congressional Record and to the Legislative Clerk for inclusion in the applicable calendar section described in subsection (b).

(3) FORM OF NOTICE—To be recognized by the appropriate leader a Senator shall submit the following notice of intent to object:

"I, Senator XXX, intend to object to XXX, dated XXX. I will submit a copy of this notice to the Legislative Clerk and the Congressional Record within 2 session days and I give my permission to the objecting Senator to object in my name." The first blank shall be filled with the name of the Senator, the second blank shall be filled with the name of the covered request, the name of the measure or matter and, if applicable, the calendar number, and the third blank shall be filled with the date that the notice of intent to object is submitted.

(4) NOTICES ON THE SENATE FLOOR- The requirement to submit a notice of intent to object to the Legislative Clerk and the Congressional Record shall not apply in the event a Senator objects on the floor of the Senate and states the following:

"I object to XXX, on behalf of Senator XXX."

(b) Calendar—

(1) OBJECTION—Upon receiving the submission under subsection (a)(2)(B), the Legislative Clerk shall add the information from the notice of intent to object to the applicable Calendar section entitled 'Notices of Intent to Object to Proceeding' created by Public Law 110-81. Each section shall include the name of each Senator filing a notice under subsection (a)(2)(B), the measure or matter covered by the calendar to which the notice of intent to object relates, and the date the notice of intent to object was filed.

(2) OBJECTION ON BEHALF- In the case of an objection made under subsection (a)(4), not later than 2 session days after the objection is made on the floor, the Legislative Clerk shall add the information from such objection to the applicable Calendar section entitled 'Notices of Intent to Object to Proceeding' created by Public Law 110-81. Each section shall include the name of the Senator on whose behalf the objection was made, the measure or matter objected to, and the date the objection was made on the floor.

(c) Removal- A Senator may have a notice of intent to object relating to that Senator removed from a calendar to which it was added under subsection (b) by submitting to the Legislative Clerk the following notice:

"I, Senator XXX, do not object to XXX, dated XXX." The first blank shall be filled with the name of the Senator, the second blank shall be filled with the name of the covered request, the name of the measure or matter and, if applicable, the calendar number, and the third blank shall be filled with the date of the submission to the Legislative Clerk under this subsection.

(d) Objecting on Behalf of a Member- Except with respect to objections made under subsection (a)(4), if a Senator who has notified his or her leader of an intent to object to a covered request fails to submit a notice of intent to object under subsection (a)(2)(B) within 2 session days following an objection to a covered request by the leader or his or her designee on that Senator's behalf, the Legislative Clerk shall list the Senator who made the objection to the covered request in the applicable 'Notice of Intent to Object to Proceeding' calendar section.

S. RES. 29

To permit the waiving of the reading of an amendment if the text and adequate notice are provided.

IN THE SENATE OF THE UNITED STATES

January 27, 2011

Mr. UDALL of Colorado (for himself and Mr. MERKLEY) submitted the following resolution; which was considered and agreed to

RESOLUTION

To permit the waiving of the reading of an amendment if the text and adequate notice are provided.

Resolved,

SECTION 1. READING OF AMENDMENTS.

- (a) Standing Order—This section shall be a standing order of the Senate.
- (b) Waiver—The reading of an amendment may be waived by a non-debatable motion if the amendment—
 - (1) has been submitted at least 72 hours before the motion; and
 - (2) is available in printed or electronic form in the Congressional Record.

S. RES. 15

To improve procedures for the consideration of legislation and nominations in the Senate.

IN THE SENATE OF THE UNITED STATES

JANUARY 24 (legislative day, JANUARY 3), 2013

Mr. REID (for himself, Mr. LEVIN, and Mr. MCCAIN) submitted the following resolution; which was considered and agreed to

RESOLUTION

To improve procedures for the consideration of legislation and nominations in the Senate.

Resolved,

SECTION 1. CONSIDERATION OF LEGISLATION.

(a) MOTION TO PROCEED AND CONSIDERATION OF AMENDMENTS.—A motion to proceed to the consideration of a measure or matter made pursuant to this section shall be debatable for no more than 4 hours, equally divided in the usual form. If the motion to proceed is agreed to the following conditions shall apply:

(1) The first amendments in order to the measure or matter shall be one first-degree amendment each offered by the minority, the majority, the minority, and the majority, in that order. If an amendment is not offered in its designated order under this paragraph, the right to offer that amendment is forfeited.

(2) If a cloture motion has been filed pursuant to rule XXII of the Standing Rules of the Senate on a measure or matter proceeded to under this section, it shall not be in order for the minority to propose its first amendment unless it has been submitted to the Senate Journal Clerk by 1:00 p.m. on the day following the filing of that cloture motion, for the majority to propose its first amendment unless it has been submitted to the Senate Journal Clerk by 3:00 p.m. on the day following the filing of that cloture motion, for the minority to propose its second amendment unless it has been submitted to the Senate Journal Clerk by 5:00 p.m. on the day following the filing of that cloture motion, or for the majority to propose its second amendment unless it has been submitted to the Senate Journal Clerk by 7:00 p.m. on the day following the filing of that cloture motion. If an amendment is not timely submitted under this paragraph, the right to offer that amendment is forfeited.

(3) An amendment offered under paragraph (1) shall be disposed of before the next amendment in order under paragraph (1) may be offered.

(4) An amendment offered under paragraph (1) is not divisible or subject to amendment while pending.

(5) An amendment offered under paragraph (1), if adopted, shall be considered original text for purpose of further amendment.

(6) No points of order shall be waived by virtue of this section.

(7) No motion to commit or recommit shall be in order during the pendency of any amendment offered pursuant to paragraph (1).

(8) Notwithstanding rule XXII of the Standing Rules of the Senate, if cloture is invoked on the measure or matter before all amendments offered under paragraph (1) are disposed of, any amendment in order under paragraph (1) but not actually pending upon the expiration of post-cloture time may be offered and may be debated for not to exceed 1 hour, equally divided in the usual form. Any amendment offered under paragraph (1) that is ruled non-germane on a point of order shall not fall upon that ruling, but instead shall remain pending and shall require 60 votes in the affirmative to be agreed to.

(b) SUNSET.—This section shall expire on the day after the date of the sine die adjournment of the 113th Congress.

SEC. 2. CONSIDERATION OF NOMINATIONS.

(a) IN GENERAL.—

(1) Post-Cloture Consideration.—If cloture is invoked in accordance with rule XXII of the Standing Rules of the Senate on a nomination described in para-

graph (2), there shall be no more than 8 hours of post-cloture consideration equally divided in the usual form.

(2) Nominations Covered.—A nomination described in this paragraph is any nomination except for the nomination of an individual—

(A) to a position at level I of the Executive Schedule under section 5312 of title 5, United States Code; or

(B) to serve as a judge or justice appointed to hold office during good behavior.

(b) SPECIAL RULE FOR DISTRICT COURT NOMINEES.—If cloture is invoked in accordance with rule XXII of the Standing Rules of the Senate on a nomination of an individual to serve as a judge of a district court of the United States, there shall be no more than 2 hours of post-cloture consideration equally divided in the usual form.

(c) SUNSET.—This section shall expire on the day after the date of the sine die adjournment of the 113th Congress.

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706 F.3d 460
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee

v.

Kevin A. RING, Appellant.

No. 11–3100.

|
Argued Nov. 15, 2012.

|
Decided Jan. 25, 2013.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Columbia, [Ellen Segal Huvelle, J., 2011 WL 7790743](#), of honest-services fraud, paying an illegal gratuity, and conspiracy relating to his provision of meals, tickets, and other **gifts** to public officials. He appealed.

Holdings: The Court of Appeals, [Tatel](#), Circuit Judge, held that:

[1] district court properly instructed jury on quid pro quo element of honest-services fraud;

[2] official's forwarding of defendant's e-mail requesting expedited review of a visa application was an “official act” within meaning of illegal-gratuity statute; and

[3] district court did not abuse its discretion by finding that the probative value of evidence of defendant's campaign contributions was not substantially outweighed by its prejudicial effect.

Affirmed.

West Headnotes (12)

[1] **Criminal Law**
🔑 Review De Novo

Whether the district court properly instructed the jury is a question of law that the Court of Appeals reviews de novo.

[Cases that cite this headnote](#)

[2] **Criminal Law**

🔑 Instructions

In reviewing challenges to jury instructions, the task of the Court of Appeals is to determine whether, taken as a whole, the instructions accurately state the governing law.

[Cases that cite this headnote](#)

[3] **Bribery**

🔑 Nature and Elements of Offenses

Outside the context of campaign contributions, no explicit quid pro quo agreement is required for a **lobbyist's** provision of other “things of value” to public officials to constitute honest-services fraud. [18 U.S.C.A. § 1346](#).

[1 Cases that cite this headnote](#)

[4] **Bribery**

🔑 Nature and Elements of Offenses

The official is not required to agree to or actually complete a corrupt exchange for an offer of something of value with the intent to influence an official act to amount to honest-services fraud by bribery. [18 U.S.C.A. § 1346](#).

[2 Cases that cite this headnote](#)

[5] **Bribery**

🔑 Nature and Elements of Offenses

That the official need not accept an offer of something of value with the intent to influence an official act for the act of bribery to be complete is evident from the structure of the statute, which defines two separate crimes: the act of offering a bribe and the act of soliciting or accepting a bribe. [18 U.S.C.A. § 201\(b\)\(1, 2\)](#).

[3 Cases that cite this headnote](#)**[6] Bribery**[🔑 Nature and Elements of Offenses](#)

A defendant may be guilty of honest-services fraud by bribery when he offers an official something of value with a specific intent to effect a quid pro quo even if that official emphatically refuses to accept; in other words, though the offerer of a bribe is guilty of honest-services fraud, his attempted target may be entirely innocent. [18 U.S.C.A. § 1346](#).

[4 Cases that cite this headnote](#)**[7] Bribery**[🔑 Instructions](#)

District court properly instructed jury on quid pro quo element of honest-services fraud, by stating that a conviction required jury to find that defendant had specific intent to influence official acts, that defendant had an intent that the official realize or know that the corrupt exchange was being proposed, and that the things of value offered were conditioned upon the official's act or agreement. [18 U.S.C.A. § 1346](#).

[2 Cases that cite this headnote](#)**[8] Bribery**[🔑 Questions for jury](#)

The question whether an action constitutes an “official act,” within meaning of the illegal-gratuity statute, is treated as one of sufficiency of the evidence. [18 U.S.C.A. § 201\(a\)\(3\)](#).

[Cases that cite this headnote](#)**[9] Bribery**[🔑 Nature and Elements of Offenses](#)

Department of Justice (DOJ) attorney's forwarding of defendant's e-mail, requesting that attorney help to expedite review of a visa application, constituted an “official act,” within meaning of illegal-gratuity statute, although attorney himself lacked independent

authority to expedite visa applications, where Immigration and Naturalization Service (INS) secretary who received attorney's e-mail felt unable to ignore the attorney's request to expedite the application because of the office he held. [18 U.S.C.A. § 201\(a\)\(3\)](#).

[2 Cases that cite this headnote](#)**[10] Criminal Law**[🔑 Relevance](#)

The Court of Appeals reviews a trial judge's application of rule governing exclusion of relevant evidence on basis of prejudice or confusion for abuse of discretion, because it assumes that the trial judge generally is in the best position to balance the probative value of the disputed evidence against the risks of prejudice and confusion. [Fed.Rules Evid.Rule 403](#), [28 U.S.C.A.](#)

[6 Cases that cite this headnote](#)**[11] Criminal Law**[🔑 Relevance](#)

Although a trial court's discretion to admit evidence under rule governing exclusion of relevant evidence on basis of prejudice or confusion is not unfettered, appellate courts must be extremely wary of second-guessing the legitimate balancing of interests undertaken by the trial judge. [Fed.Rules Evid.Rule 403](#), [28 U.S.C.A.](#)

[4 Cases that cite this headnote](#)**[12] Bribery**[🔑 Admissibility](#)**Conspiracy**[🔑 Admissibility in general](#)**Criminal Law**[🔑 Evidence calculated to create prejudice against or sympathy for accused](#)

District Court did not abuse its discretion by finding that the probative value of evidence of defendant's campaign contributions was not substantially outweighed by its prejudicial effect at trial for honest-services fraud, paying

an illegal gratuity, and conspiracy relating to his provision of meals, tickets, and other **gifts** to public officials, where the evidence had significant probative value in that it showed jury how **lobbyists** like defendant gained influence with public officials, and the district court repeatedly reminded the jury that such contributions were legitimate lobbying tools and were not illegal. 18 U.S.C.A. §§ 201(a)(3), 1346; Fed.Rules Evid.Rule 403, 28 U.S.C.A.

1 Cases that cite this headnote

West Codenotes

Limitation Recognized

18 U.S.C.A. § 1346

*462 Appeal from the United States District Court for the District of Columbia (No. 1:08-cr-00274-1).

Attorneys and Law Firms

Timothy P. O'Toole, appointed by the court, argued the cause and filed the briefs for appellant.

Paul F. Enzinna, **Jonathan Hacker**, and Allen Dickerson were on the brief for amici curiae National Association of Criminal Defense Lawyers, Inc., et al. in support of appellant.

John-Alex Romano, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were **Lanny A. Breuer**, Assistant Attorney General, and **Nathaniel B. Edmonds**, Trial Attorney. **Elizabeth Trosman**, Assistant U.S. Attorney, entered an appearance.

Before: **TATEL**, **BROWN**, and **GRIFFITH**, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge **TATEL**.

*463 **TATEL**, Circuit Judge:

**413 In 2004, a Department of Justice investigation into Jack Abramoff's lobbying team unearthed evidence of corruption so extensive that it ultimately implicated

more than twenty public officials, staffers, and **lobbyists**. Appellant Kevin Ring, once a prominent Washington **lobbyist**, was one of them. Exposing the dark underbelly of a profession that has long played an important role in American politics, this case probes the boundary between legal lobbying and criminal conduct. Ring was convicted of honest-services fraud, paying an illegal gratuity, and conspiracy relating to his provision of meals, tickets, and other **gifts** to public officials. On appeal, Ring argues that the district court's instructions on the honest-services counts misstated the law, that the jury lacked sufficient evidence to find that an "official act" underlay the illegal-gratuity charge, and that the district court ran afoul of Federal Rule of Evidence 403 and the First Amendment when it admitted evidence of his lawful campaign contributions. Although each of these arguments is weighty, we ultimately affirm Ring's conviction.

I.

Lobbying has been integral to the American political system since its very inception. *See* 1 Robert C. Byrd, *The Senate 1789–1989: Addresses on the History of the United States Senate 491–92* (Mary Sharon Hall, ed., 1988). As some have put it more cynically, "[**lobbyists** have besieged the U.S. government for as long as it has had lobbies." Peter Grier, "The **Lobbyist** Through History: Villainy and Virtue," *The Christian Science Monitor*, Sept. 28, 2009, <http://www.csmonitor.com/USA/Politics/2009/0928/the-lobbyist-through-history-villainy-and-virtue>. By 2008, the year Ring was indicted, corporations, unions, and other organizations employed more than 14,000 registered Washington **lobbyists** and spent more than \$3 billion lobbying Congress and federal agencies. *See* Lobbying Database, Center for Responsive Politics, <http://www.opensecrets.org/lobby/index.php> (compiling data from the Senate Office of Public Records).

The interaction between **lobbyists** and public officials produces important benefits for our representative form of government. **Lobbyists** serve as a line of communication between citizens and their representatives, safeguard minority interests, and help ensure that elected officials have the information necessary to evaluate proposed legislation. Indeed, Senator Robert Byrd once suggested that Congress "could not adequately consider [its]

workload without them.” 1 Byrd, *The Senate 1789–1989*, at 508.

In order to more effectively communicate their clients' policy goals, lobbyists often seek to cultivate personal relationships with public officials. This involves not only making campaign contributions, but sometimes also hosting events or providing gifts of value such as drinks, meals, and tickets to sporting events and concerts. Such practices have a long and storied history of use—and misuse. During the very First Congress, Pennsylvania Senator William Maclay complained that “New York merchants employed ‘treats, dinners, attentions’ to delay passage of a tariff bill.” *Id.* at 492. Sixty years later, lobbyists working to pass a bill that would benefit munitions magnate Samuel Colt “stage[d] lavish entertainments for wavering senators.” *Id.* at 493. Then, in the 1870s, congressmen came to rely on railroad lobbyists for free travel. *See id.* at 494. Indeed, one railroad tycoon complained that he was “averag[ing] six letters per day from Senators and Members of **414 *464 Congress asking for passes over the road.” *Id.*

The ubiquity of these practices perhaps explains why in Steven Spielberg's film *Lincoln* a lobbyist declared, “It is not illegal to bribe congressmen—they'd starve otherwise.” Although public officials certainly benefit from lobbyists' campaign contributions and other gifts, that quip, of course, is not precisely accurate. To be sure, bribing congressmen is illegal, but gifts given by lobbyists to curry political favor do not always amount to bribes. At least prior to legislation enacted in the wake of the Abramoff scandal, *see* Honest Leadership and Open Government Act of 2007, Pub.L. No. 110–81, 121 Stat. 735, there was nothing criminal about giving gifts to an official in an attempt “to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.” *United States v. Sun–Diamond Growers of California*, 526 U.S. 398, 405, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999). The line between legal lobbying and criminal conduct is crossed, however, when a gift possesses a particular link to official acts. *See id.* at 405–08, 119 S.Ct. 1402 (“link” or “connection” between gift and official act distinguishes lawful from unlawful gifts). Specifically, when the gift is given with an “intent ‘to influence’ an official act” by way of a corrupt exchange—i.e., a quid pro quo—a defendant has committed bribery or honest-services fraud. *See id.* at 404, 119 S.Ct. 1402 (quoting 18 U.S.C. § 201(b)(1)).

When a gift is intended as a “reward” for a specific past or future official act, a defendant has paid an illegal gratuity. *See id.* at 405, 119 S.Ct. 1402; 18 U.S.C. § 201(c)(1)(A). The distinction between legal lobbying and criminal conduct may be subtle, but, as this case demonstrates, it spells the difference between honest politics and criminal corruption.

Appellant Kevin Ring, after stints working for a member of the U.S. House of Representatives, a U.S. Senate committee, and the House Republican caucus, joined Jack Abramoff's lobbying team in 1999. Until its fall from grace, Abramoff's group maintained a successful and wide-ranging lobbying practice in Washington, D.C. Playing a role some characterized as the team's “chief operating officer,” Ring managed some of Abramoff's most important clients and maintained close relationships with several public officials.

Ring and the other Abramoff lobbyists relied heavily on campaign contributions to maintain relationships with elected officials and promote their clients' political interests. But it was Ring's other lobbying tactics that got him in trouble. These tactics chiefly included treating congressional and executive branch officials to dinners, drinks, travel, concerts, and sporting events. Ring referred to officials with whom he had the closest ties and with whom his lobbying efforts were most successful as his “champions.” As regular beneficiaries of Ring's largesse, these “champions” often took actions that were favorable to Ring's clients.

In 2004, a targeted federal investigation of a kickback scheme masterminded by Abramoff and another of his associates, Michael Scanlon, spawned the broader investigation that ultimately ensnared Ring. Discovering that meals, tickets, and travel Ring provided to public officials were impermissibly linked to official acts that benefitted Ring and his clients, the government indicted him on six counts of honest-services fraud, one count of paying an illegal gratuity, and one count of conspiracy to pay illegal gratuities and commit honest-services fraud. After his first trial resulted in a hung jury, the district court postponed retrial to await the Supreme Court's decision in *Skilling v. United States*, — U.S. —, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), its landmark honest-services case. Then, following a two-week trial, a jury convicted Ring on three of the six honest-services counts, the illegal gratuity count, and the

conspiracy count. Ring was sentenced to twenty months' incarceration, but the district court, observing that his case "presented challenging and novel questions of law," stayed that sentence pending appeal.

Ring now challenges the district court's instructions on the honest-services counts, the sufficiency of the evidence on the illegal-gratuity count, and the admission of evidence of his lawful campaign contributions. We consider each argument in turn.

II.

The honest-services fraud statute, 18 U.S.C. § 1346, extends the general mail- and wire-fraud statute to include not only schemes to defraud another of money or property, but also "scheme[s] or artifice[s] to deprive another of the intangible right of honest services." In *Skilling*, the Supreme Court adopted a limiting construction of the statute in order to save it from unconstitutional vagueness. Specifically, the Court held that the honest-services fraud statute "covers only bribery and kickback schemes." 130 S.Ct. at 2907. Consistent with *Skilling*, the government prosecuted Ring on a bribery theory of honest-services fraud. As both parties agree, this means that the government had to prove the major elements of bribery in order to convict Ring of honest-services fraud. As relevant to the issue here, the government had to show that Ring gave gifts with an "intent 'to influence' an official act" by way of a corrupt quid pro quo. See *Sun-Diamond*, 526 U.S. at 404, 119 S.Ct. 1402 (quoting 18 U.S.C. § 201(b)(1)).

[1] [2] Ring argues that the district court's instructions on the quid pro quo element were flawed in three respects. Specifically, he contends that the instructions failed to make clear (1) that an *explicit* quid pro quo was required, (2) that the official must *agree* to the exchange, and (3) that, at the very least, a corrupt agreement must be *offered*. Whether the district court properly instructed the jury is "a question of law that we review *de novo*." *United States v. Orenuga*, 430 F.3d 1158, 1166 (D.C.Cir.2005). In reviewing challenges to instructions, our task is to "determine whether, taken as a whole, [the instructions] accurately state the governing law." *Id.* (quoting *United States v. DeFries*, 129 F.3d 1293, 1303 (D.C.Cir.1997) (per curiam)) (alteration in original). After considering each of Ring's three challenges—the explicitness argument,

the agreement argument, and the offer argument—we conclude that the district court's careful instructions correctly stated the law of honest-services bribery.

A.

[3] In *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991), the case on which Ring primarily relies, the Supreme Court held that making campaign contributions can constitute criminal extortion under the Hobbs Act only when made pursuant to an explicit quid pro quo agreement. See *id.* at 271–74, 111 S.Ct. 1807. *McCormick* expressly declined to decide whether this requirement "exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 274 n. 10, 111 S.Ct. 1807. Ring urges us to resolve the question *McCormick* left open and hold that a lobbyist's provision of other "things of value" to public officials cannot constitute honest-services bribery absent an explicit quid pro quo agreement. Like contributing to political campaigns, Ring maintains, lobbying **416 *466 implicates core First Amendment rights—specifically, the right to petition the government. Criminalizing implicit agreements to exchange things of value for official acts, he further contends, would result in confused juries convicting on the basis of constitutionally protected conduct and chill First Amendment activity.

The *McCormick* Court failed to clarify what it meant by "explicit," and subsequent courts have struggled to pin down the definition of an explicit quid pro quo in various contexts. See *United States v. McGregor*, 879 F.Supp.2d 1308, 1313–20 (M.D.Ala.2012) (collecting cases and navigating various courts' pronouncements about the meaning of "explicit"). It is thus understandable that Ring fails to explain exactly what the addition of an explicitness requirement would mean in practice. In any event, we think it clear that no such instruction is required outside the campaign contribution context.

As an initial matter, we assume without deciding a proposition that Ring appears to take for granted: that *McCormick*, which concerned extortion, extends to honest-services fraud. Cf. *United States v. Siegelman*, 640 F.3d 1159, 1172–74 & n. 2 (11th Cir.2011) (assuming without deciding that *McCormick* applies to federal-funds bribery and honest-services fraud). But even assuming

as much, we believe that campaign contributions can be distinguished from other things of value. *See, e.g., United States v. Ganim*, 510 F.3d 134, 142–44 (2d Cir.2007) (explaining that *McCormick* requires “proof of an express promise” in the contribution context, but that an “agreement may be implied” in “the non-campaign context”). For one thing, whereas soliciting campaign contributions may be practically “unavoidable so long as election campaigns are financed by private ... expenditures,” *McCormick*, 500 U.S. at 272, 111 S.Ct. 1807, accepting free dinners is certainly not. Moreover, although providing information, commenting on proposed legislation, and other lobbying activities implicate First Amendment speech and petition rights, *see Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C.Cir.1967) (“[E]very person or group engaged ... in trying to persuade Congressional action is exercising the First Amendment right of petition.”), the First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, *de minimis*. Accordingly, to the extent concerns about criminalizing politically necessary activity or chilling constitutionally protected conduct justify imposing a higher bar for criminalizing campaign contributions, such concerns carry significantly less weight with respect to other things of value.

B.

[4] Having rejected Ring's argument that an *explicit* quid pro quo is required outside the contribution context, we next address his contention that the district court nonetheless erred by instructing the jury that “[i]t [was] not necessary for the government to prove that ... the public official actually accepted the thing of value or agreed to perform the official act or participated in the scheme or artifice to defraud.” That the official must actually enter into a corrupt agreement, Ring maintains, flows from the Supreme Court's admonition that bribery requires “a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act,” *Sun–Diamond*, 526 U.S. at 404–05, 119 S.Ct. 1402, from the need to distinguish bribery from illegal gratuity, and from our decision in *United States v. Dean*, 629 F.3d 257 (D.C.Cir.2011).

*467 **417 [5] Ring's position is foreclosed by the text and structure of the federal bribery statute, which

both parties agree serves as the benchmark for honest-services bribery, as well as by binding precedent. The bribery statute expressly criminalizes a mere “offer” of something of value with the intent to influence an official act. 18 U.S.C. § 201(b)(1). That the official need not accept that offer for the act of bribery to be complete is evident from the structure of the statute, which defines two separate crimes: the act of offering a bribe and the act of soliciting or accepting a bribe. *See id.* § 201(b)(1)–(2). Confirming this interpretation, the Supreme Court held in *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972), that, with respect to a bribe *payee*, the “acceptance of the bribe is the violation of the statute.” *Id.* at 526, 92 S.Ct. 2531. The parallel proposition in the context of a bribe *payor* is straightforward: the offer of the bribe is the violation of the statute. Indeed, we have made clear that the quid pro quo need not be “fully executed for the act to be considered a bribe.” *Orenuga*, 430 F.3d at 1166.

[6] Because bribery does not require the official to agree to or actually complete a corrupt exchange, neither does honest-services fraud by bribery. Although we need look no further than black-letter bribery law to reach this conclusion, the fact that the wire fraud statute “‘punishes the scheme, not its success,’ ” *Pasquantino v. United States*, 544 U.S. 349, 371, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (quoting *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir.2000)), lends further support to our conclusion that a defendant may be guilty of honest-services bribery where he offers an official something of value with a specific intent to effect a quid pro quo even if that official emphatically refuses to accept. In other words, though the offerer of a bribe is guilty of honest-services fraud, his attempted target may be entirely innocent. *See United States v. Anderson*, 509 F.2d 312, 332 (D.C.Cir.1974) (bribe payer's culpability may differ from official's culpability).

Contrary to Ring's argument, moreover, the proposition that the official need not agree to accept a proffered bribe hardly renders bribery, or honest-services fraud by bribery, indistinguishable from illegal gratuity, which criminalizes **gifts** given “for or because of,” 18 U.S.C. § 201(c)—as opposed to with an intent “to influence,” *id.* § 201(b)—an official act. Indeed, the Supreme Court directly answered this objection in *United States v. Sun–Diamond Growers of California*, explaining that “[t]he distinguishing feature of each crime is its intent element,”

not any action taken by another party. 526 U.S. at 404, 119 S.Ct. 1402. Specifically:

Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

Id. at 404–05, 119 S.Ct. 1402 (quoting 18 U.S.C. § 201(b)–(c)). Thus, it is the “specific intent to give or receive something of value in exchange for an official act,” *id.* (emphasis omitted), an element on which the jury in this case was carefully instructed, that preserves the distinction between bribery and gratuity.

*468 **418 Nothing in *Dean* requires a different result. There, we overturned a conviction for solicitation of a bribe, holding that bribery “necessitates an *agreement* between the public official and the other party that the official will perform an official act in return for a personal benefit to the official.” 629 F.3d at 259. Leaning heavily on the word “agreement,” Ring maintains that *Dean* stands for the proposition that an official must “agree” to accept a bribe for the requisite *quid pro quo* to occur. But in context it is clear that “agreement” is used as a synonym for specific intent. When, as in *Dean*, a public official is charged with *soliciting* a bribe, the evidence must show that the official conveyed an intent to perform official acts in exchange for personal benefit. Accordingly, the element absent in *Dean* is precisely what is present here: an intent to offer or solicit an exchange of official action for personal gain.

C.

[7] Finally, we turn to Ring's more nuanced argument that even if an official need not *agree* to a corrupt

exchange, the payor defendant must at least intend to *offer* such an exchange. This argument, with which the government appears to agree, *see* Oral Arg. Tr. 25:19–26:11; Appellee Br. 29, was initially proffered by amici and adopted as a “fallback” by Ring. *See* Oral Arg. Tr. 13:5. But we agree with the government that the district court's instructions faithfully capture this requirement. After explaining the *quid pro quo* element, the instructions stated that “[t]he defendant must intend that the public official realize or know that he or she is expected, as a result of receiving this thing of value, to exercise particular kinds of influence or decision-making to benefit the giver as specific opportunities to do so arise.... [T]his *quid pro quo*,” the instructions continued, “must include a showing that the things of value either were conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary.”

These careful instructions touched all the necessary bases, requiring a specific intent to influence official acts, an intent that the official “realize or know” that the corrupt exchange is being proposed, and a showing that the **gifts** “were conditioned upon” the official's act or agreement. They also comport with instructions approved by other circuits. In *United States v. Urciuoli*, 613 F.3d 11 (1st Cir.2010), for instance, the First Circuit upheld instructions that required the government to prove that the defendant “intended the payment to cause [the official] to alter his official acts,” *id.* at 15, and that “the payments to [the official] were made with the specific purpose of influencing his actions on official matters,” *id.* at 18.

To be sure, the district court focused more on Ring's intent than on his conduct. But that focus mirrors the Supreme Court's in *Sun–Diamond*, which defined the *quid pro quo* element not in terms of a defendant's conduct, but rather in terms of a defendant's “*specific intent* to give or receive something of value in exchange for an official act.” 526 U.S. at 404–05, 119 S.Ct. 1402 (emphasis added and other emphasis omitted). In the end, it is this *mens rea* element that distinguishes criminal corruption from commonplace political and business activities.

III.

[8] Ring's next argument takes us from the honest-services fraud charges to the sole illegal-gratuity count.

As we have already explained, the illegal-gratuity statute makes it unlawful to “give[], offer[], **419 *469 or promise[] anything of value to any public official ... for or because of any official act.” 18 U.S.C. § 201(c). The statute defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.” *Id.* § 201(a)(3). This Circuit treats the question whether an action constitutes an “official act” as one of “sufficiency of the evidence.” See *Valdes v. United States*, 475 F.3d 1319, 1322 (D.C.Cir.2007) (en banc).

[9] Ring was charged with paying an illegal gratuity when he gave Washington Wizards tickets to an attorney at the Justice Department's Office of Intergovernmental Affairs as a reward for helping to expedite review of a visa application for a foreign student seeking to attend a private school owned by Abramoff. Upon receiving a request for assistance from Ring, the attorney forwarded Ring's email to another Justice Department official who recommended he contact someone at the U.S. Immigration and Naturalization Service (“INS”). Following this advice, the attorney called an INS official's secretary and urged her to expedite the application. He then forwarded Ring's email to the secretary along with a personal note:

Thank you for looking into this. I do not know if anything can be done but I said I would look into it. If, for any reason, nothing can be done, please email me so I can pass that along. Thank you very much for you[r] assistance.

The secretary, in turn, passed the email along to five different INS officials in an effort to, as she testified, “make sure ... action was being taken to answer the request” because it had come from “higher headquarters” at the Department of Justice. Within a single business day, INS agreed to expedite the application. After getting the news that the attorney's efforts had been successful, Ring sent Abramoff an email reporting that the attorney had “[h]elped on the school and [was] now looking for tickets” to two Washington Wizards basketball games. Abramoff promptly agreed, and the attorney attended the games on Abramoff's dime.

By convicting on the illegal-gratuity count, the jury found—and Ring does not now dispute—that he provided the tickets “for or because of” the attorney's assistance with the visa application. Instead, Ring argues that the government failed to offer sufficient evidence that the attorney took an “official action” within the meaning of the illegal-gratuity statute.

In *Valdes v. United States*, this Court, sitting en banc, considered the scope of “official act” in the illegal-gratuity context. There, a police officer accepted money from an undercover agent and, at the agent's request, conducted searches of license-plate and warrant databases. See 475 F.3d at 1321–22. Emphasizing that the illegal-gratuity statute is concerned not with purely informational inquiries, but rather with “inappropriate influence on decisions that the government actually makes,” *id.* at 1325, we held that the jury lacked sufficient evidence to find that the officer's searches constituted “official acts,” *id.* at 1322–25. In so doing, we listed some examples of acts that “the statute easily covers: a clerk's manufacture of official government approval of a Supplemental Security Income benefit, as in *United States v. Parker*, 133 F.3d 322 (5th Cir.1998); a congressman's use of his office to secure Navy contracts for a ship repair firm, as in *United States v. Biaggi*, 853 F.2d 89 (2d Cir.1988); and a Veterans' Bureau official's activity securing a favorable outcome on a disability claim, as in *470 **420 *Beach v. United States*, 19 F.2d 739 (8th Cir.1927) (based on a predecessor statute).” *Valdes*, 475 F.3d at 1325. We further noted that “official acts” include acts that have been established as part of an official's position by virtue of past practice or custom. See *id.* at 1323.

Ring maintains that, like in *Valdes*, this is a case in which no reasonable juror could have found that the attorney's forwarding of the email constituted an “official act.” Because the attorney lacked decisionmaking authority with respect to visa applications, Ring argues that the attorney's intercession was not a “decision or action” on a “question, matter, ... [or] proceeding” that was or ever would be “pending” or “brought” before him. 18 U.S.C. § 201(a)(3). Instead, according to Ring, the attorney's act of forwarding the email to the INS secretary amounts to nothing more than an informational inquiry, analogous to the database search in *Valdes* or a receptionist's transfer of a phone call.

Considering the evidence in the light most favorable to the government, as we must, see *Valdes*, 475 F.3d at 1322, we think it clear that a rational jury could have found that the attorney's efforts to expedite the visa application qualified as official action. The secretary who received the attorney's email testified that the Justice Department's Intergovernmental Affairs Office was part of INS's "higher headquarters" and was "responsible for ... assisting other agencies and other state and local governments if they ha[d] an issue." In other words, unlike attorneys in DOJ units who litigate on behalf of agency clients, attorneys in the Intergovernmental Affairs Office are responsible for reaching across agency boundaries to get things done. And as the secretary went on to explain, she felt unable to ignore the attorney's request because of the office he held. Ultimately, the attorney's swift success in procuring expedited review spoke for itself.

Contrary to Ring's contention, the attorney's actions are categorically different from those *Valdes* suggests fall outside the scope of "official action." Unlike the *Valdes* police officer, the attorney was neither "moonlighting" nor making a purely informational inquiry. See *Valdes*, 475 F.3d at 1324–25. Rather, the attorney acted in his official capacity to influence the visa application process, conduct better analogized to an action *Valdes* explained was clearly within the statute's coverage: "a congressman's use of his office to secure Navy contracts for a ship repair firm." *Id.* at 1325. To be sure, the attorney himself lacked independent authority to expedite visa applications. But Ring's attempt to import a requirement that the official in question have ultimate decisionmaking authority into the definition of "official act" has no statutory basis. Cf. *United States v. Carson*, 464 F.2d 424, 433–34 (2d Cir.1972) ("There is no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision."). Indeed, the statute states that "official act[s]" include both "decision[s]" and "action[s]." 18 U.S.C. § 201(a)(3).

IV.

This brings us to Ring's final contention—that the district court ran afoul of [Federal Rule of Evidence 403](#) as well as the First Amendment by permitting the jury to draw adverse inferences from evidence about his

campaign contributions. Although the government never contended that any of Ring's campaign contributions were themselves unlawful, it repeatedly **421 *471 introduced testimony about those contributions in order to paint a fuller picture of his interactions with public officials. It also used Ring's contributions to demonstrate that he viewed money as a means to his clients' political ends. For example, the government introduced an email in which Ring asked Abramoff to make sure that a particular congressman who had acted as "a good soldier" received "his fair share of contributions." And one witness testified that Ring had a "running joke" in which he would hold up a client's campaign check and ask, "Hello quid. Where's the pro quo?" Tr. 10/ 28/10 PM at 22:2–13.

The district court recognized that this sort of evidence posed a close question under [Federal Rule of Evidence 403](#), which provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice, confusing the issues, [or] misleading the jury." Finding on the one hand that the contributions were "so intertwined and so integrally part of what [Ring] did" and that contribution evidence helped shed light on his modus operandi, and on the other that the evidence was not especially prejudicial, the district court ultimately admitted it. To avoid confusion and prejudice, however, the district court repeatedly reminded the jury—indeed, virtually every time campaign contribution evidence was presented—that such contributions are legitimate lobbying tools and that the jury must not consider the lawfulness of Ring's contributions in reaching its verdict. See, e.g., Trial Tr. 10/25/10 AM at 22:7–24:7. Pressing the same point, the district court's final jury instructions emphasized that "the propriety or legality of any campaign contributions ... [was] not before [the jury] and [the jury was] therefore instructed not to consider campaign contributions ... as part of the illegal stream of benefits that Mr. Ring [was] charged with providing to certain public officials."

Although the district court viewed this question primarily in [Rule 403](#) terms, Ring's challenge to the admission of this evidence intertwines First Amendment—and Rule 403—based lines of reasoning. To the extent Ring's First Amendment argument is distinct, it rests on the proposition that permitting a jury to draw adverse inferences from constitutionally protected activity violates a defendant's First Amendment rights. Although the

First Amendment limits the government's authority to criminalize speech and other protected activity, *see, e.g., United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010), the Supreme Court has made clear that the Amendment simply “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). Nothing in *McCormick*—which is silent on the use of campaign contributions as evidence of *other* criminal activity—suggests that contributions are an exception to that general rule.

[10] [11] Ring is left, then, with Rule 403 and the possibility that the First Amendment, even if it imposes no independent bar on the admission of campaign contribution evidence, plays some role in the Rule 403 analysis. Critical to our resolution of this issue, we review a trial judge's application of Rule 403 for “abuse of discretion” because “we assume that the trial judge generally is in the best position to balance the probative value of the disputed evidence against the risks of prejudice and confusion.” *Henderson v. George Washington University*, 449 F.3d 127, 133 (D.C.Cir.2006). Although a trial court's discretion to admit evidence under Rule 403 is not “unfettered,” appellate courts **422 *472 must be “extremely wary of second-guessing the legitimate balancing of interests undertaken by the trial judge.” *Id.*

[12] Beginning with the plus side of the Rule 403 balance sheet, we agree with the district court that the campaign-contribution evidence had significant probative value. Testimony about Ring's lawful campaign contributions gave jurors a window into the way in which lobbyists like Ring gain influence with public officials. One witness explained the role of campaign contributions in Abramoff's lobbying practices with a particularly striking metaphor:

Q: Did you ever lobby with campaign contributions?

A: Yes.

Q: How did you do that?

A: Campaign contributions are a little bit different than, for lack of a better term, things of value. I viewed campaign contributions as sort of the ante in a poker game. It's the price of being involved in the game. We

worked—we worked aggressively to raise money and we liked to do it.

Q: What do you mean by that, you viewed campaign contributions as the ante in a poker game?

A: Yeah, it's a seat at the table. That's all. That's all it is.

Trial Tr. 10/28/10 PM 21:9–20. In other words, under the government's theory of the case, campaign contributions gave the lobbyists access to public officials. Without such evidence, a jury might wonder why an official would sacrifice his integrity for a few Wizards tickets. Perhaps even more significantly, the contribution testimony amounted to strong modus operandi evidence that demonstrated Ring's transactional relationship with officials and the manner in which he pursued his clients' political aims. That Ring rewarded “good soldier[s]” with campaign contributions, for example, perhaps suggests that he put other things of value to similar use.

Turning to the other side of the Rule 403 ledger, we think it similarly clear that the contribution evidence had a strong tendency to prejudice, confuse, and mislead the jury. As the Supreme Court explained in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), “[t]he term ‘unfair prejudice’ ... speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Id.* at 180, 117 S.Ct. 644. The Committee Notes to Rule 403 explain, “[u]nfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” Advisory Committee's Note, Fed. Rule Evid. 403. Here, the government introduced the jury to a group of lobbyists who “viewed campaign contributions as ... the ante in a poker game,” Trial Tr. 10/28/10 PM 21:13–14, and to a defendant who held “\$300,000 in checks” in his hand and joked, “Hello, quid. Where's the pro quo?” *Id.* at 22:6–24. The distasteful way in which Ring spoke of campaign contributions—especially in light of the heated national debate about the proper role of money in politics—posed a significant risk of evoking precisely the kind of negative emotional response that might “lure the [jury] into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief*, 519 U.S. at 180, 117 S.Ct. 644.

The evidence may have been even more confusing and misleading than it was prejudicial. Asked to find whether Ring engaged in a corrupt “quid pro quo” with respect to meals and tickets, the jury was presented with testimony—e.g., “Hello, quid. Where’s the pro quo?” Trial Tr. 10/28/10 PM 22:2–25—that Ring viewed **423 *473 contributions in *precisely* those terms. Indeed, through its questioning the government invited the jury to conflate the contribution evidence with evidence about the things of value that were actually at issue. After eliciting testimony about contributions, for example, the prosecution asked this series of questions:

Q: In that conversation or at any other time, did Kevin Ring tell you that he treated campaign contributions any differently than he did the giving of tickets to public officials?

...

A: I don't remember a conversation like that.

Q: What about campaign contributions and meals or food, giving of meals or food to public officials?

...

Q: I'm asking whether or not Mr. Ring ever had any conversations that he treated campaign contributions differently than he treated the giving of meals and tickets to public officials?

A: I don't remember any conversations like that, no, sir.

Q: What about the treatment of the giving of trips to public officials?

A: Again, I don't remember any conversations like that.

Trial Tr. 10/27/2010 AM at 127:2–128:3.

Having laid out both sides of the Rule 403 balance sheet, we come to the question whether the contributions' status as protected speech affects the analysis. For his part, Ring fails to specify exactly what role constitutional considerations should play and neglects to grapple with the consequences and limitations of his position. But the strongest version of his argument, we think, is that concerns about jury prejudice and confusion should carry more weight in the context of core First Amendment activity. Although there appears to be little support for such a holding, injecting the First Amendment into the

Rule 403 balance in this way would resonate with First Amendment—specific “chilling” concerns—concerns that are especially powerful where political speech is involved. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 61, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). In this case, however, we need not decide whether and precisely how the First Amendment alters the Rule 403 analysis because, even assuming First Amendment concerns justify placing a thumb on the prejudice and confusion side of the scale, that added weight fails to change the outcome of the balance.

Although Ring's argument for excluding the evidence is powerful, we are mindful that the question at this stage is not whether we would have come to the same conclusion as the district court in the first instance, but whether the district court abused its discretion. In answering that question, we think it significant that the district court repeatedly instructed the jury that the campaign contributions were not illegal. Although “curative instructions are no panacea,” *Dallago v. United States*, 427 F.2d 546, 552 n. 13 (D.C.Cir.1969), the fact that the instruction was repeated every time contribution evidence arose—as opposed to being given only a single time at the end of a trial throughout which jurors may have failed to distinguish contribution evidence from other evidence—did much to mitigate the potential for confusion and First Amendment chilling, even if it could not have entirely eliminated the potential for prejudice. Moreover, the probative value of the contribution evidence and the extent to which it was inexorably intertwined with other evidence weighed heavily in favor of admission. In the end, we cannot say that the district court abused its discretion by concluding that the evidence's probative **424 *474 value was not “substantially outweighed” by its prejudicial tendencies. Fed.R.Evid. 403. After all, Rule 403 “tilts ... toward the admission of evidence in close cases,” *United States v. Moore*, 732 F.2d 983, 989(D.C.Cir.1984), and this case is nothing if not close.

V.

For the foregoing reasons, we affirm.

So ordered.

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706 F.3d 460, 403 U.S.App.D.C. 410

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Penalty for lobbyist — but not politicians — after \$51,000 birthday party



The Los Angeles City Ethics Commission has fined lobbyist John Ek \$11,000 for inviting city officials to a birthday party at a downtown restaurant. (Richard Vogel / Associated Press)



By **Emily Alpert Reyes**

FEBRUARY 21, 2017, 5:40 PM

The Los Angeles City Ethics Commission fined lobbyist John Ek more than \$11,000 on Tuesday for inviting dozens of city officials to a birthday party with free food, drinks and musical entertainment, saying he had violated city rules that restrict gifts from registered lobbyists.

But politicians and other city officials who attended the expensive event were able to repay Ek for party costs and avoid any penalty. Sergio Perez, the Ethics Commission's enforcement director, said that under city and state rules, if someone quickly reimburses the gift giver, "it's as if a gift was not received."

Nearly two years ago, Ek paid more than \$51,000 to celebrate his 50th birthday at Perch Los Angeles, hosting an invitation-only party for roughly 250 guests at the downtown bistro. An Ethics Commission investigation

found that he had invited 37 city officials to the event and had, therefore, offered them an improper gift.

Registered lobbyists are barred from offering or giving gifts to elected officials under city rules, and elected officials are barred from accepting them. Lobbyists are also prohibited from giving gifts to other city officials if they are seeking to influence decisions in their agencies.

City officials are also banned from accepting such gifts. Ek invited members of the [Los Angeles City Council](#), the controller and the mayor, as well as other city employees, but city investigators did not identify which politicians or their staffers ultimately went to the party. None of the partygoers faced fines: Ethics Commission officials said all of the city officials who attended had later reimbursed Ek for their share of the party costs — \$205.06 each — “negating acceptance of the gift.”

Mayoral candidate Yuval Kremer, who attended Tuesday’s meeting, said it was “disturbing” that the Ethics Commission was not naming the city officials who attended. “They were not whistleblowers or witnesses — they’re politicians who broke the rules,” Kremer said in an interview. “Not only are they not willing to fine them, they’re not willing to name them.”

Kremer also publicly questioned the independence of the commission, arguing that it had a “double standard” and avoided punishing sitting politicians. Members of the Ethics Commission are appointed by city officials, including the mayor and the City Council president, and the agency relies on the City Council and the mayor to approve its budget.

At Tuesday’s meeting, Ethics Commission member Andrea Sheridan Ordin asked staffers why the city had found no violation on the part of the city officials who went to the party. Perez, the enforcement director, replied that city investigators didn’t have a choice. Because the city officials had quickly repaid Ek, “there is no receipt of a gift in violation of city law,” Perez said.

The Times reviewed photos of the party and confirmed that Councilman Mitch Englander and Councilwoman [Nury Martinez](#) attended. Although an Ethics Commission report said that partygoers reimbursed Ek after being contacted by city investigators, Martinez spokesman Adam Bass said that the councilwoman knew that going to the party amounted to a gift and had paid Ek back without being contacted by the Ethics Commission.

Martinez aide Alexis Marin, Jessica Duboff, who was an aide to Councilman [Mike Bonin](#) at the time, and Justin [Wesson](#), an aide and son of Council President Herb Wesson, also went to the party. Vanessa Rodriguez, a spokeswoman for the council president, said Justin Wesson had seen the event as “nothing more, nothing less than a birthday party for a colleague.”

Ek spokesman Robert Alaniz said the lobbyist found out only after the birthday party that inviting city officials was considered offering them a gift. “Mr. Ek, who has no prior enforcement history with the Ethics Commission, has never seen this interpretation in his 25-plus years as a city lobbyist,” Alaniz said in a statement.

Members of the Ethics Commission said Tuesday that a seasoned lobbyist like Ek should have been aware of the rules. “He was in the business of being a lobbyist... So I don’t know how that mistake could have been made,” Ordin said at the Tuesday meeting.

Ek could have been fined more than \$22,000, but Ethics Commission staffers decided to cut the proposed penalty in half because he had cooperated with the investigation.

The Ethics Commission also handed out fines Tuesday to technology company Cisco, which must pay \$12,500 for failing to accurately report more than \$90,000 in lobbying expenses; Crest Real Estate, its president and project manager, who were penalized \$15,000 each — a total of \$45,000 — for failing to register and report lobbying; and former mayoral candidate Emanuel Pleitez, who must pay more than \$36,000 after failing to properly maintain spending records or turn over copies of ads from his campaign four years ago.

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POLITICS

Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff

On Washington

By CARL HULSE JULY 5, 2016

WASHINGTON — Take it from a corrupt lobbyist: When it comes to peddling influence and buying politicians, the Supreme Court just doesn't get it.

Jack Abramoff, the former superlobbyist who ended up in prison, said he fears the court's unanimous decision to toss out the bribery conviction of Bob McDonnell, the ex-governor of Virginia, reflects a regrettable innocence about how things work in the real world.

“I continue to be concerned by what seems to be a lack of understanding on

the part of the justices that a little bit of money can breed corruption,” Mr. Abramoff said when I asked him about the McDonnell case.

“When somebody petitioning a public servant for action provides any kind of extra resources — money or a gift or anything — that affects the process,” Mr. Abramoff said.

He should know.

Once a man with gold-plated Republican connections and easy access to the White House and Capitol leadership suites, Mr. Abramoff and his partners were masters of spreading favors around Washington. They parceled out tickets to major sporting events, escorted influential officials on all-expenses-paid golf junkets, paid the tabs for lavish dinners and cozied up to politicians at Signatures, a restaurant Mr. Abramoff once owned on Pennsylvania Avenue.

All the while they were soliciting and obtaining help on issues ranging from gambling to wages to tax policy.

It all came crashing down ignominiously in January 2006, when Mr. Abramoff pleaded guilty to conspiracy, fraud and tax offenses, ending his career and landing members of his inner circle behind bars with him. Dealings with Mr. Abramoff also sent Bob Ney, a former Republican representative from Ohio, to the penitentiary and contributed to the downfall of Tom DeLay of Texas, the powerful No. 2 House Republican.

Mr. Abramoff, now chastened and repentant, spent nearly four years in prison. Since his release, he has spoken out against the dangers of what he says is an inherently corrupt system where financial aid and other perks are provided to politicians who only naturally take care of benefactors they consider friends.

“People come to think those seeking favors and giving you things are your friends, your buddies,” he said, remembering his own days as an insider. “Human nature is such that your natural inclination is, ‘He has done something for me, what can I do for him?’ The minute that has crept into the public service discussion, that is a problem.”

Such favors were at the heart of the case against Mr. McDonnell. During a period of personal financial turmoil, he received a Rolex, loans, trips, clothing and other benefits from Jonnie R. Williams Sr., a wealthy businessman who was seeking the governor's help in securing state testing of a dietary supplement.

While the governor arranged meetings, made recommendations and appeared with Mr. Williams, the court ruled that he may never have committed an "official act" on Mr. Williams's behalf and that the jury should have received clearer instructions on that point.

To many observers, the court essentially said that a politician can be found guilty of corruption only if the government can definitively show an official "quo" in response to a benefactor's "quid" — a very high bar in a world of winks and nods.

"When you have a system that defines the line between illegal and legal as it does, there are ways of kind of working through it," Mr. Abramoff said. "Maybe 95 percent or 99 percent of what I did wasn't really illegal."

The court's decision was quietly celebrated by politicians who believe that prosecutors who are intent on criminalizing ordinary political wheeling and dealing have overreached in a number of cases and needed to be slapped down. They worry that too wide a net could eventually ensnare them and their colleagues.

But the ruling was loudly protested by good-government advocates who worried that the court had thrown open the door to more misdeeds and undermined already flagging public confidence in government.

"This is an absolutely terrible message to the public at the worst possible time, when our campaigns are being flooded with huge contributions that are going to buy influence in the future," said Fred Wertheimer, a longtime campaign watchdog and the president of Democracy 21, a group that pushes for government transparency. "The court forgot about the public."

The decision was the latest in which the court has seemed to play down, even minimize, the power of money to influence outcomes. The justices did not seem persuaded that donations, trips or expensive meals could make politicians

beholden to the giver. After all, the justices themselves take free trips to fancy locales to meet and speak with private groups.

In this case, the court seemed to accept Mr. McDonnell's argument that his efforts on behalf of Mr. Williams amounted to routine constituent work, something he might have done without the watch or the \$15,000 for his daughter's wedding.

During oral arguments in April, some justices seemed worried that politicians were at the mercy of vague rules that could leave them the prey of overzealous prosecutors.

“For better or worse, it puts at risk behavior that is common, particularly when the quid is a lunch or a baseball ticket, throughout this country,” Justice Stephen G. Breyer said.

Mr. Abramoff said the justices seem far removed from the unpleasant realities of his old life.

“I do think there is a disconnect, and I understand it because none of them have been in the political process,” he said of the justices.

And that remove may now have diminished both the practice and public perception of politics.

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Mark also counsels clients in connection with various intellectual property issues and disputes. He has evaluated potential infringement and validity of patents, developed strategies to redesign products to avoid infringement, assessed the merits, potential damages and potential injunctive relief for ongoing litigation in connection with diligence, and negotiated and prepared patent licenses, settlement agreements and purchase agreements.

Prior to joining Zuber Lawler & Del Duca, Mark was a Partner at Ropes & Gray LLP and a Partner at Fish & Neave LLP.

Mark received SB and SM degrees in Mechanical Engineering from the Massachusetts Institute of Technology, and received a JD *cum laude* from Harvard Law School.



William R. Covey

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As Deputy General Counsel and Director for the Office of Enrollment and Discipline (OED), Will Covey is responsible for ensuring that the nation's patent attorneys and agents are of good moral character and sufficiently knowledgeable to practice before the USPTO. Mr. Covey's team of attorneys and other professionals develop and administer a registration examination designed to measure an applicants' knowledge of patent law and practice. Successful applicants are registered to practice by OED. In addition, OED investigates complaints of unethical conduct made against individuals practicing patent or trademark law before the Office.

Mr. Covey has held a number of key positions in the USPTO including Acting General Counsel, and Deputy General Counsel for the Office of General Law. Mr. Covey was appointed to the Senior Executive Service in 2007.

Mr. Covey received his undergraduate degree from Fordham University (Magna Cum Laude, Phi Beta Kappa) and earned his J.D. from Fordham University Law School in 1991. He graduated from Harvard University's JFK School of Government (Senior Executive Fellowship) in 2005 and the U.S. Army War College with an M.S. (Strategic Studies) in 2010.

Prior to joining the USPTO in 2000, Mr. Covey was a Special Assistant U.S. Attorney for the District of New Jersey. He also served on active duty in the Pentagon. He is currently a senior officer in the Army Reserve assigned to the Office of the Army General Counsel. He completed combat tours in Iraq (2007) and Afghanistan (2011) and served as Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff.

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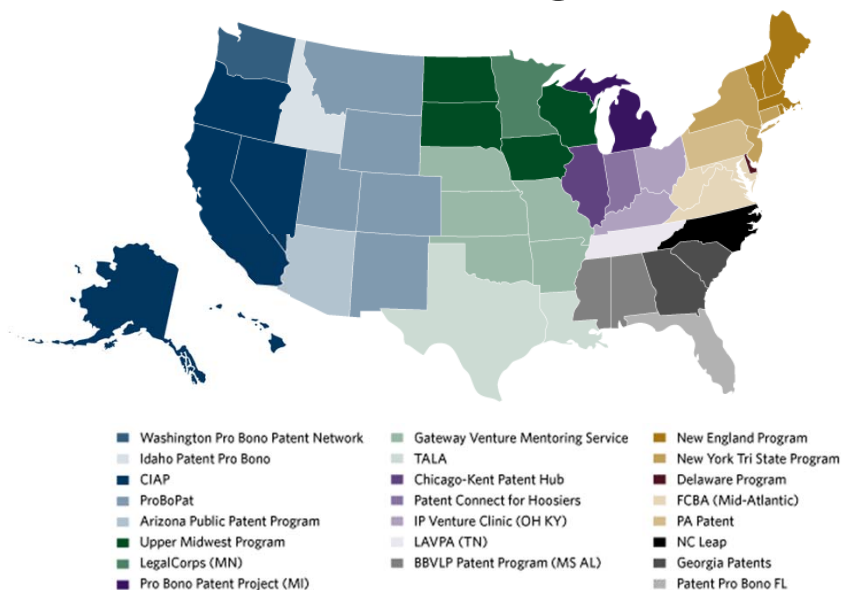


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Discipline at OED

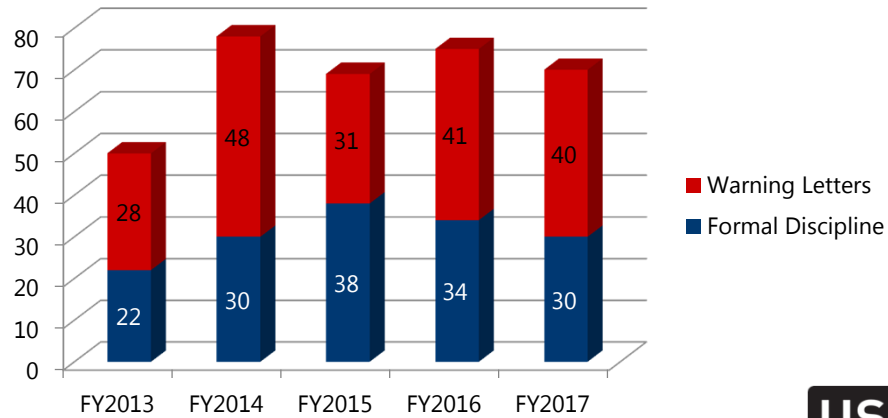


OED Discipline: Warnings vs. Formal Discipline

- Generally speaking, "formal discipline" at OED is public discipline.
- Formal disciplinary sanctions include:
 - Exclusion from practice before the Office;
 - Suspension from practice before the Office; or
 - Public reprimand.
37 C.F.R. § 11.20(a).
- The OED Director may conclude an investigation with a warning.
37 C.F.R. § 11.21.
 - A warning is neither public nor a disciplinary sanction.



OED Discipline: Warnings vs. Formal Discipline



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OED Discipline: Grievances and Complaints

- An investigation of possible grounds for discipline may be initiated by the receipt of a grievance. See 37 C.F.R. § 11.22(a).
- Grievance: "a written submission from any source received by the OED Director that presents possible grounds for discipline of a specified practitioner." 37 C.F.R. § 11.1.
- Common Sources of Information:
 - External to USPTO: Clients, Colleagues, Others.
 - Internally within USPTO: Patent Corps, Trademark Corps, Other.
- Duty to report professional misconduct:
 - 37 C.F.R. § 11.803.

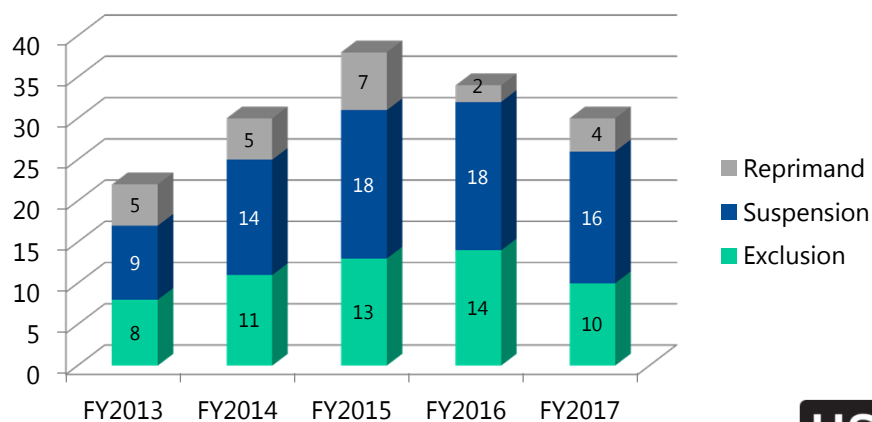
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OED Discipline: Grievances and Complaints

- If investigation reveals that grounds for discipline exist, the matter may be referred to the Committee on Discipline to make a probable cause determination. *See* 37 C.F.R. § 11.32.
- If probable cause is found, OED Director may file a complaint under 37 C.F.R. § 11.34. *See* 37 C.F.R. § 11.32.
- 37 C.F.R. § 11.34(d) specifies that the timing for filing a complaint shall be within one year after the date on which the OED Director receives a grievance.
- 37 C.F.R. § 11.34(d) also states that no complaint may be filed more than 10 years after the date on which the misconduct occurred.



USPTO Disciplinary Decisions

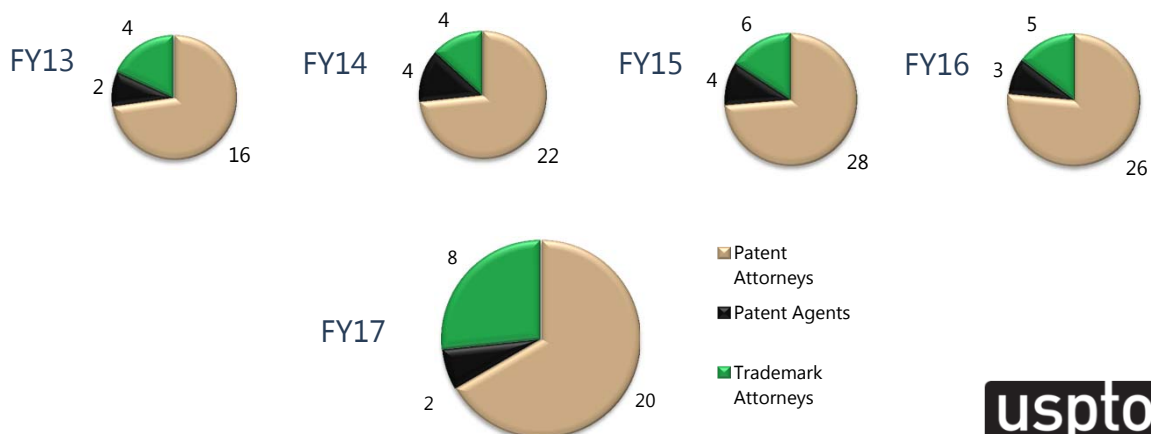



Other Types of Discipline

- Reciprocal discipline. 37 C.F.R. § 11.24.
 - Based on discipline by a state or federal program or agency.
 - Usually conducted on documentary record only.
- Interim suspension based on conviction of a serious crime. 37 C.F.R. § 11.25.

USPTO Disciplinary Decisions

Breakdown of Disciplinary Decisions by Practitioner Type



Office of Enrollment and Discipline

Proposed Revision of 37 C.F.R. § 1.56



Current 37 C.F.R. § 1.56

- (a) . . . Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section."
- (b) . . . information is material to patentability when it is not cumulative to information already of record or being made of record in the application, and (1) It establishes, by itself or in combination with other information, a prima facie case of unpatentability of a claim; or (2) It refutes, or is inconsistent with, a position the applicant takes in: (i) Opposing an argument of unpatentability relied on by the Office, or (ii) Asserting an argument of patentability.
- (b) . . . A prima facie case of unpatentability is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard, giving each term in the claim its broadest reasonable construction consistent with the specification, and before any consideration is given to evidence which may be submitted in an attempt to establish a contrary conclusion of patentability.
(emphasis added)



Therasense, Inc. v. Becton, Dickenson & Co., **649 F.3d 1276 (Fed. Cir. 2011)**

- Materiality standard is “but-for” materiality.
 - Prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art.
- Materiality prong may also be satisfied in cases of affirmative egregious misconduct
- Intent to deceive USPTO must be weighed independent of materiality.
 - Courts previously used sliding scale when weighing intent and materiality.
- Intent to deceive must be single most reasonable inference to be drawn from evidence.



2011 Proposed Changes to 37 C.F.R. § 1.56

- Initial NPRM issued on July 21, 2011 (76 FR 43631)
- 2011 Proposed Amendment to 37 C.F.R. § 1.56(b)
 - Information is material to patentability if it is material under the standard set forth in [*Therasense*]. Information is material to patentability under *Therasense* if: (1) The Office would not allow a claim if it were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction; or (2) The applicant engages in affirmative egregious misconduct before the Office as to the information.
- Similar proposed amendment to 37 C.F.R. § 1.555.
- USPTO received feedback from 24 commenters.



2016 Notice of Proposed Rulemaking

- NPRM issued October 28, 2016; <https://www.federalregister.gov>.
- 60 day comment period.
- 2016 NPRM addresses comments received to 2011 proposed rules.
- Proposed amendment to 37 C.F.R. § 1.56 (emphasis added):
 - (a) . . . Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office **all information known to that individual** to be material to patentability under the **but-for materiality standard** as defined in paragraph (b) of this section. . . . Information material to the patentability of a claim that is cancelled or withdrawn from consideration need not be submitted if the information is not material to the patentability of any claim remaining under consideration in the application. . . . However, no patent will be granted on an application in connection with which **affirmative egregious misconduct** was engaged in, fraud on the Office was practiced or attempted, or the duty of disclosure was violated through bad faith or intentional misconduct. The Office encourages applicants to carefully examine: (1) Prior art cited in search reports of a foreign patent office in a counterpart application, and (2) The closest information over which individuals associated with the filing or prosecution of a patent application believe any pending claim patentably defines, to make sure that any material information contained therein is disclosed to the Office.
 - (b) Information is but-for material to patentability if the Office would not allow a claim if the Office were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction consistent with the specification.



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Select Case Law Review



Conflict of Interest

In re Gray, Proceeding No. D2017-02 (USPTO Feb. 22, 2017).

- Exclusion on consent of patent attorney.
- Disciplinary complaint alleged:
 - Respondent's firm had agreement with companies to provide patent legal services to referred clients.
 - Engaged in numerous conflicts of interest with respect to referred clients.
 - Directed associate to withhold filing of client applications until client paid 3rd party company \$125 fee.
- Rule highlights:
 - 37 C.F.R. § 11.107(a) – Conflict of interest; current clients.
 - 37 C.F.R. § 11.108(f) – Accepting compensation from third party.
 - 37 C.F.R. § 11.504 – Permitting 3rd party payer to regulate professional judgment.



Conflict of Interest

In re Virga, Proceeding No. D2017-14 (USPTO Mar. 16, 2017).

- Patent Attorney:
 - Contracted with Desa Industries, Inc d/b/a World Patent Marketing ("WPM").
 - Agreed to prepare, file, and respond to Office actions for clients referred by WPM.
 - Attorney was unaware of amount WPM charged clients; clients were not likely aware of his compensation from WPM.
 - Did not confirm that legal fees were deposited in trust account.
 - Did not consult with clients regarding appropriateness of the patent protection sought.
 - Failed to respond to Office actions for referred clients.
- Settlement: 5-year suspension
 - Eligible to petition for reinstatement after 2 years; must take MPRE.
- Rule highlights:
 - 37 C.F.R. § 11.107(a) – Conflict of interest; current clients.
 - 37 C.F.R. § 11.108(f) – Accepting compensation from third party.
 - 37 C.F.R. § 11.504 – Permitting 3rd party payer to regulate judgment.



Conflict of Interest

In re Mikhailova, Proceeding No. D2017-18
(USPTO June 16, 2017).

- Patent Agent contracted with Desa Industries, Inc d/b/a World Patent Marketing (“WPM”) to prepare, file, and respond to Office actions for clients referred by WPM.
- Permitted WPM to act as full intermediary with clients.
- Settlement: 20 month suspension with 28 months probation.
- Rule highlights:
 - 37 C.F.R. § 11.105(b) – communicating scope of representation/fee.
 - 37 C.F.R. § 11.107(a) – Conflict of interest; current clients.
 - 37 C.F.R. § 11.108(f) – Accepting compensation from third party.
 - 37 C.F.R. § 11.504 – Permitting 3rd party payer to regulate judgment.
 - 37 C.F.R. § 11.505 – Unauthorized Practice of law.



Conflicts of Interest

In re Ramberg, Proceeding No. D2017-12 (USPTO Feb. 14, 2017).

- Patent attorney undertook joint representation of two clients who he listed as co-inventors on a provisional patent application.
- A company owned by Inventor #1 is listed as the “Applicant” on the provisional.
- Attorney later filed trademark application for company of Inventor #2.
- Did not advise regarding potential conflicts or obtain consent for undertaking the TM matter.
- Filed utility application naming only Inventor #1.
- Continued representation of both parties
- Failed to inform Inventor #2 that he was left off of the utility application.
- Public reprimand, CLE attendance, and MPRE passage.
- Rule highlights:
 - 37 C.F.R. §§ 11.107(a)(1) & (2) and (b)(3) & (4).
 - 37 C.F.R. §§ 11.104(a)(1)-(5) and (b).



Conflicts of Interest

In re Radanovic, Proceeding No. D2014-29 (USPTO Dec. 16, 2014).

- Represented co-inventors who later disputed inventorship.
- Respondent represented that he did not believe there were differing interests or that his representation of first co-inventor was directly adverse to second co-inventor because there was no evidence from second co-inventor that he made a contribution to the allowed subject matter.
- Received public reprimand.
 - Mitigating factors included clean 50-year disciplinary history.
- Rule highlights:
 - 37 C.F.R. § 10.66(b): no joint representation if practitioner's independent professional judgment is likely to be adversely affected or if it would be likely to involve representing differing interests.
 - 37 C.F.R. § 11.107(a): no representation if it will be directly adverse to another client or if there is a significant risk that representation will be materially limited by responsibilities to another client.
 - 37 C.F.R. § 11.109(a): no representation of a client in a substantially related matter in which client's interests are materially adverse to the interests of a former client without informed consent.



Conflicts of Interest

In re Lane, Proceeding No. D2011-64 (USPTO Feb. 8, 2012).

- Patent Agent:
 - Represented cardiothoracic surgeon in obtaining patent protection for medical device.
 - Entered into contract with client to assist in development and marketing of invention.
 - During representation of the client, filed a patent application in same technology area naming himself as an inventor, but excluding the client.
 - Did not obtain consent after full disclosure of actual or potential conflicts caused by business relationship or additional patent application.
- Settlement: Public reprimand and 2 years probation.
- Rule highlights:
 - 37 C.F.R. § 10.62(a) – client conflict with practitioner's own interests (see 37 C.F.R. § 11.107(a)).
 - 37 C.F.R. § 10.65 – entering business transaction with client (see 37 C.F.R. 108(a)).





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Disreputable or Gross Misconduct

In re Schroeder, Proceeding No. D2014-08
(USPTO May 18, 2015)

- Patent Attorney:
 - Submitted unprofessional remarks in two separate Office action responses.
 - Remarks were ultimately stricken from application files pursuant to 37 C.F.R. § 11.18(c)(1).
 - Order noted that behavior was outside of the ordinary standard of professional obligation and client's interests.
 - Aggravating factor: has not accepted responsibility or shown remorse for remarks.
- Default: 6-month suspension.
- Rule highlights:
 - 37 C.F.R. § 10.23(a) – Disreputable or gross misconduct.
 - 37 C.F.R. § 10.89(c)(5) – Discourteous conduct before the Office.
 - 37 C.F.R. § 10.23(b)(5) – Conduct prejudicial to the administration of justice.
 - 37 C.F.R. § 11.18 – Certification upon filing of papers.

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Neglect/Candor

In re Kroll, Proceeding No. D2014-14
(USPTO March 4, 2016)

- Patent attorney:
 - Attorney routinely offered (and charged \$) to post client inventions for sale on his website.
 - Did not use modern docket management system.
 - Attorney failed to file client's application, but posted the invention for sale on his website.
 - Attorney filed application 20 months after posting on the website.
- Aggravating factors included prior disciplinary history.
- Received two-year suspension.
- Rule highlights:
 - 37 C.F.R. § 10.23(a) – Disreputable or gross misconduct.
 - 37 C.F.R. § 11.18(b) – Certification upon filing of papers.
 - 37 C.F.R. § 10.77(c) – Neglect.



Misrepresentation/UPL

In re Swyers, Proceeding No. D2016-20
(USPTO January 26, 2017)

- Disciplinary complaint alleged:
 - TM attorney established The Trademark Company, PLLC.
 - Permitted non-attorneys to practice TM law for him with little to no supervision.
 - Multiple fraudulent or digitally manipulated TM specimens were filed with USPTO.
 - Failed to deposit client advance funds into a client trust account.
 - Failed to cooperate with OED investigation.
- Exclusion on consent.
- Rule highlights:
 - 37 C.F.R. § 10.23(b)(5) – Conduct prejudicial to the administration of justice.
 - 37 C.F.R. § 10.23(c)(2)(ii) – Giving false or misleading information to the Office.
 - 37 C.F.R. § 10.47(a) & (c) – Aiding the unauthorized practice of law.



Communication/Cooperation/UPL

In re Terzo, Proceeding No. D2016-35
(USPTO November 2, 2016).

- Disciplinary complaint alleged:
 - Mr. Terzo entered into a law firm partnership agreement with a practitioner who was emergency suspended by his state bar.
 - Mr. Terzo took over the representation of the suspended practitioner's trademark clients without informing the clients and did not consult with the clients prior to filing their applications.
 - Instead, Mr. Terzo relied on a "Trademark Questionnaire" filled out by the clients and directed non-practitioner assistants to provide clients with legal advice.
 - Mr. Terzo did not cooperate with the disciplinary investigation.
- Exclusion on consent.
 - 37 C.F.R. § 11.101 – Competence.
 - 37 C.F.R. § 11.115 – Safekeeping property.
 - 37 C.F.R. § 11.505 – Unauthorized practice of law.



Neglect/Candor

In re Etkin, Proceeding No. D2016-05 (USPTO Jan. 8, 2016)

- Disciplinary Complaint Alleged:
 - Attorney allowed applications to go abandoned without client approval.
 - Misled clients regarding status of abandoned applications.
 - Advised client to file a Track 1 CIP application and allow the original application to go abandoned. Took \$, but failed to file it; fabricated documents purporting to show filed Track 1 application.
 - Advised a client that an abandoned application could be revived within 5 years. Client waited to petition after multiple consultations on the subject. Ultimately filed Petition to Revive, certifying that the entire delay had been unintentional.
- Exclusion on consent.
- Rule highlights:
 - 37 C.F.R. § 11.101 – Competence.
 - 37 C.F.R. § 11.104 – Communication.
 - 37 C.F.R. § 11.804(c) – Conduct involving dishonesty, fraud, deceit, or misrepresentation.



Dishonesty, Fraud, Deceit or Misrepresentation

- ***In re Caracappa***, Proceeding No. D2015-37
(USPTO Jan. 5, 2016)
 - Disciplinary complaint alleged:
 - Patent attorney conspired with in-house counsel to defraud employer.
 - In-house counsel would assign work to respondent, who did not perform the work but would bill the employer.
 - In-house counsel would do the work and would receive a majority of the employer's payments to respondent.
 - Defrauded employer of \$2.4 million dollars.
 - Excluded on consent.
 - Rule highlights:
 - 37 C.F.R. § 11.804(b) – Criminal acts that adversely reflects on honesty and integrity.
 - 37 C.F.R. § 11.804(d) – Conduct that is prejudicial to administration of justice.



Decisions Imposing Public Discipline Available In FOIA Reading Room

- ▶ <http://e-foia.uspto.gov/Foia/OEDReadingRoom.jsp>
 - ▶ In the field labeled "Decision Type," select "Discipline" from the drop down menu.
 - To retrieve all discipline cases, click "Get Info" (not the "Retrieve All Decisions" link).

- ▶ Official Gazette for Patents
 - http://www.uspto.gov/news/og/patent_og/index.jsp Select a published issue from the list, and click on the "Notices" link in the menu on the left side of the web page.



Contacting OED

For Informal Inquiries, Contact OED at
571-272-4097

THANK YOU







Anthony F. Lo Cicero

Partner

Amster, Rothstein & Ebenstein LLP

An engineer by training, Anthony Lo Cicero has represented companies in patent and trademark litigation involving product areas as diverse as e-commerce platforms, angular rate sensors, refrigeration chemistry, camcorders and flat panel displays. He conducts due diligence of IP portfolios and provides strategic patent counseling to companies in a wide range of industries from recorded and published music to consumer electronics.

Very sophisticated technology competes with style and price as key aspects of the customer experience in the fashion industry. Mr. Lo Cicero represents some of the most prominent brick-and-mortar and on-line retailers in the country in patent disputes relating to the enterprise's e-commerce, mobile and point of sale systems. The retail industry regularly confronts patent assertions involving mobile platforms, electronic merchandise presentation, billing, marketing, inventory management and other features of the 21st century marketplace. Mr. Lo Cicero evaluates and responds to these assertions in a practical, business-oriented manner. Mr. Lo Cicero also evaluates contractual terms with vendors and suppliers to mitigate liability and works with retailers to identify and obtain protection for their own innovations. He has assisted retailers in successfully pursuing indemnification claims ranging to seven-figure settlements.

Many of the most prestigious apparel manufacturers and retailers in the world, along with financial services, food products, computer, consumer electronics, home products, and toy companies also turn to Mr. Lo Cicero for trademark protection. He advances brand development and enforcement strategies ranging from anti-counterfeiting and trademark infringement protection to trade dress and Internet domain matters. For example, he overcame significant legal obstacles to protecting a name and symbol for what is now one of the best-known prestige brands in the country. On many occasions, he has been called upon to enforce trademark rights for entities that do not have the advantage of a federal trademark registration.



ROBERT J. RANDO - FOUNDER AND LEAD COUNSEL FOR THE RANDO LAW FIRM P.C.

Robert J. Rando is the founder and lead counsel of The Rando Law Firm P.C. Mr. Rando is a **Fellow of the Academy of Court-Appointed Masters** and, since 2004, has enjoyed the privilege and honor of judicial appointment as a **Special Master** in numerous cases involving complex patent law issues. He is a published author and frequent lecturer at law schools and CLE programs on patent law and other IP and constitutional law issues. He is the current Treasurer for the New York Intellectual Property Law Association (NYIPLA) and an active member of the NYIPLA Amicus, Legislative Action and Programs Committees. He is also a **Master in the Honorable William C. Conner Inn of Court**.

His professional experience spans over twenty-seven years as a federal civil litigator in matters ranging from intellectual property and antitrust, to employment discrimination, civil rights, employment disputes and class action product liability cases. Primarily his experience has been focused on the litigation of patent infringement disputes in the Southern District of New York (“SDNY”), the Eastern District of New York (“EDNY”) and several other United States District Courts across the country. He has also filed Circuit Court of Appeals briefs and argued before the Appeals Court for the Second Circuit. Additionally, he has authored, co-authored, and filed Amicus briefs before the United States Supreme Court on various patent law issues from 2006 to the present.

He is experienced in a wide range of technologies, including: **computer hardware and software, silicon chip manufacturing, biotechnology products, medical devices, pharmaceuticals, chemical compounds, food additives, alternative energy products, consumer electronics, communications, security, Internet and e-commerce**.

He has engaged in mediation on behalf of his clients and has served as a **Mediator** in several private mediations all with successful outcomes. He has also served as a **Neutral** in patent and non-patent cases.

He is active in patent-related legislative initiatives through his work on the NYIPLA Legislative Action Committee and with the Federal Bar Association Government Relations Committee. In 2012, along with two other patent practitioners, he enjoyed the honor and privilege of developing and conducting a series of lectures for the **SDNY and EDNY Patent Pilot Program Judges, Magistrates and Law Clerks on the America Invents Act**.

He received his Juris Doctor, with academic honors, from **St. John’s University School of Law** in 1989. He was the Executive Publications Editor of the **St. John’s Law Review** and the recipient of an Academic Scholarship, Civil Trial Institute Honors and the American Jurisprudence Award for Excellence in Constitutional Law. He received his Bachelor of Science, with academic honors, in mathematics and computer science, from **Hofstra University** in 1983.



Melvin C. Garner

Partner
Leason Ellis LLP

Melvin Garner's practice includes all phases of patent, trademark and copyright litigation and procurement involving various technologies. The technologies include laser applications, video circuits, telecommunications (particularly cellular phones), optics (including lenses for photolithographic equipment), sintered materials, office products, medical devices, and computer hardware and software (including gaming systems).

Mr. Garner also counsels a wide variety of clients. This often involves providing or supervising the preparation and prosecution of patent applications. He also frequently provides infringement opinions for potential plaintiffs, non-infringement opinions for potential defendants and validity opinions for both litigants and inventors.

Mel has been lead counsel in over 30 litigations. These litigations have included patent and trade dress infringement. He has also handled cases involving copyright in computer databases and user interfaces. He has appeared as an expert witness in trials throughout the country, and has served as a mediator in a patent litigation. His approach is to find out the business goal of the client and its present position. Then he seeks to utilize the client's assets and available prosecution, litigation and negotiation strategies to help the client reach its business goal.

Mel is the author of Chapter 13, "Intellectual Property Protection of E-Commerce" and Chapter 58, "Trade Secret Causes of Action and Defenses, Including Sample Pleadings," *Intellectual Property Counseling and Litigation*, Matthew Bender (2010). In addition, he is a frequent lecturer at AIPLA and PLI events.

Mel is a former member of the Board of Directors of the National Inventors Hall of Fame. He is listed in *Euromoney's Guide to the World's Leading Patent Law Experts*, *Who's Who Legal – Patents*, and *New York Super Lawyers*.

***OIL STATES ENERGY SERVICES, LLC V. GREENE’S ENERGY GROUP, LLC:
PATENT RIGHTS, PUBLIC OR PRIVATE AND WHOSE THOUGHTS
AND IDEAS ARE THEY ANYWAY?***¹

By: Robert J. Rando

INTRODUCTION

“[C]ommunal ownership violates every instinct of human nature. It destroys initiative, nullifies free agency, suppresses inventive exploration, minimizes the dignity of the individual and makes a god out of an abstract thing called ‘The State’- to which is delegated complete, unrestricted control over life, liberty and property. . . . Like so many other weak systems of government, it can survive only in an atmosphere of a slave state, ruled by a king or a dictator.”

~W. Cleon Skousen, The First 2,000 Years: From Adam To Abraham

This article addresses the issue before the United States Supreme Court in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, which concerns the constitutionality of the America Invents Act of 2011 (“AIA”) post-grant *inter partes* review (“IPR”). The views expressed herein are based upon the constitutional jurisprudence related to the question, which analyzes the status of the patent right as a public property right or a private property right. The conclusions and views also comprise the interpretation of the Patent & Copyright Clause of the United States Constitution; the intent and purpose of the clause as articulated by the Framers of the Constitution; and an understanding of the natural law attributes of life, liberty and property.

The article provides an analysis and conclusions suggested by a review of the principles, precepts, and concepts outlined above. It does not present, and should not be interpreted as presenting, an expression of any opinion regarding the utility of a legislatively promulgated post-grant review proceeding that is properly constructed in fidelity with the U.S. Constitution. Nor does it address the thousands of hardworking U.S. Patent & Trademark Office (“USPTO”) patent examiners toiling to issue high quality patents, and the hundreds of dedicated, thoughtful and highly competent, Patent Trial and Appeals Board (“PTAB”) Administrative Patent Judges (“APJ”) tasked to conduct PTAB IPR trials within the confines and administrative construct of Congress’ mandate in the AIA.

Instead, this article specifically addresses the question of whether a provision of a statute (*e.g.*, the AIA), enacted by an Article I Congress and executed by an Article II Executive Agency (the USPTO), violates the U.S. Constitution Article III Separation of Powers and the Bill of Rights’ Seventh Amendment right to a jury.

I. Administrative Agency IPRs are an Unconstitutional Usurpation of, and Intrusion on, the Article III Separation of Powers and a Denial of the Seventh Amendment Right to a Jury Trial

A. It is Improper for an Administrative Agency Adjudicative Body to Invalidate Patents because it Violates the Article III Separation of Powers

The separation of powers under the United States Constitution is the backbone of our tripartite system of government. Conflicts between and among the three branches of government arise in many circumstances relating to the governance of the people and the constitutional authority for a particular branch to exercise its power. Recent twenty-first century examples include conflicts over war powers, health care and immigration.² Ultimately, these conflicts are resolved by the Supreme Court.

Oil States illustrates another such conflict between the three branches of government with respect to the constitutionality of adjudicating patent validity disputes in administrative tribunals created under Article I enumerated powers and operating in Article II Agencies rather than the constitutionally required Article III Court adjudication of those disputes.

The Supreme Court’s jurisprudence, deciding the constitutionality of conflicting jurisdictional authority among the three branches, in this instance is based on an analysis addressing “public rights” (e.g., disputes between a private party and the government or between private parties concerning public property rights) and “private rights” (e.g., disputes between private parties concerning private property rights).

The public/private property rights dichotomy, and the conflict among the three branches of government has presented itself in this case involving the adjudication of a dispute between private parties concerning the validity of rights secured to an individual inventor under a lawfully issued United States patent certificate. The patent certificate was issued based upon the sovereign’s promise of exclusivity for a limited period of time in exchange for the individual inventor’s disclosure of his private creative thoughts and ideas.

B. Background of the Patent Law Adjudication Conflict Issue

Article I, Section 8, Clause 8, of the United States Constitution provides the explicit enumerated power of Congress to secure for inventors the exclusive right to their inventions for a fixed period of time, in exchange for disclosure of the invention to the public:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

United States patent laws developed through the common law and from an early act of Congress. In 1952, Congress codified much of today’s U.S. patent law (the Patent Act of 1952). With few exceptions, the law remained as codified in the Patent Act of 1952 until 2011 when Congress enacted a major overhaul in the law in the form of the AIA.

Pursuant to the AIA, Congress authorized, *inter alia*, the Article II executive branch agency that administers the United States patent system, the Commerce Department’s USPTO, to establish an administrative tribunal proceeding to decide challenges to the validity of a U.S. patent issued by the USPTO. The administrative agency tribunal charged with this function is the PTAB. These Article II administrative agency proceedings are referred to as IPRs and are conducted by Article I APJs.

This change in the patent law is troublesome because prior to the AIA any adversarial challenge to the validity of a U.S. patent and determination to revoke or cancel the patent was decided by the Article III courts. Additionally, it is significant to note that besides running afoul of historical precedent, the IPR proceedings function without a jury, operate under different evidentiary standards and presumptions, and employ different methods of interpreting the language of the patent. Additionally, as noted above, there is no Seventh Amendment right to a jury, which is common with Article I created administrative agency tribunal proceedings.

These distinctions between the Article III court adjudication of disputed patent validity and Article II administrative tribunals inform the question that is before the Supreme Court in *Oil States*: whether separation of powers and the Seventh Amendment are violated by a congressional act (*e.g.*, the AIA) empowering an Article II administrative agency tribunal to assert judicial power concerning the property rights between private parties embroiled in a private dispute, and whether those property rights are “private” property rights or “public” property rights.

C. The Integrity of the U.S. Patent System and Fidelity to the Constitutional Imperative to Incentivize Innovation and Creative Aspirations, Secure the Intellectual Property Rights to Individuals, and Provide Uniform and Stable Patent Laws Relies Upon the Proper Separation of Powers in Enforcing Those Rights

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

~ William Blackstone

The question of the constitutionality of administrative agency adjudication of patent validity is of utmost importance in preserving the integrity of the United States patent system and the viability of the constitutional imperative to promote progress and innovation.³

This important mandate is clearly stated by James Madison in Federalist Paper No. 43, in the section referring to the enumerated power:

A power “to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries.”

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, *seems with equal reason to belong to the inventors*. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.⁴

There is no greater evidence of the success of this constitutional imperative than the United States’ position as the leading worldwide economic and technological powerhouse. The success of the U.S. patent system, relying on the quid pro quo of disclosure by the individual of his/her most private and intimate creative thoughts in exchange for the promise of a limited period of time for exclusivity over the use of those private thoughts has spurred innovation through inspiration of others to build upon and/or build around disclosed inventions to achieve the proverbial “better mouse trap.”

As recognized by the Framers of the Constitution, the right to inventions is a natural right that belongs to inventors not to the public. Thus, there can be no mistake that the right is a “private” right rather than a “public” right.

D. An Inventor’s Disclosure of His/Her Private Creative Thoughts Should Enjoy the Same Protection as Disclosure of any Other Private Thoughts

“Every man has a property in his own person. This nobody has a right to, but himself.”

~ John Locke

In other contexts, the Supreme Court recognizes the Constitution’s guarantees that an individual’s innermost private thoughts (the genesis of all intangible intellectual property) are private and entitled to protection from compelled or induced disclosure (*e.g.*, Fifth Amendment right against self-incrimination). Likewise, once expressed or disclosed, these private thoughts are afforded protection as well (*e.g.*, First Amendment free speech and Fourth Amendment protection against illegal search and seizure).

Private property rights emanating from an individual’s private thoughts and ideas should be afforded no less constitutional protection merely because they involve intellectual property thoughts. In fact, these should arguably carry greater weight since the government induces the individual inventor to disclose such private thoughts and ideas in exchange for the promise of limited exclusivity. The mere fact that the government issues a patent, evidencing this agreement between the inventor and the government, is insufficient in itself to transform these valuable private rights into a public right. In fact, the patent laws recognize the distinction in that disclosed but not claimed subject matter is considered dedicated to the public domain rather than retained by the disclosing inventor.⁵ Similarly, once a patent expires, the claimed private rights are then considered public domain. Congress has recently affirmed the necessity to protect these private thoughts as private property rights by passing legislation, with overwhelming bipartisan support, nationalizing trade secret protection.⁶ Simultaneously trivializing the rights as public property rights after inducing the individual to disclose these nationally protected valuable secrets (inventions), denies the proper constitutional protection for those private thoughts and rights and renders the quid pro quo of the Patent/Copyright clause agreement illusory.

The founding fathers recognized the necessity for the independence of the third branch of government by providing for lifetime appointment and non-diminution of compensation for judges.⁷ In Federalist Paper No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic.⁸ In Federalist Paper No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic.⁹ And in Federalist Paper No. 78, Hamilton provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence, providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*.¹⁰

Congressional enactment of the AIA followed many years of lobbying for its enactment. Those efforts promoted and pushed for the legislation which, in the case of IPRs, runs counter to the constitutional imperative behind congressional authority to enact laws *that promote the progress of innovations by providing strong, stable protection for intellectual property*. The evidence that IPRs have the opposite effect and weaken intellectual property protection is undeniable. Furthermore, the combination of IPR patent invalidation rates, recent legislation nationalizing trade secret protection, and curtailment of patent eligible subject matter, further depletes patent protection and dis-incentivizes promoting innovation and progress—all contrary to the constitutional imperative.

E. IPRs Violate the Three Principles of Article I, Section 8, Clause 8 of the U.S. Constitution

The constitutional imperative of Article I, Section 8, Clause 8, as gleaned from its plain language and recognized by the Framers, provides three specific purposeful goals:

(1) *Incentivizing innovation and creative aspirations*; (2) *Securing intellectual property rights to the individual (rather than the state or the public)*; (3) *Uniformity of Protection for Intellectual Property Rights*.¹¹

The administrative agency adjudication of patent validity in an IPR proceeding is counter to the constitutional imperative and violates its three principles.

1. *Incentivizing Innovation and Creative Aspirations*

There is an ample body of evidence that the IPR's 80% patent invalidation rate disincentivizes innovation and creative aspirations. Confidence in the valuation of patented technology has all but disappeared. The expense of acquiring a patent that has a mere 20% chance of surviving a validity challenge post-issuance deters the necessary investment in research and development required for innovation. Roulette wheels in Las Vegas casinos offer better odds for a return on investment. IPR proceedings violate the *incentivizing* principle of the constitutional imperative.

2. *Securing Intellectual Property Rights to the Individual Rather Than the State (the Public)*

Inducing an inventor to disclose his/her private creative thoughts in exchange for securing those rights to the individual, in accordance with the constitutional guarantee of securing the rights to the individual, requires the sovereign to honor and protect those rights as private (belonging to the individual), rather than confiscating them, post-issuance of the patent certificate, as public property. Anything less violates the *securing* principle of the constitutional imperative.

3. *Uniformity of Protection for Intellectual Property Rights*

The bizarre reality of two different adjudicative standards for the same determination (*e.g.*, patent invalidity) by the administrative agency in PTAB trials and by Article III courts deciding patent disputes is counter to the uniformity principle underlying the constitutional imperative (*e.g.*, PTAB broadest reasonable interpretation ("BRI") or BRI claim construction based upon preponderance of the evidence and absence of presumption of validity, compared with Article III courts' Phillips' ordinary meaning claim construction based upon clear and convincing standard and presumption of validity). The inconsistency, derived from a lack of uniformity, is compounded by the unpredictability of finality and binding authority in those patent validity determinations that occur with multiple parallel-tracked validity determinations in the two separate fora concerning validity of the same challenged patent claims.

Congressional exercise of its enumerated powers in this context has violated the principles behind the constitutional imperative and exceeded its authority by usurping the

authority of the third branch to set uniform standards for adjudicating patent validity disputes consistent with the constitutional imperative.

F. IPRs are not the Talismanic Solution in the Quest for Improved Patent Quality and Patent Law Reform

To be sure, patent quality is in the best interest of all stakeholders and the integrity of the United States patent system. It is commendable that Congress has attempted to achieve this goal. Unfortunately, IPRs, while paved with good intentions, have put the patent system on a dangerous road to a chaotic demise.

Solutions for improving patent quality need to be accomplished at the front-end administrative process and not at the expense of the constitutional imperative and the separation of powers on the back-end enforcement regime. Robust and comprehensive examination practices at the application stage achieves the goal consistent with congressional authority and the constitutional mandate.

For its part, the Supreme Court has rendered recent decisions in patent cases that reign in “bad actors” on the enforcement back end.¹² These cases equip trial courts with the necessary tools to combat abusive patent enforcement tactics without stifling the incentive to innovate, entrepreneurial investment in new technologies, and the disclosure of the private thoughts of inventors and innovators.

Unfortunately, the system has gone off the rails with Congress’ empowerment of an administrative agency to assume the heretofore judicial function of adjudicating private party disputes over patent validity simultaneously with the Article III courts under vastly different and inconsistent procedures.

G. The Constitutional Imperative of the Patent System is Not Disputed

The issue of constitutionally guaranteed patent protection for individual inventors is non-controversial from a right or left political perspective. It is about what is right and wrong with IPRs and its adverse impact on the U.S. patent system vis-a-vis the balance of power between the branches of our tripartite form of government.

As evidenced by many of the Supreme Court’s unanimous opinions in patent cases, the fundamental constitutional rights emanating from Article I, section 8, Clause 8, provide a singular foundation of principles that cannot be denied. The strength of these protections for the individual has been the lynchpin of the superior technological progress and economic success enjoyed over the history of our republic. One need only compare American progress with that of repressive regimes that do not honor and support strong protection for the private intellectual property rights of the individual to realize the genius of the Founding Fathers and Framers behind the constitutional imperative.

The basis for the constitutional provision has served the country well throughout our history and should provide the basis for determining whether an act of Congress achieves or violates the constitutional imperative. And when, as here, it is evident that an act of Congress (*i.e.*, the AIA provision establishing the IPR administrative agency adjudication of patent validity disputes and cancellation) is contrary to the constitutional imperative, the Supreme Court's historical precedent, and to the antecedent common law, then that provision must be struck down as an unconstitutional violation of the separation of powers and the Seventh Amendment right to a jury trial.

The Court has recognized in many other cases involving the Bill of Rights and separation of powers that Congress and/or the Executive has over-stepped its authority. Here, the separation of powers and the Seventh Amendment are at the heart of this case.

If the judicial branch does not abide and protect its own constitutional independence and authority, and the individual's protections under the Bill of Rights, no other branch can.

II. Evolution of Public Property Rights v. Private Property Rights

A. Article III Separation of Powers

In 1855, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Supreme Court declared that Congress has the power to delegate disputes over public rights to non-Article III courts.¹³ The Court specifically held that “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.” *Id.* at 281. This Article I public rights carve-out from Article III courts was first recognized by the Court in the context of disputes between the government and private parties. *Id.*

In 1921, in *Block v. Hirsh*, the Court extended the doctrine to disputes between private parties concerning public rights.¹⁴ The Court upheld the constitutionality of a District of Columbia statute authorizing an administrative agency to determine fair rents for holdover tenants as provided by the statute in a dispute between a private party landlord and private party tenants. *Id.*

In 1929, in *Ex parte Bakelite Corp.*, the Court held that an adversarial proceeding by a company against a competitor for unfair importation practices under federal law did not need to be heard in an Article III court.¹⁵ In *Bakelite*, the Court addressed the question of the constitutionality of “legislative courts.” *Id.* at 451-52. The case concerned executive power to levy tariffs and create a Tariff Commission to conduct hearings pursuant to the Tariff Act of 1922. *Id.* at 446. Determinations by the Tariff Commission were appealable to the Court of Customs Appeals. The Court declared that the Court of Customs Appeals was a legislative court, *i.e.*, an Article I court. Thus, regarding matters purely within the scope of the legislative

or executive branches, they may reserve to themselves the power to create new forums to decide disputes or delegate the adjudicatory function to administrative agency tribunals. *Id.* at 451.

More recently, in 1985, the Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.*, upheld the binding arbitration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).¹⁶ Under FIFRA, pesticide manufacturers seeking to register a pesticide were required to submit health, safety, and environmental data to the Environmental Protection Agency (“EPA”). *Id.* at 571-72. The data could be utilized by the EPA in approving registrations by other manufacturers, but compensation for its use was owed to the earlier registrant. The amount could be determined by agency arbitration instead of in an Article III court. The Court in *Thomas* held that this statutory scheme does not violate Article III, noting that “[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” *Id.* at 583. It followed that “Congress, acting for a valid legislative purpose to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.* at 593-94.

The following year, in 1986, the Court in *Commodity Futures Trading Commission v. Schor*, used the same rationale to uphold the constitutionality of adversary proceedings in the Commodity Futures Trading Commission (“CFTC”), for customers of commodity brokers to seek reparations from their brokers for violation of the Commodity Exchange Act (“CEA”) or agency regulations.¹⁷

The Court expanded the Article I and Article II administrative agency adjudication of disputes between private parties concerning arguably private property rights in reliance upon its asserted nexus between the private rights and the public regulatory scheme or moreover the governmental interest in the outcome and resolution of those disputes. One can question this rationale and whether it presents an “open-ended” basis for unfettered expansion of regulatory control by the two political branches of the U.S. Government without the checks and balances of the co-equal non-political third branch. Certainly, a connection can be drawn between these cases and the massive expansion of Article I and Article II *regulatory agencies* and *regulatory power* over daily activities related to private property rights.

Concern over the open-endedness of this unfettered power is evident in the 2011 case *Stern v. Marshall*, 564 U.S. 462 (2011), where the Court issued its most expansive pronouncement on the standard for applying the public rights doctrine. In *Stern*, the Court continued to apply the analysis of public rights doctrine to disputes between private parties in “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. . . . [W]hat makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.” *Id.* at 498.

The Court however held that, the dispute between the parties in *Stern* concerned a claim *sounding in tort* and *thus could not be adjudicated by an Article I bankruptcy court*. *Id.* at 494. Rather, under Article III, an Article I bankruptcy court could not enter judgment on a state law counterclaim sounding in tort, because state law counterclaims “[do] not flow from a federal statutory scheme, . . . [are] not completely dependent upon adjudication of a claim created by federal law,” and do not involve “a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.” *Id.* at 493-94 (citations omitted).

Most notably, under the *Stern* analytical framework, Article I and Article II tribunal adjudications *are prohibited* if the federal claim had antecedents in the common law in 1789, and those agency tribunals acting as factfinder in private disputes must receive plenary review in an Article III court to be considered constitutionally sound. *See id.* at 484-85.

This “historical antecedents” test is determined by examining whether a claim existed at common law in 1789, and if so, its resolution implicates the “judicial power,” and a non-Article III tribunal may not finally adjudicate it at the trial level. The Article III purpose, its system of checks and balances, and the integrity of judicial decision making would be denied if the other branches of the federal government could confer the government’s “judicial power” on entities outside Article III. That is why since *Murray’s Lessee* it has long been recognized that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” 59 U.S. 272 (1856).

When a suit is made of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. *Stern*, 564 U.S. at 484. The Constitution assigns that job—resolution of “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law” —to the judiciary. *Id.* at 495.

Nevertheless, the Court went on to recognize that Article III precedent “has not been entirely consistent.” *Id.* at 497. As Justice Scalia’s concurrence stated, this realization of how the *Stern* outcome was reconciled with every “not . . . entirely consistent” holding of the past has led reasonable jurists to believe that there were no less than seven distinct legal standards announced in the majority opinion. *Id.* at 507 (Scalia, J., concurring).

It is important to note that none of the public rights cases involve the disclosure of private thoughts induced by the sovereign, and, under the historical antecedent test, non-Article III tribunals may not finally adjudicate patent disputes at the trial level. Also, as in *Stern*, under the common law, violations of patent rights have been treated as a tort.

It is also noteworthy that the Court has recently held in *Matal v. Tam*, 137 S. Ct. 1744, 1760-61 (2017), in the context of trademark rights, that like copyrights, trademarks are “private” speech. Additionally, as pointed out by Justice Thomas (joined by Justice Scalia) in his dissenting opinion in *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293 (2015):

“[T]he right to adopt and exclusively use a trademark appears to be a *private property right that “has been long recognized by the common law and the chancery courts of England and of this country.” Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879). As the Court explained when addressing Congress’ first trademark statute, enacted in 1870, the exclusive right to use a trademark “was not created by the act of Congress, and does not now depend upon it for its enforcement.” *Ibid.* “The whole system of trademark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.” *Ibid.* Thus, it appears that the trademark infringement suit at issue in this case might be of a type that must be decided by “Article III judges in Article III courts.” *Stern*, 564 U. S. at 484, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 495.”

B&B Hardware, 135 S. Ct. 1293, 1317 (emphasis added).

The same is true for patent rights since the patent law developed from the common law.

B. Article III Separation of Powers in Invention and Land Patent Cases

In addition to patents for inventions, the U.S. government has issued patents for land grants. *United States v. Stone*, 69 U.S. 525, 535-38 (1864). Patents for invention and patents for land are treated the same way under the relevant law. *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 358-59 (1888). The Supreme Court in several cases during the nineteenth century declared that a patent for either invention or land, once issued, is private property that has left the authority of the granting office.

The Court in *American Bell Telephone Company*, compared Article I, Section 8, Clause 8, with Article IV Section 3, Clause 2, and stated that “the power . . . to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureau or officers under the government, are of the same nature, character and validity. . . .” *Id.* The Court held that to take away a patent after issuance invokes “private” rights—namely, fully vested property rights. *Id.* at 370. The Court found that the invention “has been taken from the people, from the public, and made the private property of the patentee. . . .” *Id.*

The Court has held, with respect to both patents for invention and patents for land, that it is an unconstitutional encroachment on Article III courts for the executive to affect an issued patent in any way. *Id.* In *American Bell Telephone Company*, the Court found that a patent is

“the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. . . .” *Id.* at 365. Any determinations as to whether a patent has been improvidently granted must be made by courts of law. The agency that issues the patent provides evidence of a grant by an officer who issues it acting magisterially and not judicially. *Id.* Such office or officer is not competent to cancel or annul the act of his predecessor. *Id.* That is a judicial act, and requires the judgment of a court. *Id.*

The Supreme Court in *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898), held that a patent, upon issuance, is not supposed to be subject to revocation or cancellation by any executive agent. *Id.* The Court held that it is an invasion of the province of Article III courts for the executive branch to revoke or cancel a patent as invalid. *Id.* at 612.

The Court reasoned that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the government. *Id.* at 608-09. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *Id.* The Court noted that the only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatsoever, is vested in the courts of the United States, and not in the department which issued the patent. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of land.

There are numerous land patent cases preceding the invention patent cases that reached the same conclusion. In *United States v. Stone*, 69 U.S. 525, 535 (1864), the Court determined that an Article I tribunal lacked the authority to void a patent for land.

In *Moore v. Robbins*, 96 U.S. 530 (1878), the Court decided a dispute as to whether the Secretary of the Interior could rescind a patent for land where multiple parties claimed ownership over the same tract. *Id.* The Court reasoned that Article III courts are the sole venue for adjudication once a patent has been issued and become the private property of the patentee. The question of contested rights is within the jurisdiction of the land patent granting authority (the Land Office), but once the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office and the executive. *Id.* at 532-33. Any disputes concerning the land patent must be decided by Article III courts. *Id.*

Similarly, in *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 293 (1890), the Court, relying on the same rationale to prevent officers of the Land Department from requiring two competing land owners to appear regarding the patents’ validity, stated that it “is always and

ultimately a question of judicial cognizance.” *Id.* The Court held that only the Article III courts could hear the case. *Id.* at 301-02.

In both the invention and land patent cases, the dispute arose as a result of a challenge to the validity of the granted patent. Whether the challenge is fueled by the issuing body’s mistake or negligence, the same consequence obtains—the issuing agency cannot adjudicate the dispute. Once the grant has occurred, the right is a private property right. Any dispute as to the patentee’s private property must be heard by an Article III tribunal. Otherwise, it violates the Article III separation of powers.

The harm to the rule of law that arises whenever persons other than Article III judges wield the judicial power is not overstated. The presumption of lifetime tenure and the prohibition against salary diminution is that it eliminates or minimizes the political influence on Article III judges. The lifetime tenure and no salary diminution requirement of Article III provide the greatest opportunity to maintain the independence of the federal judiciary. Also, the Article II advise and consent role for Senate confirmation of Presidential nominees to Article III Courts guarantees the People a representative voice in the vetting process. These protections do not exist in the administrative agencies of the Executive branch, whose employees perform their duties *within the bureaucracy subject to the power and authority of agency leaders, the President, and/or Congress.*

C. The Public Rights Exception Violates the Seventh Amendment Right to a Jury

The Seventh Amendment provides that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”¹⁸

The public rights exception for administrative agency tribunals runs afoul of the Seventh Amendment right to a trial by jury with respect to the PTAB IPRs challenging the validity of patents. As pointed out in the discussion of the Supreme Court’s invention patents and land patents, the dispute is one that should be viewed as a private property rights case and not a public property rights case. Moreover, historically in the United States, the issues of patent validity have been adjudicated in Article III courts.

Additionally, the Seventh Amendment right to a jury trial is violated under the Court’s historical antecedent test. Under the English Common law of the eighteenth century (at the time of the framing of the United States Constitution), the validity of patents sounded in common law. Such was the case whether incident to an infringement action or as a direct action to revoke in the Chancery Court of law and equity (since the factual determinations were actually tried in the common law courts because only they had the power to empanel juries).¹⁹ Accordingly, any distinction between validity determinations and infringement actions is misplaced.

Patent infringement actions inherently rely upon the validity of the patent at issue. This is true whether decided by adjudication of the affirmative defense, counterclaim, stipulation, or

the presumption of validity. The issues of patent infringement and patent validity are inextricably linked. Congress recognized this aspect of patent enforcement in the AIA one-year time bar for IPR petitions when the patent at issue is the subject of a patent infringement lawsuit.²⁰

Similarly, since the right to a jury trial is waivable, any patent dispute conducted by an Article III judge without a jury differs significantly from the PTAB IPR proceeding in that the litigants engage in the process knowing that their voluntary conduct waives the jury right. Patent holders faced with the challenge in IPRs are not afforded the opportunity to waive the jury right. And, of course, the separation of powers constitutional deficiency is not present since the matter is still tried as an Article III adjudicated proceeding.

While no Supreme Court case has addressed the specific question raised regarding the Seventh Amendment violation posed by PTAB IPRs (prior to the pending case), guidance may be gleaned from the Court's decision in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989):

Although 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,' the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.

Id. at 41- 42 (citations omitted).

[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury . . . to hold otherwise would be to permit Congress to eviscerate the *Seventh Amendment's* guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority. '[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity,' nor can Congress conjure away the *Seventh Amendment* by mandating that traditional legal claims be brought there or taken to an administrative tribunal.

Id. at 51-52 (citations omitted).

In *Granfinanciera*, a common law claim arose in an Article I bankruptcy court. *Id.* The Court held that a bankruptcy trustee was constitutionally entitled to a jury trial in an action to recover a fraudulent conveyance, as such suits are matters of private rights. *Id.* at 55-56. The Court found that although the common law claim arose in an Article I (bankruptcy) court, the Seventh Amendment right to a jury still applied. *Id.* at 63-64.

III. Resolution of the Critical Constitutional Issues Raised by IPRs is Necessary to Insure the Integrity and Strength of the United States Patent System

“Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.”

~Frederic Bastiat

The passage of the AIA was a culmination of efforts spanning several years of congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (the administrative challenges to patent validity through the PTAB IPRs).

The 113th and 114th Congresses also grappled with then newly proposed patent law reforms that, if enacted, would have presented additional tectonic shifts in the patent law. Major provisions of the proposals included: fee-shifting measures (requiring loser pays legal fees—counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the *Twombly/Iqbal* standard applied to all other civil matters in federal courts; and the different standards applicable to patent claim interpretation between the PTAB IPR proceedings and Article III court litigation concerning patent validity.

The executive and administrative branch have also been active in the patent law arena. President Obama was a strong supporter of the AIA and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at “patent troll” issues, we must innovate rather than litigate. Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to over 250 administrative law judges in concert with the AIA IPRs’ strict timetable requirements.

The Supreme Court, along with the other branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the present term, there has been a steady increase in the number of patent cases decided by the Court. For example, the 2014-2015 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to over the more recent terms.

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our Republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides clear insight for its significance in the Federalist Paper No. 43 (the only reference to the clause in the Federalist Papers). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for uniformity of the protection of IP rights; securing those rights for the individual rather than the state; and incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the formulation of the new Republic: how to promote a unified nation while protecting individual liberty. The fear of tyranny and protection of the “natural law” of individual liberty is a driving theme for the Constitution and throughout the Federalist Papers.

In Federalist Paper No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist Paper No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist Paper No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*.

All of these related themes are relevant to Article I, Section 8, Clause 8, and at the center of intellectual property protections then and now. The Federalist Paper No. 10 recognition that a faction may influence the law has been playing itself out in the halls of Congress in the time period leading up to the AIA and in connection with more recent patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents, and opponents of certain of these efforts.

To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not grounded in the founding principles of the Constitution and the Patent/Copyright Clause (*i.e.*, uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and

the best in the quid pro quo of political gain to the governing body threatens to undermine the individual's intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

All of these vital intersecting factors are resonating with the critical issues to be decided regarding the constitutionality of PTAB IPRs. The public property rights/private property rights jurisprudence can be clarified, and vital issues related to the strength of invention patent protection in the United States can be secured, through resolving the fundamental question of the constitutionality of Article II versus Article III adjudication of invention patent validity.

IV. CONCLUSION

IPRs, as promulgated by Congress and as currently administered, are an unconstitutional usurpation of the Article III separation of powers and violate the Seventh Amendment's right to a jury.

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² See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (war powers); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Affordable Care Act); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (naturalization/immigration).

³ See U.S. CONST. art. I, § 8, cl. 8.

⁴ THE FEDERALIST NO. 43 (James Madison) (emphasis added).

⁵ *Miller v. Brass Co.*, 104 U.S. 350 (1882) (“[T]he claim of a specific device or combination, and an omission to claim other devices or combinations *apparent on the face of the patent*, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he *dedicates it to the public.*”) (alteration in original) (emphasis added).

⁶ Defend Trade Secrets Act, Pub. L. 114-153, 130 Stat. 376 (2016) (codified at 18 U.S.C. § 1836 *et seq.*).

⁷ U.S. CONST. art. III, § 1.

⁸ THE FEDERALIST NO. 10 (James Madison).

⁹ THE FEDERALIST NO. 51 (James Madison).

¹⁰ 5 U.S. 137 (1803).

¹¹ THE FEDERALIST NO. 43 (James Madison).

¹² See, e.g., *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016) (district court's discretion to award enhanced damages and appellate review by abuse of discretion standard); *Highmark Inc. v. Allcare Mgmt. Sys.*, 134 S. Ct. 1744 (2014) (abuse of discretion standard for appellate review of attorney's fees award); *Octane Fitness v. ICON Health & Fitness*, 134 S. Ct. 1749 (2014) (“exceptional case” standard for award of attorney's fees).

¹³ 59 U.S. 272 (1855).

¹⁴ 256 U.S. 135 (1921).

¹⁵ 279 U.S. 438, 460-61 (1929).

¹⁶ 473 U.S. 568, 571 (1985).

¹⁷ 478 U.S. 833, 854 (1986).

¹⁸ *See* U.S. CONST. amend. VII.

¹⁹ *See* *Ex Parte Wood & Brundage*, 22 U.S. 603, 614-615 (1824).

²⁰ *See* 35 U.S.C. § 315 (2012).

IPRs Are a Constitutional Exercise of Congressional Authority to Empower an Administrative Agency to Determine the Validity of Patents

By: Melvin C. Garner

On June 12, 2017, the United States Supreme Court granted Oil States Energy Services' ("Oil") petition for certiorari to review the Federal Circuit's summary affirmance of a Patent and Trial Appeal Board ("PTAB") decision. The grant of certiorari was to determine: "Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury."¹

The petition also sought review of the PTAB's process for allowing amendments and its "broadest reasonable interpretation of patent claims." Although these other issues raise valid concerns, the Court chose not to address them, and they are not considered here.

The petitioner Oil makes two main arguments in challenging the constitutionality of *inter partes* review ("IPR"):

- (1) Patent "infringement cases today *must* be tried to a **jury**, as their predecessors were more than two centuries ago." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) (emphasis added). At a minimum, the Constitution requires that an **Article III judge** adjudicate all cases in law and in equity arising under federal law. U.S. CONST. art. III. (Pet. 11) (emphasis added).
- (2) Patents create property rights, protected by the Constitution. ***Once a patent is granted, it "is not subject to be revoked or cancelled by the President, or any other officer of the Government"*** because "[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property." *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 608-09 (1898). (Pet. 17) (emphasis added)

Analysis of both arguments shows that they do not support the conclusion that IPRs are unconstitutional. In particular, patent infringement cases are not patent validity cases (although validity can be a subsidiary issue), and the selected statements from old cases relied on by Oil do not establish that patents are private rights, which can only be revoked by an Article III court with a jury.

1. Patent Validity Does Not Need to be Determined in an Article III Court Before a Jury

Controversies that *may* be decided in the federal courts are identified in Article III, Section 2 of the Constitution, and include "all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made." Certainly, patent

validity is within the purview of the federal courts.² Also, the Seventh Amendment provides a constitutional right to a jury trial if such a right existed at common law in 1791.³ While it is clear that at common law before 1791, and up until today, an Article III judge and jury could decide the validity of a patent; however, what is not clear is whether they are the only ones who can do so. In other words, although an Article III judge and jury are sufficient to determine validity, are they necessary?

a. An Article III Court is Not Necessary for a Patent Validity Determination

The Supreme Court has “long recognized that, in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”⁴ If a suit is within federal jurisdiction, then the test for Article III is whether the case “is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.’”⁵ In order to “preserve the integrity of judicial decisionmaking,” Congress cannot “confer the Government’s ‘judicial Power’ on entities outside Article III.”⁶

The cases relied upon by Oil, however, are patent infringement cases. IPRs are patent validity cases, not infringement cases. At most, patent validity may be determined in a modern patent infringement case as an affirmative defense to infringement.

In England in the eighteenth century, only chancery courts had the power to revoke a patent upon request of a private citizen. The chancery court was not a law court at Westminster. *See* Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1684 (Dec. 2013) (“Lemley”).

What an Article III judge has that an Article I administrative judge lacks is lifetime tenure and no diminution of compensation. This protects the Article III judge from undue political influence. What the typical Article III judge lacks in determining patent validity is a relevant technical background and an in-depth knowledge of patent law, backgrounds that the Administrative Patent Judges (APJs) of the PTAB must have. Thus, the public is more likely to get a proper determination of the validity of the patent from the Article II proceeding than from the Article III one.⁷ Concern about political influence on ALJs is moderated by the fact that the patent would not exist at all if the same agency judging it had not granted it in the first place.

b. A Jury is Not Necessary for a Patent Validity Determination

The Seventh Amendment ensures a jury trial right if that right existed in 1791. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). Professor Lemley provides a detailed analysis of the use of juries in eighteenth-century England:

[I]n England in the eighteenth century, only chancery courts had the power to revoke a patent upon request of a private citizen. And chancery courts had no

power to convene a jury. [However, juries] could pass on the validity of a patent in two circumstances. First, a chancery court might seek the advice of a jury in assessing the facts underlying a *scire facias* petition. . . . Second, and more commonly, when a patentee sued for damages at common law rather than seeking an injunction in equity, matters of fact—including what factual issues existed concerning validity—were given by the law courts to the jury. . . . [A] ruling in the law courts could not invalidate a patent altogether, as a ruling of invalidity does today. In the law courts, invalidity as we understand it today didn't exist. The doctrines we think of today as rendering a patent invalid instead provided personal defenses to a particular infringer.

Lemley at 1684-86. Since there was no right to a jury in a pure invention patent validity case in 1791, there is no requirement for a jury trial for a patent validity determination now.

An Article III jury trial in which patent validity is determined is essentially judicial review of an administrative agency action, i.e., the original grant of the patent by the Patent Office. The Supreme Court has held that there is no constitutional right to jury review of administrative agency decisions. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977); *Cox v. United States*, 332 U.S. 442, 453 (1947). The Supreme Court has also held that the Patent Office is an administrative agency subject to the normal rules of the Administrative Procedure Act. *Dickinson v. Zurko*, 527 U.S. 150, 154–55 (1999).

In 1791, juries did evaluate the validity of patents in infringement cases, but they did not review the work of an administrative agency in the sense they do today. Further, a jury's determination that a patent was invalid in 1791 simply provided a personal defense to infringement; it did not mean (as it does today) that the patent was nullified. Judgments in England during this time period that a patent was invalid as to everyone were the province of the writ of *scire facias*, which required petitioning the King (i.e., the executive). *See* Lemley at 1683-84.

Therefore, there is no right to a jury in a purely patent-validity determination.

2. The Status of Patent Rights as Property Does Not Mean that all Determinations about Patents must be handled by an Article III Court

Oil relies heavily on the language in *McCormick*, i.e., “[o]nce a patent is granted, it ‘is not subject to be revoked or cancelled by the President, or any other officer of the Government’ because ‘[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.’” Pet. 17 (citing 169 U.S. at 608-09) (emphasis added). Oil takes this language out of context to assert that the Patent Office cannot determine the validity of a patent and that such a determination must be made by a jury in an Article III court.

a. The Limitations of the Language in *McCormick*

There are at least three problems with reliance on *McCormick*. First, *McCormick* dealt with a reissue situation where the patentee had asked the PTO to correct the patentee's error, not a re-examination situation where the PTO is being asked to correct its own error. In contrast, the IPR is a curative statute invoked by a third party to correct an error made by the Patent Office in granting an invalid patent. The fact that it is the government's mistake that is being corrected speaks to the public nature of the right in question.

Second, in *McCormick*, the context of the statement is important in order to understand it. During a reissue, the Examiner found invalid certain original claims of the patent. Rather than appeal that decision, *McCormick* withdrew the request for reissue and obtained a return of its original patent. In a later infringement suit, the defendant tried to get the court to determine that these claims were invalid based on the determination during the reissue. The Supreme Court determined that since the reissue had been withdrawn and the original patent had been returned, the determination of the Examiner had no effect.

Third, the Supreme Court in *McCormick* did not rule on the constitutionality of the reissue procedure, and the quoted statement is dicta. This case from 1898 is of questionable value in determining the constitutionality of an agency tribunal. Under current Supreme Court analysis, this question turns on whether the right adjudicated by the agency is a "public right" or a "private right." See *Stern v. Marshall*, 564 U.S. 462 (2011). The determination of the validity of a patent by the Patent Office is a determination of a public right. However, a suit for infringement of the patent against a third party is the exercise of a private right, which must be handled by an Article III forum. Additionally, a jury is required if requested by the parties.

b. The Nature of the Patent Property Right

If the patent right is taken to be a property right that is indistinguishable from other property rights for all purposes, then it is a private right and can only be taken away from the owner by an Article III court and thus the IPR procedure is unconstitutional. However, a close examination of the property right in an idea as established by a patent shows that it is primarily a creation of government and is much different than other property, such as real estate or even copyright. In fact, a patent is a federally created property right and thus a public right. See *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1291 (Fed. Cir. 2015); *Patlex Corp v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985).

Land exists without the need for government, and ownership of land existed even before government. The government's role in real estate is to register the ownership of land so that in a proceeding involving it by an Article III court or a state court, it is easier to determine the true owner. This is especially true in the face of changes in ownership due to sales and inheritance. See e.g. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Copyright is similar. A person can

create a work of art without the government and that work exists independent of government. Government registration of a copyright merely aids in a determination of the owner.

Certainly people can get ideas for new and useful machines without government. However, no protection is provided for ideas in the abstract. In fact, society has always valued the free exchange of ideas. For example, if a farmer operating a gristmill with the power of horses were to have the idea to substitute a water mill on a stream for the horse, no protection for that idea would be extended to the farmer. Neighboring farmers would be free to create the same type of mill on their property. At best, without government ideas can be protected by keeping them secret. But, where that is not possible, they can be copied by all for the benefit of society.

The patent right is created by government action as the statement from *McCormick* even acknowledges. At least in the United States, the granting of a patent is not a registration process. Rather, a patent application is examined to assure that the claim that will be protected is directed to a physical embodiment of the idea, not an abstract idea. In fact, the claim defines the right that is created. In contrast, the right to a copyright is defined by the creation of the work of art. A patent claim is often analogized to a description of the metes and bounds in a real estate deed. However, in real estate, the land exists without the deed, and the metes and bounds are merely an attempt to define what exists in nature. Without the government grant of a claim, there is no patent property.

In the patenting process, a determination is made that the idea expressed in the claim is new and not obvious. In this determination, the claim as presented is compared to prior art patents, publications, and public uses. In the case of real estate, the land is not new. It always just was. A piece of land in another county has no effect on the land in question. In copyright, the requirement is originality, not novelty. The creation of a similar work in another county has no effect on the copyright. Thus, unlike other property, the patent right is created by government to protect some ideas created by individuals in a limited way. *Patlex*, 758 F.2d at 604.

c. The Holding in *McCormick* Explained

McCormick states that once a patent has issued “it has passed beyond the jurisdiction of [the Patent] Office and is not subject to be revoked or cancelled by the . . . Government. It has become the property of the patentee, and as such is entitled to the same legal protection as other property.” 169 U.S. at 608-09. Thus, the *McCormick* court did not engage in the “public” versus “private” right analysis required by *Stern*. Also, *McCormick* seems to take the position that the quality of the right changes upon issuance by the Patent Office. This suggests that it was a public right during its creation but somehow changed to a private right for some undisclosed reason upon issuance.

The cases that the *McCormick* court relies upon for the cited statement do not support the broad interpretation that Oil asserts. For example, *United States v. Schurz*, 102 U.S. 378 (1880),

involved the ownership of land, not patents on invention. In *Seymour v. Osborne*, 78 U.S. (11 Wall.) 516, 533 (1870), the Court held that “inventions secured by letters patent are “property” of the patentee, and as such are entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.” It did not relate to whether those rights could be adjudicated in the very agency that granted them. To the same effect is *Cammeyer v. Newton*, 94 U.S. 225 (1876). However, in *Cammeyer*, the issue was whether the government could make use of the invention with compensation to the patentee. In *United States v. American Bell Telephone Co.*, the Court held that the United States could bring an action in federal court to cancel a patent allegedly procured by fraud—i.e., it authorized “the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit.” 128 U.S. 315, 373 (1888). Thus, *McCormick* cannot be taken as holding that government has no power to revoke a patent.

3. Analysis of IPRs Under the “Public Rights” Exception Shows that They are Constitutional

a. Under the Principles Set Forth in *Stern*, the Patent Right is a Public Right

Although *McCormick* did not address it, the Supreme Court in *Stern v. Marshall* did address the “public right” exception; the Court recognized that its prior decisions held:

that there [is] a category of cases involving “public rights” that Congress could constitutionally assign to “legislative” courts for resolution. [This] “public rights” exception extend[s] “only to matters arising between” individuals and the Government “in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those” branches.

564 U.S. at 485 (citations omitted).

Stern confirmed that Congress cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” *Id.* at 489 (citations omitted). The Court also recognized that “[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.” *Id.* at 507 (citations omitted).

The “public right” exception extends to cases “where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights,” while “[w]holly private tort, contract, and property cases, as well as a vast range of other cases . . . are not at all implicated.” *Id.* at 490 (citations omitted). The Court has continued, however, to limit the

exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. *Id.* at 490-92.

The *Stern* Court set forth a number of factors to be considered on the issue of whether the right is considered public or private, which include the following:

- (a) the assertion of agency authority involves only “a narrow class of common law claims” in a “particularized area of law”;
- (b) the area of law in question was governed by “a specific and limited federal regulatory scheme” as to which the agency had “obvious expertise”; and
- (c) orders were “enforceable only by order of the district court.”

Id. at 491 (citations omitted).

Applying these factors to the IPR proceeding shows that a determination of patent validity is a determination of a public right which the PTO can make under legislative direction.

In support of its petition, Oil notes that Supreme Court precedent holds that patent infringement cases must be tried to a jury in an Article III court. (Pet. 11). However, the IPR proceeding does not involve infringement decisions—it only involves validity, which may be a defense in an infringement action. Thus, the IPR involves only “a narrow class of common law claims,” i.e., the invalidity defense in an infringement case. Further, patent law certainly is a “particularized area of law.”

Patent validity is an area of law governed by “a specific and limited federal regulatory scheme” as to which the agency has “obvious expertise.” The entirety of Title 35 of the U.S. Code establishes the federal regulatory scheme by which patents are granted. Without this scheme there are no patents to inventions. Not only does the Patent Office in general have obvious expertise in the determination of patent validity, since that is its main function, the PTAB of the PTO has exceptional expertise. In order to perform their job, Examiners must have a technical education and knowledge of patent law. Such Examiners make validity determinations on their own when they reach Primary status. The Administrative Patent Judges (APJ) of the PTAB have similar or even more technical education than Examiners and typically have more training in patent law than Examiners. Examiners are not required to be patent attorneys, but the APJs are. Finally, PTAB decisions are made by three APJs, as opposed to a single examiner.

Compare this to a jury trial in an Article III court where neither the judge nor jury are required to have a technical background or experience in patent law.

Finally, the decision of the PTAB declares that: (1) the patent claims are maintained; (2) some of them are cancelled (or, in rare cases, amended); or (3) all of the claims are found to be invalid.

The PTAB, however, takes no further action. It would require a district court to give effect to the ruling by dismissing a suit brought on a patent whose claims are determined to be invalid.

While the Supreme Court has never directly addressed the issue of whether a PTO procedure determining validity is constitutional, several Federal Circuit cases have applied the “public rights” doctrine to make such a determination.

b. The Federal Circuit has Properly Applied the “Public Rights” Exception to Find Reexamination and IPR Constitutional.

In *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985), the court applied a “public rights” exception analysis to determine whether the patent reexamination statute at the time violated the Constitution. The Federal Circuit in that case affirmed “the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving ‘public rights’” and found that “the grant of a valid patent is primarily a public concern.” *Id.* at 604. The court noted that “[t]he reexamination statute’s purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted.” *Id.* at 604. Also, *Patlex* distinguished *McCormick* on the basis that it did not “forbid[] Congress [from] authoriz[ing] reexamination to correct governmental mistakes, even against the will of the patent owner. A defectively examined and therefore erroneously granted patent must yield to the reasonable Congressional purpose of facilitating the correction of governmental mistakes.” *Id.*

In *Joy Technologies, Inc. v. Manbeck*, the court held that “the issuance of a valid patent is primarily a public concern and involves a ‘right that can only be conferred by the government’ even though validity often is brought into question in disputes between private parties.” 9 59 F.2d 226, 228 (Fed. Cir. 1992) (quoting and citing *Patlex*, 758 F.2d at 604).

More recently in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), the Federal Circuit specifically applied the Supreme Court’s “public rights” analysis from *Stern v. Marshall* to find that an IPR proceeding is constitutional. The *MCM* Court cited *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 571 (1985), which held that the statutory scheme in the Federal Insecticide, Fungicide, and Rodenticide Act, which allows the Environmental Protection Agency to determine compensation between private parties, does not violate Article III. The *MCM* court noted that “[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” 812 F.3d at 1290 (citing 473 U.S. at 583). It also cited *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 854 (1986), in which the Supreme Court upheld the constitutionality of adversary proceedings in the Commodity Futures Trading Commission (“CFTC”) for customers of commodity brokers seeking reparations from their brokers for violation of the Commodity Exchange Act (“CEA”) or agency regulations. The

MCM court then concluded that patent reexamination and inter partes review are indistinguishable from the agency adjudications held permissible in the *Thomas* and *Schor* cases.

The PTAB’s involvement in the determination of patent validity “is thus a quintessential situation in which the agency is adjudicating issues under federal law.” *MCM*, 812 F.3d at 1291. “Congress [having] devised an ‘expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.’” *Id.* (citing *Stern*, 564 U.S. at 494 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932))). The teachings of the Supreme Court in *Thomas*, *Schor*, and *Stern* compel the conclusion that assigning review of patent validity to the PTO is consistent with Article III.

4. Conclusion

The decision in *Oil* will turn on whether the patent right in the context of a validity determination is considered a “private” or a “public” right. Reference to common law in eighteenth-century England should not determine the case since there were no cases based only on the invalidity of a patent of invention that was tried at law before a jury. As explained above, the better analysis is that it is a “public” right and IPRs are constitutional. Some of the other issues raised by the petition but not taken up by the Court deserve some consideration in some forum.

¹ *Oil States Energy Services LLC v. Greene’s Energy Group, LLC.*, 639 Fed. App’x 639 (Fed. Cir 2016), *petition for cert. filed* 2016 WL 6995217 (U.S. Nov. 23, 2016) (No. 16-712).

² See U.S. CONST. art. I, § 8, cl. 8; 35 U.S.C. § 1 *et seq.*

³ *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

⁴ *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)).

⁵ *Stern*, 564 U.S. at 484 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).

⁶ *Stern*, 564 U.S. at 484.

⁷ This assumes the PTAB uses fair procedures and does not engage in the actions that the Petitioner was unable to get the Supreme Court to hear.

No. 16-712

IN THE
Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION OF AMICUS COUNSEL
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*¹

The Association Of Amicus Counsel (“AAC”) is an independent, unincorporated non-profit organization of lawyers of diverse affiliations and law practices, who are committed to serving the public interest, and who, by training, scholarship, experience, and discernment in their respective areas of the law, are possessed of the requisite proficiency in preparing and submitting *amici curiae* briefs that are helpful to courts. Briefs are submitted by the AAC in support of individuals and entities both here and abroad, or in support of neither as may be appropriate. Such individuals and entities are those who feel called upon to participate in the judicial process by having their voices heard in cases of controversy, including precedent-setting litigations whose issues of contention and outcomes will affect the interests of the public, including their own, and of others similarly situated. The AAC broadly focuses on advancing the science of jurisprudence through the submission of briefs in specific cases of importance to legitimately advocate, promote, and assist in the correct judicial development of the law in the time-honored tradition of “friends of the court.”

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. Respondent, Greene’s Energy Group, LLC’s written consent to this filing, and Federal Respondent’s written consent to this filing, are submitted herewith. Petitioner consented to the filing of *amicus briefs* in support of either party or neither party in a docket entry dated July 7, 2017.

Because of the increasing prevalence of IPR proceedings and the impact of such proceedings on patent owners, the AAC's associated counsel and their clients have a strong interest in the issues presented in this case.²

SUMMARY OF ARGUMENT

The issue before the Court is whether the America Invents Act of 2011 ("AIA") post-patent-grant Inter Partes Reviews ("IPR"), which is an adversarial proceeding used by the U.S. Patent & Trademark Office ("USPTO") to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

The views expressed herein are based upon the constitutional jurisprudence related to the question, which analysis derives from the status of the exclusive patent right as a public property right or a private property right. They also comprise the interpretation of the Patent & Copyright clause of the United States Constitution; the intent and purpose of the clause as articulated by the

2. The arguments made in this brief were approved by an absolute majority of AAC's associated counsel, but do not necessarily reflect the views of all of the associated counsel of the AAC, or of the law or corporate firms with which those associated counsel are affiliated. After reasonable investigation, the AAC believes that no associated counsel of the AAC who voted in favor of filing this brief, nor any attorney affiliated with any such associated counsel in any law or corporate firm, represents a party to this litigation. Some associated counsel or affiliated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters that may be affected by the outcome of this litigation.

Framers of the Constitution; and, an understanding of the natural law attributes of life, liberty and property.³

1. The IPRs are an unconstitutional usurpation of, and intrusion on, the Article III Separation of Powers and a denial of the Seventh Amendment right to a jury trial. Congress's AIA provision, establishing the IPR administrative agency adjudication of patent validity disputes and cancellation, in a non-Article III forum without a jury, is contrary to the Supreme Court's historical precedent, the antecedent common law, and the Patent & Copyright clause's mandate.

2. The patent right, as found in this Court's historical precedent and the antecedent common law, as intended by the Framers of the Constitution, and as comprehended by the natural law or the nature of the thing, is a private property right. *See* May, Randolph J. & Cooper, Seth L., *The "Reason and Nature" of Intellectual Property:*

3. *Amicus Curiae's* analysis and conclusions are informed by a review of the principles, precepts, and concepts as noted. It does not express any opinion regarding the utility of a legislatively promulgated post-grant review proceeding that is properly constructed in fidelity with the U.S. Constitution. Nor does it directly address the *presumptively valid patents* issued by the thousands of hardworking USPTO patent examiners, and the hundreds of dedicated, thoughtful and highly competent, Patent Trial and Appeals Board ("PTAB") Administrative Patent Judges ("APJ") tasked to conduct PTAB IPR trials within the confines and administrative construct of Congress' mandate in the AIA. Moreover, it addresses the question of whether a provision of a statute (*e.g.*, the AIA), enacted by an Article I Congress and executed by an Article II Executive Agency (the USPTO), violates the U.S. Constitution Article III Separation of Powers and the Bill of Rights' Seventh Amendment Right To A Jury.

Copyright and Patent in The Federalist Papers, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4.⁴

3. The intent and purpose, or imperative, of the Patent & Copyright clause of the U.S. Constitution, comprises three distinct principles: (1) to incentivize innovation; (2) to secure the patent rights to the individual (*e.g.*, a private right) rather than the sovereign (*e.g.*, a public right); and, (3) the uniformity of protection for those rights. *See* The Federalist No. 43 (James Madison). IPRs violate each of those three principles.

ARGUMENT

I. Administrative Agency IPRs Are An Unconstitutional Usurpation Of, And Intrusion On, The Article III Separation Of Powers And A Denial Of The Seventh Amendment Right To A Jury Trial

A. It is Improper for an Administrative Agency Adjudicative Body to Invalidate Patents because it Violates the Article III Separation of Powers

The separation of powers under the United States Constitution is the backbone of our tripartite system of government. Conflicts between and among the three branches arise in many circumstances relating to the governance of the People and the Constitutional authority for a particular branch to exercise its power.

4. Available at http://www.freestatefoundation.org/images/The_Reason_and_Nature_of_Intellectual_Property_011014.pdf

Recent examples include war powers, health care and immigration. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (war powers - Separation of Powers); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Affordable Care Act - Separation of Powers); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (naturalization/immigration - Separation of Powers) (2015). Ultimately these conflicts are resolved by this Court.

The present case illustrates such conflict between the three branches of government, and the separation of powers, with respect to the constitutionality of adjudicating patent validity disputes in Administrative tribunals created under Article I enumerated powers and operating in Article II Agencies rather than the constitutionally required Article III Court adjudication of those disputes.

The Supreme Court's jurisprudence, deciding the constitutionality of conflicting jurisdictional authority among the three branches, in this instance, is based on an analysis addressing "public rights" (*e.g.*, disputes between a private party and the government or between private parties concerning public property rights) and "private rights" (*e.g.*, disputes between private parties concerning private property rights).

The public/private property rights dichotomy, and the conflict among the three branches of government has presented itself in this case involving the adjudication of a dispute between private parties concerning the validity of rights secured to an individual inventor under a lawfully issued United States patent certificate. The patent certificate was issued based upon the sovereign's promise

of exclusivity for a limited period of time in exchange for the individual inventor's disclosure of his private creative thoughts and ideas.

B. Background Of The Patent Law Adjudication Conflict Issue

Article I, Section 8, Clause 8, of the United States Constitution provides the explicit enumerated power of Congress to secure for inventors the exclusive right to their inventions for a fixed period of time, in exchange for disclosure of the invention to the public, as follows:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Id.

The U.S. Patent laws developed through the common law and from an early Act of Congress. In 1952, Congress codified much of today's U.S. patent law (the Patent Act of 1952). With few exceptions, the law remained as codified in the Patent Act of 1952 until 2011 when Congress enacted a major overhaul in the law in the form of the AIA.

Pursuant to the AIA, Congress authorized, *inter alia*, the Article II Executive Branch agency that administers the United States Patent system, the Commerce Department's United States Patent and Trademark Office, to establish an administrative tribunal proceeding to decide challenges to the validity of a U.S. patent issued by the USPTO. The administrative agency tribunal charged with this function is the Patent Trial and Appeals Board.

These Article II administrative agency proceedings are referred to as an inter-partes review or IPR conducted by Article I APJs. This change in the patent law is troublesome since prior to the AIA any adversarial challenge to the validity of a U.S. patent and determination to revoke or cancel the Patent was decided by the Article III courts. Additionally, it is significant to note that besides running afoul of historical precedent, the PTAB proceeding functions without a jury, operates under different evidentiary standards and presumptions, and employs different methods of interpreting the claim language of the patent which informs the public regarding the limitations or “metes and bounds” of the invention as described and claimed in the patent. Additionally, as is common with Article I tribunal proceedings, there is no Seventh Amendment right to a jury.

The distinctions between the Article III court adjudication of disputed patent validity and Article II administrative tribunal proceedings inform the question that is before the Supreme Court. The issues or questions being decided are whether the Separation of Powers and the Seventh Amendment are violated by the AIA empowering an Article II administrative agency tribunal to assert judicial power concerning the property rights between private parties embroiled in a private dispute and whether those property rights are “private” property rights or “public” property rights.

C. The Integrity of the U.S. Patent System and Fidelity to the Constitutional Mandate to Incentivize Innovation and Creative Aspirations, Secure the Intellectual Property Rights to Individuals, and Provide Uniform and Stable Patent Laws, Relies Upon the Proper Separation Of Powers in Enforcing Those Rights

The question of the constitutionality of administrative agency adjudication of patent validity is of utmost importance in preserving the integrity of the United States patent system and the viability of the Constitutional imperative to promote progress and innovation. *See* U.S. Const. art. I, § 8, cl. 8.

As clearly stated by James Madison in Federalist No. 43, referring to the enumerated power:

A power “to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries.”

“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, *seems with equal reason to belong to the inventors*. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”

Id. (emphasis added).

There is no greater evidence of the success of this Constitutional imperative than the United States' position as the leading worldwide economic and technological powerhouse. The success of the U.S. patent system, relying on the quid pro quo of disclosure by the individual of his/her most private and intimate creative thoughts in exchange for the promise of a limited period of time for exclusivity over the use of those private thoughts has spurred innovation through inspiration of others to build upon and/or build around disclosed inventions to achieve the proverbial "better mouse trap."

As recognized by the Framers of the Constitution, the right to inventions is a natural right that belongs to inventors not to the public. Thus, there can be no mistake that the right is a "private" right rather than a "public" right. See May, Randolph J. & Cooper, Seth L., *The "Reason and Nature" of Intellectual Property: Copyright and Patent in The Federalist Papers*, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4, at 9-10.

D. An Inventor's Disclosure of Private Creative Thoughts Should Enjoy The Same Protection as Disclosure of any Other Private Thoughts

In other contexts the Supreme Court recognizes the Constitution's guarantees that an individual's innermost private thoughts (which also comprise the genesis of all intangible intellectual property) are private and entitled to protection from compelled or induced disclosure (*e.g.*, Fifth Amendment right against self-incrimination). Likewise,

once expressed or disclosed, these private thoughts are afforded protection as well (*e.g.*, First Amendment free speech, Fourth Amendment protection against illegal search and seizure).

Private property rights emanating from an individual's private thoughts and ideas should be afforded no less constitutional protection merely because they involve intellectual property thoughts. In fact, it arguably carries greater weight since the sovereign induces the individual inventor to disclose such private thoughts and ideas in exchange for the promise of limited exclusivity. The mere fact that the sovereign issues a certificate, evidencing this agreement between the inventor and the sovereign, is insufficient in itself to transform these valuable private rights into a public right. In fact, the patent laws recognize the distinction in that disclosed but not claimed subject matter is considered dedicated to the public domain rather than retained by the disclosing inventor. *Miller v. Brass Co.*, 104 U.S. 350 (1882) (“the claim of a specific device or combination, and an omission to claim other devices or combinations *apparent on the face of the patent*, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he *dedicates* it to the public.”) (emphasis added).

Similarly, once a patent expires the claimed private rights are then considered public domain. Congress has recently affirmed the necessity to protect these private thoughts as private property rights by passing legislation, with overwhelming bipartisan support, nationalizing trade secret protection. Simultaneously trivializing the rights as public property rights after inducing the individual

to disclose these nationally protected valuable secrets (inventions), denies the proper constitutional protection for those private thoughts and rights and renders the quid pro quo of the Patent/Copyright clause agreement illusory.⁵

E. IPRs Violate the Three Principles of the U.S. Constitution Article I, Section 8, Clause 8

The Constitutional imperative of Article I, Section 8, Clause 8, as gleaned from its plain language and recognized by the Framers, provides three specific purposeful goals: (1) *Incentivizing innovation and creative aspirations*; (2) *Securing intellectual property rights to the individual (rather than the state or the public)*; (3) *Uniformity of protection for intellectual property rights*. See The Federalist No. 43 (James Madison).

The administrative agency IPR adjudication of patent validity is counter to the constitutional imperative and violates its three principles.

1. Incentivizing Innovation and Creative Aspirations

There is an ample body of evidence that the IPR's 80% invalidation rate dis-incentivizes innovation and creative aspirations. Confidence in the valuation of patented technology has all but disappeared. The expense of acquiring a patent that has a mere 20% chance of surviving a validity challenge post-issuance deters the necessary investment in R & D required for innovation.

5. Stripping away an issued patent's presumption of validity has a similar effect.

Roulette wheels in Las Vegas Casinos offer better odds for a return on investment. IPRs violate the *incentivizing* principle of the Constitutional imperative.

2. Securing Intellectual Property Rights to the Individual Rather Than The State (the Public)

Inducing an inventor to disclose his/her private creative thoughts and ideas in exchange for securing those rights to the individual, in accordance with the Constitutional guarantee of securing the rights to the individual, requires the sovereign to honor and protect those rights as private (belonging to the individual) rather than confiscating them, post-issuance of the patent certificate, as public property. Anything less violates the *securing* principle of the Constitutional imperative.

3. Uniformity of Protection for Intellectual Property Rights

The bizarre reality of two different adjudicative standards for the same determination (*e.g.*, patent invalidity) by the administrative agency, in PTAB trials, and by Article III Courts, deciding patent disputes, is counter to the uniformity principle underlying the Constitutional imperative (*e.g.*, PTAB Broadest Reasonable Interpretation or BRI claim construction based upon preponderance of the evidence and absence of presumption of validity, compared with, Article III courts' Phillips' ordinary meaning claim construction based upon clear and convincing standard and presumption

of validity).⁶ The inconsistency derived from a lack of uniformity, is compounded by the unpredictability of finality and binding authority in those patent validity determinations that occur with multiple parallel-tracked validity determinations in the two separate fora concerning validity of the same challenged patent claims.

Congressional exercise of its powers to legislate in this context has violated the principles behind the Constitutional imperative and exceeded its authority by usurping the authority of the third branch to set uniform standards for adjudicating patent validity disputes consistent with the Constitutional imperative.

The founders recognized the necessity for the independence of the third branch of government by providing for lifetime appointment and non-diminution of compensation for Judges. *See* U.S. Const. art. III, § 1. In Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. *See* The Federalist No. 10 (James Madison). In

6. The “broadest reasonable interpretation” claim construction standard provides that the claim is given its broadest reasonable meaning consistent with the language of the claim as viewed within the context of the patent specification. It is the standard employed by patent examiners for original patent application examinations and in some *ex parte* proceedings at the USPTO, where, unlike adversarial IPRs, a patent applicant may *freely* amend its claims in response to such construction. The Article III courts’ standard provides that the language of a claim, and a disputed claim term, acquires its ordinary meaning from the viewpoint of a person of ordinary skill in the art within the context of the patent specification at the time of the invention. *Phillips v. AWH. Corp.*, 415 F.3d. 1303, 1313 (Fed. Cir. 2005).

Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. *See* The Federalist No. 51 (James Madison). In Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*, 5 U.S. 137 (1803). *See* The Federalist No. 78 (Alexander Hamilton).

Congressional enactment of the AIA followed many years of lobbying for its enactment. Those efforts promoted and pushed for the legislation which, in the case of IPRs, runs counter to the Constitutional imperative behind Congressional authority to enact laws *that promote the progress of innovations by providing strong, stable protection for intellectual property*. The evidence that IPRs have the opposite effect and weaken intellectual property protection is undeniable. Furthermore, the combination of IPR patent invalidation rates, recent legislation nationalizing trade secret protection, and curtailment of patent eligible subject matter, further depletes patent protection and dis-incentivizes promoting innovation and progress -- all contrary to the Constitutional imperative.

F. IPRs are not the Talismanic Solution in the Quest for Improved Patent Quality and Patent Law Reform

To be sure, patent quality is in the best interest of all stakeholders and the integrity of the United States patent system. It is commendable that Congress has attempted

to achieve this goal. Unfortunately, IPRs, while paved with good intentions, have put the patent system on a dangerous road to a chaotic demise.

Solutions for improving patent quality need to be accomplished at the front-end administrative process and not at the expense of the Constitutional imperative and the separation of powers on the back-end enforcement regime. Robust and comprehensive examination practices at the application stage achieves the goal consistent with Congressional authority and the Constitutional mandate.

For its part, this Court has rendered recent decisions in patent cases that reign in “bad actors” on the enforcement back-end. *See, e.g., Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Highmark Inc. v. Allcare Mgmt. Sys.*, 134 S. Ct. 1744 (2014); *Octane Fitness v. ICON Health & Fitness*, 134 S.Ct. 1749 (2014). These cases equip the trial courts with the necessary tools to combat abusive patent enforcement tactics without stifling the incentive to innovate, entrepreneurial investment in new technologies, and the disclosure of the private thoughts of inventors and innovators.

Unfortunately, the patent enforcement system has gone off the rails with Congress’ empowerment of an administrative agency to assume the heretofore judicial function of adjudicating private party disputes over patent validity simultaneously with the Article III Courts under vastly different and inconsistent procedures.

G. The Constitutional Imperative of the Patent System is Not Disputed

The issue of Constitutionally guaranteed patent protection for individual inventors is non-controversial from the right or left political perspective. It is about what is right and wrong with IPRs and its adverse impact on the U.S. patent system vis-a-vis the balance of power between the branches of our tripartite form of government.

As evidenced by many of this Court's unanimous opinions in patent cases, the fundamental constitutional rights emanating from Article I, section 8, Clause 8, provide a singular foundation of principles that cannot be denied. The strength of these protections for the individual has been the lynchpin of the superior technological progress and economic success enjoyed over the history of our Republic's patent system. One need only compare American progress with that of repressive regimes that do not honor and support strong protection for the private intellectual property rights of the individual to realize the genius of the Founding Fathers and Framers behind the Constitutional imperative.

The basis for the Constitutional provision has served the country well throughout our history and should provide the basis for determining whether an Act of Congress achieves or violates the Constitutional imperative. And when, as here, it is evident that an Act of Congress (*i.e.*, the AIA provision establishing the IPR administrative agency adjudication of patent validity disputes and cancellation) is contrary to the Constitutional imperative, the Supreme Court's historical precedent, and to the antecedent common law, then that provision of the

AIA must be struck down as an unconstitutional violation of the Separation of Powers and the Seventh Amendment right to jury trial.

This Court has recognized in many other cases involving the Bill of Rights and Separation of Powers that Congress and/or the Executive has over-stepped its authority. Here the Separation of Powers and Seventh Amendment are at the heart of the case.

If the judicial branch does not abide and protect its own Constitutional independence and authority, and the individual's protections under the Bill of Rights, no other branch can.

II. Evolution of Public Property Rights v. Private Property Rights

A. Article III Separation of Powers

In 1856, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), the Supreme Court declared that Congress has the power to delegate disputes over public rights to non-Article III courts. The Court specifically held that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 281. This Article I public rights carve-out from Article III courts was first recognized by the Court in the context of disputes between the government and private parties. *Id.*

In 1921, in *Block v. Hirsh*, 256 U.S. 135 (1921), the Court extended the doctrine to disputes between private parties concerning public rights. The Court upheld the constitutionality of a District of Columbia statute authorizing an administrative agency to determine fair rents for holdover tenants as provided by the statute in a dispute between a private party landlord and private party tenants. *Id.*

In 1929, in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Court held that an adversarial proceeding by a company against a competitor for unfair importation practices under federal law did not need to be heard in an Article III court. *Id.* at 460-61. In *Bakelite*, the Court addressed the question of the constitutionality of “legislative courts.” *Id.* at 451-52. The case concerned Executive power to levy tariffs and create a Tariff Commission to conduct hearings pursuant to the Tariff Act of 1922. *Id.* at 446. Determinations by the Tariff Commission were appealable to the Court of Customs Appeals. The Court declared the Court of Customs Appeals was a legislative court, *i.e.*, an Article I court. Thus, regarding matters purely within the scope of the legislative or executive branches, they may reserve to themselves the power to create new forums to decide disputes or delegate the adjudicatory function to administrative agency tribunals. *Id.* at 451.

More recently, in 1985, the Court in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), upheld the binding arbitration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). *Id.* at 571. Under FIFRA, pesticide manufacturers seeking to register a pesticide were required to submit health, safety, and environmental data to the EPA. *Id.* at 571-72. The data

could be utilized by the EPA in approving registrations by other manufacturers, but compensation for its use was owed to the earlier registrant. The amount could be determined by agency arbitration instead of in an Article III court. The Court in *Thomas* held that this statutory scheme does not violate Article III, noting that “[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” *Id.* at 583. It followed that “Congress, acting for a valid legislative purpose to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.* at 593-94.

The following year, 1986, the Court in *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 at 854 (1986), used the same rationale in upholding the constitutionality of adversary proceedings in the Commodity Futures Trading Commission (“CFTC”), for customers of commodity brokers to seek reparations from their brokers for violation of the Commodity Exchange Act (“CEA”) or agency regulations. *Id.*

The Court expanded the Article I and Article II administrative agency adjudication of disputes between private parties concerning arguably private property rights in reliance upon its asserted nexus between the private rights and the public regulatory scheme or moreover the governmental interest in the outcome and resolution of those disputes. One can question this rationale and whether it presents an “open-ended” basis for unfettered expansion of regulatory control by the two

political branches of the U.S. Government without the checks and balances of the co-equal non-political third branch. Certainly, a connection can be drawn between these cases and the massive expansion of Article I and Article II *regulatory agencies* and *regulatory power* over daily activities related to private property rights.

As for the open-endedness of this unfettered power, the concern is evident in the 2011 case *Stern v. Marshall*, 564 U.S. 462 (2011), where this Court issued its most expansive pronouncement on the standard for applying the public rights doctrine. *Id.* In *Stern*, the Court continued to apply the analysis of public rights doctrine to disputes between private parties in “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority. . . . [W]hat makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.” *Id.* at 498.

The Court however held that, the dispute between the parties in *Stern* concerned a claim *sounding in tort* and *thus could not be adjudicated by an Article I bankruptcy court*. *See id.* at 494. Rather, under Article III, an Article I bankruptcy court could not enter judgment on a state law counterclaim sounding in tort, because state law counterclaims “[do] not flow from a federal statutory scheme, . . . [are] not completely dependent upon adjudication of a claim created by federal law,” and do not involve “a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative

agency specially assigned to that task.” *Id.* at 493-94 (citations omitted).

Most notably, under the *Stern* analytical framework, Article I and Article II tribunal adjudications *are prohibited* if the federal claim had antecedents in the common law in 1789 and those agency tribunals acting as factfinder in private disputes must receive plenary review in an Article III court to be considered constitutionally sound. *See id.* at 484-85.

This “historical antecedents” test is determined by examining whether a claim existed at common law in 1789, and if so, its resolution implicates the “judicial power,” and a non-Article III tribunal may not finally adjudicate it at the trial level. The Article III purpose, its system of checks and balances, and the integrity of judicial decision making would be denied if the other branches of the Federal Government could confer the Government’s “judicial power” on entities outside Article III. That is why since *Murray’s Lessee* it has long been recognized that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” 59 U.S. 272 (1856).

When a suit is made of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. *Stern*, 564 U.S. 462. The Constitution assigns that job – resolution of “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law,

issues of fact as well as issues of law” – to the Judiciary. *Id.* at 495.

Nevertheless the Court went on to recognize that Article III precedent “has not been entirely consistent.” *Id.* at 497. As Justice Scalia’s concurrence stated, this realization of how the *Stern* outcome was reconciled with every “not . . . entirely consistent” holding of the past has led reasonable jurists to believe that there were no less than seven distinct legal standards announced in the majority opinion. *Id.* at 507 (Scalia, J., concurring).

It is important to note that no public rights case involves the disclosure of private thoughts induced by the Sovereign, and, under the historical antecedent test non-Article III tribunals may not finally adjudicate patent disputes at the trial level. Also, as in *Stern*, under the common law, violations of patent rights have been treated as a tort since a patent dispute is fundamentally an action in tort. *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33 (1931).

Furthermore, private property rights are all of those rights that are not categorized as public property rights. Thus, all other rights are considered “private” and may only be subject to adjudication in Article III Courts. This guarantee is a fundamental element of the Constitution that helps ensure the separation of powers of the three branches of government. *See Stern*, 564 U.S. 462, 484.

It is also noteworthy that this Court has recently held in *Matal v. Tam*, 137 S. Ct. 1744, 1760-61 (2017), in the context of Trademark rights, that like Copyrights, Trademarks are “private” speech. Additionally, as pointed

out by Justice Thomas (joined by Justice Scalia) in his dissenting opinion in *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293 (2015):

“[T]he right to adopt and exclusively use a trademark appears to be a *private property right that “has been long recognized by the common law and the chancery courts of England and of this country.” Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550, 1879 Dec. Comm’r Pat. 619 (1879). As the Court explained when addressing Congress’ first trademark statute, enacted in 1870, the exclusive right to use a trademark “was not created by the act of Congress, and does not now depend upon it for its enforcement.” *Ibid.* “The whole system of trademark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.” *Ibid.* Thus, it appears that the trademark infringement suit at issue in this case might be of a type that must be decided by “Article III judges in Article III courts.” *Stern*, 564 U. S., at 484, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 495.”

B&B Hardware, 135 S. Ct. 1293, 1317 (emphasis added).

The same is true for patent rights since the patent law developed from the common law.

B. Article III Separation of Powers in Invention and Land Patent Cases

In addition to issuing patents for inventions, the U.S. Government issued patents for land grants. *United States v. Stone*, 69 U.S. 525 at 535-38 (1864). Patents for invention and patents for land are treated the same way under the relevant law. *United States v. Am. Bell Tel. Co.*, 128 U.S. 315 at 358-59 (1888). The Supreme Court in several cases during the nineteenth century declared that a patent for either invention or land, once issued, is private property that has left the authority of the granting office.

The Court in *Am. Bell Tel. Co.*, compared Article I, Section 8, Clause 8, with Article IV Section 3, Clause 2 and stated that “the power . . . to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureau or officers under the government, are of the same nature, character and validity. . . .” *Id.* The Court held that to take away a patent after issuance invokes “private” rights – namely, fully vested property rights. *Id.* at 370. The Court found that the invention “has been taken from the people, from the public, and made the private property of the patentee” *Id.*

The Court has held, with respect to both patents for invention and patents for land, that it is an unconstitutional encroachment on Article III courts for the Executive to affect an issued patent in any way. *Id.* In *Am. Bell Tel. Co.*, the Court found that a patent is “the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set

aside or annulled by some judicial tribunal. . . .” *Id.* at 365. Any determinations as to whether a patent has been improvidently granted must be made by courts of law. The agency that issues the patent provides evidence of a grant by an officer who issues it acting magisterially and not judicially. *Id.* Such office or officer is not competent to cancel or annul the act of his predecessor. *Id.* That is a judicial act, and requires the judgment of a court. *Id.*

The Court, in *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606 at 609 (1898), held that a patent, upon issuance, is not supposed to be subject to revocation or cancellation by any executive agent. *Id.* The Court held that it is an invasion of the province of Article III courts for the Executive branch to revoke or cancel a patent as invalid. *Id.* at 612.

The Court reasoned that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. *Id.* at 608-09. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *Id.* The Court noted that the only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of land.

There are numerous land patent cases preceding the invention patent cases that reached the same conclusion. In *United States v. Stone*, 69 U.S. 525 at 535 (1864), the Court determined that an Article I tribunal lacked the authority to void a patent for land. *Id.*

In *Moore v. Robbins*, 96 U.S. 530 (1878), the Court decided a dispute as to whether the Secretary of the Interior could rescind a patent for land where multiple parties claimed ownership over the same tract. *Id.* The Court reasoned that Article III courts are the sole venue for adjudication once a patent has been issued and become the private property of the patentee. The question of contested rights is within the jurisdiction of the land patent granting authority (the Land Office) but once the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office and the Executive. *Id.* at 532-33. Any disputes concerning the land patent must be decided by Article III courts. *Id.*

Similarly, in *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 293 (1890), the Court, relying on the same rationale to prevent officers of the Land Department from requiring two competing land owners to appear regarding the patents' validity, stated that it "is always and ultimately a question of judicial cognizance." *Id.* The Court held that only the Article III Courts could hear the case. *Id.* at 301-02.

In both the invention and land patent cases the dispute arose as a result of a challenge to the validity of the granted patent. Whether the challenge is fueled by the issuing body's mistake or negligence, the same consequence obtains -- the issuing agency cannot

adjudicate the dispute. Once the grant has occurred the right is a private property right. Any dispute as to the patentee's private property must be heard by an Article III tribunal. Otherwise it violates the Article III Separation of Powers.

The harm to the rule of law that arises whenever persons other than Article III judges wield the judicial power is not overstated. The presumption of lifetime tenure and the prohibition against salary diminution is that it eliminates or minimizes the political influence on Article III judges. The lifetime tenure and no salary diminution requirement of Article III provide the greatest opportunity to maintain the independence of the Federal Judiciary. Also, the Article II advise and consent role for Senate confirmation of Presidential nominees to Article III courts guarantees the People a representative voice in the vetting process. These protections do not exist in administrative agencies of the Executive branch, whose employees perform their duties *within the bureaucracy subject to the power and authority of agency leaders, the President, and/or Congress*.

C. The Public Rights Exception Violates the Seventh Amendment Right to a Jury

The Seventh Amendment provides that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved” *See* U.S. Const. amend. VII.

The public rights exception for administrative agency tribunals runs afoul of the Seventh Amendment right to a trial by jury with respect to the PTAB IPRs challenging the validity of patents. As pointed out in the discussion of the Supreme Court's invention patents and land patents,

the dispute is one that should be viewed as a private property rights case and not a public property rights case. Moreover, historically in the United States, the issues of patent validity have been adjudicated in Article III courts.

Additionally, the Seventh Amendment right to a jury trial is violated under the Court's historical antecedent test. Under the English Common law of the eighteenth century (at the time of the framing of the United States constitution) the validity of patents sounded in common law. Such was the case whether incident to an infringement action or as a direct action to revoke in the Chancery Court of law and equity (since the factual determinations were actually tried in the common law courts because only they had the power to empanel juries). *See Ex Parte Wood & Brundage*, 22 U.S. 603, 614-615 (1824). Accordingly, any distinction between validity determinations and infringement actions regarding the jury right is misplaced.

Patent infringement actions inherently rely upon the validity of the patent at issue. This is true whether decided by adjudication of the affirmative defense, counterclaim, stipulation, or the presumption of validity. The issues of patent infringement and patent validity are inextricably linked. Congress recognized this aspect of patent enforcement in the AIA one-year time bar for IPR petitions when the patent at issue is the subject of a patent infringement lawsuit. *See* 35 U.S. C. § 315.

Similarly, since the right to a jury trial is waivable, any patent dispute conducted by an Article III judge without a jury differs significantly from the PTAB IPR in that the litigants engage in the process knowing that their voluntary conduct waives the jury right. Patent holders faced with the challenge in IPRs are not afforded the opportunity to waive the jury right. And, of course,

the Separation of Powers Constitutional deficiency is not present since the matter is still tried as an Article III adjudicated proceeding.

While the specific question of the right to a jury trial in the context of IPRs is an issue of first impression, guidance may be obtained from the rationale of the Court's decision in *Granfinanciera v. Nordberg*. 492 U.S. 33 (1989):

“Although ‘the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,’ the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.”

Id. at 41- 42 (citations omitted).

“[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.... to hold otherwise would be to permit Congress to eviscerate the *Seventh Amendment's* guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority. ‘[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity,’ nor can Congress conjure away the *Seventh*

Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.”

Id. at 51-52 (citations omitted).

In *Granfinanciera*, a common law claim arose in an Article I bankruptcy court. *Id.* The Court held that a bankruptcy trustee was constitutionally entitled to a jury trial in an action to recover a fraudulent conveyance, as such suits are matters of private rights. *Id.* at 55-56. The Court found that although the common law claim arose in an Article I (Bankruptcy) Court the Seventh Amendment right to a jury still applied. *Id.* at 63-64.

III. Resolution of the Critical Constitutional Issues Raised by IPRs is Necessary to Insure the Integrity and Strength of the United States Patent System

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business entity titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (the administrative challenges to patent validity through the PTAB IPRs).

The 113th and 114th Congress also grappled with then newly proposed patent law reforms that, if enacted, would have presented additional tectonic shifts in the patent law. Major provisions of the proposals included: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements,

promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation between the PTAB IPR proceedings and Article III court litigation concerning patent validity.⁷

The Executive and administrative branch have also been active in the patent law arena.⁸ President Obama was a strong supporter of the AIA and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at “patent troll” issues, we must innovate rather than litigate. Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA IPRs’ strict timetable requirements.

The Supreme Court, in addition to the Articles I and II co-equal branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the present term there has been a steady increase in the number of patent cases decided by the Court. For example, in the 2014-15 term, patent cases occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much

7. See Rando, Robert J., *Mastering Patent Claim Construction: A Special Master’s Perspective*, 30 *Touro L. Rev.* 591, 595-98 (2014). Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol30/iss3/6>

8. *Id.* at 598.

larger than those we have become accustomed to over the more recent terms.⁹

The need for strong protection of intellectual property rights is greater now than it was at the dawn of the Republic.¹⁰ Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article I, Section 8, Clause 8. James Madison provides clear insight for its significance in the Federalist No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the formulation of the new Republic: how to promote a unified nation while protecting individual liberty. The fear of tyranny and protection of the “natural law” of individual liberty is a driving theme for the Constitution and throughout the Federalist Papers.¹¹

9. *Id.* at 594-95.

10. For a more detailed overview of the need for strong protection of intellectual property rights, see Rando, Robert J., *America's Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters*, The Federal Lawyer, June 2016, at 12. Available at: http://www.randolawfirm.com/uploads/3/4/2/1/3421962/ip_insight.pdf.

11. “Ultimately, Federalist No. 43 reveals a rich understanding of the nature of IP and its place in the U.S. Constitutional order. In subtle and succinct fashion, Federalist No. 43 identifies the ultimate source for copyright and patent in an individual’s natural right to the fruits of his or her labor. Madison regarded copyright

In Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*.

All of these related themes are relevant to Article I, Section 8, Clause 8, and at the center of intellectual property protections then and now. The Federalist No. 10 recognition that a faction may influence the law has been playing itself out in the halls of Congress in the time period leading up to the AIA and in connection with more recent patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business

and patent as forms of property that government is established to protect. Additionally, as Federalist No. 43 and other numbers point out, securing an individual’s IP rights, consistent with the rules of justice, also furthers the public good by incentivizing further investments and discoveries that promote the “progress of science and useful arts.” Consistent with Federalist No. 43, considerations of public good or social utility may be said to supply a boundary principle for IP rights, but natural right supplies IP’s grounding principle in Publius’s exploration of the U.S. Constitution.” May, Randolph J. & Cooper, Seth L., *The “Reason and Nature” of Intellectual Property: Copyright and Patent in The Federalist Papers*, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4, at 15. Available at http://www.freestatefoundation.org/images/The_Reason_and_Nature_of_Intellectual_Property_011014.pdf

model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts.

To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not grounded in the founding principles of the Constitution and the Patent/Copyright Clause (*i.e.*, uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual's rights and effectively confiscates them. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual's intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

All of these vital intersecting factors are resonating with the critical issues to be decided regarding the constitutionality of PTAB IPRs. The public property rights/private property rights jurisprudence can be clarified, and vital issues related to the strength of invention patent protection in the United States can be secured, through resolving the fundamental question of the constitutionality of Article II versus Article III adjudication of invention patent validity.

CONCLUSION

For the foregoing reasons and authority, AAC respectfully requests that this Court find that IPRs, as promulgated by Congress, and as currently administered, are an unconstitutional usurpation of the Article III Separation of Powers and violate the Seventh Amendment Jury Right.

Dated: August 31, 2017

Respectfully submitted,

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No. 16-712

IN THE
Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF AMICUS CURIAE AMERICAN
INTELLECTUAL PROPERTY LAW
ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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QUESTION PRESENTED

Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

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INTEREST OF AMICUS CURIAE

The American Intellectual Property Law Association (“AIPLA”) is a national bar association of approximately 13,500 members who are primarily lawyers engaged in private and corporate practice, in government service, and in the academic community. AIPLA’s members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.¹

AIPLA has no stake in the parties to this litigation or in the result of this case, other than its interest in

¹ In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA and its counsel. Specifically, after reasonable investigation, AIPLA believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to the litigation in this matter, (ii) no representative of any party to this litigation participated in the authorship of this brief, and (iii) no one other than AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

the correct and consistent interpretation of the laws affecting intellectual property.²

SUMMARY OF ARGUMENT

The constitutionality of the statute authorizing the Patent Trial and Appeal Board (“PTAB”) to determine patent validity³ in its *inter partes* review (“IPR”) proceedings cannot be resolved simply by asking whether patent rights are “private rights” that must be adjudicated by an Article III tribunal, or are instead “public rights” that may be adjudicated by a non-Article III tribunal. Such a rigid, binary parsing of the bundle of patent rights is not required by judicial precedent, nor is it what Congress intended when, in 2011, it enacted the Leahy-Smith America Invents Act (“AIA”).

Rather, to determine whether Congress acted within the limits of its authority in establishing a non-Article III adjudicatory forum, one must consider the substance of what Congress was seeking to accomplish with the enabling legislation. In the case of the

² AIPLA has the consent of the parties to file this amicus brief, pursuant to Supreme Court Rule 37.3(a), based on letters filed with this Court on July 7, 2017 by Petitioner and on August 11, 2017 by Respondent granting blanket consent to the filing of amicus briefs.

³ The question presented refers to the Patent and Trademark Office’s analysis of the “validity” of existing patents, whereas the issue in *inter partes* review under 35 U.S.C. § 311(b) is “unpatentability,” a determination ordinarily associated with the patent application process. While the distinctions surrounding validity and patentability can be important, those distinctions are not relevant here. For consistency with the question presented, we use the term “validity” to describe the issue considered in IPRs.

AIA, Congress sought to take advantage of the Patent and Trademark Office's ("PTO") expertise by authorizing it to revisit and revise earlier patent grants in *inter partes* adjudications with specifically limited criteria and procedures. In creating this authority within the PTO, Congress acted within its right to "promote the progress of the useful arts" under Article I of the Constitution.

ARGUMENT

I. AN ARTICLE I TRIBUNAL'S LIMITED ADJUDICATORY AUTHORITY TO REVIEW PATENT VALIDITY VIOLATES NEITHER THE SEPARATION OF POWERS DOCTRINE NOR THE SEVENTH AMENDMENT

Congress's creation of an adjudicatory process within the Patent and Trademark Office ("PTO") for the limited purpose of reviewing and, if necessary, cancelling improperly issued patents violates neither the Constitution's separation of powers nor its Seventh Amendment guarantee of a right to a jury trial. This administrative adjudication process was a significant part of the extensive patent reform under the AIA. It was enacted to permit expert review of a patent's validity in a quick, efficient and relatively inexpensive process. The legislation establishes procedures specific to the patent review proceeding, and delegates to the agency the authority to promulgate procedural rules adapted to the agency resources and the statutory procedures

The use of a limited adjudicatory process administered by an agency is by no means unique to patent

law. Congress has created agency adjudicatory bodies in numerous federal agencies, including, for example, the Securities and Exchange Commission, 5 U.S.C. § 557, 17 C.F.R. § 201.360, the Federal Trade Commission, 15 U.S.C. § 43, 16 C.F.R. § 3, and the Food and Drug Administration, 21 U.S.C. §§ 334, 335(b), 21 C.F.R. § 17, to name a few. In the case of patent rights, such law-making is well within Congress's distinct authority under Article I of the Constitution to promote the progress of the useful arts.

This is not to say that the necessary level of fairness has been achieved in the PTO's implementation of the AIA provisions on patent review. This new type of patent review, described below, continues to pose important procedural challenges on issues such as pleading practice, burdens of proof, claim construction, and amendment of patent claims. The PTO has engaged with the patent bar to work on the fairness of the proceeding.

Notwithstanding these issues of procedural fairness, the patent review proceeding established by the AIA is well within the long-accepted bounds of legislative tribunals that engage in limited adjudication to effect specific statutory rights created by Congress.

**A. The Separation of Powers
Doctrine Permits Limited
Adjudication By Non-Article III
Tribunals**

Article III of the Constitution implements the separation of powers doctrine by promoting an independent judiciary free from influence by the political branches and public opinion. *See, e.g., Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 582

(1985) (citations omitted) (“Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation”).

By contrast, Article I of the Constitution authorizes Congress to implement a wide range of governmental functions, including the establishment of adjudicatory tribunals to carry out those functions. *See, e.g.*, Const. Art. I. While such Article I tribunals lack the attributes of independence required under Article III, they do not necessarily conflict with the judicial prerogatives of Article III. *See Thomas*, 473 U.S. at 583 (“[T]he Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.”); *see also Crowell v. Benson*, 285 U.S. 22, 50 (1932) (determining that claims for compensation between private parties under a federal statute providing for employer strict liability could be determined by administrative proceeding).

This Court has described the matters adjudicated by such legislative tribunals as “public rights,” which were first characterized as disputes in which the government is a party,⁴ although the public rights/private rights dichotomy has been rejected as a bright-line test for determining when Article III must apply. *Thomas*, 473 U.S. at 585-586. An Article I tribunal is one where “the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential

⁴ *See Ex Parte Bakelite Corp.*, 279 U.S. 438, 451-52 (1929); *see also Crowell v. Benson*, 285 US 22, 50-51 (1932).

to a limited regulatory objective within the agency's authority.” *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011). *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (“If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.”).

As further explained below, the limited adjudication of patent validity within the expert agency of the PTO is fully authorized by Article I and does not impinge on Article III.

B. Article I Agency Adjudication Does Not Trigger The Seventh Amendment’s Right To Jury Trial

Not all adjudications implicate the right to jury trial. In particular, an adjudication that properly takes place in a non-Article III forum is not subject to the Seventh Amendment. *See e.g., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 443 (1977) (holding that the Seventh Amendment does not prevent Congress from assigning the task of adjudicating OSHA violations to an administrative agency); *see also, Block v. Hirsch*, 256 U.S. 135, 155-56 (1921) (upholding commission determination of rent increase as for the public benefit); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49 (1937) (upholding the award of back pay without jury trial in an NLRB unfair labor practice proceeding).

In deciding whether a right to a jury trial applies in a non-Article III tribunal, this Court considers more

than whether the matter adjudicated is a public right or a private right. The additional considerations include the following:

- Did Congress create the right assigned to the non-Article III tribunal for adjudication?
- Did Congress's reasons for not relying on an Article III court support resolution of the matter by the non-Article III tribunal?
- Is the non-Article III tribunal's jurisdiction limited to specific issues?
- Are the decisions of the non-Article III forum subject to appropriate review by an Article III court?

See Commodity Futures Trading Comm'n ("CFTC") v. Schor, 478 U.S. 833, 851 (1986) (hereinafter, "*Schor*"). The discussion of PTAB adjudications below demonstrates that the foregoing considerations weigh heavily against applying the Seventh Amendment right to a jury trial in proceedings before the PTAB.

II. CONGRESS PROPERLY DELEGATED RESOLUTION OF PATENT VALIDITY DISPUTES TO THE PTAB

A. Patents Are Property Rights But May Be Properly Classified As "Public Rights" For Article III Analysis

The creation by Congress of the PTAB for reviewing the validity of patents does not conflict with the uniform recognition of a patent as a "property right." It

is erroneous to equate the private property status of patent rights with “private rights” that are governed exclusively in Article III tribunals.

The “property right” character of a patent is confirmed in both the Patent Act and in the case law, both of which highlight the hallmark characteristic of property interests as the right to exclude others. *See* 35 U.S.C. § 154(a)(1) (“Every patent shall contain ... a grant to the patentee ... of the right to exclude others from making, using, offering for sale, or selling the invention...”); *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999) (holding that patents are property rights secured under the Due Process Clause of the Fourteenth Amendment). A patent also “confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used ... without just compensation ...” *James v. Campbell*, 104 U.S. 356, 358 (1881).

This property right characterization is central to the commodity status and transferability of patents. In 1952, Congress incorporated the private property concept into the patent statute, where it remains to this day. *See* 35 U.S.C. § 261. Following the initial qualifying language, “[s]ubject to the provisions of this title,” Section 261 provides that “patents shall have the attributes of personal property.” *Id.* Section 261 has been explained as “codify[ing] the case law reaching back to the early American Republics.” Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J. L. & TECH. 321, 343-45 (2009).

However, there is no inconsistency in concluding that the source of the patent property right is a public right conferred by federal statute. *See, e.g., Cascades*

Projection LLC v. Epson Am., Inc., 864 F.3d 1309, 1310-12 (Fed. Cir. May 11, 2017) (Dyk, J., concurrence in denial of initial hearing *en banc*, Prost, C.J., Hughes, J., joining in the concurrence). Patents did not exist at common law, and the rights created by Congress are available only upon compliance with strict statutory requirements. *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1850). *See also Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 n.5 (1964) (“Patent rights exist only by virtue of statute.”); Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U. J. OF SCI. & TECH. L., 1, 34 (“The relevant Article III question is not whether a claim involves private property rights but rather what the source of those rights is.”) (forthcoming). Moreover, the PTAB’s consideration of issues of patent validity does not preclude patent validity consideration by the judiciary in traditional patent enforcement litigation. Where such issues arise in infringement litigation, the Article III court is empowered to resolve them as part of providing complete relief to the parties in the dispute. *See Cardinal Chem. Co. v. Morton Int’l Inc.*, 508 U.S. 83, 101 (1993) (emphasizing the “strong public interest in the finality of judgments in patent litigation,” and overruling the Federal Circuit’s practice of reversing district court invalidity decisions on appeal if the district court’s non-infringement ruling is affirmed).

Nonetheless, since the Patent Act of 1836, the PTO has had limited authority to resolve patent validity disputes that are brought before it.⁵ Patent Act of

⁵ Patent Act of 1836, Pub. L. No. 24-357, § 12, 5 Stat. 117, 120-21 (1836) (setting up interference proceedings). In an interference proceeding, the PTO determines an inventor’s priority of

1836, Pub. L. No. 24-357, § 8, 5 Stat. 117, 120-21 (1836). Since 1999, with the implementation of the *inter partes* reexamination process, a board of administrative law judges at the PTO has had the authority to resolve questions related to patent validity pursued by third parties adverse to the patentee. American Inventors Protection Act, Public Law 106-113 (1999).

Hence, Congress's creation of the PTAB within the PTO for resolution of patent validity issues follows a long history of resolving such issues within the agency. In enacting the AIA, Congress amended several sections of the patent statute relating to the grant and enforcement of a patent, and revised the longstanding practice of reexamining issued patents by creating three new procedures for implementation by the PTAB. *See* 35 U.S.C. §§311 *et seq.* (*inter partes* review), 321 *et seq.* (post-grant review), and §18 of the AIA (covered business method patent review).⁶ These

invention as compared to a second inventor claiming the same invention. The losing inventor forfeits his patent rights. While the first interference statutes permitted the PTO to make the determination of lack of priority, they required a supplemental district court proceeding to cancel the patent. *See, e.g.*, Patent Act of 1836, § 12. With the Patent Act of 1952, the PTO was given the power to cancel patent claims. *See* 35 U.S.C. § 135 (1952); *see also* P. J. Federico, *Commentary on the New Patent Act*, 75 J. PAT. & TRADEMARK SOC. 151, 198 (1993) (noting that PTO cancellation of the claims “is new in substance [in the 1952 Act] and is made possible by the amplification of the right of review of the patentee provided for in section 146,” relating to civil actions).

⁶ *Inter partes* review provides for review by the PTAB of any issued patent based on limited statutory sections. 35 U.S.C. § 319. Post-grant review provides for review by the PTAB of newly-issued patents up to nine months after the date of issuance on limited statutory sections. 35 U.S.C. § 321(c). Covered

provisions of the AIA are tailored to respect the separation of powers doctrine and to provide appropriate limited adjudicatory rights to the PTAB, consistent with Article III Court oversight.

B. Patent Rights Are Properly Subject To Article I Adjudication

From the first Patent Act to the present implementation of the AIA, Congress has enacted statutes with strict conditions and requirements for conferring the exclusive rights under a patent. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966) (“Within the scope established by the Constitution, Congress may set out conditions and tests for patentability”). This Court’s precedent provides that:

when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated ... [including] provid[ing] that persons seeking to vindicate that right must do so before particular tribunals created to perform the specialized adjudicative tasks related to that right.

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80, 83 (1982) (plurality). The power to determine how disputes within its statutory right are resolved is “incidental to Congress’s power to define the right that it has created.” *Id.* at 83. Thus, Congress’s enactment of the Patent Statute and

Business Method is limited to review by the PTAB of patents that claim business methods. 35 U.S.C. § 321.

hence, resolution of patent rights pursuant to its Article I powers, strongly supports the conclusion that Congress may apportion limited adjudication to the agency responsible for managing the grant of rights. *See, e.g., Reilly*, 23 B.U. J. OF SCI. & TECH. L. at 34.

In this respect, the “public right” / “private right” dichotomy to determine the limits of legislative tribunals fails because it ignores Congressional discretion to prescribe modes of relief in the laws it enacts. For example, in *Block v. Hirsh*, this Court addressed a land owner’s exclusive possession of his property. 256 U.S. at 153. There, the owner tried to recover possession of his property after a tenant refused to vacate at the end of his lease. *Id.* Even though real property disputes between two parties are the epitome of private rights, this Court upheld Congress’s creation of an administrative commission to determine both the right of possession and the appropriate amount of rent. *Id.* at 157-58.

In several other cases, this Court also has held that claims involving private property interests are appropriately adjudicated by non-Article III forums when created by federal statute. *See, e.g., Stern*, 564 U.S. at 498-99 (upholding non-Article III adjudication in bankruptcy cases that involved a “right of recovery created by federal bankruptcy law”); *Thomas*, 473 U.S. at 586 (upholding resolution of disputes between pesticide manufactures in non-Article III forum); *Crowell*, 285 U.S. at 58 (1932) (upholding agency adjudication when the right to compensation for injuries sustained on navigable waters was created by federal law). Thus, where, as here, Congress has created rights pursuant to its Article I power, such creation

provides a strong indication that Congress also can assign adjudication of those rights to an expert agency. *See, e.g.*, Reilly, 23 B.U. J. OF SCI. & TECH. L. at 32.

This Court's decision in *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606 (1898) is not to the contrary. *McCormick* dealt with the patent reissue statute in effect at the time, which required the patent owner to surrender the original patent in order for the reissue patent to take effect and hence for the original patent to be canceled. *McCormick*, 169 U.S. at 610. When the patent owner failed to surrender the original patent, *McCormick* held that only the courts, and not the PTO, had the authority to set aside a patent, based on the language of the reissue statute. *Id.*

As pointed out by the Federal Circuit, *McCormick* was based on a statutory challenge rather than a constitutional challenge. *See, e.g.*, *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), *cert denied* 137 S. Ct. 292 (2016). Because the source of the rights at issue was the patent reissue statute of 1878,⁷ the *McCormick* decision accords with the line of cases that defer to Congress's choice in implementing the statutory rights it has created. *See, e.g.*, *Crowell*, 285 U.S. at 58; *Thomas*, 473 U.S. at 573, *Schor*, 478 U.S. at 851; *see also*, *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604, 606 (Fed. Cir. 1985) (considering constitutionality of the *ex parte* reexamination statute); *MCM Portfolio*, 812 F.3d at 1291 (considering the constitutionality of patent invalidation by the PTAB in an IPR proceeding); *Cascades Projection.*, 864 F.3d

⁷ Act of July 8, 1870, c. 230, § 53, 16 Stat. 205; Rev. Stat. § 4916,

at 1310-12 (Fed. Cir. May 11, 2017) (Dyk, J., concurrence in denial of hearing *en banc*, Prost, C.J., Hughes, J., joining in the concurrence).

**C. The AIA Proceedings Advance
The Patent Office’s Expert
Regulatory Function Of
Evaluating and Issuing Patents**

This Court has confirmed that Congress is entitled under Article I of the Constitution to create tribunals that can adjudicate claims that derive “from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority.” *Stern*, 131 S. Ct. at 2613 (2011).

Patent law is plainly “a federal regulatory scheme,” considering not only the exclusively federal source of the patent right and the exclusive adjudicatory authority over the enforcement of those rights. It is also plain that patent law includes an extensive regulatory program designed to achieve “a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the “Progress of Science and useful Arts.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

Moreover, the PTO is an expert agency responsible for examining patent applications and issuing patent claims that survive the scrutiny of examination. The Patent Office has long maintained procedures for an administrative “second look” at its decisions to grant patents, and since at least 1980, the Patent Office also

has had the authority to reexamine and cancel a patent claim that it previously allowed.⁸ *See, e.g., Cuozzo Speed Techs. LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016). Through various iterations, that authority has expanded to its current scope in IPR proceedings. *See, e.g., Cuozzo*, 136 S. Ct. at 2137-2138 (walking through statutory iterations from *ex parte* reexamination through *inter partes* review).

With respect to the AIA IPR provisions, one important objective was to expand the PTO's power to revisit and revise earlier patent grants in order to improve the overall patent system. *See id.* at 2140, citing H.R. Rep. No. 112-98, pt. 1, pp. 45, 58 (2011) (H.R. Rep.) (explaining the AIA statute seeks to “improve patent quality and restore confidence in the presumption of validity that comes with issued patents”); 157 Cong. Rec. 9778 (2011) (remarks of Rep. Goodlatte) (noting that IPR is meant to “screen out bad patents while bolstering valid ones”).

Congress created the PTAB administrative adjudicatory body to “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.” AIA, H.R. Rep. 1249 (2011) (remarks of Sen. Leahy); *see also Schor*, 478 U.S. at 855 (stating purpose of CFTC). The recognition of a need for “an inexpensive and expeditious alternative forum” to promote the progress of the useful arts supports Congress's decision to depart from an Article III forum.

⁸ *See* Patent Act of 1952, 35 U.S.C. § 135, *see supra*, n.3.

Schor, 478 at 855. Instead of trying to undermine Article III with this procedure, Congress attempted to “ensure the effectiveness of th[e] scheme” it created pursuant to its Article I powers. *Id.* at 256; *see also* Reilly, 23 B.U. J. OF SCI. & TECH. L. at 45.

D. PTAB Adjudication Applies Only To A Limited Subset of Issues Within The Specialized Area Of Patent Law

The adjudication conducted by the PTAB in *inter partes* review is subject to a variety of significant limitations. The PTAB’s IPR proceeding is concerned only with patent validity, not infringement, and even its validity determination is limited:

A petitioner in an inter partes review may request to cancel as unpatentable 1 [one] or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.

35 U.S.C. § 311(b).⁹ Confining the PTAB to validity issues of novelty and nonobviousness under Sections 102 and 103, respectively, based on prior art patents and printed publications stands in sharp contrast to the expansive scope of issues that could be considered by the bankruptcy courts analyzed in *Northern Pipeline*. *See Northern Pipeline*, 458 U.S. at 83 (holding

⁹ Statutory invalidity defenses that are not covered by the PTAB’s inter partes review authority include 35 U.S.C. §§ 101 (patent eligible subject matter) and 112 (requirements of the patent specification).

that Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws). Instead, the PTAB post-issuance review proceedings are “limited to a ‘particularized area of law,’ as in *Crowell*, *Thomas*, and *Schor*.” *Stern*, 564 U.S. at 493. The PTAB’s jurisdiction also is limited by specific timing requirements: under Section 315(b), an IPR petition must be filed within a year of receiving notice of infringement litigation, and under Section 316(11) the IPR proceeding must be concluded within 12 months of institution.

In sum, through its establishment of the IPR proceeding, Congress focused on “making effective a specific and limited federal regulatory scheme,” *Schor*, 478 U.S. at 855; “i.e., the Patent Office’s basic regulatory role in limiting patent rights to the permissible scope ... authorized by the ... Patent Act.” Reilly, 23 B.U. J. OF SCI. & TECH. L. at 45.

E. Article III Courts Retain Full Appellate Review Of PTAB Decisions, Thereby Respecting The Separation of Powers Doctrine

In reviewing the constitutionality of Congressional delegations of adjudicatory authority to a non-Article III tribunal, this Court’s precedent considers the availability of Article III review of those tribunals’ decisions. *See, e.g., Thomas*, 473 U.S. at 592, citing *Crowell*, 285 U.S. at 54 (holding that judicial review of agency adjudication afforded by statute including review of matters of law, “provides for the appropriate exercise of the judicial function ...”).

For example, in *Thomas*, a pesticide manufacturer challenged the constitutionality Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). According to the manufacturer, FIFRA violated Article III by allocating to arbitrators the functions of the judiciary and by limiting Article III review. This Court held, however, that Article III did not prohibit Congress from selecting a non-Article III forum with limited judicial review as the mechanism for resolving disputes in Congress’s statutory scheme, regardless of the private nature of the disputes between pesticide companies. *Id.* at 590. According to the Court, “many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” *Id.* at 583.

The IPR proceedings at issue in this case are subject to a more thorough Article III review of the expert agency decision. The statute provides for appellate review by the Federal Circuit Court of Appeals under the Administrative Procedure Act standards. *See* 5 U.S.C. § 706 (scope of appellate review of agency final decision). Specifically, legal determinations are reviewed *de novo* and factual determinations are reviewed for substantial evidence. 5 U.S.C. § 706(2)(D), (E). In addition, the IPR proceedings do not preclude a determination by an Article III court in a corresponding infringement action. The defendant in such an action has the right to choose the IPR proceeding initially over validity adjudication in an Article III court, and it is within the Article III court’s discretion to stay its own proceedings in view of an IPR proceeding. *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The

District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”).

Congress’s limited delegation of authority to the PTO to resolve specific validity issues with appellate review by the Federal Circuit is thus appropriate in this statutory scheme. *See Thomas*, 473 U.S. at 593; *see also Crowell*, 285 U.S. at 51.

CONCLUSION

For the foregoing reasons, AIPLA respectfully requests that this Court confirm the constitutionality of the PTO’s *inter partes* review process.

Respectfully submitted,

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No. 16-712

In the Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC, PETITIONER

v.

GREENE'S ENERGY GROUP, LLC, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether inter partes review comports with Article III and the Seventh Amendment.

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4 William Blackstone, <i>Commentaries on the Laws of England</i> (1769).....	2
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E. Wyndham Hulme, <i>Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794</i> , 33 <i>L.Q. R.</i> 180 (1917).....	40
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Floyd L. Vaughan, <i>The United States Patent System</i> (1st ed., 1956).....	39
Edward C. Walterscheid, <i>The Early Evolution of the United States Patent Law: Antecedents (Part 2)</i> , 76 J. Pat. & Trademark Off. Soc’y 849 (1994).....	39
Edward C. Walterscheid & Kenneth L. Cage, <i>Jurisdiction of the Patent and Trademark Office to Consider the Validity of Issued Patents</i> , 61 J. Pat. & Trademark Off. Soc’y 444 (1979).....	43, 49

In the Supreme Court of the United States

No. 16-712

OIL STATES ENERGY SERVICES, LLC, PETITIONER

v.

GREENE'S ENERGY GROUP, LLC, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is available at 639 Fed. Appx. 639. The decision of the Patent Trial and Appeal Board (Pet. App. 3a-36a) is not published in the United States Patents Quarterly but is available at 2015 WL 2089371.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2016. A petition for rehearing was denied on July 26, 2016 (Pet. App. 37-38). On October 14, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 23, 2016, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 12, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Pertinent constitutional and statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

1. a. The Intellectual Property Clause of the Constitution authorizes Congress to “promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, Cl. 8. At the Founding, patents were understood as an “except[ion]” to the “[w]rong[.]” of restraint of trade. 4 William Blackstone, *Commentaries on the Laws of England* 159 (1769). The Intellectual Property Clause is the only one of Congress’s enumerated powers that is conditioned on promotion of a specific public purpose.

The first patent statute conditioned the issuance of patents on approval by an Executive Branch committee that was charged with determining whether the invention in question was sufficiently useful and novel. See Patent Act of 1790, ch. 7, § 1, 1 Stat. 109-110. In 1793, Congress authorized the issuance of patents under a registration system with no examination into patentability. See Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318-321. Since 1836, Congress has entrusted the decision whether to grant a patent to an agency now known as the U.S. Patent and Trademark Office (USPTO). See 35 U.S.C. 2(a)(1), 131. When an inventor files an application with the USPTO, “[a] patent examiner with expertise in the relevant field reviews an applicant’s patent claims, considers the prior art, and determines

whether each claim meets the applicable patent law requirements.” *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2136-2137 (2016). The invention must satisfy conditions that include eligibility and utility, 35 U.S.C. 101; novelty, 35 U.S.C. 102; and non-obviousness over the prior art, 35 U.S.C. 103.

The examination is an ex parte proceeding in which no person other than the applicant has an opportunity to participate. While an applicant must disclose material prior art of which he is aware, 37 C.F.R. 1.56, he has “no general duty to conduct a prior art search” and “no duty to disclose art of which [the] applicant is unaware.” *Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs., Ltd.*, 394 F.3d 1348, 1351 n.4 (Fed. Cir. 2005). As a result, the patent examiner evaluating an application may be unaware of information that bears on whether the requirements for patentability are satisfied. See *Kappos v. Hyatt*, 566 U.S. 431, 437 (2012); *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 108-112 (2011).

In 2015, the USPTO received more than 600,000 applications—more than three times as many as it had received two decades earlier. See USPTO, *U.S. Patent Statistics Chart* (Calendar Years 1963-2015).¹ In 2015, the USPTO issued more than 325,000 patents. *Ibid.*

A patent confers on its owner “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.” 35 U.S.C. 154(a)(1). A patent holder may enforce that right through an infringement action against others who make, use, or sell the invention within the United States without authorization. 35 U.S.C. 271(a). A defendant may assert invalidity as a defense to infringement—

¹ https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm.

“that is, he may attempt to prove that the patent never should have issued in the first place.” *i4i Ltd. P’ship*, 564 U.S. at 96; see 35 U.S.C. 282. But the patent is presumed to be valid during litigation, 35 U.S.C. 282, and that statutory presumption can be rebutted only through clear and convincing evidence of invalidity, *i4i Ltd. P’ship*, 564 U.S. at 95.

b. “For several decades,” Congress has authorized the USPTO to reconsider its own decisions in issuing patents through proceedings “to reexamine—and perhaps cancel—a patent claim that it had previously allowed.” *Cuozzo*, 136 S. Ct. at 2137.

In 1980, Congress created ex parte reexamination, with the goal of restoring public and commercial “confidence in the validity of patents issued by the PTO” by providing a speedy and inexpensive mechanism for eliminating patents that had been wrongly issued. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 601 (Fed. Cir.), modified on other grounds on reh’g, 771 F.2d 480 (Fed. Cir. 1985). “Any person at any time” may file a request for reexamination of a patent based on certain prior art that bears on patentability. 35 U.S.C. 301(a)(1) and (2). The USPTO may institute an ex parte reexamination if it concludes that the petition raises “a substantial new question of patentability.” 35 U.S.C. 303(a), 304. The Director of the USPTO is also authorized “[o]n his own initiative, and [at] any time,” to “determine whether a substantial new question of patentability is raised” with respect to any issued patent “by patents and publications discovered by him.” 35 U.S.C. 303(a). In an ex parte reexamination, an examiner may cancel any claims that he finds to be unpatentable. See 35 U.S.C. 305.

In 1999, Congress created inter partes reexamination—the predecessor to inter partes review—to expand the USPTO’s authority to correct its erroneous patent grants. Optional Inter Partes Reexamination Procedure Act of 1999, Pub. L. No. 106-113, §§ 4601-4608, 113 Stat. 1501A-567 to 1501A-572. Inter partes reexamination was “similar” to ex parte reexamination but allowed “third parties greater opportunities to participate in the Patent Office’s reexamination proceedings,” *Cuozzo*, 136 S. Ct. at 2137, by permitting them to respond to the patent owner’s arguments, introduce evidence in response to the patent owner’s evidence, and engage in motions practice. See 35 U.S.C. 311-318 (2000). Subsequent amendments to the reexamination statute allowed third parties to participate in any appeal of the agency’s decision. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 13106(c), 116 Stat. 1901.

In 2011, with broad bipartisan support in both Houses, see 157 Cong. Rec. 9959-9960 (2011); *id.* at 13,200, Congress enacted the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284. The AIA responded to the “growing sense” that under existing procedures, “questionable patents [were] too easily obtained and [were] too difficult to challenge.” H.R. Rep. No. 98, 112th Cong., 1st Sess. Pt. 1, at 39 (2011) (House Report).

In order “to improve patent quality and restore confidence in the presumption of validity that comes with issued patents in court,” House Report 48, Congress revised the Patent Act’s post-issuance review procedures. The AIA created a new procedure, known as post-grant review, for challenges to patentability brought within nine months after patent issuance. 35 U.S.C. 321(c).

For challenges brought more than nine months after a patent was issued, the AIA created inter partes review, which replaced inter partes reexamination. 35 U.S.C. 311. Inter partes review serves the same “basic purposes” as inter partes reexamination—“namely, to reexamine an earlier agency decision” granting a patent. *Cuozzo*, 136 S. Ct. at 2144; see House Report 39-40 (describing inter partes review as a “system for challenging patents that should not have issued”).

As with inter partes reexamination, any person other than the patent owner may seek inter partes review on the ground that, at the time a patent was issued, the invention was not novel or was obvious in light of “prior art consisting of patents or printed publications.” 35 U.S.C. 311(a) and (b). After receiving any response from the patent owner, the Director of the USPTO may institute an inter partes review if he finds “a reasonable likelihood that the petitioner would prevail” with respect to at least one of its challenges to the validity of a patent. 35 U.S.C. 314(a).² A review of the patent’s validity is then conducted by the USPTO’s Patent Trial and Appeal Board (PTAB or Board), an administrative body created by the AIA that is composed of administrative patent judges “who are patent lawyers and former patent examiners, among others.” *Cuozzo*, 136 S. Ct. at 2137; see 37 C.F.R. 42.4(a).

² Inter partes review may not be instituted if the petitioner previously filed a civil action challenging the validity of the disputed patent, 35 U.S.C. 315(a), or if the patent owner sued the petitioner for infringement of the disputed patent more than one year before the petition was filed, 35 U.S.C. 315(b). If a petitioner seeks inter partes review within one year after being sued for infringement, the district court has discretion to decide whether to stay the underlying infringement suit. See, e.g., *Murata Mach. USA v. Daifuku Co.*, 830 F.3d 1357, 1361 (Fed. Cir. 2016).

The AIA gave third-party challengers “broader participation rights” in inter partes review than they had possessed in inter partes reexamination. *Cuozzo*, 136 S. Ct. at 2137. Both the patent owner and the third-party challenger are entitled to certain discovery, 35 U.S.C. 316(a)(5); to file affidavits, declarations, and written memoranda, 35 U.S.C. 316(a)(8); and to request an oral hearing, 35 U.S.C. 316(a)(10). The patent owner may also file a motion to amend the patent, including by proposing a reasonable number of substitute patent claims. 35 U.S.C. 316(d)(1)(B).

The Board is required to issue a final written decision on patentability within one year after the decision to institute inter partes review, unless the deadline is extended for good cause or the review is dismissed. 35 U.S.C. 316(a)(11). The Board may issue a decision “even after the adverse party has settled.” *Cuozzo*, 136 S. Ct. at 2144; see 35 U.S.C. 317(a). The Board’s decision may be appealed to the Federal Circuit. See 35 U.S.C. 141, 319. If the Board determines that any challenged claims of the patent are unpatentable, those claims are not cancelled until “the time for appeal has expired or any appeal has terminated.” 35 U.S.C. 318(b). The USPTO has a right to intervene in the court of appeals to defend the Board’s decision, whether or not any other party to the inter partes review defends the judgment. 35 U.S.C. 143; see, e.g., *Cuozzo*, 136 S. Ct. at 2144.

Before enacting the AIA, Members of Congress sought views regarding the constitutionality of the inter partes review mechanism from Professor Michael W. McConnell, formerly of the U.S. Court of Appeals for the Tenth Circuit. Professor McConnell wrote to Congress that “it is entirely consistent with the Constitution for Congress to bring to bear the experience and

expertise of the PTO in providing for more robust review of issued patents.” 157 Cong. Rec. at 13,042 (McConnell). He explained that, “from the beginning, patents have never been regarded as a fully and irrevocably vested right,” because a “patent is not a natural right, but solely a product of positive law” whose “extent, duration, and validity is a matter that must be determined by the legislative branch.” *Ibid.* He concluded that it “is entirely proper” for the AIA to “vest authority to determine validity upon reexamination in the agency entrusted by Congress with making the validity decision in the first instance,” and that such review “need not be limited to an Article III court in the first instance.” *Id.* at 13,043.

As of July 2017, more than 7000 petitions for inter partes review had been filed with the USPTO, and the agency had issued final written decisions cancelling in whole or in part more than 1300 patents. See PTAB, USPTO, *Trial Statistics: IPR, PGR, CBM 11* (July 2017).³ The median cost of litigating a patent dispute in federal court substantially exceeds the median cost of an inter partes review. See Am. Intellectual Prop. Law Ass’n, *Report of the Economic Survey* 46, 51 (June 2017).

2. Petitioner owns U.S. Patent No. 6,179,053 (the ’053 patent), which relates to an apparatus and method for protecting wellheads during hydraulic fracturing. Petitioner obtained the patent in 2001, after an examiner approved an application that did not specifically identify a Canadian patent application by the same inventor for a similar apparatus. See J.A. 1.

³ https://www.uspto.gov/sites/default/files/documents/trial_statistics_july2017.pdf.

In 2012, petitioner filed suit against respondent, alleging infringement of the '053 patent. Less than one year later, respondent filed a petition for inter partes review of two claims in the '053 patent. C.A. App. 306, 369.

The Board granted the petition, conducted an inter partes review, and found the challenged claims unpatentable under 35 U.S.C. 102. Pet. App. 29. The Board concluded that the claims were anticipated by the Canadian patent application, which the examiner did not discuss or reference during the initial examination of petitioner's patent application. The Board concluded that the prior art disclosed every element of the challenged claims, *ibid.*, and enabled one skilled in the art to make the claimed invention, *id.* at 27.

3. Petitioner appealed to the Federal Circuit, challenging the Board's patentability determination and contending that inter partes review violates Article III and the Seventh Amendment. The USPTO intervened to defend the Board's decision. Notice of Intervention (Oct. 26, 2015).

While petitioner's appeal was pending, the Federal Circuit rejected a comparable Article III and Seventh Amendment challenge to inter partes review in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1288 (2015), cert. denied, 137 S. Ct. 292 (2016). The court explained that "Congress has the power to delegate disputes over public rights to non-Article III courts," *id.* at 1289, and that "[w]hat makes a right 'public' rather than private is that the right is integrally related to particular federal government action," *id.* at 1290 (quoting *Stern v. Marshall*, 564 U.S. 462, 490-491 (2011)) (brackets in original).

The Federal Circuit in *MCM Portfolio* concluded that inter partes review of patent rights satisfies that standard. It observed that patent rights are creations of federal law, and that Congress had established inter partes review “to correct the [USPTO’s] own errors in issuing patents in the first place.” 812 F.3d at 1290. The court explained that the USPTO’s correction of its own errors in granting patents falls comfortably within this Court’s precedents allowing agency adjudications as an “expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.” *Ibid.* (citation omitted). The court further held that, “[b]ecause patent rights are public rights, and their validity [is] susceptible to review by an administrative agency, the Seventh Amendment poses no barrier to agency adjudication without a jury.” *Id.* at 1293.

In the present case, the Federal Circuit issued an unpublished order that followed *MCM Portfolio* and affirmed the Board’s decision. Pet. App. 1-2.

SUMMARY OF ARGUMENT

I. Inter partes review is consistent with Article III.

A. Consistent with longstanding practice, the Patent Act authorizes USPTO examiners within the Executive Branch to determine in the first instance whether patents should be granted. That allocation of authority is clearly constitutional. The scope, duration, and contours of the patent monopoly have no common-law footing, but are defined entirely by Congress. And in determining whether a patent should issue, the examiner does not decide the sort of concrete dispute between opposing litigants that an Article III court might resolve,

but instead decides whether the applicant will have certain rights *as against the world*.

Like the initial patent examination, inter partes review serves to protect the public from the unwarranted burdens that erroneously issued patents impose. That public purpose continues to be fully implicated for as long as a patent remains in force. And because a patent is presumed valid in litigation, based largely on the expert agency's prior decision to issue it, it was particularly appropriate for Congress to establish mechanisms to verify that the USPTO continues to view the patent as valid.

The fact that Congress specified that patents "shall have the attributes of personal property," subject to other provisions of the Patent Act, 35 U.S.C. 261, does not prevent Executive Branch officials from rescinding an earlier patent grant, subject to judicial review. Executive Branch (and other non-Article III) officials often take actions that cause the divestiture of private property rights. The justifications for that approach are particularly strong with respect to inter partes review, since the relevant property interests are entirely defined by Congress, and the agency that is authorized to cancel invalid patents is the same one that made the initial patent grant.

The fact that inter partes review uses trial-type procedures and gives the private challenger substantial participatory rights does not render it constitutionally problematic. Inter partes review is simply one mechanism by which the USPTO can leverage knowledge possessed by persons outside the government to assist it in making a decision within its bailiwick. If the Board concludes that the challenged claims are unpatentable, the

challenger receives no benefit that it would not have received if the USPTO examiner had denied the patent application in the first instance, or if the USPTO Director had reexamined and cancelled the claims *sua sponte*. Indeed, the challenger need not have Article III standing to participate in an *inter partes* review, and the Board can continue to conduct an *inter partes* review even if the challenger withdraws from the proceedings.

In a variety of circumstances, Congress requires federal agencies to solicit public comments, and sometimes to utilize trial-type procedures, before taking particular administrative action. So long as the action that the agency ultimately takes is a permissible exercise of Executive Branch authority, Congress's imposition of those requirements creates no meaningful Article III question. The same principle applies here. Congress presumably incorporated trial-type procedures into *inter partes* review in order to improve the accuracy of the Board's decisions, and there is no sound reason to force Congress to settle for procedures it views as sub-optimal.

Inter partes review is also conducive to efficient allocation of the USPTO's finite resources. As a constitutional matter, Congress could have required the USPTO to afford objecting parties an opportunity to be heard during the initial examination process. That approach, however, would have entailed substantial cost and delay for patent applicants as a class. Congress reasonably chose instead to utilize a comparatively fast *ex parte* examination at the outset, thereby allowing successful applicants to gain patent protection more quickly, while focusing more resource-intensive post-issuance review on a small class of patents that (1) are

of questionable validity and (2) have sufficient commercial importance to induce a private petitioner to bring a challenge.

The AIA did not withdraw any category of patentability disputes from the jurisdiction of Article III courts, but instead left in place all pre-existing avenues for judicial resolution of validity issues. Although inter partes review may sometimes obviate the need for judicial intervention, that is a familiar (and generally welcome) result of agency self-correction mechanisms.

This Court has issued a series of decisions addressing the constitutional limits on Congress's power to authorize the use of non-Article III adjudicators. Inter partes review much more closely resembles the non-Article III adjudicatory mechanisms that this Court has upheld than those that the Court has found to be invalid. The private interests involved are created entirely by federal statutes; resolution of patentability disputes implicates the agency's specialized expertise; and the AIA authorizes an Article III court to review the Board's legal conclusions de novo.

B. The longstanding treatment of patents as revocable privileges, and the abundant history of non-judicial patent revocations, confirm the constitutional validity of inter partes review. The justification for patents is not that an inventor has a natural right to preclude others from making or using his invention, but that patent protection will ultimately benefit the public by providing an incentive to innovate. Governmentally-conferred franchises designed to serve such purposes create "public rights," whose scope and continuing effectiveness may be resolved by non-Article III tribunals. Both in England before the Founding, and in the

United States thereafter, a variety of mechanisms existed through which patents could be revoked without judicial involvement.

As petitioner emphasizes, questions of patent validity have historically been decided by courts as well. This Court has long recognized, however, that a variety of factual and legal matters are suitable for resolution by *either* judicial or nonjudicial forums. Such matters are “public rights” for purposes of this Court’s Article III jurisprudence.

Petitioner’s reliance on *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606 (1898), is misplaced. The Court in *McCormick* simply held that the then-existing reissue statute did not authorize the Patent Office to rescind an existing patent under the circumstances of that case. The Court did not suggest that Congress was constitutionally precluded from giving such authorization. The nineteenth-century land-patent decisions that petitioner invoked in its petition for a writ of certiorari are likewise inapposite here. Those decisions announce holdings of statutory interpretation rather than constitutional law. In any event, the government in issuing a patent does not (as with a land patent) convey title to something it previously owned, but instead grants a limited franchise whose scope and contours are wholly defined by the government itself.

II. Inter partes review is consistent with the Seventh Amendment. This Court has made clear that, if Congress has permissibly assigned the resolution of a particular type of dispute to a non-Article III adjudicator, the Seventh Amendment imposes no separate bar to the use of a nonjury factfinder. That is so even in settings where the Seventh Amendment jury-trial right would apply if the dispute were heard in federal court.

Petitioner's Seventh Amendment challenge fails for an additional reason as well. Even in federal-court suits, the Seventh Amendment does not apply to equitable claims. Money damages are not available in inter partes review, and the closest judicial analog to cancellation of a patent is a declaratory judgment of invalidity. No jury-trial right attaches when a plaintiff in federal court seeks such a declaration.

ARGUMENT

Petitioner does not dispute that the initial determination whether a patent should be issued has permissibly been entrusted to Executive Branch examiners within the USPTO. Petitioner contends, however, that Article III precludes Congress from authorizing the same agency to reconsider the validity of previously issued patents. That argument is unsupported by precedent, logic, or history. Cancellation of an existing patent after inter partes review serves the same public purpose that an examiner seeks to vindicate when he concludes that a putative invention does not satisfy the statutory prerequisites to patentability. Congress's decisions to solicit input from private challengers, and to utilize trial-type procedures during inter partes reviews, create no substantial constitutional issue either. The judgment of the court of appeals should be affirmed.

I. INTER PARTES REVIEW IS CONSISTENT WITH ARTICLE III

Article III generally reserves to the judiciary the adjudication of disputes over private rights, but it imposes no such limitation on disputes over public rights, which "[C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem

proper.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). A patent holder’s right to obtain a government-issued patent allowing the inventor “to exclude others from making, using, offering for sale, or selling” a patented invention, 35 U.S.C. 154(a)(1), is a paradigmatic public right. Just as Congress has long authorized Executive Branch employees to determine in the first instance whether patents should be granted, inter partes review is a constitutionally permissible means by which the USPTO may reassess its prior patent grants and, if necessary, correct its own errors. That conclusion also comports with the traditional understanding of patent rights as privileges that the government may revoke without judicial involvement. The fact that the Board’s final decisions in inter partes reviews are appealable to the Federal Circuit, which can correct any legal errors the Board may make in deciding whether existing patents should be cancelled, reinforces that conclusion.

A. Congress May Authorize The USPTO To Reconsider Its Own Decision To Grant A Patent

1. Congress has permissibly authorized USPTO patent examiners within the Executive Branch to determine in the first instance whether patents should be granted

a. Public rights are rights that are “integrally related to particular Federal Government action.” *Stern v. Marshall*, 564 U.S. 462, 490-491 (2011); see *Granfinanciera S. A. v. Nordberg*, 492 U.S. 33, 55 n.10 (1989). Under this Court’s public-rights precedents, a matter is appropriate for agency determination if “the claim at issue derives from a federal regulatory scheme, or * * * resolution of the claim by an expert Government agency

is deemed essential to a limited regulatory objective within the agency’s authority.” *Stern*, 564 U.S. at 490-491. The Court has defined these matters in contradistinction to matters of “private right,” *Crowell v. Benson*, 285 U.S. 22, 51 (1932), such as common-law claims and claims arising under state law, *Granfinanciera*, 492 U.S. at 51, 55-56. The public-rights doctrine reflects the principle that, when the very existence of a right “depends upon the will of [C]ongress,” *Murray’s Lessee*, 59 U.S. (18 How.) at 284, Congress can set conditions on the manner of its adjudication, *id.* at 283-284; see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (plurality).

b. Consistent with longstanding practice, the Patent Act authorizes Executive Branch employees (*i.e.*, USPTO examiners) to determine in the first instance whether patents should be granted. Petitioner does not contend that initial patent-issuance decisions must instead be made by Article III courts. For at least two principal reasons, Congress’s conferral of this power on the Executive Branch is clearly constitutional.

First, patent rights “did not exist at common law,” *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1851), and have not historically been understood to reflect any “natural right” of inventors, *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966). The Constitution permits, but does not compel, the creation of a national patent system; it thus leaves to Congress the decision whether to promote the progress of the useful arts by enacting patent laws. See *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972). “The [patent] monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law.” *Gayler*, 51 U.S. (10 How.) at

494. Rather, any patent monopoly “is created by the act of Congress,” and “no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.” *Ibid.*; see *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229-230 & n.5 (1964); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 (2015) (Thomas, J., dissenting); see also McConnell, 157 Cong. Rec. at 13,042 (explaining that patents are “solely a product of positive law,” whose “extent, duration, and validity [are] matter[s] that must be determined by the legislative branch”).

Second, in determining whether a patent should issue, a patent examiner decides whether the applicant will have certain rights *as against the world*. While Article III courts resolve concrete disputes between opposing litigants, “[v]indicating the *public* interest * * * is the function of Congress and the Chief Executive.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). To be sure, to “decide on the rights of individuals,” *ibid.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)), Article III courts may and do resolve issues of patent validity in the course of deciding suits (*e.g.*, infringement suits and declaratory-judgment actions) that satisfy the Constitution’s case-or-controversy requirement. Outside the context of such concrete disputes, however, the determination whether a particular invention qualifies for patent protection under the statutory criteria is appropriate for Executive but not Judicial Branch resolution.

2. *Inter partes* review resolves a matter of public right that is integrally connected to the federal patent scheme

a. *Inter partes* review differs from the initial patent-examination process in two principal respects. First,

the question before the Board during an inter partes review is whether claims in an existing patent should be cancelled, not whether a patent should be issued in the first instance. Second, whereas the initial examination involves solely the patent applicant and the USPTO, the AIA gives significant participatory rights in the review process to a private party that successfully petitions for inter partes review. Neither of those differences, however, provides a sound basis for questioning the constitutionality of the AIA provisions that establish inter partes review.

i. Since the Founding, Congress has employed a variety of non-judicial mechanisms for cancelling issued patents. See pp. 38-45, *infra*. That historical tradition provides strong evidence that USPTO cancellation of issued patents comports with Article III. A variety of other factors reinforce that conclusion.

Inter partes review serves the same important public purposes as the initial examination, namely the protection of the public from private monopolies that exceed the bounds authorized by Congress. Inventors are entitled to patents only for inventions that further the public interest because they meet stringent statutory criteria, including novelty and non-obviousness over prior art. 35 U.S.C. 102, 103. These limitations have constitutional underpinnings, because Congress's authority to create patents is conditioned on "promotion of advances in the 'useful arts,'" and Congress "may not overreach the restraints imposed" by that purpose. *Graham*, 383 U.S. at 5-6; see *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 36 (1923); *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 327-328 (1859).

This Court has recognized the government’s “obligation to protect the public” from improperly issued patents, *United States v. American Bell Tel. Co.*, 128 U.S. 315, 357, 367 (1888) (*American Bell I*), which impose high social costs, see *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015) (meritless patents “can impose a ‘harmful tax on innovation’”) (citation omitted); *eBay Inc. v. MercExchange, L. L. C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring); *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 100-101 (1993). The public and governmental interest in preventing unauthorized exercises of the patent monopoly continues to be fully implicated for as long as a patent remains in force. In drafting the Intellectual Property Clause, “the Framers sought to balance the goal of encouraging innovation against the dangers and economic loss of monopoly. The reexamination process serves to preserve that balance by adopting a procedure by which the [USPTO] can identify patents that were issued in error.” McConnell, 157 Cong. Rec. at 13,042; see *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2135 (2016).

Facilitating the USPTO’s efforts to correct its own mistakes is particularly appropriate in light of “the presumption of validity that comes with issued patents in court.” House Report 48; see 35 U.S.C. 282(a). That presumption can be rebutted in litigation only through clear and convincing evidence, see *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011), and its primary rationale is “that the [USPTO], in its expertise, has approved the claim,” *KSR Int’l Co. v. Teleflex Co.*, 550 U.S. 398, 426 (2007). Petitioner seeks to retain the benefits of that presumption in any infringement suit it might file, while contesting Congress’s efforts to ensure that

the existence of a patent actually reflects the USPTO's current, informed judgment that the claimed invention satisfies statutory patentability requirements.

Petitioner suggests (Br. 28-29) that, because patents are a form of private property, Executive Branch officials may not rescind an earlier patent grant. That argument confuses the distinct concepts of private property and “private rights”—those rights that are not integrally related to federal government action. See *Stern*, 564 U.S. at 490-491. Executive Branch agencies routinely act on private parties' claims of entitlement to property, such as money, land, and other assets. Those Executive Branch actions can include dissolution of existing property interests as well as the creation of new property rights. That may occur, for example, when the government terminates a tenured public employee, see, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-543 (1985), or when it decides that a recipient is no longer entitled to continuing public-assistance payments, see, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261-262 (1970). Bankruptcy courts allocate property that exists apart from federal bankruptcy law; the Court in *Murray's Lessee* upheld use of a summary, non-judicial process to seize land; and various administrative tribunals have divested people of “core private rights to traditional forms of property” by ordering them to pay money damages, Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 611 (2007). The Constitution protects against arbitrary deprivations of property interests, see *Goldberg*, 397 U.S. at 261-262; *Murray's Lessee*, 59 U.S. (18 How.) at 276-277, but it does not bar Executive Branch agencies (or other non-Article III federal officials) from making those determinations.

That principle applies with particular force to cancellation of patent rights, since such rights are created by the government and their scope and contours are defined entirely by federal statute. The Patent Act states that, “[s]ubject to the provisions of this title, patents shall have the attributes of personal property.” 35 U.S.C. 261 (emphasis added). The same statutory provision that declares patent rights to be property rights thus makes clear that the nature and extent of those rights are defined by Congress. See *eBay*, 547 U.S. at 392 (emphasizing this limitation). Congress has authorized reassessment of issued patents by the expert agency charged with deciding patentability in the first instance, and the USPTO is particularly well-positioned to undertake that reassessment when additional information or arguments have come to light. See *Boesche v. Udall*, 373 U.S. 472, 476, 483 (1963) (describing an agency’s exercise of authority to cancel a lease that the agency had issued as a case “peculiarly appropriate * * * for administrative determination in the first instance”); see also McConnell, 157 Cong. Rec. at 13,043 (concluding that it is “entirely proper” for Congress to vest authority to correct erroneous patent grants “in the agency entrusted by Congress with making the * * * decision in the first instance”).

Agencies’ use of administrative processes to correct their own mistakes is commonplace.⁴ And the fact that

⁴ See, *e.g.*, 5 U.S.C. 8470 (authorizing agency to recoup erroneously issued federal employee benefits); 38 U.S.C. 5302 (authorizing agency to recoup erroneously issued veterans’ benefits); 42 U.S.C. 404 (authorizing agency to recoup erroneously issued social security benefits); 47 U.S.C. 312 (authorizing agency to revoke radio station licenses); 49 U.S.C. 13905(d)(2) (authorizing agency to revoke erroneously issued federal motor carrier registrations); 49 U.S.C. 41110

the USPTO is reassessing a decision that it was authorized to make in the first instance is strong evidence that inter partes review is not “inherently judicial.” See *Northern Pipeline*, 458 U.S. at 68 (plurality) (“The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are ‘inherently . . . judicial.’”) (citation omitted); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458 (1929) (distinguishing between matters that “inherently or necessarily require[] judicial determination” and “matters the determination of which may be, and at times has been, committed exclusively to executive officers”). In light of Congress’s unquestioned “authority to delegate to the PTO the power to issue patents in the first instance[,] [i]t would be odd indeed if Congress could not authorize the PTO to reconsider its own decisions.” *MCM Portfolio, LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1291 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 292 (2016).

ii. Many of petitioner’s arguments logically imply that *any* form of USPTO reconsideration of an issued patent would violate Article III. Late in its brief, however, petitioner obliquely suggests that ex parte reexamination is constitutional because it “is an interactive proceeding between the agency and the patent owner” that “stops short of exercising Article III judicial power over private rights.” Pet. Br. 50. Petitioner argues that inter partes review is distinguishable from ex parte

(authorizing agency to revoke erroneously issued air carrier certificates); 49 U.S.C. 44709 (authorizing agency to revoke erroneously issued airman certificates).

reexamination, and inconsistent with Article III, because it “is an adversarial proceeding with all the trappings of litigation.” *Ibid.* That argument lacks merit.

Inter partes review is simply one mechanism by which the USPTO seeks to leverage knowledge possessed by persons outside the government to assist it in making a decision within its bailiwick. Even ex parte reexamination may be conducted at the request of private parties, who may apprise the USPTO of the existence and relevance of prior art of which the agency was previously unaware. See 35 U.S.C. 301, 302. Unlike in ex parte reexamination, the AIA gives the petitioner for inter partes review substantial participatory rights in the review proceeding itself. At the end of both proceedings, however, the agency makes the same decision: whether a patent (or particular patent claims) should be cancelled.

In this case, in deciding whether the two challenged claims in petitioner’s patent should remain in force, the USPTO was determining petitioner’s rights as against the world, not its rights vis-à-vis the private party (respondent Greene’s Energy Group, LLC) that had petitioned for inter partes review. The agency’s decision cancelling the claims gave Greene’s Energy Group no benefit that it would not have received if the USPTO had disapproved the claims during the initial examination, or if the Director had reexamined and cancelled the claims sua sponte. The proceeding therefore did not determine “the liability of one individual to another under the law as defined”—the characteristic hallmark of a matter of “private right.” *Stern*, 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 489).

In other respects as well, inter partes review differs from the sorts of judicial proceedings (*e.g.*, infringement suits and declaratory-judgment actions) in which an Article III court might resolve questions of patent validity. A third-party challenger in an inter partes review need not have any concrete dispute with the patent holder and “may lack constitutional standing.” *Cuozzo*, 136 S. Ct. at 2143-2144. And the challenger “need not remain in the proceeding; rather, [the USPTO] may continue to conduct an inter partes review even after the adverse party has settled.” *Id.* at 2144; see 35 U.S.C. 317(a). Similarly, the USPTO “may intervene in a later judicial proceeding” to defend its cancellation of an improperly granted patent, “even if the private challengers drop out.” *Cuozzo*, 136 S. Ct. at 2144 (emphasis omitted); see 35 U.S.C. 143. Those aspects of inter partes review reinforce the understanding that, although private challengers may assist the Board by identifying questionable patents and bringing forward new information and arguments, the Board’s role is to protect the public interest in the integrity of existing patents, not to determine the respective rights of the patentee and challenger vis-à-vis each other.

If it is otherwise consistent with Article III for the USPTO to reassess the validity of issued patents, neither precedent nor logic suggests that Congress’s decision to mandate trial-type procedures renders inter partes review unconstitutional. In a variety of contexts, Congress requires federal agencies to solicit public comments before taking particular administrative actions. See, *e.g.*, 5 U.S.C. 553(e) (notice-and-comment rulemaking); 33 U.S.C. 1344(a) (authorizing the Secretary of the Army to “issue permits, after notice and opportunity for public hearings for the discharge of

dredged or fill material into the navigable waters”). Indeed, when particular agency rules “are required by statute to be made on the record after opportunity for an agency hearing,” the agency must employ formal rulemaking procedures having many of the attributes associated with courtroom proceedings. 5 U.S.C. 553(c); see 5 U.S.C. 556, 557. So long as the rules ultimately promulgated are permissible exercises of Executive Branch authority, Congress’s decision to impose those procedural requirements does not create any meaningful Article III question.

Similarly here, so long as the decision the Board ultimately makes is one that can properly be entrusted to Executive Branch officials, the use of trial-type procedures does not render the inter partes review mechanism constitutionally infirm. This Court has long recognized that “the crucible of meaningful adversarial testing” can enhance the accuracy of decision-making, *United States v. Cronin*, 466 U.S. 648, 656 (1984), and prevent “administrative abuses,” *Boesche*, 373 U.S. at 485-486. Congress presumably mandated the use of trial-type procedures in inter partes review because it believed they would increase the accuracy of the Board’s decisions. If reconsideration of issued patents is a function the Board may constitutionally perform, nothing in this Court’s Article III precedents requires Congress to settle for internal agency procedures that it views as sub-optimal.

Petitioner is also wrong in suggesting (Br. 42-47) that inter partes review violates Article III because the administrative patent judges who sit on the Board are chosen and assigned to specific matters without the involvement of Article III courts. The Constitution no more requires that form of Article III supervision for

the Board members who reconsider issued patents than for the patent examiners who rule on patent applications in the first instance.⁵ Petitioner’s criticisms (Br. 43-47) of various procedures that give the Director of the USPTO a role in the selection, promotion, retention, and assignment of administrative patent judges likewise do not cast doubt on the validity of the AIA provisions that authorize inter partes review.

A virtue of administrative adjudication is the agency’s ability to ensure application of uniform standards “to the thousands of cases involved” through tools that include oversight of agency employees. *Crowell*, 285 U.S. at 54; see *Boesche*, 373 U.S. at 484 (noting the importance of uniformity in managing the “magnitude and complexity” of an administrative scheme). If a particular USPTO procedure regarding assignment or oversight of judges raises serious constitutional concerns, those concerns can be addressed on an as-applied basis in a case (unlike this one) where the allegedly infirm procedure has actually been utilized. The possibility of such challenges, however, provides no basis for holding that the AIA provisions authorizing inter partes review are facially inconsistent with Article III.

⁵ This Court has sometimes treated supervision of particular adjudicators by Article III judges as relevant to its public-rights analysis. See, e.g., *Peretz v. United States*, 501 U.S. 923, 936 (1991) (magistrate judges conducting voir dire in criminal trials). In other cases, however, it has upheld decision-making by adjudicators that do not function as adjuncts of Article III courts. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985) (civilian arbitrators selected on consent of the parties or appointed by federal agency); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 445 (1977) (Occupational Safety and Health Commission).

b. Inter partes review is also conducive to efficient allocation of the USPTO's finite resources. The USPTO performs pre-issuance review of more than half a million patent applications each year, but initial patent examinations are conducted ex parte, with no opportunity for persons other than the applicant to participate. Examiners therefore must decide, in a limited period of time, whether an invention satisfies statutory criteria "without the aid of arguments which could be advanced by parties interested in proving patent invalidity." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969). The patent applicant, moreover, has "no general duty to conduct a prior art search" and "no duty to disclose art of which [the] applicant is unaware." *Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs., Ltd.*, 394 F.3d 1348, 1351 n.4 (Fed. Cir. 2005). In addition, patent examiners' own research "often does not (and cannot) encompass the full scope of prior art relevant to a patent application," which may take the form of patents in foreign languages, "thesis papers located in obscure libraries around the world, obscure foreign publications that have not been translated into English, and online journals that require subscriptions or payments." PTAB Bar Ass'n Amicus Br. 13-14.

By enabling the USPTO to take "a second look at an earlier administrative grant of a patent" based on new information or arguments, *Cuozzo*, 136 S. Ct. at 2144, inter partes review thus helps to ensure that unpatentable inventions do not continue to receive unwarranted monopoly protection, thereby addressing what Congress determined was a substantial problem of erroneous grants under the preexisting patent system. House Report 39-40. Inter partes review also affords advantages over alternative mechanisms for pursuing the

same objectives. Congress could have required, in connection with every initial patent examination, that third parties who are opposed to the application be given an opportunity to argue and submit evidence. But undertaking that process for each of the 500,000 patent applications submitted every year would “lead to years’ delay in the issuance of patents” and risk “disincentiviz[ing] innovation or entry into the patent system.” PTAB Bar Ass’n Amicus Br. 19 (alteration omitted). It would also greatly increase costs.

Congress’s decision to pair a comparatively fast *ex parte* examination at the outset with opportunities for post-grant review thereafter benefits patent applicants by enabling them to gain patent protection more quickly. It also benefits the public by focusing more resource-intensive review on a small class of cases: those in which a third party identifies a challenge to patentability that has a reasonable likelihood of success, and in which the patent has proved to be of sufficient commercial importance to make it worthwhile for the third party to bring a challenge. See 35 U.S.C. 311(b), 314(a); PTAB Bar Ass’n Amicus Br. 12 (“[N]o member of the public will spend the hundreds of thousands of dollars needed to prepare an IPR petition and see the proceeding through to its conclusion” for “[t]he run-of-the-mill patent that is not commercially significant and never asserted against an accused infringer.”). Congress’s evident authority to mandate an opportunity for third-party participation in the initial examination process reinforces the constitutionality of the more modest approach reflected in the AIA, under which the USPTO makes initial patent grants without that scrutiny but may conduct more intensive post-issuance review in a smaller class of cases.

3. *The AIA provisions that govern inter partes review do not intrude on or diminish the authority of Article III courts*

Contrary to petitioner’s contention (Br. 49), the AIA provisions that created inter partes review did not “withdraw” questions of patent validity from Article III courts. The AIA did not eliminate or curtail any preexisting authorization for courts to resolve such questions, either in infringement suits or in declaratory-judgment actions. To be sure, by establishing an additional mechanism for the USPTO to correct its own mistakes, Congress sought to reduce the need for courts to perform the same function. But the possibility that agency self-correction may obviate the need for judicial intervention has traditionally been viewed as a *virtue* of administrative-appeal mechanisms and administrative-exhaustion requirements. See, e.g., *McKart v. United States*, 395 U.S. 185, 195 (1969). There is no sound reason to regard inter partes review with a more jaundiced eye.

Even in situations (not present here) where a judge or jury rejects an alleged infringer’s defense of invalidity, and the Board subsequently cancels the same patent on inter partes review, the agency’s decision does not usurp or undermine judicial authority. “Courts do not find patents ‘valid,’” but “only that the patent challenger did not carry the ‘burden of establishing invalidity in the particular case.’” *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1429 n.3 (Fed. Cir. 1988) (citations and emphasis omitted); see McConnell, 157 Cong. Rec. at 13,043. Invalidity defenses in court must be established by clear and convincing evidence, see *ili Ltd. P’ship*, 564 U.S. at 102-103, while the Board decides questions of patentability using a preponderance standard, see

35 U.S.C. 316(e). Just as a civil finding of liability for wrongful death does not displace an acquittal in a criminal prosecution where the beyond-a-reasonable-doubt standard applies, the Board's conclusion that particular claims are unpatentable is not logically inconsistent with a court's determination that an infringement defendant failed to prove the invalidity of those claims by clear and convincing evidence. See McConnell, 157 Cong. Rec. at 13,044.

The current functional resemblance between inter partes review and litigation, moreover, is attributable in large part to twentieth century legal developments. For much of the country's history, "this Court harbored doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement," until those doubts were "dispelled" in 1933. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (citing cases). And until this Court's decision in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), a judgment of patent invalidity had issue-preclusive effect only in subsequent litigation between the same parties, leaving the patent holder free to attempt to enforce its patent against other alleged infringers. See *id.* at 317, 349-350. If that preclusion rule were still in place, the distinction between the role of federal courts in determining the rights of individual litigants, and the role of Executive Branch officials in protecting the public interest, would be particularly apparent.

To current patent practitioners, a declaratory-judgment action that seeks to render the challenged patent a practical nullity is a familiar type of judicial proceeding. For most of our country's history, however, no private litigant in federal court could have achieved that

result. One consequence of *Blonder-Tongue* is that judicial determinations of patent invalidity are now a more powerful tool for protecting the public from the costs imposed by erroneously issued patents. The increased potential for judicial rulings to vindicate that public interest, however, does not cast doubt on the USPTO's constitutional authority to perform that quintessential Executive Branch function.

4. *Inter partes* review satisfies even the standards this Court has articulated for the imposition of monetary liability by non-Article III adjudicators

This Court has issued a series of decisions addressing the constitutional limits on Congress's power to authorize the use of non-Article III adjudicators. The adjudicators in those cases were typically empowered to determine "the liability of one individual to another," *Stern*, 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 51), including liability for monetary relief. Even in that setting, the Court has frequently sustained Congress's use of non-Article III officials.

In *Crowell v. Benson*, *supra*, this Court sustained, against an Article III challenge, statutory provisions that authorized an agency to adjudicate claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* See 285 U.S. at 36-37. The Court explained that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact" must be made by Article III judges. *Id.* at 51. The court concluded that claims under the statute, which displaced a traditional common-law cause of action, were claims of private right. *Ibid.*; see *Thomas*, 473 U.S. at 587. But the Court concluded that the statute permissibly authorized the

agency to decide disputes and to make conclusive findings of fact regarding compensation claims, because the authority of Article III courts “to deal with matters of law” in reviewing or enforcing the agency’s decisions “provide[d] for the appropriate exercise of the judicial function in this class of cases.” *Crowell*, 285 U.S. at 54, 57. In reaching that conclusion, the Court emphasized that the agency’s determinations were confined to a discrete area of law, were “closely analogous” to other determinations that agencies regularly made, *id.* at 54, and provided a “prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact” particularly suitable for specialized agency determination, *id.* at 46; see *Stern*, 564 U.S. at 489 n.6 (“*Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes.”).

In *Thomas v. Union Carbide Agricultural Products Co.*, *supra*, this Court upheld a mandatory arbitration system under which private parties can be ordered to make payments to other private parties for using information pertaining to pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The Court explained that “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Thomas*, 473 U.S. at 593-594. The Court upheld the FIFRA arbitration system after observing that it concerned a compensation right created by federal law and that arbitration advanced FIFRA’s objective of swiftly resolving before subject-

matter experts specialized questions of compensation. *Id.* at 590-591.

This Court has upheld other uses of agency forums to decide questions “integrally related to particular Federal Government action.” *Stern*, 564 U.S. at 490-491. It has upheld resolution of landlord-tenant disputes through a federal administrative system. *Block v. Hirsh*, 256 U.S. 135, 158 (1921). It has upheld an agency procedure to determine whether companies violated a federal worker-safety statute and to impose penalties for violations. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 458 (1977). The Court has also concluded that Congress may assign non-Article III courts to adjudicate claims concerning restructuring of debtor-creditor relations under federal bankruptcy law. *Stern*, 564 U.S. at 492 n.7; see *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting).

By contrast, the Court has disapproved the use of non-Article III adjudicators to resolve common-law and state-law claims, after determining that adjudication of those causes of action was not closely intertwined with administration of a federal statutory scheme. In *Stern*, for example, the Court concluded that a bankruptcy court could not adjudicate a common-law claim of tortious interference as a counterclaim in bankruptcy because the counterclaim did “not flow from a federal statutory scheme,” qualify as “‘completely dependent upon’ adjudication of a claim created by federal law,” or call upon agency expertise in a “particularized area of the law.” 564 U.S. at 493 (citations omitted); see *Northern Pipeline*, 458 U.S. at 69-79 (plurality) (state-law claims); *Granfinanciera*, 492 U.S. at 60-61 (“fraudulent conveyance actions” constituting “a pre-existing,

common-law cause of action that was not integrally related to the reformation of debtor-creditor relations”).

Inter partes review much more closely resembles the non-Article III adjudicatory mechanisms that this Court has upheld than those that the Court has found to be invalid. Inter partes review involves interests that are “derived from a federal regulatory scheme.” *Stern*, 564 U.S. at 490; see *ibid.* (explaining that “resolution of [a] claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority”). Patent law is a “technically complex subject matter,” *Dickinson v. Zurko*, 527 U.S. 150, 160 (1999), making it “especially appropriate to administrative as opposed to judicial redetermination,” McConnell, 157 Cong. Rec. at 13,045, and the USPTO has “special expertise in evaluating patent applications,” *Kappos v. Hyatt*, 566 U.S. 431, 445 (2012). PTAB judges include patent lawyers and former patent examiners, *Cuozzo*, 136 S. Ct. at 2137, who have far more experience assessing novelty and obviousness than generalist judges or juries, PTAB Bar Ass’n Amicus Br. 20-21.

In addition, while the USPTO decides in an inter partes review whether a claimed invention failed to satisfy the requirements of novelty and non-obviousness, its determinations can be appealed to an Article III court, which reviews the agency’s findings of fact deferentially and its conclusions of law de novo. See *MCM Portfolio*, 812 F.3d at 1287. Inter partes review thus preserves the “complete authority” of Article III courts “to insure the proper application of the law” with respect to questions of patentability, while providing an “expert and inexpensive method” for determining subsidiary factual questions. *Crowell*, 285 U.S. at 46-47, 54.

And by specifying that no patent may be cancelled until any appellate review has been completed, see 35 U.S.C. 318(b), inter partes review affords greater solicitude to judicial review than did the administrative scheme upheld in *Crowell*, where the agency orders were “not to be stayed pending” judicial review except on a showing of “irreparable damage.” *Crowell*, 285 U.S. at 44-45.

Inter partes review therefore would satisfy even the standards this Court has imposed when Congress authorizes non-Article III adjudicators to hold one private party liable to another for monetary relief. As we explain above (see pp. 18-25, *supra*), however, the more fundamental flaw in petitioner’s argument is that inter partes review is not a mechanism for imposing legal liability, or for determining the respective rights of adverse litigants vis-à-vis each other. It is instead a procedure by which the USPTO reconsiders its own prior determination that a putative inventor has satisfied the statutory prerequisites for obtaining a patent monopoly as against the world. For substantially the same reasons that initial patent examination is appropriately entrusted to an Executive Branch agency, Congress’s authorization for the same agency to review its own prior decisions raises no significant Article III concern.

B. The Longstanding Treatment of Patents As Revocable Privileges Confirms That Congress May Authorize the USPTO To Reconsider Its Patent Grants

1. At the Founding, patent rights were understood to be revocable without judicial involvement—in other words, as public rights. The Founding generation distinguished between “‘core’ private rights” that individuals would enjoy “even in the absence of political society,” and “privileges” or “franchises” that the government could create “for reasons of public policy.” Nelson

567. Privileges and franchises were “legal interests capable of being held by individuals” and could “form the basis for private claims against other individuals.” *Ibid.* But “even in private hands they amounted to mere ‘trusts of civil power to be exercised for the public benefit.’” *Id.* at 568 (citation omitted).

Such rights therefore were “not understood to vest in private individuals in the same way as core private rights.” Nelson 568. Instead, because these interests existed as creations of the sovereign to serve the public interest, the sovereign could allow their revocation without judicial involvement. *Teva Pharms.*, 135 S. Ct. at 848 (Thomas, J., dissenting) (detailing history); see *Public Serv. Comm’n of Puerto Rico v. Havemeyer*, 296 U.S. 506, 515-517 (1936); Nelson 571-572; Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 384 (1868). The interests that the Founding generation described as “privileges” or “franchises” thus had the attributes of what this Court since *Murray’s Lessee* has called “public rights.” See Nelson 563-564.

Patents have always been understood as privileges or franchises. Rather than reflecting any perceived “natural right” of inventors to monopolize discoveries, *Graham*, 383 U.S. at 9, patents were understood as creations of the sovereign that “intrude” on “the natural right of the public to appropriate all new ideas that may be voluntarily disclosed,” 1 William C. Robinson, *The Law of Patents for Useful Inventions* §§ 25-26 (1890); see *American Bell I*, 128 U.S. at 370 (patents “take[] from the people this valuable privilege and confer[] it as an exclusive right upon the patentee”); *Teva Pharms.*, 135 S. Ct. at 848 n.2 (Thomas, J., dissenting) (explaining

that the Founders saw no “‘core’ property right in inventions”). Thus, at English common law, see *Teva Pharms.*, 135 S. Ct. at 848 (Thomas, J., dissenting), and in the United States, courts consistently classified the patent as a “franchise or exclusive privilege,” *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1853); see *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 244 (1832) (a patent is a “privilege which is the consideration paid by the public for the future use of the machine”); see *Boesch v. Graff*, 133 U.S. 697, 702 (1890) (“franchise” or “exclusive privilege”); *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 548 (1873) (“franchise” secured by patent); *O’Reilly v. Morse*, 56 U.S. (18 How.) 62, 133 (1854) (“franchise granted to [inventor] by the law”); *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 9 (1829) (“exclusive privileges”).⁶

2. A long history of non-judicial patent cancellation confirms that understanding. For as long as governments have issued patents, they have reserved the right

⁶ Several of petitioner’s amici argue that the Intellectual Property Clause’s reference to “secur[ing]” rights for inventors indicates that the Framers believed that inventors possess inherent or natural rights in their inventions, which the law would “secure” to them with patents. See Biotechnology Innovation Org. Amicus Br. 7-8; Pharma. Research & Manuf. of Am. Amicus Br. 29; 27 Law Professors Amicus Br. 14. The copyright plaintiff in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), made substantially the same argument, contending that the term “secure,” as used in the Intellectual Property Clause, “clearly indicates an intention, not to originate a right, but to protect one already in existence.” *Id.* at 661. The Court squarely rejected that argument, stating that when read in context, “the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right.” *Ibid.* The Court further explained that, “where the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed.” *Id.* at 663-664.

to cancel patents without judicial involvement or subject only to appellate judicial review.

English Practice: Post-issuance patent cancellation dates at least to Elizabethan England. The sovereign's authority to grant a patent was a matter of royal prerogative, and that "same prerogative could be used to revoke the grant." Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 2)*, 76 J. Pat. & Trademark Off. Soc'y 849, 859 (1994). Queen Elizabeth I famously employed that power in 1601, when Parliament threatened to legislate against patents that she had granted affording monopoly protections over such everyday items as salt, vinegar, ale, and soap. *Id.* at 854 n.14. The Queen responded by "summarily cancel[ling] the most objectionable patents," and by "allow[ing] courts of law to pass judgment on the remainder." Floyd L. Vaughan, *The United States Patent System* 14 (1st ed., 1956).

The English Privy Council, the Crown's principal advisory body, was also empowered to annul patents (or to recommend that the sovereign annul patents) without involving the courts. "From the earliest times," patents were granted on the condition that "the patent should be forthwith voided if it was made to appear to six or more of the Privy Council * * * that the invention was not new, or the patentee not the first and true inventor." William Martin, *The English Patent System* 111 (1904); see *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 381 (1996). Throughout the seventeenth and eighteenth centuries, the Privy Council regularly entertained third parties' petitions to cancel patents. In 1732, for example, the Privy Council "made void" a patent for lighting a coastline upon the petition of a third

party “on the ground of the insufficiency of the specification and the want of novelty and prejudicial character of the invention.” E. Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794*, 33 L.Q.R. 180, 187-189 (1917). And while in 1753 the Privy Council “granted the courts concurrent jurisdiction to revoke a patent,” Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1683 (2013), the Privy Council acted on petitions to cancel defective patents through the American Founding. See *ibid.* (noting that the Privy Council retained the right to revoke patents until 1847); Hulme 192-193 (describing the Privy Council’s consideration of petitions to cancel patents through the Founding).

Early American Practice: Early American courts and legislatures also treated patents as privileges or franchises that could be revoked without judicial involvement. When patent-revocation questions arose in early American practice, “it seems to have been assumed that patents were revocable” without the involvement of the courts, based on the principle that “what the legislature’s discretion could award in the patent grant could also be taken away by the same power.” Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 110-111 (June 2005); see *id.* at 110 n.251.⁷ In 1798, for example, the New York legislature revoked a steamboat patent that it had issued to one inventor (John Fitch) and assigned the patent to Robert Livingston. See *id.* at 110 n.251. When Livingston sued to enjoin alleged violations of his patent rights, the defendants raised myriad defenses, but “all assumed that the legislature had [the]

⁷ <https://law.utexas.edu/faculty/obracha/dissertation/>.

power” to revoke Fitch’s patent and award it to Livingston. *Ibid.*; see *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812). Similarly, after Congress issued one of the earliest United States patents to Benjamin Folger, a rival “petitioned Congress for the repeal of Folger’s grant,” Christopher Beauchamp, *Repealing Patents* 21 (Sept. 27, 2017),⁸ on the ground that “letters patent ha[d] been obtained by the said Benjamin Folger surreptitiously, and from false suggestions.” *House of Representatives Journal*, 3d Cong., 1st Sess. 98 (1793) (House Journal); see Beauchamp 19-20. Folger filed a counter-petition. House Journal 125. While the House ultimately chose to enact legislation authorizing a court to resolve the dispute, Beauchamp 20-22, the actions of the petitioners and the House reflect a shared understanding that the choice of forum for patent repeal belonged to the legislature.

American legislatures’ uses of “working clauses” or “revocation clauses” also reflected the understanding that patents could be revoked without judicial involvement. See Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 *Ariz. L. Rev.* 263, 284 (2016). Colonial legislatures often inserted into patents clauses that required inventors to begin practicing their inventions within a specified time period after a patent grant. See Bruce Bugbee, *Genesis of American Patent and Copyright Law* 67 (1967) (citing examples).⁹ If the inventor failed to satisfy those requirements, “the legislatures would retract or transfer the patent to a more deserving grantee” without judicial process. Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 *Berkeley Tech. L.J.* 45, 65-66 (2013).

⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044003#.

⁹ These clauses were also common in English patents. See Hovenkamp 284.

Congress also used such clauses in private patent bills in which Congress issued patents to particular inventors through legislation. In a patent for the steam engine, Congress specified that the patent “shall cease, determine, and become absolutely null and void, *without resort to legal process*,” if the inventor “shall fail to introduce the said invention into public use in the United States, within two years from the passing of this act.” Act of Mar. 3, 1835, ch. 89, 6 Stat. 614-615 (emphasis added). And a statute allowing resident aliens to apply for patents similarly specified that “every patent granted by virtue of this act * * * shall cease and determine and become absolutely void *without resort to any legal process*” if the patentees failed to introduce the patented invention into public use within one year. Act of July 13, 1832, ch. 203, 4 Stat. 577 (emphasis added).

Reissues: The Patent Office was also authorized to cancel patents under reissue statutes. Under the reissue statute in effect from 1836 until 1870, a patent holder could seek reissue of a patent in order to fix an error resulting from a mistake in the application, but was required to surrender the original patent to do so. See Patent Act of 1836, ch. 357, § 13, 5 Stat. 117, 122; Patent Act of 1870, ch. 230, § 53, 16 Stat. 206. The patent “became destitute of validity and absolutely void” at the start of the reissue proceedings, and the Patent Office would cancel the original patent even if the application for reissue was rejected. *Peck v. Collins*, 103 U.S. 660, 663 (1881). Congress later amended the statute to change that procedure, specifying that the surrender of the original patent would take effect only “upon the issue of the amended patent.” Patent Act of

1870, ch. 230, § 53, 16 Stat. 206; see *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 610-611 (1898) (construing the 1870 law); pp. 47-49, *infra*.

Interferences Under the Patent Act: The longstanding procedure of patent interference also reflects the understanding that agencies may invalidate patents. Before the AIA was enacted, the Patent Act provided that a patent should go to an invention's first inventor, whether or not that person was first to seek a patent. Starting in 1836, the Patent Office used a procedure known as interference to determine priority of invention between a patent application and either a competing application or an issued patent. See Act of July 4, 1836, ch. 357, § 16, 5 Stat. 123-124. A disappointed party in an interference proceeding "could bring a bill in equity in federal district court" to challenge the agency's decision. *Kappos*, 566 U.S. at 439. But the factual findings of the Patent Office—"a special tribunal, entrusted with full power in the premises"—had near-preclusive effect in that judicial review. *Morgan v. Daniels*, 153 U.S. 120, 124 (1894).

The 1952 Patent Act expanded the USPTO's interference authority by providing that the agency's "final judgment adverse to a patentee" in an interference proceeding "shall constitute cancellation of the claims involved." Ch. 13, § 135, 66 Stat. 801-802. The USPTO could thus render final decisions cancelling issued patents on the basis of prior inventions. See Edward C. Walterschied & Kenneth L. Cage, *Jurisdiction of the Patent and Trademark Office to Consider the Validity of Issued Patents*, 61 J. Pat. & Trademark Off. Soc'y 444, 462 (1979). A disappointed party could seek review in district court, see Patent Act of 1952, ch. 13, § 146, 66

Stat. 802, but the agency’s findings of fact were reviewable only under the deferential “substantial evidence” standard unless new evidence was introduced in the judicial proceeding, *Kappos*, 566 U.S. at 436; *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1328 (Fed. Cir. 2014).

Maintenance Fees: Since 1980, Congress has also required most patentees to pay maintenance fees, 35 U.S.C. 41(b)(1), and specified that if the fee is not paid within six months after the deadline, “the patent shall expire,” 35 U.S.C. 41(b)(2). Thus, Congress has authorized the cancellation of issued patents before the end of the patent term for “[f]ailure to pay a maintenance fee,” subject only to appellate review. Cf. *Ray v. Lehman*, 55 F.3d 606, 608 (Fed. Cir.) (Rich, J.) (affirming the USPTO’s refusal to reinstate a patent after the patent expired for non-payment of maintenance fees and the patentee belatedly paid the fees), cert. denied, 516 U.S. 916 (1995).

Post-Issuance Agency Review: Every U.S. patent that is currently in force was issued at a time when the USPTO was authorized by statute to cancel patents as improperly granted. Since 1980, the USPTO has been authorized to conduct an ex parte reexamination of an issued patent on the petition of a third party, 35 U.S.C. 301, or at “any time” on the Director’s “own initiative,” 35 U.S.C. 303(a). The Federal Circuit has repeatedly upheld the constitutionality of that practice. See *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228-229, cert. denied, 506 U.S. 829 (1992); *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 603-604, modified on other grounds on reh’g, 771 F.2d 480 (Fed. Cir. 1985); McConnell, 157 Cong. Rec. at 13,043. More than 15 years ago, Congress authorized the USPTO to cancel

patents through inter partes reexamination, the predecessor to inter partes review. See Optional Inter Partes Reexamination Procedure of 1999, Pub. L. No. 106-113, §§ 4601-4608, 113 Stat. 1501A-567 to 1501A-572. Inter partes reviews are therefore “hardly novel but rather are based on longstanding procedures established by Congress and repeatedly recognized as constitutional.” McConnell, 157 Cong. Rec. at 13,043; cf. *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) (a government practice of “twenty years duration” can merit “great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning”).

3. Petitioner acknowledges (Br. 25) that the English Crown or Privy Council could cancel improperly issued patents. But after relying extensively on English practice as part of its own argument (Br. 22-25), petitioner dismisses the English tradition of non-judicial cancellation as showing only that patents were seen as “a royal prerogative, to be granted or withdrawn at the sovereign’s discretion.” Br. 25. That argument overlooks that public rights *are* those matters that can “be granted or withdrawn at the sovereign’s discretion.” *Ibid.* Because the “traditional taxonomy” distinguishing privileges or franchises from private rights under English law “informed American understandings of the respective roles of the political branches and the judiciary in the constitutional separation of powers,” Nelson 568-569, this Court has treated an English tradition of non-judicial adjudication as demonstrating that a matter may be adjudicated outside of Article III courts. See, e.g., *Murray’s Lessee*, 59 U.S. (18 How.) at 281-282 (relying on English practice concerning “claims for pub-

lic taxes”); *Sharif*, 135 S. Ct. at 1951 (Roberts, C.J., dissenting) (explaining that the “exception to the requirements of Article III for certain bankruptcy proceedings” reflects that, “[w]hen the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy ‘commissioners’” to resolve bankruptcy claims).

Petitioner also suggests that the centuries-old practice of treating patents as revocable privileges is not relevant if patent-validity questions were more “typically” resolved in judicial than in nonjudicial forums. Pet. Br. 26 (emphasis omitted). That argument lacks merit. This Court has explained since *Murray’s Lessee* that matters that can be resolved in both judicial and nonjudicial forums are public rights. See 59 U.S. (18 How.) at 284 (defining as public rights those matters “which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper”). Even if challenges to the validity of issued patents were often brought in judicial forums, the undisputed authority of the Crown and Privy Council to cancel patents is inconsistent with private-right status. To support a contrary view, petitioner invokes a passage in *Granfinanciera* (Br. 25-26), but that passage did not discuss whether a matter involved public rights at all. See 492 U.S. at 43-44. Instead, it addressed the separate question whether a dispute sounds in law or in equity for purposes of the Seventh Amendment. *Ibid.*

4. Petitioner also suggests (Br. 33-34) that Congress is constitutionally barred from authorizing inter partes review because Congress did not create inter partes review when it first created a federal patent system. See Pet. Br. 33 (stating that Congress may provide for

agency adjudication only when it creates “a ‘new statutory obligation’” that is “without a historical analogue to actions adjudicated by courts”) (brackets and citation omitted). Even in reviewing adjudicative schemes used to impose liability on private parties, this Court has not imposed any such limitation on the public-rights doctrine. See, e.g., *Stern*, 564 U.S. at 490-491 (“[W]hat makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action.”). And while some frameworks for agency adjudication that this Court has upheld involved entirely new statutory obligations, others did not. The agency arbitration scheme challenged in *Thomas* replaced a prior framework for determining fees under a compulsory-licensing provision. See 473 U.S. at 590 (explaining Congress’s choice to “select arbitration as the appropriate method of dispute resolution” due to shortcomings in prior statute); *id.* at 571-575 (describing history). And the federally created obligations in *Atlas Roofing* and *Block* could hardly be described as “without a historical analogue to actions adjudicated by courts,” Pet. Br. 33, because they involved, respectively, workplace-safety requirements and landlord-tenant obligations. See *Atlas Roofing*, 430 U.S. at 450; *Block*, 256 U.S. at 156.

In any event, inter partes review does not authorize the USPTO to impose liability on any private party. It is simply a mechanism by which the agency can reconsider its own prior patent-issuance decision. See pp. 18-25, *supra*. Nothing in this Court’s precedents remotely suggests that Congress is constitutionally foreclosed from adding new administrative-reconsideration mechanisms to an existing statutory scheme.

5. Petitioner’s reliance (Br. 28-29) on *McCormick Harvesting Mach. Co.*, *supra*, is misplaced. The Court in *McCormick* did not announce any constitutional limit on Congress’s power to authorize the Patent Office to correct its own mistakes, but simply construed the then-extant version of a federal patent-reissue statute. The patent owner in *McCormick* sought a reissue of his patent from the Patent Office, and he surrendered his original patent upon submitting his reissue application. During the reissue proceeding, an examiner rejected patent claims that were common to both the original patent and the reissue. Before the Patent Office formally acted on the reissue, the patent owner abandoned the application for reissue, and the Patent Office returned the surrendered patent. 169 U.S. at 608.

The patent owner subsequently brought an infringement suit, and the district court held that the Patent Office had annulled the original patent when it rejected the reissue. *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 58 F. 773, 778 (N.D. Ohio 1893). On appeal, the Sixth Circuit recognized that the district court would have been correct “under the patent laws in force in 1866” as those laws had been construed in *Peck*, *supra*. See *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 69 F. 371, 400 (1895) (Taft, C.J.). The court of appeals explained, however, that this Court had not yet “considered and decided” whether the Patent Office’s rejection of patent claims in reissue proceedings still amounted to a cancellation of the original patent under amended reissue provisions that Congress had enacted in 1870. *Id.* at 401. The panel certified to this Court the question whether an examiner’s rejection of a reissue that includes “the same claims as those

which were included in the [original] patent” invalidates the original patent. *Ibid.*

This Court answered that question in the negative, holding that rejection of a reissue had no effect on the original patent under the amended reissue statute. The Court recognized that Congress had previously granted the Patent Office authority to “absolutely extinguish the original patent” during a reissue proceeding. *McCormick Harvesting Mach. Co.*, 169 U.S. at 610-611 (citing *Peck*, 103 U.S. at 660). The Court concluded, however, that the revised statute did not grant that authority, because under that statute the surrender of the original patent “takes effect only upon the issue of the amended patent,” and “until the amended patent shall have been issued the original stands precisely as if a reissue had never been applied for.” *Id.* at 610. The Court explained that, since Congress had not authorized the Patent Office to cancel an original patent during a reissue, “[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States.” *Id.* at 609. As a leading patent historian explained in 1979 when the USPTO considered amending its regulations on reconsideration of issued patents, the Court in *McCormick* simply held that the USPTO lacked authority to cancel a patent “except to the extent that such is expressly permitted by statute.” Edward C. Walterscheid & Kenneth L. Cage 450. The *McCormick* Court’s statutory analysis does not control the constitutional question presented here.

6. The nineteenth-century land-patent cases that petitioner invoked in its petition for a writ of certiorari (Pet. 17) are even farther afield. This Court has rejected administrative attempts to cancel land patents

when statutory authorization was absent. See, *e.g.*, *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 298-299 (1890) (holding, based on “a careful examination of th[e] statute,” that Land Office could not revoke an issued land patent). But the Court has upheld cancellations that were authorized by, for example, clauses that reserved a right of cancellation if the grantee failed to satisfy conditions, see *United States v. Repentigny*, 72 U.S. (5 Wall.) 211, 267-268 (1866).

In any event, patents for land and inventions “are not in all things alike.” *United States v. American Bell Tel. Co.*, 167 U.S. 224, 238 (1897) (*American Bell II*). A land patent confers “absolute property of the Government” that is “in existence before the right is conveyed.” *Ibid.* Hence, this Court has likened the grant of a land patent to the sale of real property in which the United States, “as owner,” passes title and is bound “in the same manner that an individual would have been bound under similar circumstances.” *United States v. Hughes*, 52 U.S. (11 How.) 552, 568 (1851). By contrast, a “patent for an invention is not a conveyance of something which the Government owns,” *American Bell II*, 167 U.S. at 238, but is instead a time-limited monopoly derived entirely from a statute. Control over such a federally created privilege is more “closely integrated into a public regulatory scheme,” *Granfinanciera*, 492 U.S. at 54 (citation omitted), than control over land the government has transferred. And patents “have the attributes of personal property” only because Congress has so provided, and only “[s]ubject to the provisions of” Title 35. 35 U.S.C. 261.

This Court in *Boesche*, in upholding the Secretary of the Interior’s “authority to cancel [a] [mineral] lease administratively for invalidity at its inception,” 373 U.S. at

476, distinguished the Court’s precedents holding that “land patents once delivered and accepted could be canceled only in judicial proceedings,” *id.* at 477. The Court explained that “the true line of demarcation is whether as a result of the transaction ‘all authority or control’ over the lands has passed from ‘the Executive Department,’ or whether the Government continues to possess some measure of control over them.” *Ibid.* Observing that a mineral lease does not give the lessee “anything approaching full ownership” of the land, the Court concluded that the Secretary “should have the power, in a proper case, to correct his own errors.” *Id.* at 478. The same reasoning applies here.

II. INTER PARTES REVIEW IS CONSISTENT WITH THE SEVENTH AMENDMENT

A. Because inter partes review comports with Article III, the Seventh Amendment imposes no separate obstacle to its constitutionality. If Congress has permissibly assigned “the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Granfinanciera*, 492 U.S. at 53-54; see *id.* at 55 n.10 (“Congress may decline to provide jury trials” where the action involves “statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency.”); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (“[T]he Seventh Amendment is not applicable to administrative proceedings.”); see also *Block*, 256 U.S. at 158.

That principle applies “even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead.” *Atlas Roofing*, 430 U.S. at 455. For example, in

Pernell v. Southall Realty, 416 U.S. 363 (1974), this Court held that the parties to a suit in district court were entitled to a jury trial under the Seventh Amendment, but recognized that “the Seventh Amendment would not be a bar to” entrusting those same disputes “to an administrative agency” rather than a court. *Id.* at 383. Only because “Congress ha[d] not seen fit” to entrust the dispute to an agency was Congress required to “preserve to parties their right to a jury trial.” *Ibid.* Petitioner does not dispute that principle. In sum, because Congress permissibly charged the USPTO with reevaluating its own patentability determinations in an administrative proceeding, “the Seventh Amendment poses no barrier to agency adjudication without a jury,” *MCM Portfolio*, 812 F.3d at 1293.

B. Petitioner’s Seventh Amendment claim also fails for the separate reason that inter partes review does not afford relief analogous to that traditionally granted by courts of law. When a matter is assigned to the courts for adjudication, the Seventh Amendment preserves a jury-trial right only in suits “in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.” *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.)) (emphasis omitted). Inter partes review provides no right to monetary damages, but instead allows only the equitable remedy of cancellation of a patent. Its closest judicial analog therefore is a declaratory-judgment action for patent invalidity, in which no jury-trial right attaches. See *In re Technology Licensing Corp.*, 423 F.3d 1286, 1290-1291 (Fed. Cir. 2005) (per curiam) (if only equitable relief is at issue,

“the accused infringer has no right to a jury trial”), cert. denied, 547 U.S. 1178 (2006).

This Court’s precedents underscore that patent cancellations do not implicate a jury-trial right, even when patent-cancellation cases have been assigned to the courts, rather than to an administrative agency. When the United States brought suits in federal court to cancel patents on grounds of invalidity—before the creation of administrative procedures for post-issuance review—the suits were brought in equity and resolved without juries. See *American Bell I*, 128 U.S. at 360 (affirming authority of the government to bring a bill in equity to cancel a patent, and rejecting the argument that the proper remedy “is in the common-law courts, and not in a court of equity”); see also *Mowry v. Whitney*, 81 U.S. (14 Wall.) 434, 440 (1872); *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535 (1865). In deeming equity jurisdiction proper, the Court relied on English practice and on early patent statutes, which specified that parties seeking to challenge decisions of the Patent Office could proceed only through a “bill in equity.” *American Bell I*, 128 U.S. at 364; see Patent Act of 1870, ch. 230, § 52, 16 Stat. 205, Patent Act of 1836, ch. 357, § 16, 5 Stat. 123-124; see also Lemley 1683. The historical understanding that patent-cancellation actions sound in equity would be fatal to petitioner’s Seventh Amendment claim even if this case involved patent cancellation through the courts, rather than through an administrative agency.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. III, § 2 provides:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more states;—between a State and Citizens of another State;—between Citizens of different states;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. U.S. Const. Amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. 35 U.S.C. 2(a) provides in pertinent part:

Powers and duties

(a) IN GENERAL.—The United States Patent and Trademark Office, subject to the policy direction of the Secretary of Commerce—

(1) shall be responsible for the granting and issuing of patents and the registration of trademarks;

* * * * *

4. 35 U.S.C. 141(c) provides:

Appeal to Court of Appeals for the Federal Circuit

(c) POST-GRANT AND INTER PARTES REVIEWS.—A party to an inter partes review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit.

5. 35 U.S.C. 261 provides:

Ownership; assignment

Subject to the provisions of this title, patents shall have the attributes of personal property. The Patent and Trademark Office shall maintain a register of interests in patents and applications for patents and shall record any document related thereto upon request, and may require a fee therefor.

Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.

A certificate of acknowledgment under the hand and official seal of a person authorized to administer oaths within the United States, or, in a foreign country, of a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States, or apostille of an official designated by a foreign country which, by treaty or convention, accords like effect to apostilles of designated officials in the United States, shall be prima facie evidence of the execution of an assignment, grant or conveyance of a patent or application for patent.

An interest that constitutes an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

6. 35 U.S.C. 311 provides:

Inter partes review

(a) **IN GENERAL.**—Subject to the provisions of this chapter, a person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent. The Director shall establish, by regulation, fees to be paid by the person requesting the review, in such amounts as the Director determines to be reasonable, considering the aggregate costs of the review.

(b) **SCOPE.**—A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.

(c) **FILING DEADLINE.**—A petition for inter partes review shall be filed after the later of either—

- (1) the date that is 9 months after the grant of a patent; or
- (2) if a post-grant review is instituted under chapter 32, the date of the termination of such post-grant review.

7. 35 U.S.C. 314 provides:

Institution of inter partes review

(a) **THRESHOLD.**—The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response

filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

(b) **TIMING.**—The Director shall determine whether to institute an inter partes review under this chapter pursuant to a petition filed under section 311 within 3 months after—

(1) receiving a preliminary response to the petition under section 313; or

(2) if no such preliminary response is filed, the last date on which such response may be filed.

(c) **NOTICE.**—The Director shall notify the petitioner and patent owner, in writing, of the Director's determination under subsection (a), and shall make such notice available to the public as soon as is practicable. Such notice shall include the date on which the review shall commence.

(d) **NO APPEAL.**—The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.

8. 35 U.S.C. 315 provides:

Relation to other proceedings or actions

(a) **INFRINGEMENT'S CIVIL ACTION.**—

(1) **INTER PARTES REVIEW BARRED BY CIVIL ACTION.**—An inter partes review may not be instituted if, before the date on which the petition for such a review is filed, the petitioner or real party in

interest filed a civil action challenging the validity of a claim of the patent.

(2) STAY OF CIVIL ACTION.—If the petitioner or real party in interest files a civil action challenging the validity of a claim of the patent on or after the date on which the petitioner files a petition for inter partes review of the patent, that civil action shall be automatically stayed until either—

(A) the patent owner moves the court to lift the stay;

(B) the patent owner files a civil action or counterclaim alleging that the petitioner or real party in interest has infringed the patent; or

(C) the petitioner or real party in interest moves the court to dismiss the civil action.

(3) TREATMENT OF COUNTERCLAIM.—A counterclaim challenging the validity of a claim of a patent does not constitute a civil action challenging the validity of a claim of a patent for purposes of this subsection.

(b) PATENT OWNER'S ACTION.—An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).

(C) JOINDER.—If the Director institutes an inter partes review, the Director, in his or her discretion, may

join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

(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.

(e) **ESTOPPEL.**—

(1) **PROCEEDINGS BEFORE THE OFFICE.**—The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, may not request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review.

(2) **CIVIL ACTIONS AND OTHER PROCEEDINGS.**—The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, may not assert either in a civil action arising in whole or in

part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review.

9. 35 U.S.C. 316 provides:

Conduct of inter partes review

(a) REGULATIONS.—The Director shall prescribe regulations—

(1) providing that the file of any proceeding under this chapter shall be made available to the public, except that any petition or document filed with the intent that it be sealed shall, if accompanied by a motion to seal, be treated as sealed pending the outcome of the ruling on the motion;

(2) setting forth the standards for the showing of sufficient grounds to institute a review under section 314(a);

(3) establishing procedures for the submission of supplemental information after the petition is filed;

(4) establishing and governing inter partes review under this chapter and the relationship of such review to other proceedings under this title;

(5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery shall be limited to—

(A) the deposition of witnesses submitting affidavits or declarations; and

(B) what is otherwise necessary in the interest of justice;

(6) prescribing sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding;

(7) providing for protective orders governing the exchange and submission of confidential information;

(8) providing for the filing by the patent owner of a response to the petition under section 313 after an inter partes review has been instituted, and requiring that the patent owner file with such response, through affidavits or declarations, any additional factual evidence and expert opinions on which the patent owner relies in support of the response;

(9) setting forth standards and procedures for allowing the patent owner to move to amend the patent under subsection (d) to cancel a challenged claim or propose a reasonable number of substitute claims, and ensuring that any information submitted by the patent owner in support of any amendment entered under subsection (d) is made available to the public as part of the prosecution history of the patent;

(10) providing either party with the right to an oral hearing as part of the proceeding;

(11) requiring that the final determination in an inter partes review be issued not later than 1 year after the date on which the Director notices the institution of a review under this chapter, except that the Director may, for good cause shown, extend the 1-year period by not more than 6 months, and may adjust the time periods in this paragraph in the case of joinder under section 315(c);

(12) setting a time period for requesting joinder under section 315(c); and

(13) providing the petitioner with at least 1 opportunity to file written comments within a time period established by the Director.

(b) CONSIDERATIONS.—In prescribing regulations under this section, the Director shall consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter.

(c) PATENT TRIAL AND APPEAL BOARD.—The Patent Trial and Appeal Board shall, in accordance with section 6, conduct each inter partes review instituted under this chapter.

(d) AMENDMENT OF THE PATENT.—

(1) IN GENERAL—During an inter partes review instituted under this chapter, the patent owner may file 1 motion to amend the patent in 1 or more of the following ways:

(A) Cancel any challenged patent claim.

(B) For each challenged claim, propose a reasonable number of substitute claims.

(2) ADDITIONAL MOTIONS.—Additional motions to amend may be permitted upon the joint request of the petitioner and the patent owner to materially advance the settlement of a proceeding under section 317, or as permitted by regulations prescribed by the Director.

(3) SCOPE OF CLAIMS.—An amendment under this subsection may not enlarge the scope of the claims of the patent or introduce new matter.

(e) EVIDENTIARY STANDARDS.—In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.

10. 35 U.S.C. 318 provides in pertinent part:

Decision of the Board

(a) FINAL WRITTEN DECISION.—If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d).

(b) CERTIFICATE.—If the Patent Trial and Appeal Board issues a final written decision under subsection (a) and the time for appeal has expired or any appeal has terminated, the Director shall issue and publish a certificate canceling any claim of the patent finally de-

terminated to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable.

* * * * *

11. 35 U.S.C. 319 provides:

Appeal

A party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) may appeal the decision pursuant to sections 141 through 144. Any party to the inter partes review shall have the right to be a party to the appeal.

No. 16-712

IN THE
Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,
Petitioner,
v.

GREENE'S ENERGY GROUP, LLC, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF FOR RESPONDENT
GREENE'S ENERGY GROUP, LLC**

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October 23, 2017

QUESTION PRESENTED

Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

The parties to the proceedings include those listed on the cover.

Greene's Energy Group, LLC ("Respondent" or "Greene's") is an independent, privately held company. Respondent has no parent corporation. No publicly held company owns 10% or more of Respondent's stock.

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Patent Act of 1836, Ch. 357, 5 Stat. 117	14, 19
Patent Act of 1870, 16 Stat. 198	19, 40, 41, 42
Patent Act of 1952, Pub. L. No. 593-950, 66 Stat. 792	14, 19, 42
37 C.F.R. § 1.56(a) (2000).....	4, 16
37 C.F.R. § 42.71(d).....	6
 ENGLISH STATUTES	
21 Jam. 1, ch. 3, § 1 (1623), <i>reprinted in</i> 4 Statutes of the Realm 1213 (1963).....	45

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 OTHER AUTHORITIES	
4 W. Holdsworth, <i>A History of English Law</i> (1924).....	44
7 W. Holdsworth, <i>A History of English Law</i> (1926).....	14, 15
157 CONG. REC. S952 (daily ed. Feb. 28, 2011).....	20, 21
157 CONG. REC. S1357-58 (daily ed. Mar. 8, 2011).....	20
157 CONG. REC. S1375 (daily ed. Mar. 8, 2011).....	24
157 CONG. REC. S1376 (daily ed. Mar. 8, 2011).....	21
Caleb Nelson, <i>Adjudication in the Political Branches</i> , 107 Colum. L. Rev. 559 (2007)...	37, 43
Christopher Beauchamp, <i>Repealing Patents</i> (Brooklyn Law School Legal Studies Research Paper No. 534, 2017)	51, 53
D. Seaborne Davies, <i>Early History of the Patent Specification</i> , 50 L. Q. Rev. 86 (1934).....	46
E. Wyndham Hulme, <i>Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794</i> , II 33 L. Q. Rev. 180 (1917).....	45

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Eric C. Cohen, <i>A Primer on Inter Partes Review, Covered Business Method Review, and Post-Grant Review before the Patent Trial and Appeal Board</i> , 24 Fed. Cir. B. J. 1 (2014).....	25
Greg Reilly, <i>The Constitutionality of Administrative Patent Cancellation</i> , 23 B. U. J. Sci. & Tech. L. 377 (2017)	46
H.R. Rep. No. 96-1307(I) (1980), <i>reprinted in</i> 1980 U.S.C.C.A.N. 6460	20
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H.R. Rep. No. 112-98 (2011).....	10, 32
Mark A. Lemley, <i>Why Do Juries Decide if Patents are Valid?</i> , 99 Va. L. Rev. 1673 (2013).....	<i>passim</i>
Oren Bracha, <i>Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909</i> (2016).....	45
U.S. Patent & Trademark Office, <i>Patent Trial and Appeal Board Statistics</i> (Dec. 31, 2016), available at https://goo.gl/h7Y4Yv	25
U.S. Patent & Trademark Office, <i>Table of Annual U.S. Patent Activity Since 1790</i> , (Mar. 17, 2016) available at https://goo.gl/wUnZXm	8, 25
U.S. Patent & Trademark Office, <i>Trial Statistics/ IPR, PGR, CBM/ Patent Trial and Appeal Board</i> (Sept. 2017) available at https://goo.gl/tmD8a3	25

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W.M. Hindmarch, A Treatise on the Law Relating to Patent Privileges for the Sole Use of Inventions (1846).....	45

OPINIONS AND ORDERS BELOW

The order denying panel rehearing and rehearing en banc (Pet. App. 37-38) is unreported. The panel order disposing of the case without opinion (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted at 639 F. App'x 639 (Fed. Cir. May 4, 2016). The opinion and order of the Patent Trial and Appeal Board ("PTAB") (Pet. App. 3-36) is not published in the *United States Patents Quarterly* but is available at 2015 WL 2089371 (PTAB May 1, 2015).

STATEMENT OF JURISDICTION

The court of appeals entered its order denying en banc rehearing on July 26, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 8 of the United States Constitution provides:

Congress shall have the power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Article III, Section 1 of the United States Constitution provides:

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which

shall not be diminished during their Continuance in Office.

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT

In passing the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 35 U.S.C. § 1 *et seq.* (2011) (“AIA”), Congress provided for *inter partes* review (“IPR”), an administrative mechanism intended to “protect the public’s ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)). Like its antecedents, IPR is a “specialized agency proceeding” according the United States Patent and Trademark Office (“PTO”) a “second look” at its own initial patentability decision. 136 S. Ct. at 2143-44.

Patent rights derive exclusively from federal statute, and Congress has given the PTO the sole authority to issue patents. The PTO examines patent applications and issues a patent if the statutory criteria for patentability are satisfied. IPR permits the PTO to perform limited post-issuance error-correction; that is, to determine whether the claims in a patent should

have issued in the first place. The PTO has long been empowered by Congress to review, post-issuance, its own initial patentability determinations, and such post-issuance error-correction forms an integral part of the patent regulatory scheme.

IPR allows a third party, like Greene's, to ask the PTO to reexamine its initial patentability decision and to cancel any challenged claims found unpatentable in light of prior art. 35 U.S.C. § 311(a). The "prior art" is the collective body of preexisting information in the categories listed in 35 U.S.C. § 102 (2000) (pre-AIA), and includes patents or printed publications that published more than one year before the U.S. patent application was filed. See, *e.g.*, 35 U.S.C. § 102(b) (2000). Prior art is generally considered information in the public domain. The AIA modified what constitutes prior art, but those changes do not impact this case.

IPR has two principal phases. In the pre-institution phase, a petition requesting IPR is filed, detailing the challenged claim, the grounds for the challenge, and the evidentiary support for the challenge. 35 U.S.C. § 312(a)(3). A patent holder has the option to file a preliminary response. § 313. The PTO, as gatekeeper, must determine whether to institute an IPR based on whether a petitioner has shown a reasonable likelihood it would prevail as to at least one of the claims in the petition. § 314(a).

In the post-institution phase, the PTO examines the patentability of challenged claims, applying the broadest reasonable construction. The PTO applies this same standard during prosecution of patent applications prior to issuance. *Cuozzo*, 136 S. Ct. at 2143. The post-institution process leads to a final written decision on the patentability of the instituted claims. See §§ 316, 318.

This case involves an IPR of U.S. Patent No. 6,179,053 (“the ’053 patent”), which names L. Murray Dallas (“Mr. Dallas”) as sole inventor. J.A. 1. The ’053 patent discloses a well tool described as being used to protect wellhead equipment during fracking, *i.e.*, “stimulation to enhance hydrocarbon flow and make or keep [oil and gas wells] economically viable.” J.A. 11. The original patent application leading to the ’053 patent was filed in the PTO on August 12, 1999. Based on the prior art that the PTO examiner evaluated at the time, the claims were found patentable and the PTO issued the ’053 patent on January 30, 2001.

Mr. Dallas is also identified as sole inventor in a Canadian published patent application, No. 2,195,118 (“Dallas ’118”). The Canadian patent office published that application on July 14, 1998. J.A. 18. Like the ’053 patent, Dallas ’118 discloses a well tool for protecting wellhead equipment during fracking operations. Because Dallas ’118 published more than one year before the ’053 patent application was filed, Dallas ’118 is prior art to the ’053 patent under 35 U.S.C. § 102(b) (2000) (pre-AIA). Pet. App. 20 n.5.

However, Dallas ’118 was never cited to the PTO during the original examination of the ’053 patent.¹ J.A. 1. Nor did the PTO independently locate Dallas ’118 during the original examination. In short, the PTO did not evaluate the patentability of claims 1 and 22 over Dallas ’118 before issuing the ’053 patent. See J.A. 1 (face of ’053 patent does not list Dallas ’118). As Greene’s IPR of the ’053 patent ultimately

¹ “Each individual associated with the filing and prosecution of a patent application has * * * a duty to disclose to the Office all information known to that individual to be material to patentability.” 37 C.F.R. § 1.56(a) (2000).

demonstrated, had the PTO evaluated Dallas '118 during the original examination, patent claims 1 and 22 would have never issued.

On December 3, 2013, Greene's petitioned for IPR, requesting that the PTO institute an IPR proceeding and find claims 1 and 22 of the '053 patent unpatentable (the "IPR Petition"). Greene's request was simple: the PTO should conduct a specialized agency proceeding to take a second look at its initial patentability determination because prior art demonstrated that its earlier grant of two claims in the '053 patent was in error. Pet. App. 4. Greene's IPR Petition explained why Dallas '118 anticipated (*i.e.*, rendered not novel) claims 1 and 22 of the '053 patent.² Pet. App. 4. Greene's IPR Petition targeted only two claims in the '053 patent, making no request as to the remaining 25 claims.

The Petitioner (Oil States Energy Services) filed a patent owner preliminary response, arguing that the IPR proceeding should not be instituted. Patent Owner Preliminary Response [IPR2014-00216, Doc. 8] available at <https://goo.gl/k6WrSB>. However, the PTO disagreed. In performing its gatekeeping function, the PTO found that Greene's established a reasonable likelihood that claims 1 and 22 of the '053 patent were unpatentable as anticipated by Dallas '118, and instituted the IPR. C.A. App. 36-56.

Following institution, Petitioner actively participated in the IPR proceeding, filing a patent owner

² The Dallas '053 patent refers to U.S. Patent No. 5,819,851 ("the '851 patent"), which has the same basic disclosure as Dallas '118. However, under section 102, the '851 patent is not prior art to the '053 patent. Pet. App. 20 n.5.

response (arguing claims 1 and 22 remained patentable), several supporting declarations, and an optional “motion to amend,” seeking to substitute claims 1 and 22 of the ’053 patent with new claims 28 and 29. Pet. App. 4. Greene’s opposed Petitioner’s motion to amend because, *inter alia*, the proposed amended claims were also not patentable over the prior art. Pet. App. 34-36.

While both parties submitted declarations to support their positions, and took depositions of certain declarants, neither party served any document requests, interrogatories, or requests for admissions; deposed non-declarants; or subpoenaed third parties. The PTO did not conduct a claim construction hearing, summary judgment proceeding, or pre-trial proceeding.

The PTAB held a short hearing where counsel presented argument but no live testimony. Rec. of Oral Hrg. 3 [IPR2014-00216, Doc. 52] available at <https://goo.gl/ozwp7f>. Thereafter, the PTAB rejected Petitioner’s claim construction position, and issued a final written decision holding claims 1 and 22 of the ’053 patent unpatentable as anticipated by Dallas ’118. Pet. App. 29. The PTAB explained in detail why Dallas ’118 rendered claims 1 and 22 of the ’053 patent unpatentable, *i.e.*, why they should have never issued in the first place. Pet. App. 20-29.

Rather than seek reconsideration by the PTAB, as permitted under 37 C.F.R. § 42.71(d), Petitioner appealed to the Court of Appeals for the Federal Circuit (“Federal Circuit”). In that appeal, Petitioner fully presented its claim construction and patentability positions. Pet. C.A. Br.

The Federal Circuit reviewed *de novo* the claim construction determination and affirmed the PTAB’s final written decision. Pet. App. 1-2. Petitioner sought

panel rehearing, or en banc rehearing, which the Federal Circuit denied. Pet. App. 37-38. Petitioner then petitioned the Court for certiorari.

SUMMARY OF ARGUMENT

Congress has plenary power under the Constitution to provide for patent monopolies of proper scope to “promote the Progress of Science and useful Arts.” U.S. Const. Art. I, § 8, cl. 8. Exercising this power, Congress has created by statute the patent right, and defined the nature, scope and limits of that right. *Deepsouth Packing Co., Inc. v. Laitram Corp.*, 406 U.S. 518 (1972). U.S. patent rights thus derive not from the common law, but exclusively from statutes enacted to advance a paramount public purpose. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1850). Moreover, patent rights are expressly granted “subject to” the power of Congress to define such rights. 35 U.S.C. § 261; *eBay, Inc. v. Mercexchange, LLC*, 547 U.S. 388, 392 (2006). The nature of U.S. patent rights, which Petitioner ignores out of necessity, is at the core of the constitutional question before the Court.

Congress has also adopted a comprehensive regulatory scheme for issuing patents. Congress created the PTO, a highly specialized administrative agency, granting it the exclusive authority to issue patents. As to patents, the PTO has one predominant objective: to issue valid patents. In furtherance of that objective, the PTO examines patent applications and is authorized to issue a patent only if the specific statutory criteria for patentability are satisfied. Of course, where the standards for patentability are not

met, a patent should not issue, and any patent issued in error cannot possibly create a legitimate property right in the holder.

The PTO, while proficient and diligent in advancing its core mission, is not perfect. Errors are made in the course of original examination and issuance of a substantial number of patents.³ Indeed, this case presents one such error. During the initial examination process, the PTO was unaware of prior art which rendered claims 1 and 22 of the '053 patent unpatentable. The less-than-fully informed PTO nonetheless granted the patent, and bestowed upon the recipient a federal monopoly cloaked in the presumption of validity.

To address this problem, and to ensure patent monopolies are “kept within their legitimate scope,” Congress long ago authorized the PTO to engage in limited, post-issuance error-correction. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). IPR is one such error-correction mechanism, allowing the specialized agency empowered to make the initial patentability determination a “second look” at its own decision. *Id.* at 2143-44. Thus IPR is an integral part of Congress’s regulatory framework for maintaining the proper scope of patent monopolies.

Petitioner asserts that the post-issuance patentability determinations made in an IPR are the exclusive province of Article III courts. But this assertion ignores fully that “the primary responsibility for sifting out

³ From 2012 to 2015 (the last full year of available statistics), the PTO received 2,282,639 applications for invention patents, and issued 1,130,075 such patents. U.S. Patent & Trademark Office, *Table of Annual U.S. Patent Activity Since 1790*, at 1 (Mar. 17, 2016) available at <https://goo.gl/wUnZXm>.

unpatentable material lies in the [PTO]. To await litigation is—for all practical purposes—to debilitate the patent system.” *Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966). Fortunately however, neither Article III nor the Seventh Amendment compel Petitioner’s untoward result.

Article III “does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court.” *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986). Indeed, the limited patentability questions presented in an IPR include nothing that “inherently or necessarily requir[e] judicial determination.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 453 (1929). Where, as here, “the claim at issue derives from a federal regulatory scheme, or * * * resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective,” the Court has applied the “public rights” doctrine, determining that Congress may in such circumstances assign adjudication to a non-Article III forum. *Stern v. Marshall*, 564 U.S. 462, 490 (2011). In applying this doctrine, “what makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action.” *Id.* at 490-91.

Accordingly, patent rights are public rights, that is, derived from a “federal regulatory scheme” and “integrally related to particular Federal Government action.” *Stern*, 564 U.S. at 490-91. See also *Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944) (patent a “grant of a special privilege”); cf. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting) (describing invention patents as “‘privileges’ or ‘franchises’ ‘which public authorities ha[ve] created purely for reasons of

public policy and which ha[ve] no counterpart in the Lockean state of nature”) (citation omitted). IPR is an administrative mechanism designed for “improving patent quality and providing a more efficient system for challenging patents that should not have issued.” H.R. Rep. No. 112-98, at 39-40 (2011). The reexamination of patentability determinations to correct errors made in the initial assessment is “closely intertwined with [the] federal regulatory program Congress has power to enact.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1989).

The patentability determinations made in an IPR bear no resemblance to the claims this Court addressed in *Stern, Granfinanciera*, and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982). Unlike those claims, which Congress had “nothing to do with,” *Stern*, 564 U.S. at 493, Congress has **everything** to do with IPR. Patent rights are created solely by Congress, the power to determine patentability and issue patents is given by Congress to the PTO, and the federal statutes provide the exclusive criteria for patentability. According to the PTO the limited ability to review its own patentability determination hardly constitutes the adjudication of a “[w]holly private” dispute. *Granfinanciera*, 492 U.S. at 51.

Moreover, despite Petitioner’s arguments to the contrary, IPR differs fundamentally from litigation. Indeed, the Court in *Cuozzo* noted IPR has a different “purpose” and is not like litigation, but rather “more like a specialized agency proceeding.” 136 S. Ct. at 2143. In an IPR, there is no adjudication of liability as between private parties, nor any award of damages. The PTO simply determines whether it made a mistake when issuing the challenged patent claims. The issue has not been “removed” from federal court as

Petitioner suggests (Pet. Br. 14); Congress has simply determined certain patentability questions need not arrive there in the first place.

Petitioner's reliance on Nineteenth Century precedent is unavailing. All the cited cases were decided based on the patent statutes as they existed at the time and not on Article III or the Seventh Amendment. See, e.g., *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606 (1898).

English tradition is equally unavailing. First, the historical record is less than clear. Moreover, to the extent there is any clarity, it favors the constitutionality of IPR. But in all events, the Court should decline Petitioner's invitation to disregard constitutionally established congressional primacy over U.S. patents based on a hazy historical record.

In sum, Article III does not preclude Congress from authorizing the PTO to correct its own errors through a limited, post-issuance administrative proceeding.

The Seventh Amendment likewise presents no impediment to IPR. Where Congress may appropriately assign the limited, post-issuance patentability questions presented in an IPR to a non-Article III forum, the Seventh Amendment "poses no independent bar." *Granfinanciera*, 492 U.S. at 53-54. Moreover, even if the Court considers the Seventh Amendment analysis, an IPR is not a suit at common law, does not adjudicate a "legal claim," and entails no possible award of damages. The patentability questions presented in an IPR have no English common-law analogues and any "relief" granted is purely equitable in nature and serves the general public.

ARGUMENT**I. PATENT RIGHTS EMANATE SOLELY FROM FEDERAL STATUTE.**

The nature of the right at issue is central to the Court's determination of the question presented. Congress has plenary authority to create and regulate patents, and U.S. patents have always emanated solely from federal statute. Petitioner's assertion that patents are "common law, private property," (Pet. Br. 3), is incorrect. Patent rights are created solely by Congress to promote a paramount public purpose. Congress alone defines the parameters of the patent rights bestowed on an inventor, and establishes both substantive and procedural limits on the access to and exercise of those rights. Petitioner's argument contravenes the origin, purpose, nature, and limits of patent rights. Petitioner asks the Court to deprive Congress of the power to create an administrative mechanism designed to promote the core purpose of the patent laws, namely, to ensure only valid patent claims are granted the statutory monopoly.

A. Congress Has Plenary Power to Promote Useful Arts.

The Constitution delegates to Congress the sole, discretionary, and permissive power to secure exclusive rights to inventors. U.S. Const. Art. I, § 8, cl. 8. Congress decides the nature and scope of any such exclusive rights for limited times, whether through patents or otherwise. See *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510-11, 517 (1917) (Congress is "the source of all rights under patents"). The Article I grant is "permissive," meaning that nothing in the Constitution requires giving exclusive rights to inventors for their discoveries.

Deepsouth Packing Co., Inc. v. Laitram Corp., 406 U.S. 518, 530 (1972). Thus, Congress has broad authority to create the patent right, to define the contours of that right, and to establish the conditions attached to the grant of that right. *Id.* (“[T]he sign of how far Congress has chosen to go can come only from Congress.”).

Petitioner argues that patents existed in the United States before the Constitution, suggesting erroneously that U.S. patents derive from common law rights. See Pet. Br. 3, 34-35. But U.S. patents derive entirely from federal statute:

The [patent] monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.

Gayler v. Wilder, 51 U.S. (10 How.) 477, 494 (1850); see also *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923) (“Patent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment.”). The patent right is created exclusively through the statutory monopoly, and has no separate existence. See *Gayler*, 51 U.S. at 493-94.

In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 592 (1834), this Court rejected the notion that patent rights predated the Constitution at common law. Construing Article I, Section 8, the Court observed

the word *secure*, as used in the constitution, could not mean the protection of an

acknowledged legal right. It refers to inventors * * * and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

33 U.S. (8 Pet.) at 661. See also *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 195 (1856) (“the right of property which a patentee has in his invention * * * is derived altogether from these statutory provisions” and “his rights are to be regulated and measured by these laws, and cannot go beyond them”).

Pursuant to its constitutional authority, Congress enacted comprehensive patent legislation, beginning with the Patent Act of 1790 (“1790 Act”), defining the patent right and authorizing the Executive Branch to issue patents based on specified criteria. Patent Act of 1790, § 1, 1 Stat. 109. Since 1790, Congress has enacted numerous Patent Acts, including the Patent Act of 1793, the Patent Act of 1832, the Patent Act of 1836, the Patent Act of 1952 (“1952 Act”), Act to Amend the Patent and Trademark Laws of 1980, American Inventors Protection Act of 1999 (“AIPA”), and the AIA in 2011. U.S. patent rights derive solely from these statutes, not from the common law. The patentability determinations made in an IPR are therefore not “the stuff of the traditional actions at common law.” Pet. Br. 15. See *Crown Die & Tool*, 261 U.S. at 40; *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting) (“Notwithstanding a movement to recognize a ‘core’ property right in inventions, the English common law placed patents squarely in the final category, as franchises that ‘depend upon express legislation,’ and ‘hath [their] essence by positive municipal law.’”) (quoting 7 W.

Holdsworth, *A History of English Law* 479 n.7, 480 & n.4, 497 (1926)).

A patent does not give an inventor affirmative rights to make, sell, or use a patented invention. Instead, it provides a right to exclude others via a federally issued monopoly. See, e.g., *Crown Die & Tool*, 261 U.S. at 36-37 (“Government is not granting the common law right to make, use and vend,” but the statutory right to “exclude others.”); 35 U.S.C. § 154(a)(1) (“Every patent shall contain * * * a grant to the patentee * * * of the right to exclude others from making, using, offering for sale, or selling the invention.”); *Motion Picture Patents*, 243 U.S. at 510 (patents “restrain others from manufacturing, using or selling that which [the patent holder] has invented”). “In granting a patent, the Government is acting * * * as a sovereign bestowing upon the inventor a right to exclude the public at large from the invention marked out by his claims.” *Teva*, 135 S. Ct. at 848 (Thomas, J., dissenting).

As an exception to an otherwise free market, Congress may not “enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby.” *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). Congress also may not authorize patents “whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” *Id.*; see also *Lear, Inc. v. Adkins*, 395 U.S. 653, 663-64, 670 (1969) (“Surely the equities of the [patentee/]licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain” and “[i]t is as important to the public that competition should not be repressed by worthless

patents as that the patentee of a really valuable invention should be protected in his monopoly.”) (citation omitted); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (restriction of patent monopolies “paramount”); *Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944) (“protection of the public in a system of free enterprise * * * nullifies a patent where any part of it is invalid”). Unpatentable claims reflect knowledge that is and should remain freely available to the public.

While Petitioner asserts a patent is “emphatically a private property right,” (Pet. Br. 16), the rights embodied in a patent are instead public, granted to promote the paramount public purpose of the progress of science and useful arts. *Mercoïd*, 320 U.S. at 665 (“public interest * * * is dominant in the patent system”). See also 37 C.F.R. § 1.56(a) (2000) (“A patent by its very nature is affected with a public interest.”). Any benefit accorded the individual inventor is subservient to this overriding public purpose. See, e.g., *Quanta Computer, Inc. v. LG Elects., Inc.*, 553 U.S. 617, 626 (2008) (purpose “not the creation of private fortunes for the owners of patents but is ‘to promote the progress of science and useful arts’”) (quoting *Motion Picture Patents*, 243 U.S. at 511). Congress created IPR to advance this paramount public purpose by reducing the prevalence of invalid monopolies. Thus the nature of the patent right, which Petitioner ignores out of necessity, authorizes Congress to provide for limited post-issuance patentability determinations by the PTO.⁴

⁴ At the very least, patents are quasi-private rights, that is, “statutory entitlements * * * bestowed by the government on individuals.” *B & B Hardware v. Hargis Indus.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (citation omitted). Either

**B. Patent Rights Are Granted “Subject To”
the Power of Congress.**

Petitioner ignores the key language in the Patent Act limiting the property interest conferred by Congress to an inventor in the form of a patent. The Act provides: “*Subject to the provisions of this title*, patents shall have the attributes of personal property.” 35 U.S.C. § 261 (emphasis added). In quoting section 261, Petitioner omits this limitation that long pre-dates the application for the ’053 patent. Pet. Br. 27-28. But the phrase “subject to” is a potent modifier, expressly qualifying a patent’s “attributes of personal property.” § 261; see also *eBay, Inc. v. Mercexchange, LLC*, 547 U.S. 388, 392 (2006) (noting the statutory limitation). Thus, an applicant has no property right to receive or retain a patent that fails the statutory standards. A patent issued in error cannot possibly create a legitimate property right. Further, such a patent does not transform into a legitimate property right simply because the error might be revealed in a limited, post-issuance review process conducted by the very agency that issued the patent in the first place.

Moreover, an inventor need not seek patent protection and can protect her invention in other ways (*e.g.*, as a trade secret such as the formula for Coca-Cola®). But should an inventor seek voluntarily to obtain the government-granted monopoly rights embodied in a patent, she does so knowing any such rights are “subject to” Congress’s power to define the parameters and to adopt procedures to correct error. Thus the PTO power to engage in post-issuance error-correction inheres in every issued patent.

way, the rights granted remain subject to the power of Congress, and subservient to the paramount public purpose.

II. CONGRESS IS AUTHORIZED TO PROVIDE FOR POST-ISSUANCE ERROR-CORRECTION.

IPR simply provides a mechanism by which the PTO can correct its own initial mistake. As this Court has determined, IPR is a “specialized agency proceeding” the purpose of which is to allow the PTO to “reexamine an earlier agency decision.” *Cuozzo*, 136 S. Ct. at 2143-44. Moreover, IPR has a narrow scope, limited to consideration of only grounds that “could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications,” and incorporating several procedural protections for the patent owner. 35 U.S.C. §§ 311, 315.

A. IPR Is a Permissible Post-Issuance Error-Correction Mechanism.

Congress has provided several post-issuance error-correction mechanisms empowering the administrative agency that initially assessed patentability to reexamine issued patents and correct or cancel them where appropriate. *Cuozzo*, 136 S. Ct. at 2137 (“For several decades, the Patent Office has also possessed the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed.”). As Congress has refined the process over the years, the fundamental question of whether a patent should have issued in the first place has remained constant.

Reissue is an early post-issuance error-correction mechanism, codified in the Patent Act of 1832. See § 3, 4 Stat. 559; *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 242-43 (1832) (finding that, even before the 1832 Act, the Department of State, the entity issuing the patent, could correct a defect in that patent post-

issuance).⁵ In a reissue, the patent owner requests that the patent-granting authority—today the PTO—correct a defective patent. See Patent Act of 1836, Ch. 357, § 13, 5 Stat. 117. One such defect is the patentee claiming as her invention more than she had a right to claim as new. *Id.*; *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 609-10 (1898) (citing Patent Act of 1870, § 53, 16 Stat. 198). In a reissue, the patentee requests that the original issuing administrative agency, *e.g.*, the PTO, change the patent to correct the specified defect. Reissue practice continues today. 35 U.S.C. § 251.

Another post-issuance error-correction mechanism, evolving from the 1800's, is an interference proceeding. Beginning in 1836, the Commissioner could decide whether a patent application interfered with (that is, claimed the same invention as) “any unexpired patent which shall have been granted” to determine priority of invention. See Patent Act of 1836, § 8. The losing inventor had a remedy by bill in equity. *Id.* § 16. The 1952 Act authorized the PTO to cancel patent claims. 35 U.S.C. § 135 (1952) (final judgment of the Board “shall constitute cancellation of the claims”).

Congress further expanded post-issuance error-correction in 1980, creating *ex parte* reexamination. This procedure gives “the Patent Office * * * the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed.” *Cuozzo*, 136

⁵ In *Grant*, the Court reasoned that “[i]f the mistake should be committed in the department of state, no one would say that it ought not to be corrected. All would admit that a new patent, correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued.” 31 U.S. (6 Pet.) at 242.

S. Ct. at 2137. *Ex parte* reexaminations allow third parties to request that the PTO reexamine an issued patent based on prior art. Third parties with historical background and expertise in the same subject matter often locate important prior art the PTO does not locate during the initial examination process. Cf. *Lear*, 395 U.S. at 670 (“[T]he Patent Office is often obliged to reach its [initial] decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity.”). Congress considered it critical that the PTO have the ability to reexamine issued patents. See *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 601 (Fed. Cir. 1985). Congress expected that *ex parte* reexamination would keep strong patents in the system while removing illegitimate ones, thereby helping “restore confidence in the effectiveness of our patent system.” H.R. Rep. No. 96-1307(I), at 3 (1980), reprinted in 1980 U.S.C.C.A.N. 6460, 6462-63.

Recognizing weaknesses in prior reexamination procedures, including limited third-party participation and the third party’s inability to appeal the PTO’s decision, in the 1999 AIPA, Congress expanded reexamination to include *inter partes* reexamination. *Inter partes* reexamination afforded third parties a greater opportunity to participate in the proceeding. See 35 U.S.C. § 314 (2000); H.R. Rep. No. 106-287, at 59 (1999) (discussing same). The third party requester also received certain appeal rights. 35 U.S.C. § 315(b) (2000).

Congress yet further improved reexamination through IPR, an “inter partes reexamination expansion,” (157 CONG. REC. S1357-58 (daily ed. Mar. 8, 2011) (statement of Sen. Hatch)), intended to “improve the current inter partes administrative process for

challenging the validity of a patent.” 157 CONG. REC. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley).⁶ Congress also mandated that IPRs would be decided within one year from institution, seeking to remedy the problem of lengthy *inter partes* reexamination proceedings, which usually last three to five years. 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl). Congress also believed that IPR would remedy another flaw of *inter partes* reexamination—the possibility of serial challenges—because the PTO can reject IPR petitions that raise the same or substantially the same prior art or arguments previously presented to the PTO with respect to the patent. 35 U.S.C. § 325(d); 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

In *Cuozzo*, this Court determined the purpose of IPR is the same as reexamination, namely, “to reexamine an earlier agency decision.” 136 S. Ct. at 2144. Petitioner tacitly concedes the constitutionality of *ex parte* reexamination and *inter partes* reexamination. See Pet. Br. 5-7, 49-50. Yet there is no principled basis for a different constitutional result as to IPR. Congress has modified the process, but not the power. Like IPR, *ex parte* and *inter partes* reexamination authorize post-issuance error-correction by the PTO of an initial patentability determination, do not accord the challenged claims any presumption of validity, and construe those claims using the broadest reasonable

⁶ The AIA provides several post-issuance error-correction mechanisms. For patents that are up to nine months old, it provides for “post-grant review” by the PTAB. 35 U.S.C. § 321(c). For older patents, it provides for IPR. § 319. For certain patents, it provides for Covered Business Method review. AIA § 18, 125 Stat. 329.

construction.⁷ Petitioner argues, without authority, that increased participation in an IPR by third parties and the conduct of the proceedings somehow cross the constitutional line. Pet. Br. 6-8, 50. But, in “chang[ing] the name from ‘reexamination’ to ‘review,’ [there is nothing to indicate] Congress wanted to change its basic purposes, namely, to reexamine an earlier agency decision.” *Cuozzo*, 136 S. Ct. at 2144. Rather, Congress determined the patent system, and therefore the public, would benefit if the PTO received more developed input from third parties.

B. IPR Is a Limited and Specialized Agency Proceeding.

1. IPR Is Narrow in Scope.

IPR decides only the patentability of individual patent claims. IPR does not decide infringement,⁸ damages, inequitable conduct, ownership, and/or a host of other patent issues. The PTO reviews its initial patentability determination to assess whether it had erroneously found that the claims presented in the application process were patentable.

Even as to patentability, IPRs concern only a limited subset of issues. During the initial examination of a patent application, the PTO generally considers numerous patentability issues, including prior art that may exist in many forms (*i.e.*, patents, publications, prior sales, public knowledge, and earlier invention materials by others); patent eligibility (35 U.S.C.

⁷ This standard differs from the “ordinary meaning” standard applied when district courts assess validity.

⁸ Throughout its brief, Petitioner merges the concepts of validity and infringement (*e.g.*, Pet. Br. 2, 23-24). But IPR does not involve or adjudicate infringement claims.

§ 101); anticipation/novelty (§ 102); obviousness (§ 103); and specification requirements, such as written description and indefiniteness (§ 112). By contrast, an IPR petition may request to cancel one or more claims “only on a ground that could be raised under section 102 or section 103 and only on the basis of prior art consisting of patents or printed publications.” § 311.

The IPR process also includes important procedural safeguards that protect patent owners, imposing greater restrictions on third parties as compared to *ex parte* reexamination. *First*, a challenger may not file an IPR petition if that challenger filed a civil action challenging the validity of the same patent. 35 U.S.C. § 315(a). *Second*, a challenger may not file an IPR petition more than one year after it has been served with a complaint alleging infringement of the patent at issue. § 315(b). *Third*, if the PTAB issues a final written decision in an IPR proceeding, certain estoppels apply against the petitioner. Thus, the petitioner may not “request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that [IPR].” § 315(e)(1). In addition, the petitioner may not “assert either in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that [IPR].” § 315(e)(2).

2. IPR Is Not Litigation or Inherently Judicial.

Despite Petitioner’s claims otherwise (Pet. Br. 8-10, 17, 20-22), IPR differs fundamentally from private party litigation, both in form and purpose. In *Cuozzo*,

a case ignored completely by Petitioner, this Court rejected similar arguments, holding that IPR “is less like a judicial proceeding and more like a specialized agency proceeding.” 136 S. Ct. at 2143. The Court noted several distinctions: (1) initiating parties need not have a stake in the outcome or even standing, (2) the PTO may continue an IPR even after the initiating party has settled, (3) the PTO may intervene in a later *judicial* proceeding to defend its decision, even where private challengers settle or drop out, and (4) the burden of proof in an IPR is different from that in district court. *Id.* at 2143-44. Also unlike in district court, in IPR the patent owner may make one “motion to do just what he would do in the examination process, namely, amend or narrow the claim” (*i.e.*, modify what is adjudicated). *Id.* at 2145 (citing 35 U.S.C. 316(d)). “[T]hese features, as well as *inter partes* review’s predecessors, indicate that the purpose of the proceeding is not quite the same as the purpose of district court litigation.” *Id.* at 2144.

Additionally, unlike filing a complaint in district court (initiating suit), an IPR petitioner must *ask* the PTO to institute an IPR. The PTO may only do so if it determines there is a reasonable likelihood the petitioner will prevail (*i.e.*, demonstrate unpatentability) on at least one claim. 35 U.S.C. § 314; see 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“petitioners [must] present information that creates serious doubts about the patent’s validity”). The PTO thus plays a significant gatekeeping role with no analogue in district court lawsuits. PTO statistics demonstrate that, as of December 31, 2016, the PTO rejected close to 30% of IPR petitions before

institution, *i.e.*, 1171 out of 4054 “completed” IPR petitions.⁹

Petitioner also argues IPR uses common litigation terms like “discovery” and “trial.” Pet. Br. 21. But “discovery” in an IPR is unlike discovery in district court. In the latter, Federal Rule 26 provides for broad discovery. Fed. R. Civ. P. 26(b)(1). In IPR, discovery is limited. 35 U.S.C. § 316(a)(5). Moreover, IPR “trials” are short hearings, almost never involving live witnesses. See Eric C. Cohen, *A Primer on Inter Partes Review, Covered Business Method Review, and Post-Grant Review before the Patent Trial and Appeal Board*, 24 Fed. Cir. B. J. 1, 5 n.40 (2014) (noting that in the first two years of IPRs, the Board allowed live testimony once).

Further, in an IPR the PTO has an independent ability to ensure statutorily granted monopolies remain within their legitimate scope. While Petitioner stresses that parties in an IPR can settle their dispute “at any time,” (Pet. Br. 21), it ignores that, unlike litigation, where a settlement usually ends a lawsuit, in an IPR, the PTAB can proceed to issue a final

⁹ U.S. Patent & Trademark Office, *Patent Trial and Appeal Board Statistics*, at 10 (Dec. 31, 2016) available at <https://goo.gl/h7Y4Yv>. Petitioner claims the PTAB acts as a patent “death squad” (Pet. Br. 48), but the data indicate otherwise. Since passage of the AIA through September 30, 2017, a total of 6,955 IPR petitions have been filed (not all completed), and the PTAB has issued 1,440 final written decisions finding some or all of the challenged claims unpatentable. See U.S. Patent & Trademark Office, *Trial Statistics/IPR, PGR, CBM/Patent Trial and Appeal Board*, at 3, 11 (Sept. 2017) available at <https://goo.gl/tmD8a3>. This compares to the 1,130,075 invention patents granted just between 2012 and 2015. U.S. Patent & Trademark Office, *Table of Annual U.S. Patent Activity Since 1790*, at 1 (Mar. 17, 2016) available at <https://goo.gl/wUnZXm>.

written decision even after the parties seek termination. 35 U.S.C. § 317(a); see also *Cuozzo*, 136 S. Ct. at 2144 (citing § 317(a)).

Finally, the limited patentability questions presented in an IPR proceeding include nothing that “inherently or necessarily requir[e] judicial determination.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 453 (1929). IPR targets specific, individual claims in a patent on the narrow basis of obviousness or anticipation/novelty over the prior art. Like the initial examination process, the PTAB applies the same patentability criteria to the claims construed based on the same broadest reasonable construction standard, and no presumption of validity is accorded the challenged claims. These characteristics demonstrate IPR is truly a “second look,” not an Article III adjudication. See *Cuozzo*, 136 S. Ct. at 2144.

III. IPR DOES NOT VIOLATE ARTICLE III.

Article III provides that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. Art. III, § 1. But Article III “does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court.” *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986). “Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts,” and “the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decision-making authority in tribunals that lack the attributes of Article III courts.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); see also *Palmore*

v. *United States*, 411 U.S. 389, 407 (1973) (“[n]either [the Supreme] Court nor Congress has read the Constitution as requiring every federal question arising under the federal law * * * to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction.”).

Where, as here, Congress has exercised its plenary authority to delegate to a non-Article III forum the adjudication of a “particularized area of law,” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982), the Court has, as Petitioner acknowledges (Pet. Br. 27), recognized application of the “public rights” doctrine. *Stern v. Marshall*, 564 U.S. 462 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Schor*, 478 U.S. 833; *Thomas*, 473 U.S. 568; *N. Pipeline*, 458 U.S. 50; *Crowell v. Benson*, 285 U.S. 22 (1932); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (“congress may or may not bring [certain matters] within the cognizance of the courts of the United States, as it may deem proper”).

In *Stern*, the Court determined the public rights doctrine applies in “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency’s authority.” 564 U.S. at 490. Thus, “what makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action.” *Id.* at 490-91. See also *Granfinanciera*, 492 U.S. at 54 (public rights include “seemingly ‘private’ right[s] that [are] so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary”) (citation

omitted). The Court contrasted between suits that were “quintessentially suits at common law,” where the doctrine has not been applied, and those that “flow from a federal statutory scheme,” where it has been applied. *Stern*, 564 U.S. at 492-93 (citing *Granfinanciera*, 492 U.S. at 54-56; *Thomas*, 473 U.S. at 584-85; *Atlas Roofing v. Occupational Safety & Health Comm’n*, 430 U.S. 442, 458 (1977)). The Court has also made clear the government need not be a party for the doctrine to apply.¹⁰ *Stern*, 564 U.S. at 490. See also *Thomas*, 473 U.S. at 586-87 (noting that in *Crowell*, the fact that an adjudication “clearly concern[ed] obligations among private parties, * * * did not make the scheme invalid under Article III”).

This Court has also eschewed bright-line tests in determining whether a given congressional delegation of adjudicative functions to a non-Article III body is within its powers. See *Schor*, 478 U.S. at 857. The “inquiry, in turn, is guided by the principle that ‘practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.’” *Id.* at 847-48 (quoting *Thomas*, 473 U.S. at 587). In conducting such inquiry, “due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.” *Schor*, 478 U.S. at 857. In assessing those practical consequences, the Court in *Schor* weighed

¹⁰ Petitioner’s argument (Pet. Br. 30) to the contrary is thus unavailing. Moreover, as developed herein, while not a “party,” the government has an interest in the patentability question presented in an IPR, as the adjudication impacts directly the relationship between the government and the patentee, determining whether the patentee meets the requirements to hold a federal monopoly.

various factors to determine whether agency adjudication of a claim “impermissibly threatens the institutional integrity of the Judicial Branch.” *Id.* at 851. The Court listed various factors for making the determination:

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. The Court further analyzed whether the parties consented to the administrative forum and the nature of the available judicial review. See *id.* at 852, 855. In applying the factors, the Court concluded that, even though the cause of action was a pure state law claim to recover debit balances, *id.* at 838, its initial adjudication by an administrative agency did not contravene separation of powers principles or Article III. *Id.* at 856-57.

A. IPR Adjudicates Public Rights.

In adopting IPR, “Congress devised an ‘expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.’” *Stern*, 564 U.S. at 494 (quoting *Crowell*, 285 U.S. at 46-47). IPR is a narrow procedural mechanism Congress has chosen to enable the PTO to correct its own patentability determination errors, thereby “improv[ing] patent quality and restor[ing] confidence in the presumption

of validity that comes with issued patents.” *Cuozzo*, 136 S. Ct. at 2140 (quoting legislative history). Determining patentability in an IPR is therefore “integrally related to particular Federal Government action.” *Stern*, 564 U.S. at 490-91.

1. The Claims at Issue in IPR Derive Solely from a Federal Regulatory Scheme.

As discussed, (pp. 12-17, *supra*), patent rights emanate solely from federal statute and are expressly granted “subject to” the power of Congress to define those rights. Patent rights are therefore public rights, derived from a “federal regulatory scheme.” *Stern*, 564 U.S. at 490. See also *Mercoïd*, 320 U.S. at 665 (patent is “grant of a special privilege ‘to promote the Progress of Science and useful Arts.’”); cf. *Teva*, 135 S. Ct. at 848 n.2 (Thomas, J., dissenting) (describing invention patents as “‘privileges’ or ‘franchises’ ‘which public authorities ha[ve] created purely for reasons of public policy and which ha[ve] no counterpart in the Lockean state of nature’”) (citation omitted).

As this Court has recognized, Congress has created a federal patent system that seeks “a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989). The core of the regulatory scheme involves extensive statutory conditions that govern when an inventor is entitled to a patent. *Id.* at 156. Beyond these substantive statutory criteria, Congress’s regulatory scheme for granting patents includes the fees for filing and examination, formal requirements for applications, and how examination of applications is to be conducted. 35

U.S.C. §§ 41, 111-113, 115, 131-133. Indeed, Congress has established an entire agency, the PTO, whose core function is to determine patentability.

Complementing the authority it gives to the PTO to make initial patentability determinations, Congress also authorized the PTO to conduct certain post-issuance error-correction procedures to ensure further the validity of the patent monopolies granted. Some post-issuance procedures take a second look at the initial administrative act to grant a patent, namely *ex parte* reexamination, *inter partes* reexamination, and IPR. Thus, IPR is an integral part of the federal regulatory scheme of patent rights. Allowing the PTO to engage in post-issuance error-correction of its own initial decisions is essential to the regulatory scheme of granting valid patent monopolies.

An IPR determination involves the core elements of Congress's broad power over patents. To issue a patent, Congress's scheme requires that the PTO examine patent claims and determine patentability. Reevaluating patentability to correct errors made in that initial assessment is "closely intertwined with [the] federal regulatory program Congress has power to enact." *Granfinanciera*, 492 U.S. at 55. See also *id.* (noting that challenged provision involves public rights because "the dispute arises in the context of a federal regulatory scheme that virtually occupies the field") (citing *Thomas*, 473 U.S. at 600 (Brennan, J., concurring in the judgment)).

Taking Petitioner's assertion to its logical extent, the moment the PTO issues a patent, it loses the ability to correct its own errors regarding its own initial patentability determination. Thus, even where, as here, the PTO's error is due to the omission or failure by a patent applicant during the examination process,

an otherwise invalid patent may still be enforced. A patent issued in error will carry a “presumption of validity” and the holder will enjoy the statutory monopoly against ideas that should be open to free competition. This result contravenes the fundamental purpose of the congressional regime, the public interest, and this Court’s precedent. See *Lear*, 395 U.S. at 656 (the Court’s decisions emphasize “the strong federal policy favoring free competition in ideas which do not merit patent protection”).

2. IPR Determinations Are Essential to a Limited Regulatory Objective.

As to patents, the PTO has one paramount regulatory objective: to issue valid patents. IPR advances that core mission, providing a mechanism for the PTO to take “a second look” and to ensure patent monopolies are valid. *Cuozzo*, 136 S. Ct. at 2144. In *Cuozzo*, this Court reviewed the AIA’s legislative history and ruled that it was an “important congressional objective [to] giv[e] the Patent Office significant power to revisit and revise earlier patent grants.” *Cuozzo*, 136 S. Ct. at 2139-40.

Petitioner asserts post-issuance error-correction must be litigated in an Article III court. Pet. Br. 19-20. But Congress and the Court have both recognized that litigation is an imperfect instrument for ensuring patent monopolies are legitimate. Patents issued in error contravene the public interest. Congress therefore “designed [IPR] to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” H.R. Rep. No. 112-98, at 40. The PTO, not the courts, has “the primary responsibility for sifting out unpatentable material, * * * [t]o await

litigation is—for all practical purposes—to debilitate the patent system.” *Graham*, 383 U.S. at 18.

Petitioner would handcuff Congress, leaving all post-issuance patentability determinations to be resolved through litigation. But then only those with Article III standing and sufficient resources will be able to litigate patentability in the courts. This will “debilitate” the patent system, preventing Congress from achieving its stated goals in passing the AIA. The Court should accept congressional findings about why the AIA was necessary and why the mechanism chosen was an effective way to solve the identified problem. See *Brown*, 60 U.S. at 197 (“We think [patent] laws ought to be construed in the spirit in which they were made—that is, as founded in justice”); *Grant*, 31 U.S. (6 Pet.) at 241-42 (same).

In other circumstances where Congress has deemed administrative adjudication essential to the success of a federal regulatory scheme, this Court has upheld such adjudication as within Congress’s Article I powers. In *Thomas*, 473 U.S. at 571, this Court upheld the binding arbitration scheme created by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). The Court observed that the arbitration scheme was in response to the “near disaster” of earlier FIFRA provisions, focusing on the “obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.” *Id.* at 590 (citation omitted). The Court looked at both the “nature of the right at issue” and “the concerns motivating the Legislature.” *Id.* IPR likewise serves an important public purpose and represents Congress’s legislative response

to its growing concern over the quality of U.S. patents, for which then-existing administrative mechanisms had been inadequate. As in *Thomas*, Congress revisited earlier legislation that had proven insufficient.

Likewise in *Schor*, the CFTC, pursuant to its statutory authority, created a process allowing customers of brokers to seek reparations before that Agency for alleged violations of the Commodities Exchange Act. The Court emphasized that the CFTC, “like the agency in *Crowell*, deals only with a ‘particularized area of law’” and contrasted this with the 1978 Bankruptcy Act, which was found unconstitutional in *Northern Pipeline*, because it gave bankruptcy courts jurisdiction broadly over “‘all civil proceedings arising under title 11 or arising in or *related to* cases under title 11.’” 478 U.S. at 852-53 (quoting 28 U.S.C. § 1471(b)).

So here, the PTO regulates a “particularized area of law” and IPR addresses directly the core task of the PTO, namely, determining patentability. “It would be odd indeed if Congress could not authorize the PTO to reconsider its own decisions.” *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1291 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 292 (2016).

3. IPR Patentability Determinations Bear No Resemblance to the Claims in *Stern*, *Granfinanciera*, and *Northern Pipeline*.

An IPR adjudication bears no resemblance to the adjudications this Court evaluated in *Stern*, *Granfinanciera*, and *Northern Pipeline*. In each case, an Article I tribunal had adjudicated state law claims between private parties, one of which had not consented to the forum’s jurisdiction. In *Stern*, the state law claim was for tortious interference; in *Granfinanciera*,

for fraudulent transfer; and in *Northern Pipeline*, for breach of contract. Each such claim originated in the common law, not from a federal statutory scheme. The resolution of these claims was “not completely dependent upon adjudication of a claim created by federal law.” *Stern*, 564 U.S. at 493 (citation omitted). They did not “depend on the will of Congress.” *Id.* (citation omitted). In short, “Congress ha[d] nothing to do with” the claims involved in *Stern*, *Granfinanciera*, and *Northern Pipeline*. *Id.*

By contrast, Congress has **everything** to do with the adjudication of patentability in an IPR. The patent rights Congress grants do not supplant any common law rights.¹¹ Rather, the rights at issue are created solely by federal statutes Congress enacted pursuant to a specific plenary grant of constitutional authority. Congress has given the power to grant patent rights solely to the PTO, and the federal statutes and associated regulatory scheme provide the exclusive criteria for patentability. Even the relationship between the participants in an IPR derives exclusively from the congressional framework. Providing the agency empowered to grant the rights in question a “second look” at its own decision hardly qualifies as the adjudication of a “[w]holly private tort, contract, [or] property” dispute between private parties. *Granfinanciera*, 492 U.S. at 51 (quoting *Atlas Roofing*, 430 U.S. at 458). See also *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1280 (10th Cir. 2015) (contrasting “prototypical public rights disputes [which] arise from ‘federal statutory scheme[s]’ [and] ‘quintessential[]’ private rights disputes [which]

¹¹ Petitioner’s claim that Congress could bypass Article III through the “mere creation of a[ny] right by federal statute” is therefore a *non-sequitur*. Pet. Br. 35.

involve common law rights affecting personal life, liberty, or property”).

Additionally, IPR does not adjudicate “liability of one individual to another under the law.” *Crowell*, 285 U.S. at 51. IPR determines, based on very narrow grounds, whether a patentee remains entitled to the statutory right granted by the government. Put another way, IPR resolves only the question whether issuance of the patent was a mistake (*i.e.*, whether the initial patent grant should have occurred in the first place). This determination involves the rights as between the government, as issuer, and the patentee, as holder. While this determination may impact a private dispute, it does not constitute an adjudication of private rights solely between private parties, *i.e.*, liability for injury in tort, *Stern*, for fraudulent transfer, *Granfinanciera*, or for breach of contract, *Northern Pipeline*.

In an IPR, a third party stands to gain nothing more than what is provided to the public, that is, “free access to materials already available.” *Graham*, 383 U.S. at 6. So here, Petitioner was not found “liable” to Greene’s—or to anyone. Petitioner did not have to pay damages to Greene’s or to provide any personal relief to Greene’s. The PTO determined two claims of Petitioner’s ’053 patent were unpatentable, leaving 25 patent claims intact. Greene’s did not take ownership of these two claims. The PTO simply reexamined its earlier decision to grant certain patent claims. The third-party input (like Greene’s) assisted the PTO in making the decision, but did not transform the IPR process into a “wholly private” dispute.

Patent rights are thus not “emphatically” private. Pet. Br. 16. Moreover, since the very existence of the rights at issue in an IPR depends on the will of

Congress, Congress “may also provide that persons seeking to vindicate th[ose] right[s] must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.” *N. Pipeline*, 458 U.S. at 83. Indeed, “[t]he distinction between ‘core’ private rights, on the one hand, and public rights and government-created privileges, on the other, has traditionally had significant implications for the way in which rights are adjudicated.” *Teva*, 135 S. Ct. at 848 n.2 (Thomas, J., dissenting) (“Thus, no matter how closely a franchise resembles some ‘core’ private right, it does not follow that it must be subject to the same rules of judicial interpretation as its counterpart.”).¹²

Petitioner characterizes IPR as adjudicating private rights by merging the distinct concepts of “patent-infringement and patent-validity disputes,” claiming that both were adjudicated by courts for centuries, and “resolved competing claims to private property rights.” Pet. Br. 2. But this tactic fails. IPR does not decide infringement, and such issues are not before the

¹² Even assuming the patent rights at issue in an IPR were “private” rights, this Court has upheld adjudication of such private rights before a non-Article III tribunal where Congress has deemed this necessary to protect federal interests. See *Schor*, 478 U.S. at 856 (CFTC adjudication of private state-law counterclaims); *Crowell*, 285 U.S. at 51, 53-54 (agency determination of “private right”—compensation for workers injured or killed performing maritime activities); *Atlas Roofing*, 430 U.S. 442 (damages owed by one private party to another adjudicated by administrative tribunal). See also Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 605 (2007) (“The innovation of *Atlas Roofing* was to drive a wedge between core private rights to life and liberty (which retain the full protections of the traditional framework) and traditional forms of property (which no longer require as much ‘judicial’ involvement when pitted against public rights).”).

Court. Moreover, IPR does not adjudicate any competing claim to property. Instead, IPR looks to determine if any patent right should have ever been granted. Here, the PTAB determined that prior art, previously undisclosed by the inventor to the PTO, rendered unpatentable the two challenged patent claims in Petitioner's '053 patent. Although the less-than-fully informed PTO issued claims 1 and 22 of the patent, such claims should have never issued. This determination impacts the private dispute between Petitioner and Greene's, but it does not adjudicate that dispute. Congress added through IPR the benefit of additional third-party input as to the issue of patentability, but the point of IPR is not to determine liability as between the private parties.

4. IPR Does Not Threaten the Institutional Integrity of the Judicial Branch.

Consideration of the *Schor* factors also supports the conclusion IPR comports with Article III. First, in IPR, the PTO does not “exercise the range of jurisdiction and powers normally vested only in Article III courts.” *Schor*, 478 U.S. at 851. Rather, the same patentability issues considered in an IPR were vested in the PTO during the initial examination process. IPR just allows the PTO to “reexamine” those same issues and its own initial patentability determination. *Cuozzo*, 136 S. Ct. at 2144. There is no “full dress exercise of judicial power” (Pet. Br. 49), or any departure “from the traditional agency model.” *Schor*, 478 U.S. at 852.

Next, while Petitioner claims it did not consent to the IPR process (Pet. Br. 17), it did knowingly seek a patent monopoly “subject to” the power of Congress to define the procedures and conditions accompanying

the rights granted. 35 U.S.C. § 261 (1994). Petitioner should not now dispute that “where Congress create[d] the] substantive right, pursuant to one of its broad powers to make laws, Congress may [also] have something to say about the proper manner of adjudicating that right.” *N. Pipeline*, 458 U.S. at 84 n.35. The “subject to” language in section 261, and post-issuance error-correction by the PTO, have been an integral part of the congressional framework since well before Petitioner sought a patent monopoly. That Congress modified somewhat the reexamination process does not alter its “basic purposes.” *Cuozzo*, 136 S. Ct. at 2144.¹³

Finally, IPR decisions are reviewable by an Article III court. Final decisions of the PTO may be appealed to the Federal Circuit. 35 U.S.C. § 319. The Federal Circuit applies a *de novo* standard of review for legal conclusions and the substantial evidence standard of review for findings of fact. *MCM*, 812 F.3d at 1287. This is the same appellate standard of review applied in appeals from PTO decisions for original application examination and for patent reexaminations. See, e.g., *In re Distefano*, 808 F.3d 845, 848 (Fed. Cir. 2015); *In re Baxter Int’l, Inc.*, 678 F.3d 1357, 1361 (Fed. Cir. 2012). Such review provides a higher level of scrutiny than the regulatory scheme upheld in *Thomas*. See 473 U.S. at 573-74 (judicial review available only for fraud, misrepresentation, or other misconduct).

¹³ IPR alters nothing about the substantive standards for patentability. The references by various amici to repealing patent laws in effect at the time a patent is issued as in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843) and Takings Clause cases such as *Horne v. Dept. of Agric.*, 133 S. Ct. 2053 (2015), are therefore inapposite.

B. Nineteenth Century Precedent Does Not Limit Congressional Authority.

Petitioner misplaces reliance on Nineteenth Century precedent to argue the Court has already decided that post-issuance patentability determinations must occur in an Article III court. None of these cases addressed Article III or the Seventh Amendment, and all were decided based on then-existing congressional statutory regimes. Indeed, none even discuss, much less limit, Congress's power to grant such authority.

Petitioner asserts the Court's statement in *McCormick*, 169 U.S. at 609, that: "The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent" means only an Article III court may decide validity questions. Pet. Br. 32. But *McCormick* did not address Article III and was decided according to the then-existing patent statute. Congress had not yet authorized the Patent Office to fully cancel an original patent, without the patent holder surrendering the original patent in connection with an amended patent being issued. Absent any statutory mechanism, courts were the only option to render patents invalid.

McCormick did not hold that Congress could never adopt statutory post-issuance error-correction procedures. Instead, *McCormick* simply enforced Congress's then-existing statutory scheme for a post-issuance procedure at the Patent Office. The Court in *McCormick* relied entirely on the statute in finding that it did not permit the Patent Office to cancel an original patent when the patent owner abandoned its reissue patent application. *McCormick*, 169 U.S. at 609-11 (citing Patent Act of 1870, 16 Stat. 198). As a

result, the Court held that “until the amended patent shall have been issued the original stands precisely as if a reissue had never been applied for, and must be returned to the owner upon demand.” *Id.* at 610 (citation omitted). Reflecting then-existing statutory authority, the Court added that “the patent office has no greater authority to mutilate it by rejecting any of its claims than it has to cancel the entire patent.” *Id.*

The Court explained that the Patent Act of 1870 (16 Stat. 198) modified prior law pursuant to which surrendering the original patent could result in its cancellation. *McCormick*, 169 U.S. at 609; see also *Peck v. Collins*, 103 U.S. 660, 664-65 (1880) (finding that, under the 1866 patent statute, “[s]urrender of the patent was an abandonment of it, and the applicant for reissue took upon himself the risk of getting a reissue or of losing all”). *McCormick* simply held that, given the language in the Act of 1870, the Patent Office no longer had the statutory authority to cancel the original patent.

Significantly, the Court specifically distinguished land patents, which the Court stated are “absolutely free” from control by officers of the land department, from invention patents, which are directly limited by statutory reissue procedures. *McCormick*, 169 U.S. at 609. If invention patents provided the same rights as land patents, the Court would have rejected the notion of the Patent Office having any ability to review the claims presented in an issued patent. Instead, the Court observed that, in a reissue application, “the Patent Office was authorized to deal with all its claims, the originals as well as those inserted first in the [reissue] application, and might declare them to be invalid.” *Id.* at 612. The Court thus recognized the

statutory authority for post-issuance error-correction by the Patent Office.

Therefore, *McCormick* demonstrates that Congress defines the scope of the PTO power to review issued invention patents. Permitting such review based on post-issuance information provided by the holder (1870), through interference proceedings (1952), through *ex parte* reexamination (1980), through *inter partes* reexamination (1999), or through IPR (2011), does not alter the constitutional analysis. See *Patlex*, 758 F.2d at 604 (“purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted”).

Petitioner likewise misreads *United States v. American Bell Telephone Co.*, 128 U.S. 315, 364 (1888), arguing patent validity challenges were actions at common law that could only be decided by courts. Pet. Br. 58. *American Bell* addressed the question whether the government could seek to annul or vacate a patent in equity courts. In answering the question, the Court looked to what Congress had provided for determining the scope of patent rights. The Court found that giving the government the right “only expresses the necessary effect of the acts of Congress.” *Id.* at 363. The Court held that giving equity courts jurisdiction to adjudicate the government’s request was premised on the “very clea[r] sense of Congress that if such power is to be exercised anywhere it should be in the equity jurisdiction of those courts.” *Id.* at 364. *American Bell*, like *McCormick*, involved no statutory challenge, nor any Article III or Seventh Amendment question.

Petitioner selectively quotes *American Bell* in an attempt to conflate “private property” and “private

right” for Article III purposes. Pet Br. 16-17. A review of the full text demonstrates the Court viewed a patent as the grant of a federal privilege. The Court emphasized that when a patent is issued, “the government and its officers are acting as the *agents of the people*, and have, under the authority of law vested in them, *taken from the people* this valuable *privilege* and conferred it as an exclusive right upon the patentee.” 128 U.S. at 370 (emphasis added). This Court’s Nineteenth Century decisions recognize Congress’s broad, ongoing authority regarding federally granted privileges. See also Nelson, *supra*, at 571. *American Bell* does not hold that invention patents are purely private rights for Article III purposes.

To the contrary, *American Bell* reinforces the right of Congress to legislate to protect the public interest as to patents that should not have issued. The Court noted the government’s suit to cancel a patent differs from the remedy accorded a private defendant in an infringement action. At the time, if an alleged infringer raised a successful invalidity defense, the result applied only to that individual. By contrast, the government’s suit would “put[] an end to all suits which the patentee can bring against anybody. It opens to the entire world the use of the invention or discovery in regard to which the patentee had asserted a monopoly.” 128 U.S. at 372.

Petitioner’s cited cases construing land patents from the Nineteenth Century are even less persuasive. See *Moore v. Robbins*, 96 U.S. 530, 532-33 (1877) (no statute authorized the Land Department to revoke a land patent after issuance); *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593 (1897) (same). As noted above, *McCormick* specifically differentiates land

patents from invention patents.¹⁴ *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286 (1890), makes clear the decision turns on congressional intent. “These expressions of the statute * * * show what the purpose of Congress was in passing the law.” *Id.* at 300-01. None of these cases hold that Congress may never give the PTO post-issuance error-correction authority.

C. English Tradition Confirms Patents Are Not Private Property Rights.

Petitioner misinterprets the English tradition. A closer look at English tradition reveals that any guidance it does provide favors the constitutionality of PTO review of issued patents.

In the Sixteenth-Eighteenth Centuries in England, patents were royal grants of privilege, not common law rights, and originally, the Crown could grant patents for invention as well as royal prerogatives for goods or businesses. *Teva*, 135 S. Ct. at 847 (Thomas, J., dissenting) (citing 4 W. Holdsworth, *A History of English Law* 350-51 (1924)); Mark A. Lemley, *Why Do Juries Decide if Patents are Valid?*, 99 *Va. L. Rev.* 1673, 1680-81 (2013).

Petitioner emphasizes the Statute of Monopolies (Pet. Br. 51, 53-54), enacted in 1623 in response “to abuses whereby the Crown would issue letters patent, granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.” *Bilski v. Kappos*, 561 U.S. 593, 627 (2010)

¹⁴ In *Teva*, Justice Thomas noted that differences between land patents and invention patents made the deed analogy fit even more uneasily as to the latter, cautioning that “[w]e should not blithely extend the rules governing the construction of deeds to their even more distant cousins, invention patents.” 135 S. Ct. at 848 (Thomas, J., dissenting).

(Stevens, J., concurring) (citation omitted). By its terms, the Statute of Monopolies “generally prohibited the Crown from granting” monopoly rights, but “permitted grants of exclusive rights to the ‘working or making of any manner of new Manufacturers.’” *Id.* (quoting 21 Jam. 1, ch. 3, § 1 (1623), *reprinted in* 4 Statutes of the Realm 1213 (1963)).

Yet despite the Statute of Monopolies, the Crown retained the right to revisit its grant of patents. As Petitioner admits (Pet. Br. 25), the King acted to cancel patents through a body of the King’s advisors known as the Privy Council. See Lemley, *supra*, at 1681; E. Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794*, II 33 L. Q. Rev. 180, 195 (1917) (summarizing numerous Privy Council proceedings, with petitions through 1794). The Privy Council retained the power to revoke patents in the late 1790s and 1800s. See Lemley, *supra*, at 1683; Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909*, at 22 n.39 (2016) (“Although the issue is somewhat obscured, it seems that Privy Council jurisdiction over patents, rather than being revoked in one dramatic moment, gradually declined and faded away toward the end of the eighteenth century.”); W.M. Hindmarch, *A Treatise on the Law Relating to Patent Privileges for the Sole Use of Inventions* 431-32 (1846) (“no doubt” Privy Council’s revocation power would be exercised in appropriate case). In short, the Crown retained the power to revoke patents.

Petitioner claims that the “ordinary” remedy for the Crown or the public for dealing with a bad patent was by *scire facias*. Pet. Br. 25. Petitioner then baldly asserts that the Privy Council was used on

“rare occasions,” and that such occasional use has no effect on the historical practice analysis, citing *Granfinanciera*. Pet. Br. 25-26. Petitioner is wrong. The Privy Council was the forum of choice for revoking patents into the mid-1700s, remained active into the late 1700s, and remained available well into the 1800s.¹⁵ See Lemley, *supra*, at 1683; D. Seaborne Davies, *Early History of the Patent Specification*, 50 L. Q. Rev. 86, 103 (1934); Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B. U. J. Sci. & Tech. L. 377, 407-08 (2017) (Privy Council had revocation power “even into the mid-1800s”). Moreover, while *scire facias* proceedings in equity courts may have also been available in the late 1700s, the availability of concurrent forums each having the power to revoke patents dooms Petitioner’s Article III argument.¹⁶ Petitioner tries to salvage its position by misinterpreting and selectively quoting *Granfinanciera*. Pet. Br. 25-26. Contrary to Petitioner’s argument, the Court in *Granfinanciera* flatly rejected the assertion that a court of equity would “typically or indeed ever” entertain a suit “to recover an allegedly fraudulent transfer of money.” *Granfinanciera*, 492 U.S. at 43-44 (emphasis added). The Court found no precedent showing otherwise. See *id.* at 44-47.

Likewise, Petitioner notes that infringement actions were long considered by courts of law and that

¹⁵ The existence of the Privy Council demonstrates that patent validity was not “the subject of a suit at the common law, or in equity, or admiralty.” *Murray’s Lessee*, 59 U.S. (18 How.) at 284.

¹⁶ The presence of alternative forums reflects the modern U.S. practice, where patent validity can be challenged in federal district courts as a defense to an infringement action or in the PTO in a post-issuance error-correction proceeding.

questions of validity often arose in the context of such suits. But simply because courts considered validity issues presented as a byproduct to an infringement action does not mean separate patentability issues were the exclusive domain of the law courts. Today also, a patent owner can file a patent infringement case in federal district court and the accused infringer can raise validity issues in that case. But an IPR is a separate proceeding that does not decide questions of infringement, and instead only decides limited questions of patentability. IPR thus has no correlation to an historic infringement action.

IV. IPR IS CONSISTENT WITH THE SEVENTH AMENDMENT.

The Seventh Amendment does not require IPR patentability questions to be submitted to a jury. Indeed, the Court need only reach the Seventh Amendment issue if it determines IPR violates Article III. “[I]f Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Granfinanciera*, 492 U.S. at 53-54. See *id.* at 53 (“if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal”). As demonstrated above, IPR does not violate Article III, so the Seventh Amendment “poses no independent bar” to the PTO adjudication of an IPR.

Even if the Court considers separately the Seventh Amendment analysis, no jury is required. First,

patentability is a public rights question properly assigned to an administrative agency, so no jury is required. Second, the jury right only extends to suits “at common law.” An IPR proceeding is not analogous to common law causes of action ordinarily decided in English law courts. An IPR neither adjudicates a “legal” claim, nor does it involve a “legal remedy”—there is no question of money damages. It simply does not involve “wholly private” tort, contract or property claims.

Petitioner claims the right to a jury trial “in actions enforcing ‘statutory rights’ is ‘a matter too obvious to be doubted.’ *Curtis v. Loether*, 415 U.S. 189, 193 (1974).” Pet. Br. 35. But central to this Court’s reasoning in *Curtis* was that the Seventh Amendment applies to statutory actions “if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.” *Curtis*, 415 U.S. at 194. IPR does not involve a statutorily created action for damages in an ordinary court of law. Moreover, as made clear in *Atlas Roofing*, for public rights, “the Seventh Amendment does not prohibit Congress from assigning * * * initial adjudication to an administrative forum with which the jury would be incompatible.” 430 U.S. at 450.

A. There Is No Jury Right in Cases Involving Public Rights.

In *Granfinanciera*, this Court emphasized that Congress may decline to provide jury trials for actions involving public rights. *Granfinanciera*, 492 U.S. at 51 (“Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.”). Indeed, as to public rights, “Congress

may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable.” *Id.* at 52. Since IPR involves public rights, the Seventh Amendment is not implicated.

This Court has held that there is no constitutional jury right in an administrative proceeding. See *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (Seventh Amendment does not apply to administrative proceedings); *Atlas Roofing*, 430 U.S. at 455; *Cox v. United States*, 332 U.S. 442, 453 (1947). Thus, in *Atlas Roofing*, the Court found no Seventh Amendment violation where administrative tribunals assess penalties against private parties under the Occupational Health and Safety Act, because the Seventh Amendment does not require Congress “to choke the already crowded federal courts with new types of litigation or prevent[it] from committing some new types of litigation to administrative agencies with special competence in the relevant field.” 430 U.S. at 455. The PTO is an administrative agency with special competence in patent law, and Petitioner does not contend otherwise. Denying the PTO authority to conduct IPR and instead forcing all post-issuance patentability determinations to proceed in Article III courts would certainly further choke the court system. Parties without Article III standing would be entirely left without a forum to further the public interest in removing illegitimate patents from the system. Mandating that juries decide all questions of patentability for issued patents eviscerates Congress’s limited regulatory objective of having an expert agency review the initial grant, correct its own errors, and restore confidence in the U.S. patent system.

B. IPR Is Not a Suit “at Common Law.”

Contrary to Petitioner’s assertion, IPRs are not “suits at common law.” Pet. Br. 50 (quoting U.S. Const. Amend. VII). “Suits at common law” refers “to cases tried prior to the adoption of the Seventh Amendment in courts of law in which a jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not.” *Atlas Roofing*, 430 U.S. at 449. See also *Feltner v. Columbia Pictures*, 523 U.S. 340, 348 (1998) (same); *Granfinanciera*, 492 U.S. at 42 (same).

To make this determination, a court must consider both the nature of the action and the remedy sought: “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.” *Tull*, 481 U.S. at 417-18 (citations omitted). Here, both inquiries lead to the conclusion that no legal right is at issue. IPR patentability determinations have no counterpart in English law courts, and the remedy of patent claim cancellation is purely equitable in nature. Moreover, even if an action were tried at law as of 1791, the Court must consider whether the particular issue must fall to the jury in order to preserve the substance of the common law right as it existed in 1791. See *Tull*, 481 U.S. at 425-26.

1. English Tradition Supports That No Legal Right Is at Issue.

Petitioner and amici misapprehend both the nature of the patent right under English law—which is different from what a “U.S. patent” means today—and offer at best an incomplete picture of the use of juries under

English law. Moreover, Petitioner’s reliance on the limited precedent available is less than convincing. As this Court has noted, “the state of patent law in the common-law courts before 1800 led one historian to observe that the reported cases are destitute of any decision of importance.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 381 (1996) (citation omitted). Indeed, there is no sufficient historical record to support the contention that the patentability issues presented in an IPR “should be a guaranteed jury issue.” *Id.* at 380 (noting the “primitive state of jury patent practice at the end of the 18th century”). Nonetheless, based on this “muddled” history, Petitioner asks this Court to abandon congressionally established procedures integral to the patent regulatory framework. See Christopher Beauchamp, *Repealing Patents* at 8, 22 (Brooklyn Law School Legal Studies Research Paper No. 534, 2017) (describing the historical record relative to Eighteenth Century English and American patent jurisprudence as “wildly convoluted” and “opaque”).

English law courts had no analogous action to reexamine the initial patentability determination as to certain claims in a patent. Eighteenth-Century English patents were markedly distinct from modern era U.S. patents in ways directly impacting patentability. IPR determinations consider the patentability of specific patent claims based on specific statutory criteria. Yet, “[p]rior to 1790 nothing in the nature of a claim had appeared either in British patent practice or in that of the American states.” *Markman*, 517 U.S. at 378 (citation omitted). In the mid-Eighteenth Century, English patents did not have multiple claims, were not challenged under obviousness, and were not substantively examined for patentability before being issued. Juries most certainly did not construe “claims” or

decide “patentability” questions in the modern sense. Lemley, *supra*, at 1682, 1686-89, 1698.

These differences strain Petitioner’s attempt to analogize modern U.S. patentability determinations to English common law suits. The comparison strains further considering that the 1790 Act, creating U.S. patent rights, pre-dated the ratification of the Seventh Amendment, and the first U.S. patent issued on July 31, 1790. See *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 785 (2011) (discussing first U.S. patent). Thus, the distinct constitutional grant of authority to Congress, the timing of the origin of the patent right in the United States, and the establishment of congressional primacy as to patents, diminish the relevance of then-existing English practice, rendering the historical comparison inapt. See *Brown*, 60 U.S. at 198 (while noting that decisions applying English law were worthy of respect, finding that the Court “must interpret our patent laws with reference to our own Constitution and laws and judicial decisions”).

Beyond the differences in the nature of the right, Petitioner and amici fail to recognize that, in English tradition in 1791, patent validity was not exclusively decided in common law courts. As outlined above (p. 44-47, *supra*), the English system that Congress “found” in 1791 involved the Crown having concurrent jurisdiction over patent law, with the Privy Council having patent revocation power, and sometimes courts of equity conducting *scire facias* proceedings. Petitioner’s argument that the Statute of Monopolies of 1623 required that patent validity be judged in courts of law before juries (Pet. Br. 53) fails to acknowledge that the actual state of the law in 1791 involved concurrent paths for assessing validity of patents. In

short, juries were not mandatory. This aspect of the English system mirrors the allocation of authority today—the PTO has the power to conduct limited review of its patentability determinations pursuant to statute and Article III courts are also able to adjudicate an entire range of patent validity issues.

Petitioner also argues that juries were sometimes used in connection with *scire facias* proceedings, but fails to acknowledge that chancery courts would only refer disputed subsidiary issues of fact. Pet. Br. 51-53. See Lemley, *supra*, at 1688 n.60 (listing cases affirming *scire facias* revocations by chancery court without a jury). The ultimate decision of invalidity remained with the King’s Bench. See *id.* at 1687. Moreover, although the historical record on these issues is, as noted, “opaque,” what is clear is that the 1790 Act and the Patent Act of 1793 did not authorize actions for *scire facias* in the United States, and those Acts “did not simply import English practice.” Beauchamp, *supra*, at 32.

Consideration of the relief yields the same conclusion. IPR affords only the equitable relief of cancellation of one or up to all claims in a patent. Claims for annulment or cancellation of a patent—entirely different from the question of patent infringement—were traditionally brought before courts of equity, not resolved by juries. See *Mowry v. Whitney*, 81 U.S. (14 Wall.) 434, 440 (1872) (explaining, prior to the existence of administrative avenues for patent reconsideration, “the appropriate tribunal for the annulling of a grant or patent from the government” was chancery “and its mode of proceeding”).

Petitioner’s reliance on English patent infringement actions that could involve patent validity issues (Pet. Br. 51-53) is misplaced. IPRs are standalone

proceedings that only determine patentability, not infringement. How infringement proceedings might have been conducted has no meaningful impact on the remedy in IPR. Infringement actions sought a determination of liability and money damages against the alleged infringer. IPR only determines patentability, not any award of money damages. Further, unlike IPR, validity challenges in English infringement cases presented only a personal defense to the party, not invalidation of the patent against the entire public.

2. An IPR Proceeding Does Not Involve a Legal Remedy.

IPR provides only equitable relief to the public in general. A salient factor of a suit at law was a claim for monetary damages. See *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) (“where an action is simply * * * for the recovery of a money judgment, the action is one at law”) (citation omitted); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476 (1962) (agreeing “that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal”).

IPR involves no claim for monetary damages. Instead, the PTO determines patentability. As noted (pp. 34-38, *supra*), IPR does not adjudicate liability wholly between two private parties and does not award damages. Here, Greene’s received no individualized relief. The PTO corrected its initial error, finding unpatentable the two challenged claims in the ’053 patent. The benefits of the adjudication flow to the public, not merely the third-party participant.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 23, 2017

In The
Supreme Court of the United States

—◆—
OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

—◆—
BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

The parties to the proceedings include those listed on the cover.

Oil States Energy Services, LLC, formerly known as Stinger Wellhead Protection, Inc., is a wholly owned subsidiary of Oil States Energy Services Holding, Inc., which is a wholly owned subsidiary of Oil States International, Inc., a publicly traded company.

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 OTHER AUTHORITIES	
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1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)	15
2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 236-39, §§ 930-34 (Melville M. Bigelow ed., Little, Brown, & Co., 13th ed. 1886)	23

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Adam Mossoff, <i>Patents As Constitutional Private Property: The Historical Protections Of Patents Under The Takings Clause</i> , 87 B.U. L. REV. 689 (2007).....	27
AIA Progress Statistics, USPTO, PATENT TRIAL & APPEAL BOARD (Sept. 25, 2014), https://www.uspto.gov/sites/default/files/ip/boards/bpai/stats/aia_statistics_09_25_2014.pdf	11
B. Zorina Khan, <i>Looking Backward: Founding Choices in Innovation and Intellectual Property Protection</i> , in FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S (Douglas A. Irwin & Richard Sylla eds., 2010)	3
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Erin Coe, <i>4 Favorites for PTAB's Top Post</i> , LAW360 (Jan. 7, 2016), https://www.law360.com/articles/742735/4-favorites-for-ptab-s-top-post	11

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Erin Coe, <i>USPTO Director Wants To Oversee A PTAB Case</i> , LAW360 (May 3, 2016), https://www.law360.com/articles/791561/exclusive-uspto-director-wants-to-oversee-a-ptab-case	21
Frank H. Easterbrook, <i>Presidential Review</i> , 40 CASE W. RES. L. REV. 905 (1989)	20
<i>General Information Concerning Patents</i> , USPTO (Oct. 2015), https://www.uspto.gov/patents-getting-started/general-information-concerning-patents	29
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Jacob Corré, <i>The Argument, Decision, and Reports of Darcy v. Allen</i> , 45 EMORY L.J. 1261 (1996).....	24

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James Wilson, <i>Government, Lectures on Law</i> , 1:296-297 (1791), reprinted in THE FOUNDERS CONSTITUTION, Article 3, Section 1, U. CHI. (2000), http://press-pubs.uchicago.edu/founders/documents/a3_1s15.html	22
Jennifer R. Bush, <i>Administrative Patent Judges: Not Your Typical Federal Judge</i> , FENWICK & WEST LLP (July 10, 2014), https://www.fenwick.com/publications/pages/administrative-patent-judges-not-your-typical-federal-judge.aspx	11
Letter from Richard A. Epstein, Professor, New York University School of Law, and F. Scott Kieff, Professor, George Washington University School of Law, to the House Judiciary Committee (Mar. 30, 2011)	44
MANUAL OF PATENT EXAMINING PROCEDURE § 2609 (9th ed., 2015).....	7, 8
Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756 (Aug. 14, 2012)	9, 16, 21
Oral Argument, <i>Yissum Research Dev. Co. of the Hebrew Univ. of Jerusalem v. Sony Corp.</i> , 626 F. App'x 1006 (Fed. Cir. 2015) (Nos. 2015-1342, 2015-1343), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-1342.mp3	10, 46
Oren Bracha, <i>Owning Ideas: A History of Anglo-American Intellectual Property</i> 9 (June 2005) (unpublished Ph.D. thesis, Harvard Law School), https://law.utexas.edu/faculty/obracha/dissertation/pdf/chapter1.pdf	25

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<i>Organizational Structure and Administration of Patent Trial and Appeal Board</i> , USPTO (May 12, 2015), https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf ...	11, 44
<i>Patent Trial and Appeal Board: Are you interested in becoming an administrative patent judge?</i> , USPTO (Apr. 10, 2014), https://www.uspto.gov/ip/boards/bpai/ptab_brochure_v2_4_10_14.pdf	44
<i>PTAB Statistics</i> , USPTO (Mar. 31, 2016), https://www.uspto.gov/sites/default/files/documents/2016-3-31%20PTAB.pdf	48
Ryan Davis, <i>PTAB’s ‘Death Squad’ Label Not Totally Off-Base</i> , LAW360 (Aug. 14, 2014), http://bit.ly/2p2JPDo	48
Sean Bottomley, <i>Patent Cases in the Court of Chancery, 1714-58</i> , 35 J. LEGAL HIST. 27 (2014).....	4, 18, 24, 53, 56
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USPTO, <i>Benefits of being an Administrative Patent Judge at the Patent Trial and Appeal Board (PTAB)</i> , YOUTUBE (Feb. 13, 2015), https://www.youtube.com/watch?v=y_vTvPuUUBY&feature=youtu.be	22
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The order denying panel rehearing and rehearing *en banc* (Pet. App. 37-38) is unreported. The panel order disposing of the case without opinion (Pet. App. 1-2) is unreported and available at 639 F. App'x 639 (Fed. Cir. 2016). The opinion and order of the Patent Trial and Appeal Board (Pet. App. 3-36) is unreported and available at 2015 WL 2089371 (PTAB May 1, 2015).



STATEMENT OF JURISDICTION

The court of appeals entered its order denying *en banc* rehearing on July 26, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.



STATEMENT

From centuries before the Founding until centuries after, courts adjudicated patent-infringement and patent-validity disputes. These cases resolved competing claims to private property rights, with juries deciding disputed questions of fact, such as whether a patent's claims described a novel invention. Article III promises a court to these litigants, and the Seventh Amendment promises a jury.

Six years ago, with the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (AIA), Congress established *inter partes* review, which allows private third parties to remove these cases from Article III courts and transfer them to an administrative agency within the Executive Branch. That agency—the PTO's Patent Trial and Appeal Board (Board)—conducts “trial proceedings,” as the Board correctly calls them, presided over by Board “judges,” who serve for no particular term, depend on superior

Executive officers for raises and promotions, and ultimately answer to a political appointee of the President, the Director of the PTO, who can and has intervened in Board proceedings specifically (and admittedly) to alter the outcomes of cases.

Neither Article III nor the Seventh Amendment tolerates this arrangement. By reserving “the judicial Power of the United States” to the Judicial Branch, Article III permits only courts to adjudicate these cases involving common-law, private-property rights. Especially “as the administrative state expands and non-Article III tribunals adjudicate more disputes * * * there must be vigilance in protecting Article III jurisdiction.” *Cascades Projection LLC v. Epson Am., Inc.*, Nos. 2017-1517, 2017-1518, 2017 WL 1946963, at *14 (Fed. Cir. May 11, 2017) (Reyna, J., dissenting from denial of initial hearing *en banc*). And the Seventh Amendment, which “preserve[s]” the right to a jury for “Suits at common law,” entitles litigants to the common-law decider of facts in these suits: a jury. By permitting an administrative agency to extinguish private property rights, *inter partes* review violates both Article III’s separation of powers and the Seventh Amendment’s right to a jury.

1. Patent rights in the United States existed long before the framing of the Constitution, which provides in Article I, § 8, cl. 8 that “Congress shall have the power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” B. Zorina Khan,

Looking Backward: Founding Choices in Innovation and Intellectual Property Protection, in FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S 322-23 (Douglas A. Irwin & Richard Sylla eds., 2010). These patent rights trace their lineage to similar rights that existed for centuries in England, where disputes about these rights were resolved in courts—either at law or before the Court of Chancery. Sean Bottomley, *Patent Cases in the Court of Chancery, 1714-58*, 35 J. LEGAL HIST. 27, 36-37, 41-43 (2014); see also H. Tomás Gómez-Arostegui, *Equitable Infringement Remedies Before 1800*, RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 195, 210-12 (2016). Disputed fact questions in these matters were resolved by juries—even in Chancery. *Liardet v. Johnson*, 62 Eng. Rep. 1000, 1002 (Ch. 1780).

For the first several hundred years, the U.S. patent system was based on a “first to invent” doctrine—which meant that the inventor who first conceived of the invention and then reduced it to practice was entitled to patent protection. *Seymour v. Osborne*, 11 Wall. 516, 552 (1870). Under the first-to-invent rule, when a subsequent application claimed the right to patent an already applied-for or already patented innovation, the PTO could declare that the later application “interfered” with the earlier. Patent Act of 1836, Pub. L. No. 24-357, § 8, 5 Stat. 117, 120-21 (1836); 35 U.S.C. § 135(a) (2006). These “interference” proceedings applied only to applications relatively close in time, e.g., 35 U.S.C. § 135(b)(1) (one year following issuance of patent on same material), and determined only the true inventor of the patented subject matter. 35 U.S.C.

§ 135(a). Interference proceedings could be appealed as of right to either a federal district court (for a full trial, including plenary trying of facts) or a federal appellate court, at the appellant's option, with all questions of law reviewed *de novo*. *Kappos v. Hyatt*, 132 S. Ct. 1690, 1697-98 (2012) (describing 1836 Patent Act and judicial review available); *Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 659 F.3d 1186, 1191-92 (Fed. Cir. 2011). Aside from these limited proceedings to determine the true inventor, federal courts alone adjudicated the validity of issued patents. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 601 (Fed. Cir. 1985) (citing *Iowa State Univ. Research Found., Inc. v. Sperry Rand Corp.*, 444 F.2d 406, 409 (4th Cir. 1971)).

2. In 1981, Congress instituted an administrative proceeding called *ex parte* reexamination, whereby Congress provided a means for the PTO to address substantial questions about issued patents in collaboration with patent owners. See *Patlex*, 758 F.2d at 601-02. An *ex parte* reexamination begins when either a patent owner or a third party requests it. The request must be based on prior art—patents or printed publications indicating that the invention claimed in the patent was already known. 35 U.S.C. §§ 301, 302. If the PTO determines that the requester has raised a substantial new question of patentability, then the PTO orders the patent to be reviewed via an *ex parte* reexamination proceeding. 35 U.S.C. § 303. This proceeding involves only the patent owner and the PTO; third-party requesters are precluded from further involvement unless the patent owner files a statement seeking to rebut the requester's assertions of a

substantial new question of patentability, in which case the requester may respond. 35 U.S.C. § 304.

Ex parte reexamination is fundamentally an interactive process—similar to a patent’s initial prosecution—in which a patent owner submits claims, the patent examiner provides written responses explaining the examiner’s conclusions regarding whether the claims are patentable in the light of the identified prior art, and the patent owner can respond either by challenging the examiner’s assertions, amending the claims, or cancelling the claims. See 37 C.F.R. §§ 1.530-1.570. In an *ex parte* reexamination, there is no opportunity for discovery, and third parties do not participate in any other way. 35 U.S.C. § 305.

This “focus on previous examinations rather than prior litigation” or trappings of litigation “follows from the fact that ‘reexamination[s are] conducted according to the procedures established for [an] initial examination,’ 35 U.S.C. § 305, and PTO examination procedures have distinctly different standards, parties, purposes, and outcomes compared to civil litigation.” *In re Swanson*, 540 F.3d 1368, 1377 (Fed. Cir. 2008). Once an *ex parte* reexamination begins, it can neither be withdrawn nor settled, and it ends only when the PTO confirms or cancels the patentable claims following any amendments the patent owner makes in an attempt to preserve the patent. 35 U.S.C. § 307.

3. Congress expanded the reexamination regime in 1999 when it created *inter partes* reexamination, which was designed to “make reexamination a viable,

less-costly alternative to patent litigation by giving third-party requesters the option of inter-partes reexamination procedures,” in which third-party requesters were “afforded an expanded, although still limited, role in the reexamination process.” 145 CONG. REC. S13,259 (daily ed. Oct. 27, 1999) (statement of Sen. Hatch); see also *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1332 (Fed. Cir. 2008).

Both *ex parte* and *inter partes* reexaminations were overseen by administrative patent judges who, along with the Director, the Deputy Director, the Commissioner for Patents, and the Commissioner for Trademarks, formed the Board of Patent Appeals and Interferences (BPAI). 35 U.S.C. § 6 (1999). The BPAI also reviewed adverse decisions of examiners upon applications for patents. 35 U.S.C. § 134(a).

Inter partes reexamination afforded third-party requesters “an expanded, although still limited role” by permitting them to (1) file comments on substantive submissions by patent owners; (2) introduce evidence to rebut the patent owner’s evidence or the examiner’s findings; (3) submit additional prior art; (4) file petitions to extend page limits or obtain other exceptions to the procedural rules; or (5) appeal the examiner’s determination regarding patentability. But as the PTO warned, “[p]atent owners and third party requesters are cautioned that the reexamination statute, regulations, and published examining procedures do not countenance so-called ‘litigation tactics’ in reexamination proceedings.” MANUAL OF PATENT EXAMINING PROCEDURE § 2609 (9th ed., 2015). *Inter partes*

reexaminations were thus designed to resemble traditional claim amendment-and-response patent prosecution and were not adversarial. *Ibid.*

4. In 2011, Congress passed the AIA to “update our patent laws.” H.R. REP. NO. 112-98, at 39 (2011). The AIA made several significant changes to the U.S. patent system, including replacing the “first to invent” regime with a “first to file” regime, and abolishing *inter partes* reexamination and replacing it with *inter partes* review. 125 Stat. at 299, 305. The AIA also renamed the BPAI, which is now the Patent Trial and Appeal Board. *Id.* at 290.

Like its predecessor, the Board reviews examiners’ adverse decisions on applications for patents and appeals of *ex parte* (and residual *inter partes*) reexaminations. 35 U.S.C. § 6. The Board likewise oversees residual interference proceedings. *Ibid.* But now the Board also reviews existing patents through *inter partes* review, which allows the Board for the first time to extinguish patent rights after adjudicating a litigation-like adversarial proceeding between the patent owner and a third party. See 35 U.S.C. §§ 311(a) & 318(a); *Google Inc. v. Jongerius Panoramic Techs., LLC*, IPR 2013-00191, Paper 50, at 4 (PTAB Feb. 13, 2014).

Like litigation, *inter partes* review begins with the filing of a petition—almost always by an alleged patent infringer—that asks the Board to invalidate a patent on the ground that it was anticipated by or rendered obvious in view of identified prior art. 35 U.S.C.

§ 311(b). The petitioner and patent owner then participate in an adversarial proceeding before the Board, which refers to that proceeding as a “trial.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012) (codified at 37 C.F.R. § 42). The parties take discovery, engage in motion practice regarding evidence, and cross-examine fact and expert witnesses via depositions. See *id.* at 48,757-48,768.

Many of the procedural rules that govern the proceedings are often based expressly on the Federal Rules of Civil Procedure. E.g., *id.* at 48,760 (*inter partes* review procedures on sealing confidential information designed “in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G)”); 48,761 (“The types of discovery available under the Federal Rules of Civil Procedure can be sought by the parties.”); 48,762 (modeling option for required disclosures “after Rule 26(a)(1)(A) of the Federal Rules”); 48,772 (prohibiting “speaking” objections “[c]onsistent with the policy expressed in Rule 1 of the Federal Rules of Civil Procedure”). The Board holds a hearing, 37 C.F.R. § 42.70, and—in view of all the record evidence—issues a “final written decision” on whether the patent should be invalidated. 35 U.S.C. § 318(a). The Board’s regulations refer to this decision as a “judgment.” Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,766-48,767. The judgment may be appealed as of right only to the Federal Circuit. 35 U.S.C. §§ 141(c), 319.¹

¹ By contrast, a party dissatisfied with an interference proceeding had recourse to the federal district courts for plenary review of all questions of law raised in the interference. See 35 U.S.C. §§ 141, 146 (1999).

The Director of the PTO, who is a political appointee, selects how many and which of the Board’s officers—called “judges”—will preside over any given case, subject only to the statutory requirement that each case “shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director.” 35 U.S.C. § 6(c). The Director can designate himself as a member to decide an *inter partes* review. See 35 U.S.C. § 6(a) (“The Director, the Deputy Director, * * * and the administrative patent judges shall constitute the Patent Trial and Appeal Board.”).

In what one Federal Circuit judge described as “case-specific readjudication,” a Solicitor for the PTO has acknowledged that the Director has added additional judges to a Board panel to reverse the panel’s judgment. Oral Argument at 48:00-06, *Yissum Research Dev. Co. of the Hebrew Univ. of Jerusalem v. Sony Corp.*, 626 F. App’x 1006 (Fed. Cir. 2015) (Nos. 2015-1342, 2015-1343).² As a Solicitor for the PTO explained, the Director has to “be able to make sure that her policy judgments are enforced by the Board” in any given case. *Id.* at 43:17-42.

Over the last several years, the Board has more than tripled in size “in large part due to the establishment of the AIA trials under the America Invents

² Available at <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-1342.mp3>.

Act.”³ The first written opinion in one of these trials issued in late 2013; the Board has received thousands of petitions since. See *Garmin v. Cuozzo Speed Tech.*, IPR 2012-00001, Paper 59 (PTAB Nov. 13, 2013); *AIA Progress Statistics*, USPTO, PATENT TRIAL & APPEAL BOARD (Sept. 25, 2014), https://www.uspto.gov/sites/default/files/ip/boards/bpai/stats/aia_statistics_09_25_2014.pdf.

Currently, over 200 judges serve on the Board. Erin Coe, *4 Favorites for PTAB’s Top Post*, LAW360 (Jan. 7, 2016), <https://www.law360.com/articles/742735/4-favorites-for-ptab-s-top-post>. The vast majority—over 80 percent—are former patent attorneys with extensive experience in patent litigation. Jennifer R. Bush, *Administrative Patent Judges: Not Your Typical Federal Judge*, FENWICK & WEST LLP (July 10, 2014), <https://www.fenwick.com/publications/pages/administrative-patent-judges-not-your-typical-federal-judge.aspx>.

5. Petitioner Oil States Energy Services, LLC is an industry leader in providing support and service equipment to the global oil and gas industry. Oil States owns a patent that covers apparatuses and methods of protecting wellhead equipment from the pressures and abrasion involved in the hydraulic fracturing of oil wells—U.S. Pat. No. 6,179,053 (the ’053 Patent)—invented by Murray Dallas, an employee of a

³ *Organizational Structure and Administration of Patent Trial and Appeal Board*, USPTO (May 12, 2015), <https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf>.

predecessor company of Oil States. Pet. App. 4, 5, 20-21.

In 2012, Oil States filed an infringement suit against Greene's Energy Group, LLC; Greene's filed an answer, asserting the affirmative defense and counterclaim of invalidity. Answer at 11, 14, *Oil States Energy Servs., LLC v. Trojan Wellhead Prot., Inc.*, No. 6:12-cv-611, 2014 WL 12360946 (E.D. Tex. 2014), ECF No. 12.

Almost a year into the litigation, as the case neared the close of discovery, Greene's petitioned the Board to institute *inter partes* review. *Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC*, IPR 2014-00216, Paper 1 (PTAB Dec. 3, 2013). Greene's argued that the '053 Patent was anticipated by prior art—i.e., a previous patent application, also filed by Dallas, concerning an earlier invention, features of which the '053 Patent explicitly criticized. *Ibid.*; see also *Trojan Wellhead Prot., Inc.*, 2014 WL 12360946, at *8-9. Over Oil States' opposition, the Board instituted *inter partes* review of the '053 Patent. *Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC*, IPR 2014-00216, Paper 12 (PTAB June 10, 2014).

The district court then issued its claim construction order in the underlying civil litigation, construing the terms of the '053 Patent in a way that, as Greene's conceded, conclusively resolved against Greene's the claim that Dallas's application anticipated the '053 Patent. *Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC*, IPR 2014-00216, Paper 52 at 14-15 (PTAB Feb. 11, 2015). This same claim formed the basis of

Greene's *inter partes* review petition. *Trojan Wellhead Prot., Inc.*, 2014 WL 12360946, at *8-9.

The *inter partes* review proceeding continued in parallel. Oil States argued that the Board should adopt the same claim constructions as the district court—but the Board disagreed in its final written decision. Pet. App. 14-18. Acknowledging that the district court came to a different conclusion, the Board nevertheless held that Oil States' patent had been anticipated by the previous patent application. *Id.* at 14, 29. As a result, the Board concluded that the claims were “unpatentable.” *Id.* at 5. The Board denied Oil States' application to amend its claims, instead invalidating them. *Id.* at 36.

Oil States appealed the Board's final judgment to the Federal Circuit, challenging both the merits of the Board's decision and the constitutionality of *inter partes* review under Article III and the Seventh Amendment. Notice of Docketing, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC* (No. 2015-1855), 639 F. App'x 639 (Fed. Cir. 2016) (mem.), ECF No. 1; Brief of Patent Owner-Appellant Oil States Energy Services, LLC, *Oil States Energy Servs.*, 639 F. App'x 639 (No. 2015-1855), ECF No. 16. The government intervened on appeal to defend *inter partes* review and its application in this case. Notice of Intervention by the United States Patent and Trademark Office, *Oil States Energy Servs.*, 639 F. App'x 639 (No. 2015-1855), ECF No. 19. Before briefing closed, however, the Federal Circuit issued its decision in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), which rejected the same challenges to

the constitutionality of *inter partes* review, and thereby foreclosed Oil States’ Article III and Seventh Amendment arguments.

After oral argument, the panel summarily affirmed the Board without issuing an opinion. Pet. App. 1-2. The court of appeals denied panel rehearing and rehearing *en banc*. *Id.* at 37, 38. This Court granted Oil States’ petition for a writ of certiorari.



SUMMARY OF ARGUMENT

Congress may not remove cases from the federal courts because it does not like their judgments. As this Court has long held, “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855)). That is just what Congress has done with *inter partes* review, which wrests patent-validity cases from federal courts and entrusts them to administrative-agency employees, who decide questions of law that Article III reserves to judges and questions of fact that the Seventh Amendment reserves to juries. Neither Article III nor the Seventh Amendment tolerates this circumvention.

I. Article III, Section 1—which vests “[t]he judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from

time to time ordain and establish”—protects both the separation of powers and the rights of litigants. *Wellness Int’l Network v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (quoting U.S. CONST. art. III, § 1). Article III serves these dual aims “by specifying the defining characteristics of Article III judges.” *Stern*, 564 U.S. at 483. These characteristics—life tenure and salary protection—“ensure that each judicial decision [is] rendered, not with an eye toward currying favor with * * * the Executive,” but instead with the “[c]lear heads * * * and honest hearts” that are “essential to good judges.” *Id.* at 484 (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)).

But “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.” *Ibid.* That is why “[w]hen a suit is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,’ * * * the responsibility for deciding that suit rests with Article III judges in Article III courts.” *Ibid.* (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)).

Inter partes review impermissibly transfers the responsibility for deciding common-law suits from Article III judges to administrative agency employees who are beholden to Executive Branch officials—precisely the evil the Framers sought to avoid. See *id.* at 483 (“In establishing the system of divided power in the

Constitution, the Framers considered it essential that ‘the judiciary remain[] truly distinct from both the legislature and the executive.’” (quoting THE FEDERALIST No. 78, p. 466 (Alexander Hamilton) (C. Rossiter ed., 1961))).

First, patent-validity cases were traditionally tried in English courts, as all parties agree. Fed. BIO at 15; Greene’s BIO at 6. Patent-validity questions usually arose in response to an infringement action, which was brought in the courts of law or the Court of Chancery. Either way, the matter was “the subject of a suit at the common law, or in equity, or admiralty,” and thus its adjudication cannot be transferred from Article III courts to the Board. *Stern*, 564 U.S. at 484 (quoting *Murray’s Lessee*, 18 How. at 284).

Second, the Board unquestionably exercises “the judicial power of the United States” in conducting *inter partes* review. The proceeding, which the Board calls a “case,” e.g., Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,756, 48,759, 48,762, begins when a patent challenger seeks a judgment of invalidity from the Board. The parties resolve preliminary issues through motions practice, take discovery, examine witnesses, and proceed to a “trial,” resolved by “judges,” culminating in a final, self-executing “judgment.” This is the exercise of the “judicial Power of the United States.”

The Board exercises the judicial power to adjudicate disputes between private parties over private-property rights. A patent is emphatically a private property right, “taken from the people, from the public,

and made the private property of the patentee,” *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888), and no “public right” exception excuses this failure to comply with Article III. Patent-validity claims subject to *inter partes* review are not asserted by or against the government; *inter partes* reviews occur between private parties. They have not been exclusively resolved by another branch; courts have adjudicated these cases for centuries. Nor are they new statutory obligations integrally related to a particular governmental enforcement action: patent rights predate the Constitution by centuries, and the federal government enforces no other governmental action through *inter partes* review. If a patent-validity case—a dispute over a private property right—may be swept out of the federal courts under the cloak of “public rights,” then anything can be, and Article III’s guarantee is mere “wishful thinking.” *Stern*, 564 U.S. at 495.

Nor can the Board be justified as a mere “adjunct” of Article III courts, see *id.* at 487-88, as it operates without meaningful Article III supervision and without the litigants’ consent. The Board is not supervised by Article III courts in any way. Its decisions are final “judgments” appealable as of right directly to the Federal Circuit. Likewise Oil States, like most patent owners, emphatically did *not* consent to its property rights being adjudicated in a proceeding that bears all of the hallmarks of litigation but enjoys none of the protections of Article III. Article III does not permit Congress to bestow upon the Board the judicial power to adjudicate cases historically heard by courts at

common law. That power remains for the federal courts and their life-tenured, salary-protected judges alone.

II. *Inter partes* review impermissibly supplants juries as well as judges. The Seventh Amendment guarantees a jury trial “[i]n suits at common law,” including those to vindicate “statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-41, 42 (1989) (citation omitted). English history is clear that patent-validity questions were. In 1791, “[a]n action for patent infringement [was] one that would have been heard in the law courts of old England.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 992 (Fed. Cir. 1995). It had been that way for 200 years before that. See, e.g., *Darcy v. Allen*, 77 Eng. Rep. 1260 (K.B. 1603).

Even when a patent owner initiated an infringement action in the Court of Chancery, if the alleged infringer at issue, the Court of Chancery was required to send the matter to a court of law for a jury trial. Bottomley, *supra*, at 36-37, 41-43; see also Gómez-Arostegui, *supra*, at 210-12. Juries inevitably decided disputed questions of fact regarding patent validity. *Ibid.* So too today. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) (patent “infringement cases today *must* be tried to a jury” (emphasis added)).

Inter partes review, however, conditions patent owners’ jury-trial rights on their opponents’ choice of forum. The Seventh Amendment does not tolerate such a veto. As they have for centuries, patent owners have the right to try patent-infringement and patent-validity questions to juries—not to the Board.



ARGUMENT

I. *Inter Partes* Review Violates Article III.

Only an “Article III judge[] in [an] Article III court[]” may exercise the judicial power to decide a case that is the “subject of a suit at the common law, or in equity, or admiralty,” *Stern*, 564 U.S. at 484 (quoting *Murray’s Lessee*, 18 How. at 284), unless (1) the case resolves a claim on public rights, *id.* at 485, or (2) the litigants consent to a non-Article III forum under meaningful supervision by an Article III court. *Wellness Int’l*, 135 S. Ct. at 1944. In conducting *inter partes* review, the Board unabashedly wields the judicial power without any semblance of Article III’s protections—and without any justification this Court has recognized for doing so.

The Board’s adjudications resolve disputes over private rights heard for centuries in courts at common law. Administrative agents beholden to politically appointed Executive officers issue final judgments without the patent owner’s consent, much less meaningful Article III supervision. Article III does not permit the Board to exercise this judicial power.

A. *Inter Partes* Review Impermissibly Adjudicates Matters That Were The Subject Of Suits At Common Law.

Through *inter partes* review, the Board (i) adjudicates patent-validity challenges, which (ii) were the subject of suits at common law. *Inter partes* review therefore violates Article III.

1. *Inter Partes* Review Is An Exercise Of The Judicial Power.

The judicial power is the power to “hear and determine a cause,” *United States v. O’Grady*, 22 Wall. 641, 647 (1874), “subject to review only by superior courts in the Article III hierarchy.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Private litigants and coordinate branches of government alike understand that the hallmark of the judicial power is the authority to “conclusively resolve[a] case,” because the “judicial Power is one to render dispositive judgments.” *Ibid.* (internal quotation marks omitted) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989)). The Board unquestionably resolves cases, exercising through *inter partes* review an Article III tribunal’s powers in both form and substance.

Inter partes review bears every salient characteristic associated with the exercise of the judicial power. *Inter partes* review begins when a patent challenger files a petition with the Board seeking a declaration

that a given patent's claims are invalid. 35 U.S.C. § 311(a). The challenger and patent owner:

- Conduct motion practice before the Board, Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,758;
- Take discovery for a subsequent trial, *id.* at 48,761-48,762;
- Depose and cross-examine witnesses, introduce evidence, and object to evidence based on the Federal Rules of Evidence, *ibid.*;
- Participate in an adversarial trial (called a "trial") during which they brief issues and argue before the Board's judges (called "judges"), *id.* at 48,758;
- May settle their case any time before judgment, 35 U.S.C. § 317(a), as amended, and 35 U.S.C. § 327;
- Receive a final, binding judgment (referred to as a "judgment" in the Board's regulations, e.g., Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,761, 48,766-48,767), as to the patent's validity, 35 U.S.C. § 318(a); and
- Can appeal that judgment as of right only directly to the U.S. Court of Appeals for the Federal Circuit. 35 U.S.C. §§ 141, 319.

Even the PTO describes *inter partes* review proceedings as adjudications, advertising that the Board "adjudicates * * * case[s]." Erin Coe, *USPTO Director Wants To Oversee A PTAB Case*, LAW360 (May 3,

2016), <https://www.law360.com/articles/791561/exclusive-uspto-director-wants-to-oversee-a-ptab-case>. Judges in these proceedings “develop[] patent case law through their decisions,” and thereby “shape and grow the patent case law.” USPTO, *Benefits of being an Administrative Patent Judge at the Patent Trial and Appeal Board (PTAB)*, YOUTUBE (Feb. 13, 2015), https://www.youtube.com/watch?v=y_vTvPuUUBY&feature=youtu.be. This accurate description of the Board’s role maps onto the Founders’ understanding of the judicial power: “The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.” James Wilson, *Government, Lectures on Law*, 1:296-297 (1791), reprinted in THE FOUNDERS CONSTITUTION, Article 3, Section 1, U. CHI. (2000), http://press-pubs.uchicago.edu/founders/documents/a3_1s15.html.

Inter partes review, then, involves the exercise of the “judicial Power of the United States” by an administrative tribunal that is unquestionably not an Article III court. And, as demonstrated next, the tribunal exercises the judicial power to adjudicate matters that were the subject of suits at common law, and thus must remain in Article III courts.

2. Patent Validity Was The Subject Of Suits At Common Law.

Again, “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, *is the*

*subject of a suit at the common law, or in equity, or admiralty.’” Stern, 564 U.S. at 484 (emphasis added) (quoting Murray’s Lessee, 18 How. at 284). Thus inter partes review cannot survive constitutional scrutiny if patent-validity claims were the subject of suits at common law or in equity. The parties in this case all agree that patent-validity claims were the subject of suits at common law or in equity—the only meaningful dispute is whether they were the subject of suits at common law or in equity for Seventh Amendment purposes. Where Article III is concerned, however, the dispute is entirely academic because, as both Greene’s and the government acknowledge, courts (whether at law or in equity) have adjudicated patent-validity challenges for centuries. Greene’s BIO at 6 (“Claims for annulment or cancellation of a patent * * * were traditionally brought before courts of equity[.]”); Fed. BIO at 15 (same).*

English courts heard patent-infringement cases throughout the 18th century. See *Markman*, 52 F.3d at 992 (“An action for patent infringement is one that would have been heard in the law courts of old England.”); see also, e.g., *Boulton v. Bull*, 126 Eng. Rep. 651, 656, 660 (C.P. 1795); *Morris v. Bramsom*, 1 Carp. P.C. 30, 31 (K.B. 1776); *Turner v. Winter*, 99 Eng. Rep. 1274, 1275 (K.B. 1787); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 236-39, §§ 930-34 (Melville M. Bigelow ed., Little, Brown, & Co., 13th ed. 1886).

A patent-invalidity case began in one of several ways. First, it could have been filed as an infringement action in the Courts of King’s Bench, Common Pleas, or the Exchequer of Pleas, where a defendant might

assert the relevant patent's invalidity as a defense. Bottomley, *supra*, at 36-37, 41-43; see also Gómez-Arostegui, *supra*, at 210-12; Br. for H. T. Gómez-Arostegui and S. Bottomley as *Amici Curiae* ("Legal Historians") at 5-6. Second, it could have begun as an infringement suit in the Court of Chancery—although if the defendant placed the patent's validity at issue, the matter was sent to a court of law for a jury trial. *Morris*, 1 Carp. P.C. at 31; *Turner*, 99 Eng. Rep. at 1275; *Horton v. Harvey* (K.B. 1781), reprinted in 1 James Oldham, *The Mansfield Manuscripts* 762 (1992); Br. of Legal Historians at 6.

Judicial adjudication of patent validity as a defense to infringement has a long pedigree. *Darcy*, 77 Eng. Rep. at 1262; see also Jacob Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261, 1297 (1996). These validity defenses included assertions that a patent's claims were not novel, *Newsham v. Grey*, C33/376, f. 336^{r-v} (Ch. 1740), 2 Atk. 286, 286 (Ch. 1742); *Morris*, 1 Carp. P.C. at 32; *Martin v. Calfson* (K.B. 1781), reprinted in 1 James Oldham, *The Mansfield Manuscripts* 760-61—the same matter that the Board now adjudicates in *inter partes* review. 35 U.S.C. § 311(b).

Infringement suits aside, the Court of Chancery also reviewed the validity of a patent in actions commenced by a writ of *scire facias*—essentially a show-cause order to explain why the patent should not be revoked. *Am. Bell Tel. Co.*, 128 U.S. at 360; see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF

ENGLAND 260-61 (1768) (“Where the crown hath unadvi[s]edly granted any thing by letters patent, which ought not to be granted, * * * the remedy to repeal the patent is by writ of *scire facias* in chancery.”).

To be sure, the King occasionally also acted to cancel patents. On rare occasions, the Privy Council would withdraw patents on behalf of the King—a practice that appears to have arisen out of the initial concept of patents as a royal prerogative, to be granted or withdrawn at the sovereign’s discretion, and which has no analogue in American patent law. See Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 9 (June 2005) (unpublished Ph.D. thesis, Harvard Law School), <https://law.utexas.edu/faculty/obracha/dissertation/pdf/chapter1.pdf> (“The essence of sixteenth and seventeenth century English patents was being an instrument for the exercise of royal prerogative power.”). But these patent withdrawals were rare indeed, having ceased entirely by 1779. Br. of Legal Historians at 34-37. Even a treatise writer in 1846, who urged others to revive use of the Privy Council for patent revocation, admitted that the “ordinary” remedy for the Crown or the public for dealing with a bad patent was “only available by pleading and proving the cause of invalidity in a Court of justice,” by which he meant *scire facias*. W.M. HINDMARCH, A TREATISE ON THE LAW RELATING TO PATENT PRIVILEGES 431 (1846). These proceedings bear little on the scope of judicial authority in England at common law.

In any event, as this Court has noted before, tracing the roots of a historical practice does not depend on

how a matter was *occasionally* resolved, but on how it was *typically* resolved. See, e.g., *Granfinanciera*, 492 U.S. at 43 (“Respondent does not * * * contend that actions to recover fraudulent conveyances or preferential transfers were more than occasionally tried in courts of equity * * * While respondent’s assertion that courts of equity sometimes provided relief * * * is true, however, it hardly suffices to undermine petitioners’ submission that the present action * * * would not have sounded in equity 200 years ago in England.”).

Modern practice overwhelmingly reflects historical practice. The federal district courts routinely decide patent validity, which accused infringers assert as a defense or counterclaim. The “defenses in any action involving * * * infringement of a patent” include “[i]nvalidity of the patent.” 35 U.S.C. § 282; see also, e.g., *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1673 (2017) (“Sandoz counterclaimed for declaratory judgments that the asserted patent was invalid[.]”); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l Inc.*, 534 U.S. 124, 129 (2001) (“Farm Advantage answered with a general denial of patent infringement and entered a counterclaim of patent invalidity[.]”).

In sum, for centuries before the Founding—and, until very recently, for centuries after—courts determined whether a patent was valid. Because a patent’s validity “is the subject of a suit at the common law, or in equity, or admiralty,” Congress may not “withdraw from judicial cognizance” cases adjudicating that matter. *Stern*, 564 U.S. at 484 (quoting *Murray’s Lessee*, 18 How. at 284). *Inter partes* review does just that—and,

as demonstrated next, it does so without any justification that this Court has recognized.

B. *Inter Partes* Review Cannot Be Justified By The Public-Rights Doctrine.

This Court has, to be sure, permitted tribunals other than Article III courts to exercise the judicial power over public rights—but that doctrine cannot justify *inter partes* review. Public rights encompass only claims (i) by or against the government, (ii) which have been historically resolved outside the Judicial Branch, or (iii) the resolution of which is “essential to a limited regulatory objective * * * integrally related to particular federal government action.” *Stern*, 564 U.S. at 490-91. Patent-validity claims are none of these. Patents “have * * * the attributes of personal property,” 35 U.S.C. § 261, and thus patent-validity claims involve disputes over quintessential private property rights that must be adjudicated by courts. Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protections Of Patents Under The Takings Clause*, 87 B.U. L. REV. 689, 701 (2007) (discussing the American judicial tradition of patents’ protection under Takings Clause as property rights).

If a question about a patent’s validity may instead be shunted from the federal courts to an administrative agency “simply by deeming it part of some amorphous ‘public right,’” then Article III’s protections have devolved into mere “wishful thinking.” *Stern*, 564 U.S. at 495. After all, public-rights cases are the exception.

Most disputes involve only private rights—including “private tort, contract, and property cases, as well as a vast range of other cases.” *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 458 (1977). “Private rights * * * traditionally include[] * * * property rights,” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 130-39), and these cases adjudicate “the liability of one individual to another under the law as defined.” *Stern*, 564 U.S. at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). These private rights—the broad swath of matters fit for judicial resolution—may only be adjudicated by Article III courts.

1. Patent-Validity Cases Are Private-Right Disputes Historically Resolved By Courts.

This Court has always regarded patents as property rights that may only be adjudicated as private rights—i.e., by Article III courts. Patents and the rights they confer have been referred to as “property” as early as the 1793 Patent Act. 1 Stat. 318, 320 (1793) (entitling inventors to “present a petition to the Secretary of State, signifying a desire of obtaining an exclusive property” in that invention); see also 35 U.S.C. § 261. Hence this Court’s observation over a century ago that a patent takes its subject “from the people, from the public, and ma[kes it] the private property of the patentee.” *Am. Bell Tel. Co.*, 128 U.S. at 370. The resulting patent rights are unquestionably the patent

owner’s “private property.” *Brown v. Duchesne*, 60 U.S. 183, 197 (1856). Only one “authority [is] competent to set” a private property right such as “a patent aside, or to annul it, or to correct it for any reason whatever.” *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 609 (1898). It is the same authority that can do so for all private rights: “the courts of the United States.” *Ibid.*

Patents remain private property, and thus private rights, to the present day. Like a parcel of land, a patent entitles its owner to exclude others. See *General Information Concerning Patents*, USPTO (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents> (“A patent for an invention is the grant of a property right to the inventor * * * the right to exclude others[.]”). The owner not only may, but *must*, enforce the boundaries of his property; the government asserts no ownership rights in the patent and does not assist the owner in protecting his rights. *Ibid.* (“Once a patent is issued, the patentee must enforce the patent without aid of the USPTO.”). He must therefore seek judicial recourse against trespassers—infringers, in the patent context—to vindicate the boundaries of his property. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 786 F.3d 899, 924-25 (Fed. Cir. 2015). In this, a patent owner is like any other private party pressing a “private tort, contract,” or—especially—“property case[.]” *Atlas Roofing*, 430 U.S. at 458. This “vast range of * * * cases” is “not at all implicated” by the public-rights doctrine. *Ibid.* Neither is this case.

2. Patent-Validity Cases Are Not Brought By Or Against The Government.

The first, most straightforward line demarcating public-rights cases is whether the case is brought against the government. If so, the government could condition its consent to hear the claim at all on its being heard in its choice of forum. *Stern*, 564 U.S. at 489. This Court first recognized the notion of public rights in exactly that context in *Murray's Lessee*. There, the Treasury Department determined that a customs collector failed to transfer payments to the federal government and, as a consequence, sold a parcel of land belonging to the collector. 18 How. at 274-75. Multiple claimants asserted title to the land, with one challenging the Treasury Department's original determination and sale as an adjudication outside Article III courts. *Ibid.* After cautioning that Congress could not withdraw Article III matters from the federal courts, this Court coined the term "public right" to describe actions such as the sale. *Id.* at 284.

As this Court has since explained, because a case regarding the sale could commence only through a waiver of sovereign immunity, "[t]he point of *Murray's Lessee* [is] simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all" because of sovereign immunity. *Stern*, 564 U.S. at 489. Little explanation is required to understand that this category of public-rights cases cannot save *inter partes* review, which is initiated by

private parties and implicates no waivers of sovereign immunity.⁴

3. Patent Cases Have Not Historically Been Resolved Wholly Outside The Judicial Branch.

Murray's Lessee discussed another category of public rights cases—those involving rights that traditionally have been resolved wholly within another branch. 18 How. at 284. Congress could leave the adjudication of a justiciable case about those rights to that branch, this Court observed, or otherwise reassign its adjudication as it pleased. *Ibid.* Sometimes describing these matters as those “that historically could have been determined exclusively by” the Executive or Legislative Branches, *N. Pipeline*, 458 U.S. at 68 (plurality op.), *Murray's Lessee* provided as an example equitable claims of land ownership to territory that had been formally ceded to the United States. *Murray's Lessee*, 18 How. at 284. The Executive could unilaterally resolve competing rights disputes over these lands, just as the Recorder of Land Titles had in *Burgess v. Gray*, 16 How. 48, 61 (1853). *Murray's Lessee*, 18 How. at 284 (citing *Gray*). These cases, therefore, could also be adjudicated outside of Article III courts.

⁴ Of course, patent claims against the federal government may be heard in the Article I Court of Federal Claims. 28 U.S.C. § 1498(a).

Aside from adjudicating land claims in territory ceded to the United States, *Gray*, 16 How. at 61, and in the District of Columbia, where Congress has plenary power, *Am. Ins. Co. v. Canter*, 1 Pet. 511, 518 (1828); see also U.S. CONST. art. I, § 8, cl. 17, these public-rights cases included adjudications regarding membership in Indian tribes; the appraisal, classification, and collection of customs duties, *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458-59 (1929); and other similar “functions, although mostly quasi judicial, [which] were all susceptible of performance by executive officers, and had been performed by such officers in earlier times.” *Id.* at 458-59.

Disputes about a patent’s validity, however, were not only *not* adjudicated by Executive “officers in earlier times,” but this Court had also declared “the courts of the United States * * * [t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever,” *McCormick*, 169 U.S. at 609, and *not* “the department which issued the patent,” the Executive. *Ibid.* Both historical practice and *McCormick*, then, foreclose calling a patent a “public right” on this basis.

4. Patent Cases Do Not Involve “New Statutory Obligations,” Nor Is Their Adjudication “Essential To A Limited Regulatory Objective.”

That leaves only the most recent strain of public-rights cases—those involving claims that “derive[] from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority.” *Stern*, 564 U.S. at 490. But these cases cannot justify the Board’s adjudication of private patent rights either. This category includes only claims that meet two criteria. First, the claim must arise from a “new statutory obligation[]” created by Congress without a historical analogue to actions adjudicated by courts. *Atlas Roofing*, 430 U.S. at 450 (citation omitted). Second, the claim must be “integrally related to” a regulatory scheme governing parties’ private conduct beyond merely the adjudication of those kinds of claims. *Stern*, 564 U.S. at 490-91. Patent-validity claims satisfy neither criterion.

First, this Court has reaffirmed time and again that this category of public rights arises only from *new* statutory obligations without historical analogues. Thus in *Atlas Roofing*, this Court emphasized that OSHA had expanded well beyond common-law negligence and wrongful-death liability by “creat[ing] new statutory obligations” that were previously unheard of. 430 U.S. at 450.

Similarly, there was no common-law analogue to the statutory compensation scheme in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), which entitled federal pesticide registrants to compensation for the costs of trade-secret information disclosed to the federal government. As this Court noted, trade-secret property interests were conventionally extinguished by their disclosure to a party not obligated to keep them secret—so a statute entitling the disclosure of a secret to compensation provided a claim without a common-law counterpart. *Id.* at 584-85.

Likewise, the obligations vindicated by the broker-reparation scheme in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), significantly expanded the common law. This Court later described the Commodity Exchange Act as prohibiting both “fraudulent” and “manipulative conduct” related to commodity futures transactions, *id.* at 836—a novel statutory expansion on traditional fraud (just as the OSHA obligations in *Atlas Roofing* expanded negligence and wrongful-death actions).⁵

Compared to these novel administrative regimes, patents are hardly “new statutory obligations.” Far

⁵ In *Schor*, this Court permitted the Commission to adjudicate a state-law, private-right counterclaim along with the public-rights claims because it was “necessary to make the reparations procedure workable” and amounted to an “intrusion * * * [that] can only be termed *de minimis*.” 478 U.S. at 856. Moreover, the parties in *Schor* consented to the adjudication, see *Wellness Int’l*, 135 S. Ct. at 1944, and that is not the case here.

from being a stranger to the common law, patents have been adjudicated by American and English courts for centuries. The most one could say is that they arise by statute. But this is not enough: the applicability of the constitutional right to jury trial—and thus the right to an Article III court, *Granfinanciera*, 492 U.S. at 53-54—in actions enforcing “statutory rights” is “a matter too obvious to be doubted.” *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

If the mere creation of a right by federal statute sufficed to enable Congress to vest the judicial power to adjudicate disputes regarding that right in a non-Article III tribunal, then Congress could just as easily create an Article I court to adjudicate Sherman Act cases, as American antitrust law significantly expanded on common-law jurisprudence regarding restraints of trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Of course, it cannot. *Fleitmann v. Welsbach Street Lighting Co. of Am.*, 240 U.S. 27, 29 (1916). Indeed, the notion that Congress could divest federal courts of the judicial power over rights merely because they arise under the laws of the United States would surely have confused the conventions ratifying Article III, who affirmed that the “judicial power” of the federal courts “shall extend to all cases, in law and equity, arising under * * * the laws of the United States,” U.S. CONST. art. III, § 2, even when those laws granted rights.

Second, even if patent rights were somehow “new statutory obligations,” they still would not qualify as

public rights because they fail the second requirement—they are not “integrally related” to a particular federal government action with a limited regulatory objective. *Stern*, 564 U.S. at 490-91. In other words, these integrally related adjudications are closely related in subject matter to an attempt to enforce a governmental obligation on regulated parties. The adjudication itself cannot be the “limited regulatory objective”—otherwise it would be no limit at all.

Atlas Roofing is the paradigm of this sort of case. There, the federal government cited two companies for violating OSHA after several employees died in workplace incidents. 430 U.S. at 447. The adjudication of these citations in a non-Article III tribunal was permissible, this Court held, because they were integrally related to the government’s enforcement action against the cited business. *Id.* at 460-61. Likewise, in *Thomas*, this Court approved a non-Article III tribunal where the dispute was “integral[ly] related” to a “complex regulatory scheme” involving particular governmental regulatory actions over particular pesticides. 473 U.S. at 589. And the claims adjudicated in *Schor* arose from a private attempt to enforce government regulatory obligations under the Commodities Exchange Act, along with a state-law counterclaim that arose out of the same transaction, adjudicated because it was “necessary to make the reparations procedure workable.” 478 U.S. at 856-57. These, too, were integrally related to the Act’s reparations procedure and to the Act’s enforceable public obligations.

In each of these cases, the rights in question derived from a federal regulatory scheme where adjudicating those rights was critical to a specific regulatory obligation enforceable through an action *aside* from the adjudication itself. But *inter partes* review does not follow from a governmental enforcement effort, does not regulate private conduct, does not follow from any public obligations borne by patent owners, and therefore is not integrally related to any particular federal governmental action.

It is not, for example, conducted to resolve a citation or sanction by the federal government for noncompliance with a federal regulatory regime, as in *Atlas Roofing*. Nor, as in *Thomas*, is *inter partes* review pursuant to some common governmental obligation on regulated entities. Nor, as in *Schor*, is it the adjudication of competing claims of right under a federal regulatory regime. Indeed, the PTO disclaims the responsibility to regulate private parties and the infringement of their rights that administrative agencies enforcing public rights take up: the Board does not seek to enforce obligations against private parties on behalf of the government. Instead, it adjudicates “[w]holly private * * * property cases,” the very opposite of “public rights.” See *Atlas Roofing*, 430 U.S. at 458.

Thus to justify its conclusion that *inter partes* review involves a public right, the Federal Circuit was forced to expand this Court’s narrow public-rights doctrine far beyond what this Court has ever recognized. See *MCM Portfolio*, 812 F.3d at 1290-91. Rather than

“limit[ing] the exception to cases * * * in which resolution of the claim by an expert government agency is deemed *essential* to a *limited regulatory objective*,” *Stern*, 564 U.S. at 490 (emphasis added), the Federal Circuit vastly expanded it by regarding agency “expertise” as sufficient. And contrary to the Federal Circuit, see *MCM Portfolio*, 812 F.3d at 1290-91, agency expertise alone is no limit at all. Any agency (one hopes) may gain expertise in a given regulatory scheme and accompanying area of law by having the Executive Branch’s authority to enforce that law delegated to it. Indeed, to justify conferring the judicial power under Article III merely on the PTO’s expertise amounts to a buy-one-get-one-free sale for the Constitution’s Vesting Clauses: exercise the executive power, get the judicial power thrown in, too.

And to justify the PTO’s exercise of the judicial power based on its potential *errors* in applying the patent law (by wrongly issuing certain patents in the first place), see *ibid.*, is risible. There is already a branch with the specific competence and the constitutional mandate to examine whether Executive Branch actors have complied with the laws of the United States: the Judicial Branch. This argument for exercising the judicial power amounts to the belief that combining the various powers in our government into one body improves the chances that each will be exercised well. It suffices to say that this belief is reflected neither in the Founders’ conception of the separation of powers nor in this Court’s.

If these threadbare reasons suffice to combine separated powers, then the Constitution's powers are separated in name only. Congress may bypass Article III by setting up a specialist Executive body to perform any lawful function and then bootstrap the illegitimate power to adjudicate cases arising from those actions under the guise of expertise and error correction. A public-rights doctrine so capacious cannot be reconciled with Article III or this Court's cases enforcing its limits. Patent-infringement and patent-validity cases are private property disputes, and no conception of public rights that this Court has recognized or should recognize converts such a private dispute into a public one.

C. No Other Basis Recognized By This Court Can Excuse *Inter Partes* Review.

This Court has also considered whether, as a practical matter, decision-making by a non-Article III tribunal would “usurp the constitutional prerogatives of Article III courts.” *Wellness Int’l*, 135 S. Ct. at 1944-45. This analysis further confirms that *inter partes* review violates Article III because it intrudes upon the separation of powers and usurps the constitutional prerogatives of the Judicial Branch.

1. *Inter Partes* Review Subjects Litigants To A Non-Article III Tribunal Without Their Consent.

First and foremost, this Court has considered whether the parties have consented to adjudication by a non-Article III tribunal. See *Wellness Int'l*, 135 S. Ct. at 1943. Although “notions of consent and waiver cannot be dispositive because the limitations [of Article III] serve institutional interests that the parties cannot be expected to protect,” *Schor*, 478 U.S. at 851, where “the decision to invoke th[e] forum is left entirely to the parties,” *id.* at 855, consent diminishes separation-of-powers concerns “for it seems self-evident that * * * Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.” *Ibid.*; see also *Peretz v. United States*, 501 U.S. 923, 936 (1991) (holding that Article III permits a litigant to consent to a magistrate judge supervising jury selection); *Wellness Int'l*, 135 S. Ct. at 1944 (explaining that the “entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver” (internal quotation marks omitted)).

Inter partes review, however, can and does—as it did in this case—adjudicate patent validity over the objections of the patent owner. Like the litigants in *Stern* and *Northern Pipeline*, Oil States “‘did not * * * consent to’ resolution of the claim against it in a non-Article III forum.” 135 S. Ct. at 1946 (quoting *Stern*, 564 U.S. at 493). To the contrary, Oil States vigorously opposed *inter partes* review. “[T]he cases in which this

Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court.” *Wellness Int’l*, 135 S. Ct. at 1947. This is precisely such a case.

2. *Inter Partes* Review Is Conducted Without Meaningful Article III Supervision.

This Court has, at times, approved the exercise of the judicial power by non-Article III tribunals when they are subject to substantial supervision by Article III courts. See *Schor*, 478 U.S. at 853 (agency orders were “enforceable only by order of the district court”); *Northern Pipeline*, 458 U.S. at 85-86 (explaining that “the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court”). *Inter partes* review, however, is conducted without any Article III supervision whatsoever: proceedings begin and run their course to judgment without an Article III court’s involvement at any point.

The Board’s orders—or “judgments”—are wholly self-executing and appealable as of right only directly to the Federal Circuit. Nor can the district court—as in *Wellness International*—withdraw a reference to the Board. See 135 S. Ct. at 1945. Once *inter partes* proceedings are instituted, litigants have no option other than to try their case before a non-Article III tribunal without having that tribunal subject to any Article III supervision or control.

An Article III court becomes involved with an *inter partes* review proceeding only if a party appeals to the Federal Circuit. But appellate review is not what this Court has deemed “supervision” or “control.” For example, an Article III court controlled the non-Article III tribunal in *Crowell* in part because the tribunal could not issue a self-executing judgment—only a district court could. 285 U.S. at 44-45, 48. Likewise, only a district court could enforce the Commission’s orders in *Schor*, 478 U.S. at 853. And references to bankruptcy judges can be withdrawn by district courts. *Northern Pipeline*, 458 U.S. at 80 n.31.

This Court has also underscored Article III courts’ control over magistrates, including their selection as an initial matter. *Wellness Int’l*, 135 S. Ct. at 1945. But *inter partes* review shares none of these characteristics. Board judgments are self-executing; no Article III court may withdraw *inter partes* proceedings; and the Executive controls the composition of the Board. All that is left to an *inter partes* litigant is a right to appeal, which this Court has never held or even suggested could be sufficient as “control” or “supervision.”

Moreover, even when an *inter partes* litigant appeals to the Federal Circuit, the Board receives extraordinary deference. The Federal Circuit reviews *inter partes* review proceedings to determine whether the Board’s findings are supported by “substantial evidence,” *Homeland Housewares, LLC v. Whirlpool Corp.*, No. 2016-1511, ___ F.3d ___, 2017 WL 3318764, at *2 (Fed. Cir. Aug. 4, 2017), a standard of review that this Court has equated to the standard for overturning

a jury's verdict. *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Indeed, this standard is far more deferential than the "clearly erroneous" review held insufficient in *Northern Pipeline*, 458 U.S. at 85, and vastly more deferential than the schemes upheld in *Crowell* and *Schor*. See *Schor*, 478 U.S. at 853 ("CFRC orders are also reviewed under the same 'weight of the evidence' standard sustained in *Crowell*, rather than the more deferential [clearly erroneous] standard found lacking in *Northern Pipeline*."); *Dickenson v. Zurko*, 527 U.S. 150, 152-53 (1999).

Thus when conducting *inter partes* review, the Board does not function merely as a fact-finding "adjunct" of the district court, reserving judicial power for the Judicial Branch. To the contrary, the Board adjudicates cases entirely bereft of the Article III court supervision that this Court has deemed essential. For example, in permitting parties to waive their right to an Article III forum and permit adjudications of particular matters in bankruptcy courts, the Court noted that "[b]ankruptcy judges, like magistrate judges, 'are appointed and subject to removal by Article III judges.'" *Wellness Int'l*, 135 S. Ct. at 1945 (quoting *Peretz*, 501 U.S. at 937). The entire process of adjudication by bankruptcy judges and magistrates thus "takes place under the district court's total control and jurisdiction." *Ibid.*

Not so with *inter partes* review. Board judges are appointed through a process seated entirely in the Executive Branch. The Director of the PTO recommends potential judges to the Commerce Secretary, who in

turn makes the final selection. *Patent Trial and Appeal Board: Are you interested in becoming an administrative patent judge?*, USPTO (Apr. 10, 2014).⁶ The Secretary is not required to seek the President’s approval, nor is Congress involved in the selection process. *Ibid.*; see also Letter from Richard A. Epstein, Professor, New York University School of Law, and F. Scott Kieff, Professor, George Washington University School of Law, to the House Judiciary Committee 12-13 (Mar. 30, 2011) (noting the sweeping powers of the PTO Director regarding the Board and concluding that the agency has “the power that is denied to the President and the Congress in setting up both Article I and Article III courts”).

Once selected, the judges have no tenure-in-office protections beyond those that ordinary civil servants enjoy. Unlike, for example, judges on the Article I Court of Claims, they do not serve for a fixed term of years. 28 U.S.C. § 172. And they may be discharged like any other federal employee covered by the civil service laws. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

Board judges depend wholly on their superiors for performance evaluations, promotions, and raises. See, e.g., *Organizational Structure and Administration of Patent Trial and Appeal Board*, *supra* (describing promotion system). The salary and promotion potential of

⁶ Available at https://www.uspto.gov/ip/boards/bpai/ptab_brochure_v2_4_10_14.pdf.

every judge thus depends on the approval of a politically appointed Executive Branch officer (or the officer's subordinates).

Not only are the judges of the Board wholly dependent on politically appointed Executive Branch officers for salary, promotion, and tenure, but the Executive Branch can also directly influence the Board's decision-making. The Director of the PTO, a political appointee, selects how many judges (above the three required by the statute) and which ones will adjudicate cases. See 35 U.S.C. § 6(c). The Director can even designate himself to adjudicate an *inter partes* review. See 35 U.S.C. § 6(a).

The risk that these powers will be used to influence specific decisions is not hypothetical. It has already happened. Two Federal Circuit judges recently expressed “concern[] about the PTO’s practice of expanding panels to decide requests for rehearing.” *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, No. 16-2321, ___ F.3d ___, 2017 WL 3597455, at *6 (Fed. Cir. Aug. 22, 2017) (Dyk, J., concurring). “Here, after a three-member panel of administrative judges denied” a petitioner’s request to join its second, time-barred, petition with its earlier, timely filed and instituted *inter partes* review, the petitioner requested rehearing. *Id.* at *1-2. “The Acting Chief Judge, acting on behalf of the Director” then “expanded the panel from three to five members” in order, in the Director’s words, to achieve “uniformity” of the Board’s decisions. *Id.* at *6. That expanded panel reversed the prior panel’s decision, leading several Federal Circuit judges

to “question whether the practice of expanding panels where the PTO is dissatisfied with a panel’s earlier decision is” an “appropriate mechanism” for “achieving the” Director’s “desired uniformity.” *Ibid.*

This is not the first time the Director of the PTO has appointed judges to panels to alter decisions in pending cases. After a three-member panel of the Board’s predecessor BPAI reversed a patent examiner’s rejection of claims in a patent application, the head of the BPAI appointed an expanded panel for rehearing. *In re Alappat*, 33 F.3d 1526, 1531 (Fed. Cir. 1994) (*en banc*), abrogated on other grounds by *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008). The five new members all voted against the decision of the original three-member panel. *Ibid.* A plurality of the Federal Circuit concluded that the “statutory scheme” permitted the head of the Board “to determine the composition of Board panels, and thus he may convene a Board panel which he knows or hopes will render the decision he desires, even upon rehearing, as he appears to have done in this case.” *Id.* at 1535 (plurality op.).

The PTO’s Solicitor recently acknowledged that the practice of appointing additional judges to reverse a panel’s judgment continues under the current Board. See *Yissum Research Dev. Co.*, *supra*, Oral Argument at 48:00-06. As the Solicitor put it, the Director has to “be able to make sure that her policy judgments [were] enforced by the Board” in any given case. *Id.* at 43:17-42. Such a system of adjudication—in which a political appointee can hand-pick a panel to render the decision

she desires—could not be further removed from the guarantees of judicial independence secured by Article III.

These are the dangers against which Article III supervision is designed to guard: the possibility that Congress could “transfer jurisdiction [to non-Article III tribunals],” thus “aggrandiz[ing] * * * one branch at the expense of the other.” *Wellness Int’l*, 135 S. Ct. at 1944 (quoting *Schor*, 378 U.S. at 850). Congress has done just that, wresting the judicial power from a politically independent judicial tribunal and vesting it in a politically beholden Executive one—aggrandizing to the Executive that which belongs to the Judiciary. Article III’s “structural purpose[s],” *ibid.*, forbid Congress from doing so.

D. The Concerns That Led Congress To Establish *Inter Partes* Review Confirm The Article III Violation.

The “concerns that drove Congress to depart from the requirements of Article III” in establishing *inter partes* review only confirm that it violates Article III. See *Schor*, 478 U.S. at 851.

Congress created *inter partes* review primarily out of a concern that the federal district courts provided insufficient protection against the assertion of meritless patents. See H.R. REP. NO. 112-98, at 39 (noting “a growing sense that questionable patents are too easily obtained and are too difficult to challenge”); *id.* at 48 (explaining that the statute seeks to “improve

patent quality and restore confidence in the presumption of validity that comes with issued patents”). To the extent the AIA was motivated by concerns about abusive or inefficient consolidation of patent litigation in the Eastern District of Texas, in particular, preliminary studies suggest that this Court’s recent decision in *TC Heartland LLC v. Kraft Food Brands, LLC*, 134 S. Ct. 1514 (2017), is expected to reduce filings there by 70 percent. See, e.g., *How TC Heartland May Affect District Court Filings: A Quantitative Assessment*, Unified Patents (June 1, 2017), <https://www.unifiedpatents.com/news/2017/5/31/a-quantitative-assessment-of-how-tc-heartland-may-affect-district-court-filings>.

Not surprisingly, *inter partes* review has done just what it was designed to do—invalidating nearly 80 percent of the patents in the cases it adjudicates as of March 2016. *PTAB Statistics*, USPTO (Mar. 31, 2016), <https://www.uspto.gov/sites/default/files/documents/2016-3-31%20PTAB.pdf>. As the then-chief administrative judge of the Board put it in 2014, “[i]f we weren’t, in part, doing some ‘death squadding,’ we would not be doing what the statute calls on us to do.” Ryan Davis, *PTAB’s ‘Death Squad’ Label Not Totally Off-Base*, LAW360 (Aug. 14, 2014), <http://bit.ly/2p2JPDo>.

Congress quite intentionally withdrew a significant number of patent disputes—those involving invalidity defenses and counterclaims—from federal district courts because Congress was dissatisfied with the speed and results of district court decision-making. Congress is free to change the rules of decisions

applied by federal courts (within the constraints imposed by other constitutional provisions, of course). But Congress cannot withdraw matters traditionally adjudicated in courts of law from Article III courts so that an administrative agency can adjudicate those matters in “trials” that lack Article III’s most fundamental guarantees. Such a purpose is flatly inconsistent with the separation-of-powers principles inherent in Article III.

Indeed, because *inter partes* review stands virtually alone among non-Article III tribunals in combining both a full-dress exercise of judicial power with a private-right subject matter, invalidating *inter partes* review would have no spill-over effect into other administrative proceedings.

Unlike the Court of Federal Claims—which adjudicates only claims against the government, and thus necessarily public rights—the Board resolves cases between private parties. See 28 U.S.C. § 1491. Unlike the International Trade Commission, whose “decisions * * * involving patent issues have no preclusive effect in other forums,” see *Texas Instruments v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996), the Board issues final “judgments” that can be overturned only by the Federal Circuit. As observed by one Federal Circuit judge, “a decision of the PTO, an administrative agency under a coordinate branch of government, can displace a judgment of an Article III court.” *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1370 (Fed. Cir. 2015) (O’Malley, J., dissenting). Unlike interference proceedings, *inter partes* review

provides no recourse to a federal district court for a full Article III trial. And unlike traditional *ex parte* reexamination—which is an interactive proceeding between the agency and the patent owner—*inter partes* review is an adversarial proceeding with all the trappings of litigation.

Each of these other tribunals or proceedings stops short of exercising Article III judicial power over private rights. *Inter partes* review does not. This Court would therefore call no other tribunal or proceeding into question by prohibiting this clear intrusion into Article III.

II. *Inter Partes* Review Violates The Seventh Amendment.

No less than wrongfully usurping the role guaranteed to federal courts by Article III, *inter partes* review also usurps the role guaranteed to juries under the Seventh Amendment. Historically, challenges to a patent’s validity were decided in actions at law, with disputed questions of fact resolved by juries. The Seventh Amendment preserves the same jury right for patent owners today.

The Seventh Amendment guarantees federal litigants a jury “[i]n suits at common law,” U.S. CONST. amend. VII, “preserv[ing] the right to jury trial as it existed in 1791.” *Curtis*, 415 U.S. at 193. Thus federal litigants may try to juries questions of fact in actions customarily tried to juries in the late 18th century as

well as their modern-day statutory analogues. *Granfinanciera*, 492 U.S. at 42. Patent-validity actions were tried to juries in England, but the Board adjudicates those same actions (or their modern-day analogues) today. The Seventh Amendment does not permit that arrangement.

As discussed above, *supra* Part I.A.2., patent-validity cases began in several ways in England in 1791: during a patent infringement action at law or suit in equity, or otherwise through an action commenced by a writ of *scire facias*. A dispute concerning a patent's validity was treated as an action at law in any event. The Statute of Monopolies, which regulated the granting of patents in England, "declared * * * [t]hat all * * * lettres patentes * * * and the force and validitie of them and every of them ought to be, and shall be for ever hereafter examyned heard tryed and determined by and accordinge to the Cōmon Lawes of this Realme & not otherwise." 21 Jac. 1, c. 3, § 2.

Infringement actions were the typical way that patent-validity questions arose. For the most part in 1791, "[a]n action for patent infringement is one that would have been heard in the law courts of old England." *Markman*, 52 F.3d at 992. This was the usual occurrence, and this Court bases its historical analysis on what typically occurred, occasional outliers notwithstanding. See, e.g., *Granfinanciera*, 492 U.S. at 43.

An infringement action brought in the law courts would begin with the patent owner filing an action for

trespass on the case, Gómez-Arostegui, *supra*, at 212-13; Br. of Legal Historians at 9—the archetypical common-law tort action for damages. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715-16 (1999). “Actions on the case, like other actions at law, were tried before juries,” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (Thomas, J.), and a patent-infringement action was no different.⁷ In response, when the alleged infringer generally denied infringement through a “not guilty” plea, the case was tried to a jury if the alleged infringer requested it. Gómez-Arostegui, *supra*, at 212-13; Br. of Legal Historians at 9.

Juries resolved numerous disputed-fact questions in these actions, including those that would preclude a conclusion of infringement if found in the negative. These questions included whether a patent’s invention was novel and whether the patent owner had actually invented the patented invention. E.g., *Liardet v. Johnson* (K.B. 1778), reprinted in 1 James Oldham, *The Mansfield Manuscripts* 753, 756. Jury instructions in these cases would charge jurors with determining, for

⁷ In this, a patent-infringement action operated like its close cousin, the copyright-infringement action, which, as this Court has held, is plainly an action at law to which the Seventh Amendment right attaches. *Feltner*, 523 U.S. at 351, 354-55; see also H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit under the Statute of Anne in 1710*, 25 BERK. TECH. L.J. 1247, 1326-38 (2010) (explaining that “courts of record,” such as those called on under Statute of Anne, cited in *Feltner*, were necessarily courts at law, and thus actions instituted in such courts were at law, not in equity). Just so here.

example, whether a claimed invention was “known and in use before” an alleged infringement as “a matter of fact, the proof of which lies on Defendant.” *Ibid.* Likewise, another instruction informed the jury that they must decide if the “Patentee * * * [was] really the inventor [and] the Invention * * * is new.” Br. of Legal Historians at 17-18; *Strutt v. James* (C.P. 1783). In other words, not only was the question of patent infringement tried to a jury, but the necessary preconditions for the patent’s validity were tried to a jury as well.

A patent owner could initiate an infringement action in the Court of Chancery as well; after all, the owner had his choice of venue between the courts of law or the courts of equity. Bottomley, *supra*, at 36-37. But the Statute of Monopolies prevented the courts of equity from determining a patent’s validity. Indeed, Edward Coke explained that the Statute of Monopolies’ restriction on patent-validity questions to courts of law—that all challenges to patents or their validity must “be examined, heard, tried, and determined in the courts of the common law according to the common law”—was designed *deliberately* to exclude courts of equity and other bodies from resolving patent-validity questions. EDWARD COKE, *THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 182-83 (London, W. Clarke, & Sons, 1809) (1644).

Validity questions could be determined *only* in courts of law—and thus before juries—and “not at the councell table, star-chamber, chancery, exchequer

chamber, or any other court of like nature, but only according to the common laws of this realm.” *Ibid.* Coke explained why the Statute of Monopolies required these actions to be heard in the courts of law, and thus before juries: “such boldness the monopolists took” in these other, jury-less venues in “not obeying the commandments and clauses of the said grants of monopolies” that “the preventing of which mischief” through exclusive trial at law was necessary. *Ibid.* Thus only juries could be entrusted to decide whether a patent was valid.

As a result, when a patent owner began an infringement action in the courts of equity, if the alleged infringer challenged the patent’s validity as a defense, the court of equity was required to send the case to a court of law for jury trial. As one jurist sitting in equity summarized, “[i]f [a] Question arises whether there is Infringement or Novelty of Invention, they”—the courts of equity—“refer those Questions to Law.” *Liardet v. Johnson*, GT Eldon MS, Notes of Cases 1779, at 34, 46 (Ch. 1780); Br. of Legal Historians at 12. As Blackstone explained, once a court of equity “direct[ed] the matter to be tried by jury,” 3 WILLIAM BLACKSTONE, COMMENTARIES 452, “the verdict of the jurors determine[d] the fact” issues so tried “in the court in equity.” *Ibid.* Far from “advisory,” jury verdicts in these cases were binding. Even when filed in courts of equity, infringement actions and validity questions were tested as actions at law, tried to juries.

A patent’s validity could also be challenged through an action commenced by a writ of *scire facias*, which would be initiated in the Court of Chancery.

But the Court of Chancery still treated these proceedings as actions at law, and sat as a court of law, as Blackstone noted that Chancery always did for actions instituted by writs of *scire facias*. 3 WILLIAM BLACKSTONE, COMMENTARIES 47. In this dual court—“the one ordinary, being a court of common law; the other extraordinary being a court of equity,” *ibid.*, *scire facias* writs were heard by the former. *Ibid.* “The ordinary legal court [of Chancery] is much more ancient than the court of equity. It’s [*sic*] jurisdiction is to hold plea[s] upon a *scire facias* to repeal and cancel the king’s letters patent, when made against law, or upon untrue suggestions.” *Ibid.*

Here, too, disputed fact questions on the *scire facias* writ were tried to juries, although the Court of Chancery had to send the case again to the Court of King’s Bench, as the Court of Chancery could not summon a jury. As Blackstone again summarizes: “if any fact be disputed between the parties” on the writ’s issuance, “the chancellor cannot try it, having no power to summon a jury.” *Id.* at 48. Instead, he “must deliver the record * * * into the court of king’s bench, where it shall be tried by the country”—tried *by jury*—“and judgment shall be there given thereon.” *Ibid.* American courts, including this Court, took this practice with them with the writ. See *Ex Parte Wood & Brundage*, 22 U.S. 603, 614-15 (1824) (“[I]t is ORDERED * * * that the said Judge do award a process, in the nature of a *scire facias*, to the patentees, to show cause why the said patent should not be repealed * * * and that if the issue be an issue of fact, the trial thereof be by a jury.”).

No matter whether presented in an infringement action in the courts of law, as one in the courts of equity, or in an action commenced by a writ of *scire facias* in the Court of Chancery, the result was the same: questions as to a patent's validity were tried to juries. Bottomley, *supra*, at 36-37, 41-43; see also Gómez-Arostegui, *supra*, at 210-12; Br. of Legal Historians at 14-19. The resolution of disputed facts in these cases is therefore part of the jury-trial right preserved by the Seventh Amendment—and must remain in courts, before juries.

Transferring the adjudication of these fact questions from juries to the Board is not merely incidental to *inter partes* review—it is the point. A petition for *inter partes* review may seek *only* the cancellation of “[one] or more claims of a patent,” and only on specific grounds: that a patent's subject-matter is not novel, that it was anticipated by the prior art, or that the patent's invention was obvious. 35 U.S.C. §§ 102(a), 103, 311(b). As demonstrated above, these are the same types of issues that *juries* traditionally decided in suits at common law.

Juries likewise resolved numerous disputed questions of fact about patents, such as whether the patentee actually invented the subject matter, whether the invention was useful, whether the patent had explained its method of production enough to enable others to replicate the invention, and so on. E.g., *Hill v. Thompson*, 3 Meriv. 622, 630 (Ch. 1817); *Boulton*, 126 Eng. Rep. at 659; *Liardet v. Johnson* (K.B. 1778), reprinted in 1 James Oldham, *The Mansfield Manuscripts* 753, 756; Br. of Legal Historians at 16-18. For

that matter, juries decided these questions as ultimate issues. *Ibid.* Whether modern questions regarding novelty or obviousness are precisely the same questions that English jurors resolved, they are unquestionably close statutory analogues, so the result is the same: they fall within the Seventh Amendment's scope. See generally *Granfinanciera*, 492 U.S. at 42.

Patent owners therefore have a right to try disputed-fact questions in these matters to juries. As English historical practice reveals, patent-validity and patent-infringement actions are two sides of the same coin: validity challenges arose in response to infringement actions, and were adjudicated in the same case—the same “Suit[] at common law.” Before *inter partes* review, these questions arose in the same Article III cases as well. Indeed, the first Patent Act, passed a year *before* the Seventh Amendment was ratified, expressly entitled patent owners to jury trials over infringement actions, guaranteeing “damages as shall be assessed by a jury” for this “action on the case”—meaning an action at law. 1 Stat. 109, 111. Sensibly, “there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.” *Markman*, 517 U.S. at 377 (citing *Bramah v. Hardcastle*, 1 Carp. P.C. 168 (K.B. 1789)). This guarantee is meaningless if an alleged infringer may nullify it by filing a preemptive or parallel petition for *inter partes* review.

The distinction is no mere matter of procedure. The jury-trial right was one of the most venerated by both the English and the Founders: as “the glory of the

English law,” 3 WILLIAM BLACKSTONE, COMMENTARIES 79, “the Constitution would have been justly obnoxious * * * if it had not recognized” the right “in the most solemn terms.” 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1773 (Boston, Hilliard, Gray, & Co. 1833). For disputed-fact questions concerning the validity of a patent, juries are the ones entitled to decide—and patent owners are entitled to have them do so.

* * *

Patent-validity challenges were “traditional actions at common law” and therefore “the responsibility for deciding that [type of] suit rests,” at a minimum, “with Article III judges in Article III courts.” *Stern*, 564 U.S. at 484; see also *Am. Bell Tel. Co.*, 128 U.S. at 365 (“Patents are sometimes issued unadvisedly or by mistake * * * * In such cases courts of law will pronounce them void * * * * That is a judicial act, and requires the judgment of a court.”). Thus the “exercise of judicial power” in these cases “may [not] be taken from the Article III Judiciary.” *Stern*, 564 U.S. at 494, 495. Nor may disputed fact issues in these cases—which were traditionally suits at common law—be taken away from juries. But that is just what Congress has done with *inter partes* review. For all these reasons, *inter partes* review violates the Constitution.



CONCLUSION

The judgment of the court of appeals should be reversed.

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137 S.Ct. 1523
Supreme Court of the United States
IMPRESSION PRODUCTS, INC., Petitioner
v.
LEXMARK INTERNATIONAL, INC.

No. 15–1189.

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Argued March 21, 2017.

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Decided May 30, 2017.

Synopsis

Background: Patentee brought action alleging that competitor infringed its patents related to toner cartridges by refurbishing and reselling cartridges that patentee had sold in United States, and by importing cartridges that patentee had sold abroad. The United States District Court for the Southern District of Ohio, [Michael R. Barrett, J., 9 F.Supp.3d 830](#), entered an order denying competitor's motion to dismiss with respect to cartridges that had been sold abroad, and subsequently entered an order granting competitor's motion to dismiss with respect to cartridges that had been sold domestically, [2014 WL 1276133](#). Parties appealed. The United States Court of Appeals for the Federal Circuit, en banc, Taranto, Circuit Judge, [816 F.3d 721](#), affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice [Roberts](#), held that:

[1] patentee exhausted its patent rights with respect to domestically sold cartridges, abrogating [Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700](#), and

[2] patentee exhausted its patent rights with respect to internationally sold cartridges, abrogating [Jazz Photo Corp. v. International Trade Commission, 264 F.3d 1094](#), [Dickerson v. Tinling, 84 F. 192](#), [Dickerson v. Matheson, 57 F. 524](#).

Reversed and remanded.

Justice [Ginsburg](#) filed an opinion concurring in part and dissenting in part.

Justice [Gorsuch](#) took no part in the consideration or decision of the case.

1525 Syllabus

A United States patent entitles the patent holder to “exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States.” [35 U.S.C. § 154\(a\)](#). Whoever engages in one of these acts “without authority” from the patentee may face liability for patent infringement. [§ 271\(a\)](#). When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to “exhaust.”

Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and abroad. It owns a number of patents that cover components of those cartridges and the manner in which they are used. When Lexmark sells toner cartridges, it gives consumers two options: One option is to buy a toner cartridge at full price, with no restrictions. The other option is to buy a cartridge at a discount through Lexmark's “Return Program.” In exchange for the lower price, customers who buy through the Return Program must sign a contract agreeing to use the cartridge only once and to refrain from transferring the cartridge to anyone but Lexmark.

Companies known as remanufacturers acquire empty Lexmark toner cartridges—including Return Program cartridges—from purchasers in the United States, refill them with toner, and then resell them. They do the same with Lexmark cartridges that they acquire from purchasers overseas and import into the United States. Lexmark sued a number of these remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. The first group consists of Return Program cartridges that Lexmark had sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, Impression Products infringed the Lexmark patents when it refurbished and resold them. The second group consists of all toner cartridges that

Lexmark had sold abroad and that Impression Products imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so Impression Products infringed its patent rights by doing just that.

***1526** Impression Products moved to dismiss on the grounds that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired overseas. The District Court granted the motion to dismiss as to the domestic Return Program cartridges, but denied the motion as to the cartridges sold abroad. The Federal Circuit then ruled for Lexmark with respect to both groups of cartridges. Beginning with the Return Program cartridges that Lexmark sold domestically, the Federal Circuit held that a patentee may sell an item and retain the right to enforce, through patent infringement lawsuits, clearly communicated, lawful restrictions on post-sale use or resale. Because Impression Products knew about Lexmark's restrictions and those restrictions did not violate any laws, Lexmark's sales did not exhaust its patent rights, and it could sue Impression Products for infringement. As for the cartridges that Lexmark sold abroad, the Federal Circuit held that, when a patentee sells a product overseas, it does not exhaust its patent rights over that item. Lexmark was therefore free to sue for infringement when Impression Products imported cartridges that Lexmark had sold abroad. Judge Dyk, joined by Judge Hughes, dissented.

Held :

1. Lexmark exhausted its patent rights in the Return Program cartridges that it sold in the United States. A patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose. As a result, even if the restrictions in Lexmark's contracts with its customers were clear and enforceable under contract law, they do not entitle Lexmark to retain patent rights in an item that it has elected to sell. Pp. 1531 – 1536.

(a) The Patent Act grants patentees the “right to exclude others from making, using, offering for sale, or selling [their] invention[s].” 35 U.S.C. § 154(a). For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude: When a patentee sells

an item, that product “is no longer within the limits of the [patent] monopoly” and instead becomes the “private, individual property” of the purchaser. *Bloomer v. McQuewan*, 14 How. 539, 549–550, 14 L.Ed. 532. If the patentee negotiates a contract restricting the purchaser's right to use or resell the item, it may be able to enforce that restriction as a matter of contract law, but may not do so through a patent infringement lawsuit.

The exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act promotes innovation by allowing inventors to secure the financial rewards for their inventions. Once a patentee sells an item, it has secured that reward, and the patent laws provide no basis for restraining the use and enjoyment of the product. Allowing further restrictions would run afoul of the “common law's refusal to permit restraints on the alienation of chattels.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538, 133 S.Ct. 1351, 185 L.Ed.2d 392. As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction “is void, because ... it is against Trade and Traffique, and bargaining and contracting between man and man.” 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628). Congress enacted and has repeatedly revised the Patent Act against the backdrop of this hostility toward restraints on alienation, which is reflected in the exhaustion doctrine.

***1527** This Court accordingly has long held that, even when a patentee sells an item under an express, otherwise lawful restriction, the patentee does not retain patent rights in that product. See, e.g., *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 128 S.Ct. 2109, 170 L.Ed.2d 996. And that well-settled line of precedent allows for only one answer in this case: Lexmark cannot bring a patent infringement suit against Impression Products with respect to the Return Program cartridges sold in the United States because, once Lexmark sold those cartridges, it exhausted its right to control them through the patent laws. Pp. 1531 – 1533.

(b) The Federal Circuit reached a different result because it started from the premise that the exhaustion doctrine is an interpretation of the patent infringement statute, which prohibits anyone from using or selling a patented article “without authority” from the patentee. According to the Federal Circuit, exhaustion reflects a default rule

that selling an item “*presumptively* grant[s] ‘authority’ for the purchaser to use it and resell it.” 816 F.3d 721, 742. But if a patentee withholds some authority by expressly limiting the purchaser’s rights, the patentee may enforce that restriction through patent infringement lawsuits. See *id.*, at 741.

The problem with the Federal Circuit’s logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is a limit on the scope of the patentee’s rights. The Patent Act gives patentees a limited exclusionary power, and exhaustion extinguishes that power. A purchaser has the right to use, sell, or import an item because those are the rights that come along with ownership, not because it purchased authority to engage in those practices from the patentee. Pp. 1533 – 1536.

2. Lexmark also sold toner cartridges abroad, which Impression Products acquired from purchasers and imported into the United States. Lexmark cannot sue Impression Products for infringement with respect to these cartridges. An authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.

The question about international exhaustion of intellectual property rights has arisen in the context of copyright law. Under the first sale doctrine, when a copyright owner sells a lawfully made copy of its work, it loses the power to restrict the purchaser’s right “to sell or otherwise dispose of ... that copy.” 17 U.S.C. § 109(a). In *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 133 S.Ct. 1351, 185 L.Ed.2d 392, this Court held that the first sale doctrine applies to copies of works made and sold abroad. Central to that decision was the fact that the first sale doctrine has its roots in the common law principle against restraints on alienation. Because that principle makes no geographical distinctions and the text of the Copyright Act did not provide such a distinction, a straightforward application of the first sale doctrine required concluding that it applies overseas.

Applying patent exhaustion to foreign sales is just as straightforward. Patent exhaustion, too, has its roots in the antipathy toward restraints on alienation, and nothing in the Patent Act shows that Congress intended to confine that principle to domestic sales. Differentiating between the patent exhaustion and copyright first sale doctrines

would also make little theoretical or practical sense: The two share a “strong similarity ... and identity of purpose,” *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 13, 33 S.Ct. 616, 57 L.Ed. 1041, and many everyday products are subject to both patent and copyright protections.

***1528** Lexmark contends that a foreign sale does not exhaust patent rights because the Patent Act limits a patentee’s power to exclude others from making, using, selling, or importing its products to acts that occur in the United States. Because those exclusionary powers do not apply abroad, the patentee may not be able to sell its products overseas for the same price as it could in the United States, and therefore is not sure to receive the reward guaranteed by American patent laws. Without that reward, says Lexmark, there should be no exhaustion.

The territorial limit on patent rights is no basis for distinguishing copyright protections; those do not have extraterritorial effect either. Nor does the territorial limit support Lexmark’s argument. Exhaustion is a distinct limit on the patent grant, which is triggered by the patentee’s decision to give a patented item up for whatever fee it decides is appropriate. The patentee may not be able to command the same amount for its products abroad as it does in the United States. But the Patent Act does not guarantee a particular price. Instead, the Patent Act just ensures that the patentee receives one reward—of whatever it deems to be satisfactory compensation—for every item that passes outside the scope of its patent monopoly.

This Court’s decision in *Boesch v. Graff*, 133 U.S. 697, 10 S.Ct. 378, 33 L.Ed. 787, is not to the contrary. That decision did not, as Lexmark contends, exempt all foreign sales from patent exhaustion. Instead, it held that a sale abroad does not exhaust a patentee’s rights when the patentee had nothing to do with the transaction. That just reaffirms the basic premise that only the patentee can decide whether to make a sale that exhausts its patent rights in an item.

Finally, the United States advocates what it views as a middle-ground position: that a foreign sale exhausts patent rights unless the patentee expressly reserves those rights. This express-reservation rule is based on the idea that overseas buyers expect to be able to use and resell items freely, so exhaustion should be the presumption. But, at the same time, lower courts have

long allowed patentees to expressly reserve their rights, so that option should remain open to patentees. The sparse and inconsistent decisions the Government cites, however, provide no basis for any expectation, let alone a settled one, that patentees can reserve rights when they sell abroad. The theory behind the express-reservation rule also wrongly focuses on the expectations of the patentee and purchaser during a sale. More is at stake when it comes to patent exhaustion than the dealings between the parties, which can be addressed through contracts. Instead, exhaustion occurs because allowing patent rights to stick to an already-sold item as it travels through the market would violate the principle against restraints on alienation. As a result, restrictions and location are irrelevant for patent exhaustion; what matters is the patentee's decision to make a sale. Pp. 1535 – 1538.

816 F.3d 721, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part. GORSUCH, J., took no part in the consideration or decision of the case.

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For U.S. Supreme Court briefs, see:

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

A United States patent entitles the patent holder (the “patentee”), for a period of 20 years, to “exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States.” 35 U.S.C. § 154(a). Whoever engages in one of these acts “without authority” from the patentee may face liability for patent infringement. § 271(a).

When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to “exhaust.” The purchaser and all subsequent owners are free to use or resell the product just like any other item of personal property, without fear of an infringement lawsuit.

This case presents two questions about the scope of the patent exhaustion doctrine: First, whether a patentee that sells an item under an express restriction on the purchaser's right to reuse or resell the product may enforce that restriction through an infringement lawsuit. And second, whether a patentee exhausts its patent rights by selling its product outside the United States, where American patent laws do not apply. We conclude that a patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose or the location of the sale.

I

The underlying dispute in this case is about laser printers—or, more specifically, the cartridges that contain the powdery substance, known as toner, that laser printers use to make an image appear on paper. Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and around the globe. It owns a number of patents that cover components of those cartridges and the manner in which they are used.

When toner cartridges run out of toner they can be refilled and used again. This creates an opportunity for other companies—known as remanufacturers—to acquire empty Lexmark cartridges from purchasers in the United States and abroad, refill them with toner, and then resell them at a lower price than the new ones Lexmark puts on the shelves.

Not blind to this business problem, Lexmark structures its sales in a way that encourages customers to return spent cartridges. It gives purchasers two options: One is to buy a toner cartridge at full price, with no strings attached. The other is to buy a cartridge at roughly 20-percent *1530 off through Lexmark's "Return Program." A customer who buys through the Return Program still owns the cartridge but, in exchange for the lower price, signs a contract agreeing to use it only once and to refrain from transferring the empty cartridge to anyone but Lexmark. To enforce this single-use/no-resale restriction, Lexmark installs a microchip on each Return Program cartridge that prevents reuse once the toner in the cartridge runs out.

Lexmark's strategy just spurred remanufacturers to get more creative. Many kept acquiring empty Return Program cartridges and developed methods to counteract the effect of the microchips. With that technological obstacle out of the way, there was little to prevent the remanufacturers from using the Return Program cartridges in their resale business. After all, Lexmark's contractual single-use/no-resale agreements were with the initial customers, not with downstream purchasers like the remanufacturers.

Lexmark, however, was not so ready to concede that its plan had been foiled. In 2010, it sued a number of remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. One group consists of Return Program cartridges that Lexmark sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, the remanufacturers infringed the Lexmark patents when they refurbished and resold them. The other group consists of all toner cartridges that Lexmark sold abroad and that remanufacturers imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so the remanufacturers ran afoul of its patent rights by doing just that.

Eventually, the lawsuit was whittled down to one defendant, Impression Products, and one defense: that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired abroad. Impression Products filed separate motions to dismiss with respect to both groups of cartridges. The District Court granted the motion as to the domestic Return Program cartridges, but denied the motion as to the cartridges Lexmark sold abroad. Both parties appealed.

The Federal Circuit considered the appeals en banc and ruled for Lexmark with respect to both groups of cartridges. The court began with the Return Program cartridges that Lexmark sold in the United States. Relying on its decision in *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (1992), the Federal Circuit held that a patentee may sell an item and retain the right to enforce, through patent infringement lawsuits, "clearly communicated, ... lawful restriction[s] as to post-sale use or resale." 816 F.3d 721, 735 (2016). The exhaustion doctrine, the court reasoned, derives from the prohibition on making, using, selling, or importing items "without authority." *Id.*, at 734 (quoting 35 U.S.C. § 271(a)). When you purchase an item you presumptively also acquire the authority to use or resell the item freely, but that is just a presumption; the same authority does not run with the item when the seller restricts post-sale use or resale. 816 F.3d, at 742. Because the parties agreed that Impression Products knew about Lexmark's restrictions and that those restrictions did not violate any laws, the Federal Circuit concluded that Lexmark's sales had not exhausted all of its patent rights, and that the company could sue for infringement when Impression Products refurbished *1531 and resold Return Program cartridges.

As for the cartridges that Lexmark sold abroad, the Federal Circuit once again looked to its precedent. In *Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094 (2001), the court had held that a patentee's decision to sell a product abroad did not terminate its ability to bring an infringement suit against a buyer that "import[ed] the article and [sold] ... it in the United States." 816 F.3d, at 726–727. That rule, the court concluded, makes good sense: Exhaustion is justified when a patentee receives "the reward available from [selling in] American markets," which does not occur when the patentee sells overseas, where the American patent offers no protection and

therefore cannot bolster the price of the patentee's goods. *Id.*, at 760–761. As a result, Lexmark was free to exercise its patent rights to sue Impression Products for bringing the foreign-sold cartridges to market in the United States.

Judge Dyk, joined by Judge Hughes, dissented. In their view, selling the Return Program cartridges in the United States exhausted Lexmark's patent rights in those items because any “authorized sale of a patented article ... free[s] the article from any restrictions on use or sale based on the patent laws.” *Id.*, at 775–776. As for the foreign cartridges, the dissenters would have held that a sale abroad also results in exhaustion, unless the seller “explicitly reserve[s] [its] United States patent rights” at the time of sale. *Id.*, at 774, 788. Because Lexmark failed to make such an express reservation, its foreign sales exhausted its patent rights.

We granted certiorari to consider the Federal Circuit's decisions with respect to both domestic and international exhaustion, 580 U.S. —, 137 S.Ct. 546, 196 L.Ed.2d 442 (2016), and now reverse.

II

A

[1] First up are the Return Program cartridges that Lexmark sold in the United States. We conclude that Lexmark exhausted its patent rights in these cartridges the moment it sold them. The single-use/no-resale restrictions in Lexmark's contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.

[2] [3] The Patent Act grants patentees the “right to exclude others from making, using, offering for sale, or selling [their] invention[s].” 35 U.S.C. § 154(a). For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude. See *Bloomer v. McQuewan*, 14 How. 539, 14 L.Ed. 532 (1853). The limit functions automatically: When a patentee chooses to sell an item, that product “is no longer within the limits of the monopoly” and instead becomes the “private, individual property” of the purchaser, with the rights and benefits that come along with ownership. *Id.*, at 549–550. A patentee is free to set the price and negotiate contracts with purchasers, but may not, “by virtue of his

patent, control the use or disposition” of the product after ownership passes to the purchaser. *United States v. Univis Lens Co.*, 316 U.S. 241, 250, 62 S.Ct. 1088, 86 L.Ed. 1408 (1942) (emphasis added). The sale “terminates all patent rights to that item.” *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625, 128 S.Ct. 2109, 170 L.Ed.2d 996 (2008).

[4] [5] This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act *1532 “promote[s] the progress of science and the useful arts by granting to [inventors] a limited monopoly” that allows them to “secure the financial rewards” for their inventions. *Univis*, 316 U.S., at 250, 62 S.Ct. 1088. But once a patentee sells an item, it has “enjoyed all the rights secured” by that limited monopoly. *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 661, 15 S.Ct. 738, 39 L.Ed. 848 (1895). Because “the purpose of the patent law is fulfilled ... when the patentee has received his reward for the use of his invention,” that law furnishes “no basis for restraining the use and enjoyment of the thing sold.” *Univis*, 316 U.S., at 251, 62 S.Ct. 1088.

We have explained in the context of copyright law that exhaustion has “an impeccable historic pedigree,” tracing its lineage back to the “common law's refusal to permit restraints on the alienation of chattels.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538, 133 S.Ct. 1351, 185 L.Ed.2d 392 (2013). As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction “is void, because ... it is against Trade and Traffique, and bargaining and contracting between man and man.” 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628); see J. Gray, *Restraints on the Alienation of Property* § 27, p. 18 (2d ed. 1895) (“A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land”).

[6] This venerable principle is not, as the Federal Circuit dismissively viewed it, merely “one common-law jurisdiction's general judicial policy at one time toward anti-alienation restrictions.” 816 F.3d, at 750. Congress enacted and has repeatedly revised the Patent Act against the backdrop of the hostility toward restraints on alienation. That enmity is reflected in the exhaustion doctrine. The patent laws do not include the right to “restrain [] ... further alienation” after an initial sale; such

conditions have been “hateful to the law from Lord Coke’s day to ours” and are “obnoxious to the public interest.” *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501, 37 S.Ct. 412, 61 L.Ed. 866 (1917). “The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.” *Keeler*, 157 U.S., at 667, 15 S.Ct. 738.

But an illustration never hurts. Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem. See Brief for Costco Wholesale Corp. et al. as *Amici Curiae* 7–9; Brief for Intel Corp. et al. as *Amici Curiae* 17, n. 5 (“A generic smartphone assembled from various high-tech components could practice an estimated 250,000 patents”).

[7] This Court accordingly has long held that, even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that *1533 product. In *Boston Store of Chicago v. American Graphophone Co.*, for example, a manufacturer sold graphophones—one of the earliest devices for recording and reproducing sounds—to retailers under contracts requiring those stores to resell at a specific price. 246 U.S. 8, 17–18, 38 S.Ct. 257, 62 L.Ed. 551 (1918). When the manufacturer brought a patent infringement suit against a retailer who sold for less, we concluded that there was “no room for controversy” about the result: By selling the item, the manufacturer placed it “beyond the confines of the patent law, [and] could not, by qualifying restrictions as to use, keep [it] under the patent monopoly.” *Id.*, at 20, 25, 38 S.Ct. 257.

Two decades later, we confronted a similar arrangement in *United States v. Univis Lens Co.* There, a company that made eyeglass lenses authorized an agent to sell its products to wholesalers and retailers only if they promised to market the lenses at fixed prices. The Government filed an antitrust lawsuit, and the company defended its arrangement on the ground that it was exercising authority under the Patent Act. We held that the initial sales “relinquish [ed] ... the patent monopoly with respect to the article[s] sold,” so the “stipulation ... fixing resale prices derive[d] no support from the patent and must stand on the same footing” as restrictions on unpatented goods. 316 U.S., at 249–251, 62 S.Ct. 1088.

It is true that *Boston Store* and *Univis* involved resale price restrictions that, at the time of those decisions, violated the antitrust laws. But in both cases it was the sale of the items, rather than the illegality of the restrictions, that prevented the patentees from enforcing those resale price agreements through patent infringement suits. And if there were any lingering doubt that patent exhaustion applies even when a sale is subject to an express, otherwise lawful restriction, our recent decision in *Quanta Computer, Inc. v. LG Electronics, Inc.* settled the matter. In that case, a technology company—with authorization from the patentee—sold microprocessors under contracts requiring purchasers to use those processors with other parts that the company manufactured. One buyer disregarded the restriction, and the patentee sued for infringement. Without so much as mentioning the lawfulness of the contract, we held that the patentee could not bring an infringement suit because the “authorized sale ... took its products outside the scope of the patent monopoly.” 553 U.S., at 638, 128 S.Ct. 2109.

Turning to the case at hand, we conclude that this well-settled line of precedent allows for only one answer: Lexmark cannot bring a patent infringement suit against Impression Products to enforce the single-use/no-resale provision accompanying its Return Program cartridges. Once sold, the Return Program cartridges passed outside of the patent monopoly, and whatever rights Lexmark retained are a matter of the contracts with its purchasers, not the patent law.

B

The Federal Circuit reached a different result largely because it got off on the wrong foot. The “exhaustion doctrine,” the court believed, “must be understood as an interpretation of” the infringement statute, which prohibits anyone from using or selling a patented article “without authority” from the patentee. 816 F.3d, at 734 (quoting 35 U.S.C. § 271(a)). Exhaustion reflects a default rule that a patentee’s decision to sell an item “presumptively grant[s] ‘authority’ to the purchaser to use it and resell it.” 816 F.3d, at 742. But, the Federal Circuit explained, the patentee does not have to hand over the full “bundle *1534 of rights” every time. *Id.*, at 741 (internal quotation marks omitted). If the patentee expressly withholds a stick from the bundle—perhaps by restricting the purchaser’s resale rights—the buyer never acquires that withheld authority, and the patentee may continue to enforce its right to exclude that practice under the patent laws.

[8] [9] The misstep in this logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is instead a limit on “the scope of the patentee’s rights.” *United States v. General Elec. Co.*, 272 U.S. 476, 489, 47 S.Ct. 192, 71 L.Ed. 362 (1926) (emphasis added). The right to use, sell, or import an item exists independently of the Patent Act. What a patent adds—and grants exclusively to the patentee—is a limited right to prevent others from engaging in those practices. See *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 35, 43 S.Ct. 254, 67 L.Ed. 516 (1923). Exhaustion extinguishes that exclusionary power. See *Bloomer*, 14 How., at 549 (the purchaser “exercises no rights created by the act of Congress, nor does he derive title to [the item] by virtue of the ... exclusive privilege granted to the patentee”). As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.

The Federal Circuit also expressed concern that preventing patentees from reserving patent rights when they sell goods would create an artificial distinction between such sales and sales by licensees. Patentees, the court explained, often license others to make and sell their products, and may place restrictions on those licenses. A computer developer could, for instance, license a manufacturer to make its patented devices and sell them only for non-commercial use by individuals. If a licensee

breaches the license by selling a computer for commercial use, the patentee can sue the licensee for infringement. And, in the Federal Circuit’s view, our decision in *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273, *aff’d on reh’g*, 305 U.S. 124, 59 S.Ct. 116, 83 L.Ed. 81 (1938), established that—when a patentee grants a license “under clearly stated restrictions on post-sale activities” of those who purchase products from the licensee—the patentee can *also* sue for infringement those purchasers who knowingly violate the restrictions. 816 F.3d, at 743–744. If patentees can employ licenses to impose post-sale restrictions on purchasers that are enforceable through infringement suits, the court concluded, it would make little sense to prevent patentees from doing so when they sell directly to consumers.

The Federal Circuit’s concern is misplaced. A patentee can impose restrictions on licensees because a license does not implicate the same concerns about restraints on alienation as a sale. Patent exhaustion reflects the principle that, when an item passes into commerce, it should not be shaded by a legal cloud on title as it moves through the marketplace. But a license is not about passing title to a product, it is about changing the contours of the patentee’s monopoly: The patentee agrees not to exclude a licensee from making or selling the patented invention, expanding the club of authorized producers and sellers. See *General Elec. Co.*, 272 U.S., at 489–490, 47 S.Ct. 192. Because the patentee is exchanging rights, not goods, it is free to relinquish only a portion of its bundle of patent protections.

[10] [11] [12] A patentee’s authority to limit licensees does not, as the Federal Circuit thought, mean that patentees can use licenses *1535 to impose post-sale restrictions on purchasers that are enforceable through the patent laws. So long as a licensee complies with the license when selling an item, the patentee has, in effect, authorized the sale. That licensee’s sale is treated, for purposes of patent exhaustion, as if the patentee made the sale itself. The result: The sale exhausts the patentee’s rights in that item. See *Hobbie v. Jennison*, 149 U.S. 355, 362–363, 13 S.Ct. 879, 37 L.Ed. 766 (1893). A license may require the licensee to impose a restriction on purchasers, like the license limiting the computer manufacturer to selling for non-commercial use by individuals. But if the licensee does so—by, perhaps, having each customer sign a contract promising not to use the computers in business—the sale nonetheless exhausts all patent rights in the item sold. See

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 506–507, 516, 37 S.Ct. 416, 61 L.Ed. 871 (1917). The purchasers might not comply with the restriction, but the only recourse for the licensee is through contract law, just as if the patentee itself sold the item with a restriction.

[13] *General Talking Pictures* involved a fundamentally different situation: There, a licensee “knowingly ma[de] ... sales ... outside the scope of its license.” 304 U.S., at 181–182, 58 S.Ct. 849 (emphasis added). We treated the sale “as if no license whatsoever had been granted” by the patentee, which meant that the patentee could sue both the licensee and the purchaser—who knew about the breach—for infringement. *General Talking Pictures Corp. v. Western Elec. Co.*, 305 U.S. 124, 127, 59 S.Ct. 116, 83 L.Ed. 81 (1938). This does not mean that patentees can use licenses to impose post-sale restraints on purchasers. Quite the contrary: The licensee infringed the patentee's rights because it did *not* comply with the terms of its license, and the patentee could bring a patent suit against the purchaser only because the purchaser participated in the licensee's infringement. *General Talking Pictures*, then, stands for the modest principle that, if a patentee has not given authority for a licensee to make a sale, that sale cannot exhaust the patentee's rights.

In sum, patent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.

III

[14] [15] Our conclusion that Lexmark exhausted its patent rights when it sold the domestic Return Program cartridges goes only halfway to resolving this case. Lexmark also sold toner cartridges abroad and sued Impression Products for patent infringement for “importing [Lexmark's] invention into the United States.” 35 U.S.C. § 154(a). Lexmark contends that it may sue for infringement with respect to all of the imported cartridges—not just those in the Return Program—because a foreign sale does not trigger patent exhaustion unless the patentee “expressly or implicitly transfer[s] or license[s]” its rights. Brief for Respondent 36–37. The Federal Circuit agreed, but we do not. An authorized sale outside the

United States, just as one within the United States, exhausts all rights under the Patent Act.

[16] This question about international exhaustion of intellectual property rights has also arisen in the context of copyright law. Under the “first sale doctrine,” which is codified at 17 U.S.C. § 109(a), when a copyright owner sells a lawfully made copy of its work, it loses the power to restrict the purchaser's freedom “to sell or otherwise dispose of ... that copy.” In *1536 *Kirtsaeng v. John Wiley & Sons, Inc.*, we held that this “‘first sale’ [rule] applies to copies of a copyrighted work lawfully made [and sold] abroad.” 568 U.S., at 525, 133 S.Ct. 1351. We began with the text of § 109(a), but it was not decisive: The language neither “restrict [s] the scope of [the] ‘first sale’ doctrine geographically,” nor clearly embraces international exhaustion. *Id.*, at 528–533, 133 S.Ct. 1351. What helped tip the scales for global exhaustion was the fact that the first sale doctrine originated in “the common law's refusal to permit restraints on the alienation of chattels.” *Id.*, at 538, 133 S.Ct. 1351. That “common-law doctrine makes no geographical distinctions.” *Id.*, at 539, 133 S.Ct. 1351. The lack of any textual basis for distinguishing between domestic and international sales meant that “a straightforward application” of the first sale doctrine required the conclusion that it applies overseas. *Id.*, at 540, 133 S.Ct. 1351 (internal quotation marks omitted).

Applying patent exhaustion to foreign sales is just as straightforward. Patent exhaustion, too, has its roots in the antipathy toward restraints on alienation, see *supra*, at 1528 – 1533, and nothing in the text or history of the Patent Act shows that Congress intended to confine that borderless common law principle to domestic sales. In fact, Congress has not altered patent exhaustion at all; it remains an unwritten limit on the scope of the patentee's monopoly. See *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (“[W]here a common-law principle is well established, ... courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident” (internal quotation marks omitted)). And differentiating the patent exhaustion and copyright first sale doctrines would make little theoretical or practical sense: The two share a “strong similarity ... and identity of purpose,” *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 13, 33 S.Ct. 616, 57 L.Ed. 1041

(1913), and many everyday products—“automobiles, microwaves, calculators, mobile phones, tablets, and personal computers”—are subject to both patent and copyright protections, see *Kirtsaeng*, 568 U.S., at 545, 133 S.Ct. 1351; Brief for Costco Wholesale Corp. et al. as *Amici Curiae* 14–15. There is a “historic kinship between patent law and copyright law,” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), and the bond between the two leaves no room for a rift on the question of international exhaustion.

Lexmark sees the matter differently. The Patent Act, it points out, limits the patentee's “right to exclude others” from making, using, selling, or importing its products to acts that occur in the United States. 35 U.S.C. § 154(a). A domestic sale, it argues, triggers exhaustion because the sale compensates the patentee for “surrendering [those] U.S. rights.” Brief for Respondent 38. A foreign sale is different: The Patent Act does not give patentees exclusionary powers abroad. Without those powers, a patentee selling in a foreign market may not be able to sell its product for the same price that it could in the United States, and therefore is not sure to receive “the reward guaranteed by U.S. patent law.” *Id.*, at 39 (internal quotation marks omitted). Absent that reward, says Lexmark, there should be no exhaustion. In short, there is no patent exhaustion from sales abroad because there are no patent rights abroad to exhaust.

[17] The territorial limit on patent rights is, however, no basis for distinguishing copyright protections; those protections “do not have any extraterritorial operation” either. 5 M. Nimmer & D. Nimmer, Copyright § 17.02, p. 17–26 (2017). Nor does the territorial limit support the premise of Lexmark's argument. Exhaustion is a separate limit on the patent grant, and does not depend on the patentee receiving some undefined premium for selling the right to access the American market. A purchaser buys an item, not patent rights. And exhaustion is triggered by the patentee's decision to give that item up and receive whatever fee it decides is appropriate “for the article and the invention which it embodies.” *Univis*, 316 U.S., at 251, 62 S.Ct. 1088. The patentee may not be able to command the same amount for its products abroad as it does in the United States. But the Patent Act does not guarantee a particular price, much less the price from selling to American consumers. Instead, the right to exclude just ensures that the patentee receives one

reward—of whatever amount the patentee deems to be “satisfactory compensation,” *Keeler*, 157 U.S., at 661, 15 S.Ct. 738—for every item that passes outside the scope of the patent monopoly.

This Court has addressed international patent exhaustion in only one case, *Boesch v. Graff*, decided over 125 years ago. All that case illustrates is that a sale abroad does not exhaust a patentee's rights when the patentee had nothing to do with the transaction. *Boesch*—from the days before the widespread adoption of electrical lighting—involved a retailer who purchased lamp burners from a manufacturer in Germany, with plans to sell them in the United States. The manufacturer had authority to make the burners under German law, but there was a hitch: Two individuals with no ties to the German manufacturer held the American patent to that invention. These patentees sued the retailer for infringement when the retailer imported the lamp burners into the United States, and we rejected the argument that the German manufacturer's sale had exhausted the American patentees' rights. The German manufacturer had no permission to sell in the United States from the American patentees, and the American patentees had not exhausted their patent rights in the products because they had not sold them to anyone, so “purchasers from [the German manufacturer] could not be thereby authorized to sell the articles in the United States.” 133 U.S. 697, 703, 10 S.Ct. 378, 33 L.Ed. 787 (1890).

[18] Our decision did not, as Lexmark contends, exempt all foreign sales from patent exhaustion. See Brief for Respondent 44–45. Rather, it reaffirmed the basic premise that only the patentee can decide whether to make a sale that exhausts its patent rights in an item. The American patentees did not do so with respect to the German products, so the German sales did not exhaust their rights.

Finally, the United States, as an *amicus*, advocates what it views as a middle-ground position: that “a foreign sale authorized by the U.S. patentee exhausts U.S. patent rights unless those rights are expressly reserved.” Brief for United States 7–8. Its position is largely based on policy rather than principle. The Government thinks that an overseas “buyer's legitimate expectation” is that a “sale conveys all of the seller's interest in the patented article,” so the presumption should be that a foreign sale triggers exhaustion. *Id.*, at 32–33. But, at the same time, “lower courts long ago coalesced around” the rule that “a

patentee's express reservation of U.S. patent rights at the time of a foreign sale will be given effect," so that option should remain open to the patentee. *Id.*, at 22 (emphasis deleted).

The Government has little more than "long ago" on its side. In the 1890s, two *1538 circuit courts—in cases involving the same company—did hold that patentees may use express restrictions to reserve their patent rights in connection with foreign sales. See *Dickerson v. Tintling*, 84 F. 192, 194–195 (C.A.8 1897); *Dickerson v. Matheson*, 57 F. 524, 527 (C.A.2 1893). But no "coalesc[ing]" ever took place: Over the following hundred-plus years, only a smattering of lower court decisions mentioned this express-reservation rule for foreign sales. See, e.g., *Sanofi, S.A. v. Med-Tech Veterinarian Prods., Inc.*, 565 F.Supp. 931, 938 (D.N.J.1983). And in 2001, the Federal Circuit adopted its blanket rule that foreign sales do not trigger exhaustion, even if the patentee fails to expressly reserve its rights. *Jazz Photo*, 264 F.3d, at 1105. These sparse and inconsistent decisions provide no basis for any expectation, let alone a settled one, that patentees can reserve patent rights when they sell abroad.

The theory behind the Government's express-reservation rule also wrongly focuses on the likely expectations of the patentee and purchaser during a sale. Exhaustion does not arise because of the parties' expectations about how sales transfer patent rights. More is at stake when it comes to patents than simply the dealings between the parties, which can be addressed through contract law. Instead, exhaustion occurs because, in a sale, the patentee elects to give up title to an item in exchange for payment. Allowing patent rights to stick remora-like to that item as it flows through the market would violate the principle against restraints on alienation. Exhaustion does not depend on whether the patentee receives a premium for selling in the United States, or the type of rights that buyers expect to receive. As a result, restrictions and location are irrelevant; what matters is the patentee's decision to make a sale.

* * *

The judgment of the United States Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice **GORSUCH** took no part in the consideration or decision of this case.

Justice **GINSBURG**, concurring in part and dissenting in part.

I concur in the Court's holding regarding domestic exhaustion—a patentee who sells a product with an express restriction on reuse or resale may not enforce that restriction through an infringement lawsuit, because the U.S. sale exhausts the U.S. patent rights in the product sold. See *ante*, at 1531 – 1536. I dissent, however, from the Court's holding on international exhaustion. A foreign sale, I would hold, does not exhaust a U.S. inventor's U.S. patent rights.

Patent law is territorial. When an inventor receives a U.S. patent, that patent provides no protection abroad. See *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531, 92 S.Ct. 1700, 32 L.Ed.2d 273 (1972) ("Our patent system makes no claim to extraterritorial effect."). See also 35 U.S.C. § 271(a) (establishing liability for acts of patent infringement "within the United States" and for "import[at]ion into the United States [of] any patented invention"). A U.S. patentee must apply to each country in which she seeks the exclusive right to sell her invention. *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 456, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007) ("[F]oreign law alone, not United States law, currently governs the manufacture and sale of components of patented inventions in foreign countries."). See also Convention at Brussels, An Additional Act *1539 Modifying the Paris Convention for the Protection of Industrial Property of Mar. 20, 1883, Dec. 14, 1900, Art. I, 32 Stat. 1940 ("Patents applied for in the different contracting States ... shall be independent of the patents obtained for the same invention in the other States."). And patent laws vary by country; each country's laws "may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions." *Microsoft*, 550 U.S., at 455, 127 S.Ct. 1746 (internal quotation marks omitted).

Because a sale abroad operates independently of the U.S. patent system, it makes little sense to say that such a sale exhausts an inventor's U.S. patent rights. U.S. patent protection accompanies none of a U.S. patentee's sales abroad—a competitor could sell the same patented

product abroad with no U.S.-patent-law consequence. Accordingly, the foreign sale should not diminish the protections of U.S. law in the United States.

The majority disagrees, in part because this Court decided, in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 525, 133 S.Ct. 1351, 185 L.Ed.2d 392 (2013), that a foreign sale exhausts U.S. *copyright* protections. Copyright and patent exhaustion, the majority states, “share a strong similarity.” *Ante*, at 1536 (internal quotation marks omitted). I dissented from our decision in *Kirtsaeng* and adhere to the view that a foreign sale should not exhaust U.S. *copyright* protections. See 568 U.S., at 557, 133 S.Ct. 1351.

But even if I subscribed to *Kirtsaeng*'s reasoning with respect to copyright, that decision should bear little weight in the patent context. Although there may be a “historical kinship” between patent law and copyright law, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), the two “are not identical twins,” *id.*, at 439, n. 19, 104 S.Ct. 774. The Patent Act contains no analogue

to 17 U.S.C. § 109(a), the Copyright Act first-sale provision analyzed in *Kirtsaeng*. See *ante*, at 1535 – 1536. More importantly, copyright protections, unlike patent protections, are harmonized across countries. Under the Berne Convention, which 174 countries have joined,^{*} members “agree to treat authors from other member countries as well as they treat their own.” *Golan v. Holder*, 565 U.S. 302, 308, 132 S.Ct. 873, 181 L.Ed.2d 835 (2012) (citing Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, Arts. 1, 5(1), 828 U.N.T.S. 225, 231–233). The copyright protections one receives abroad are thus likely to be similar to those received at home, even if provided under each country's separate copyright regime.

For these reasons, I would affirm the Federal Circuit's judgment with respect to foreign exhaustion.

All Citations

137 S.Ct. 1523, 198 L.Ed.2d 1, 85 USLW 4279, 122 U.S.P.Q.2d 1605, 17 Cal. Daily Op. Serv. 4867, 2017 Daily Journal D.A.R. 4923, 26 Fla. L. Weekly Fed. S 599

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- * See WIPO–Administered Treaties: Contracting Parties: Berne Convention, www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=5 (as last visited May 25, 2017).

137 S.Ct. 734
Supreme Court of the United States

LIFE TECHNOLOGIES
CORPORATION et al., Petitioners

v.
PROMEGA CORPORATION.

No. 14–1538.

|
Argued Dec. 6, 2016.

|
Decided Feb. 22, 2017.

Synopsis

Background: Exclusive licensee of patents directed toward process for examining polymorphism in samples of deoxyribonucleic acid (DNA) brought infringement action against sublicensee, which manufactured genetic testing toolkits abroad. The United States District Court for the Western District of Wisconsin, [Barbara Brandriff Crabb, J., 2002 WL 32359938](#), granted licensee's motion to reconsider the claim construction, and later, [2012 WL 12862829](#), granted sublicensee's motion for judgment as matter of law (JMOL) that its accused toolkits were not infringing after jury verdict in licensee's favor. Parties appealed. The United States Court of Appeals for the Federal Circuit, [Chen](#), Circuit Judge, [773 F.3d 1338](#), affirmed in part, reversed in part, vacated in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice [Sotomayor](#), held that:

[1] quantitative measurement rather than qualitative measurement is used when determining whether an alleged infringer has supplied a substantial portion of the components of a patented invention for combination abroad, as basis for liability for active inducement of patent infringement;

[2] a single component of a multicomponent invention does not constitute a substantial portion of the components; and

[3] sublicensee, which supplied from the United States only a single component for the five-component genetic testing toolkits, was not liable for infringement.

Reversed and remanded.

Justice [Alito](#) filed an opinion concurring in part and concurring in the judgment, in which Justice Thomas joined.

Chief Justice Roberts took no part in the decision of the case.

*736 Syllabus *

Respondent Promega Corporation sublicensed the Tautz patent, which claims a toolkit for genetic testing, to petitioner Life Technologies Corporation and its subsidiaries (collectively Life Technologies) for the manufacture and sale of the kits for use in certain licensed law enforcement fields worldwide. One of the kit's five components, an enzyme known as the *Taq* polymerase, was manufactured by Life Technologies in the United States and then shipped to the United Kingdom, where the four other components were made, for combination there. When Life Technologies began selling the kits outside the licensed fields of use, Promega sued, claiming that patent infringement liability was triggered under § 271(f)(1) of the Patent Act, which prohibits the supply from the United States of “all or a substantial portion of the components of a patented invention” for combination abroad. The jury returned a verdict for Promega, but the District Court granted Life Technologies' motion for judgment as a matter of law, holding that § 271(f)(1)'s phrase “all or a substantial portion” did not encompass the supply of a single component of a multicomponent invention. The Federal Circuit reversed. It determined that a single important component could constitute a “substantial portion” of the components of an invention under § 271(f)(1) and found the *Taq* polymerase to be such a component.

Held : The supply of a single component of a multicomponent invention for manufacture abroad does not give rise to § 271(f)(1) liability. Pp. 739 – 743.

(a) [Section 271\(f\)\(1\)](#)'s phrase “substantial portion” refers to a quantitative measurement. Although the Patent Act itself does not define the term “substantial,” and the term's ordinary meaning may refer either to qualitative importance or to quantitatively large size, the statutory context points to a quantitative meaning. Neighboring words “all” and “portion” convey a quantitative meaning, and nothing in the neighboring text points to a qualitative interpretation. Moreover, a qualitative reading would render the modifying phrase “of the components” unnecessary the first time it is used in [§ 271\(f\)\(1\)](#). Only the quantitative approach thus gives meaning to each statutory provision.

Promega's proffered “case-specific approach,” which would require a factfinder to decipher whether the components at issue are a “substantial portion” under either a qualitative or a quantitative test, is rejected. Tasking juries with interpreting the statute's meaning on an ad hoc basis would only compound, not resolve, the statute's ambiguity. And Promega's proposal to adopt an analytical framework that accounts for both the components' quantitative and qualitative aspects is likely to complicate rather than aid the factfinder's review. Pp. 739 – 741.

(b) Under a quantitative approach, a single component cannot constitute a “substantial portion” triggering [§ 271\(f\)\(1\)](#) liability. This conclusion is reinforced by [§ 271\(f\)](#)'s text, context, and structure. [Section 271\(f\)\(1\)](#) consistently refers to the plural “components,” indicating that multiple components make up the substantial portion. Reading [§ 271\(f\)\(1\)](#) to cover any single component would also leave little room for [§ 271\(f\)\(2\)](#), which refers to “any component,” and would undermine [§ 271\(f\)\(2\)](#)'s express reference to a single component “especially made or especially adapted for use in the invention.” The [*737](#) better reading allows the two provisions to work in tandem and gives each provision its unique application. Pp. 741 – 743.

(c) The history of [§ 271\(f\)](#) further bolsters this conclusion. Congress enacted [§ 271\(f\)](#) in response to [Deepsouth Packing Co. v. Laitram Corp.](#), 406 U.S. 518, 92 S.Ct. 1700, 32 L.Ed.2d 273, to fill a gap in the enforceability of patent rights by reaching components that are manufactured in the United States but assembled overseas. Consistent with Congress's intent, a supplier may be liable under [§ 271\(f\)\(1\)](#) for supplying from the United States all or a substantial

portion of the components of the invention or under [§ 271\(f\)\(2\)](#) for supplying a single component if it is especially made or especially adapted for use in the invention and not a staple article or commodity. But, as here, when a product is made abroad and all components but a single commodity article are supplied from abroad, the activity is outside the statute's scope. Pp. 742 – 743.

[773 F.3d 1338](#), reversed and remanded.

[SOTOMAYOR](#), J., delivered the opinion of the Court, in which [KENNEDY](#), [GINSBURG](#), [BREYER](#), and [KAGAN](#), JJ., joined, and in which [THOMAS](#) and [ALITO](#), JJ., joined as to all but Part II–C. [ALITO](#), J., filed an opinion concurring in part and concurring in the judgment, in which [THOMAS](#), J., joined. [ROBERTS](#), C.J., took no part in the decision of the case.

Attorneys and Law Firms

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Opinion

Justice [SOTOMAYOR](#) delivered the opinion of the Court.

This case concerns the intersection of international supply chains and federal patent law. Section 271(f)(1) of the Patent Act of 1952 prohibits the supply from the United States of “all or a substantial portion” of the components of a patented invention for combination abroad. [35 U.S.C. § 271\(f\)\(1\)](#). We granted certiorari to determine whether a party that supplies a single component of a multicomponent invention for manufacture abroad can be held liable for infringement under [§ 271\(f\)\(1\)](#). [579 U.S.](#)

—, 136 S.Ct. 2505, 195 L.Ed.2d 838 (2016). We hold that a single component does not constitute a substantial portion of the components that can give rise to liability under § 271(f)(1). Because only a single component of the patented invention at issue here was supplied from the United States, we reverse and remand.

I

A

We begin with an overview of the patent in dispute. Although the science behind *738 the patent is complex, a basic understanding suffices to resolve the question presented by this case.

The Tautz patent, U.S. Reissue Patent No. RE 37,984, claims a toolkit for genetic testing.¹ The kit is used to take small samples of genetic material—in the form of nucleotide sequences that make up the molecule deoxyribonucleic acid (commonly referred to as “DNA”)—and then synthesize multiple copies of a particular nucleotide sequence. This process of copying, known as amplification, generates DNA profiles that can be used by law enforcement agencies for forensic identification and by clinical and research institutions around the world. For purposes of this litigation, the parties agree that the kit covered by the Tautz patent contains five components: (1) a mixture of primers that mark the part of the DNA strand to be copied; (2) nucleotides for forming replicated strands of DNA; (3) an enzyme known as *Taq* polymerase; (4) a buffer solution for the amplification; and (5) control DNA.²

Respondent Promega Corporation was the exclusive licensee of the Tautz patent. Petitioner Life Technologies Corporation manufactured genetic testing kits.³ During the timeframe relevant here, Promega sublicensed the Tautz patent to Life Technologies for the manufacture and sale of the kits for use in certain licensed law enforcement fields worldwide. Life Technologies manufactured all but one component of the kits in the United Kingdom. It manufactured that component—the *Taq* polymerase—in the United States. Life Technologies shipped the *Taq* polymerase to its United Kingdom facility, where it was combined with the other four components of the kit.

Four years into the agreement, Promega sued Life Technologies on the grounds that Life Technologies had infringed the patent by selling the kits outside the licensed fields of use to clinical and research markets. As relevant here, Promega alleged that Life Technologies' supply of the *Taq* polymerase from the United States to its United Kingdom manufacturing facilities triggered liability under § 271(f)(1).

B

At trial, the parties disputed the scope of § 271(f)(1)'s prohibition against supplying all or a substantial portion of the components of a patented invention from the United States for combination abroad. Section 271(f)(1)'s full text reads:

“Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.”

*739 The jury returned a verdict for Promega, finding that Life Technologies had willfully infringed the patent. Life Technologies then moved for judgment as a matter of law, contending that § 271(f)(1) did not apply to its conduct because the phrase “all or a substantial portion” does not encompass the supply of a single component of a multicomponent invention.

The District Court granted Life Technologies' motion. The court agreed that there could be no infringement under § 271(f)(1) because Promega's evidence at trial “showed at most that *one* component of all of the accused products, [the *Taq*] polymerase, was supplied from the United States.” 2012 WL 12862829, *3 (W.D.Wis., Sept.

13, 2012) (Crabb, J.). Section 271(f)(1)'s reference to “a substantial portion of the components,” the District Court ruled, does not embrace the supply of a single component. *Id.*, at *5.

The Court of Appeals for the Federal Circuit reversed and reinstated the jury's verdict finding Life Technologies liable for infringement.⁴ 773 F.3d 1338, 1353 (2014). As relevant here, the court held that “there are circumstances in which a party may be liable under § 271(f)(1) for supplying or causing to be supplied a single component for combination outside the United States.” *Ibid.* The Federal Circuit concluded that the dictionary definition of “substantial” is “important” or “essential,” which it read to suggest that a single important component can be a “‘substantial portion of the components’” of a patented invention. *Ibid.* Relying in part on expert trial testimony that the *Taq* polymerase is a “‘main’” and “‘major’” component of the kits, the court ruled that the single *Taq* polymerase component was a substantial component as the term is used in § 271(f)(1). *Id.*, at 1356.

II

The question before us is whether the supply of a single component of a multicomponent invention is an infringing act under 35 U.S.C. § 271(f)(1). We hold that it is not.

A

[1] The threshold determination to be made is whether § 271(f)(2)'s requirement of “a substantial portion” of the components of a patented invention refers to a quantitative or qualitative measurement. Life Technologies and the United States argue that the text of § 271(f)(1) establishes a quantitative threshold, and that the threshold must be greater than one. Promega defends the Federal Circuit's reading of the statute, arguing that a “substantial portion” of the components includes a single component if that component is sufficiently important to the invention.

We look first to the text of the statute. *Sebelius v. Cloer*, 569 U.S. —, —, 133 S.Ct. 1886, 1892–1893, 185 L.Ed.2d 1003 (2013). The Patent Act itself does not define the term “substantial,” and so we turn to its ordinary

meaning. *Ibid.* Here we find little help. All agree the term is ambiguous and, taken in isolation, might refer to an important portion or to a large portion. Brief for Petitioners 16; Brief for Respondent 18; Brief for United States as *Amicus Curiae* 12. “Substantial,” as it is commonly understood, may refer either to qualitative importance or to *740 quantitatively large size. See, e.g., Webster's Third New International Dictionary 2280 (defs. 1c, 2c) (1981) (Webster's Third) (“important, essential,” or “considerable in amount, value, or worth”); 17 Oxford English Dictionary 67 (defs. 5a, 9) (2d ed. 1989) (OED) (“That is, constitutes, or involves an essential part, point, or feature; essential, material,” or “Of ample or considerable amount, quantity, or dimensions”).

[2] The context in which “substantial” appears in the statute, however, points to a quantitative meaning here. Its neighboring terms are the first clue. “[A] word is given more precise content by the neighboring words with which it is associated.” *United States v. Williams*, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Both “all” and “portion” convey a quantitative meaning. “All” means the entire quantity, without reference to relative importance. See, e.g., Webster's Third 54 (defs. 1a, 2a, 3) (“that is the whole amount or quantity of,” or “every member or individual component of,” or “the whole number or sum of”); 1 OED 324 (def. 2) (“The entire number of; the individual components of, without exception”). “Portion” likewise refers to some quantity less than all. Webster's Third 1768 (defs. 1, 3a) (“an individual's part or share of something,” or “a part of a whole”); 12 OED 154, 155 (def. 1a, 5a) (“The part (of anything) allotted or belonging to one person,” or “A part of any whole”). Conversely, there is nothing in the neighboring text to ground a qualitative interpretation.

[3] Moreover, the phrase “substantial portion” is modified by “of the components of a patented invention.” It is the supply of all or a substantial portion “of the components” of a patented invention that triggers liability for infringement. But if “substantial” has a qualitative meaning, then the more natural way to write the opening clause of the provision would be to not reference “the components” at all. Instead, the opening clause of § 271(f)(1) could have triggered liability for the supply of “all or a substantial portion of ... a patented invention, where [its] components are uncombined in whole or in part.” A qualitative reading would render the phrase “of the components” unnecessary the first time it is used in §

271(f)(1). Whenever possible, however, we should favor an interpretation that gives meaning to each statutory provision. See *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). Only the quantitative approach does so here. Thus, “substantial,” in the context of § 271(f)(1), is most reasonably read to connote a quantitative measure.

Promega argues that a quantitative approach is too narrow, and invites the Court to instead adopt a “case-specific approach” that would require a factfinder to decipher whether the components at issue are a “substantial portion” under *either* a qualitative or quantitative test. Brief for Respondent 17, 42. We decline to do so. Having determined the phrase “substantial portion” is ambiguous, our task is to resolve that ambiguity, not to compound it by tasking juries across the Nation with interpreting the meaning of the statute on an ad hoc basis. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345–346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

As a more general matter, moreover, we cannot accept Promega's suggestion that the Court adopt a different analytical framework entirely—one that accounts for both the quantitative *and* qualitative aspects of the components. Promega reads § 271(f)(1) to mean that the answer to whether a given portion of the components is “substantial” depends not only on the number of components involved but also on their qualitative importance to the invention *741 overall. At first blush, there is some appeal to the idea that, in close cases, a subjective analysis of the qualitative importance of a component may help determine whether it is a “substantial portion” of the components of a patent. But, for the reasons discussed above, the statute's structure provides little support for a qualitative interpretation of the term.⁵

Nor would considering the qualitative importance of a component necessarily help resolve close cases. To the contrary, it might just as easily complicate the factfinder's review. Surely a great many components of an invention (if not every component) are important. Few inventions, including the one at issue here, would function at all without any one of their components. Indeed, Promega has not identified any component covered by the Tautz patent that would not satisfy Promega's “importance” litmus test.⁶ How are courts—or, for that matter, market participants attempting to avoid liability—to

determine the relative importance of the components of an invention? Neither Promega nor the Federal Circuit offers an easy way to make this decision. Accordingly, we conclude that a quantitative interpretation hews most closely to the text of the statute and provides an administrable construction.

B

[4] [5] Having determined that the term “substantial portion” refers to a quantitative measurement, we must next decide whether, as a matter of law, a single component can ever constitute a “substantial portion” so as to trigger liability under § 271(f)(1). The answer is no.

As before, we begin with the text of the statute. Section 271(f)(1) consistently refers to “components” in the plural. The section is targeted toward the supply of all or a substantial portion “of the *components*,” where “such *components*” are uncombined, in a manner that actively induces the combination of “such *components*” outside the United States. Text specifying a substantial portion of “components,” plural, indicates that multiple components constitute the substantial portion.

The structure of § 271(f) reinforces this reading. Section 271(f)(2), which is § 271(f)(1)'s companion provision, reads as follows:

“Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.”

Reading § 271(f)(1) to refer to more than one component allows the two provisions *742 to work in tandem. Whereas § 271(f)(1) refers to “components,” plural, § 271(f)(2) refers to “any component,” singular. And, whereas § 271(f)(1) speaks to whether the components supplied by a party constitute a substantial portion of the components, § 271(f)(2) speaks to whether a party has supplied “any” noncommodity component “especially made or especially adapted for use in the invention.”

We do not disagree with the Federal Circuit's observation that the two provisions concern different scenarios. See 773 F.3d, at 1354. As this Court has previously observed, §§ 271(f)(1) and 271(f)(2) “differ, among other things, on the quantity of components that must be ‘supplie[d] ... from the United States’ for liability to attach.” *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454, n. 16, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007). But we do not draw the Federal Circuit's conclusion from these different but related provisions. Reading § 271(f)(1) to cover *any* single component would not only leave little room for § 271(f)(2), but would also undermine § 271(f)(2)'s express reference to a single component “especially made or especially adapted for use in the invention.”⁷ Our conclusion that § 271(f)(1) prohibits the supply of components, plural, gives each subsection its unique application.⁸ See, e.g., *Cloer*, 569 U.S., at —, 133 S.Ct., at 1892–1893.

Taken alone, § 271(f)(1)'s reference to “components” might plausibly be read to encompass “component” in the singular. See 1 U.S.C. § 1 (instructing that “words importing the plural include the singular,” “unless the context indicates otherwise”). But § 271(f)'s text, context, and structure leave us to conclude that when Congress said “components,” plural, it meant plural, and when it said “component,” singular, it meant singular.

We do not today define how close to “all” of the components “a substantial portion” must be. We hold only that one component does not constitute “all or a substantial portion” of a multicomponent invention under § 271(f)(1). This is all that is required to resolve the question presented.

C

The history of § 271(f) bolsters our conclusion. The Court has previously observed that Congress enacted § 271(f) in response to our decision in *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 92 S.Ct. 1700, 32 L.Ed.2d 273 (1972). See *Microsoft Corp.*, 550 U.S., at 444, 127 S.Ct. 1746. In *Deepsouth*, the Court determined that, under patent law as it existed at the time, it was “not an infringement *743 to make or use a patented product outside of the United States.” 406 U.S., at 527, 92 S.Ct. 1700. The new § 271(f) “expand[ed] the definition of infringement to include supplying from the United States a patented invention's components,” as outlined in subsections (f)(1) and (f)(2). *Microsoft*, 550 U.S., at 444–445, 127 S.Ct. 1746.

The effect of this provision was to fill a gap in the enforceability of patent rights by reaching components that are manufactured in the United States but assembled overseas and that were beyond the reach of the statute in its prior formulation. Our ruling today comports with Congress' intent. A supplier may be liable under § 271(f)(1) for supplying from the United States all or a substantial portion of the components (plural) of the invention, even when those components are combined abroad. The same is true even for a single component under § 271(f)(2) if it is especially made or especially adapted for use in the invention and not a staple article or commodity. We are persuaded, however, that when as in this case a product is made abroad and all components but a single commodity article are supplied from abroad, this activity is outside the scope of the statute.

III

We hold that the phrase “substantial portion” in 35 U.S.C. § 271(f)(1) has a quantitative, not a qualitative, meaning. We hold further that § 271(f)(1) does not cover the supply of a single component of a multicomponent invention. The judgment of the Court of Appeals for the Federal Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Justice [ALITO](#), with whom Justice THOMAS joins, concurring in part and concurring in the judgment. I join all but Part II–C of the Court's opinion. It is clear from the text of [35 U.S.C. § 271\(f\)](#) that Congress intended not only to fill the gap created by *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 92 S.Ct. 1700, 32 L.Ed.2d 273 (1972)—where all of the components of the invention were manufactured in the United States, *id.*, at 524, 92 S.Ct. 1700—but to go at least a little further. How much further is the question in this case, and the genesis of [§ 271\(f\)](#) sheds no light on that question.

I note, in addition, that while the Court holds that a single component cannot constitute a substantial portion of an invention's components for [§ 271\(f\)\(1\)](#) purposes, I do not read the opinion to suggest that *any* number greater than one is sufficient. In other words, today's opinion establishes that more than one component is necessary, but does not address *how much* more.

All Citations

137 S.Ct. 734, 197 L.Ed.2d 33, 85 USLW 4049, 121 U.S.P.Q.2d 1641, 17 Cal. Daily Op. Serv. 1585, 2017 Daily Journal D.A.R. 1566, 26 Fla. L. Weekly Fed. S 434

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The Tautz patent expired in 2015. The litigation thus concerns past acts of infringement only.
- 2 Because the parties here agree that the patented invention is made up of only these five components, we do not consider how to identify the “components” of a patent or whether and how that inquiry relates to the elements of a patent claim.
- 3 Applied Biosystems, LLC, and Invitrogen IP Holdings, Inc., are also petitioners in this proceeding and are wholly owned subsidiaries of Life Technologies Corporation. The agreement at issue here was originally between Promega and Applied Biosystems. 773 F.3d 1338, 1344, n. 3 (C.A.Fed.2014).
- 4 Chief Judge Prost dissented from the majority's conclusion with respect to the “active inducement” element of [35 U.S.C. § 271\(f\)\(1\)](#). 773 F.3d, at 1358–1360. Neither that question, nor any of the Federal Circuit's conclusions regarding Life Technologies' liability under [§ 271\(a\)](#) or infringement of four additional Promega patents, see *id.*, at 1341, is before us. See 579 U.S. —, 136 S.Ct. 2505, 195 L.Ed.2d 838 (2016).
- 5 The examples Promega provides of other statutes' use of the terms “substantial” or “significant” are inapposite. See Brief for Respondent 19–20. The text of these statutes, which arise in different statutory schemes with diverse purposes and structures, differs in material ways from the text of [§ 271\(f\)\(1\)](#). The Tax Code, for instance, refers to “a substantial portion of a return,” [26 U.S.C. § 7701\(a\)\(36\)\(A\)](#), not to “a substantial portion of the entries of a return.”
- 6 Life Technologies' expert described the *Taq* polymerase as a “main” component. App. 160. The expert also described two other components the same way. *Ibid.*
- 7 This Court's opinion in *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 447, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007), is not to the contrary. The holding in that case turned not on the number of components involved, but rather on whether the software at issue was a component at all.
- 8 Promega argues that the important distinction between these provisions is that [§ 271\(f\)\(1\)](#), unlike [§ 271\(f\)\(2\)](#), requires a showing of specific intent for active inducement. Brief for Respondent 34–41. But cf. *Global–Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 765–766, 131 S.Ct. 2060, 179 L.Ed.2d 1167 (2011) (substantially equating the intent requirements for [§§ 271\(b\)](#) and [271\(c\)](#), on which Promega asserts [§§ 271\(f\)\(1\)](#) and [\(f\)\(2\)](#) were modeled). But, to repeat, whatever intent subsection (f)(1) may require, it also imposes liability only on a party who supplies a “substantial portion of the components” of the invention. Thus, even assuming that subsection (f)(1)'s “active inducement” requirement is different from subsection (f)(2)'s “knowing” and “intending” element—a question we do not reach today—that difference between the two provisions does not read the “substantial portion” language out of the statute.

NYIPLA
One-Day Patent CLE Seminar
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Licensing Strategies in View of
Lexmark and *Promega*

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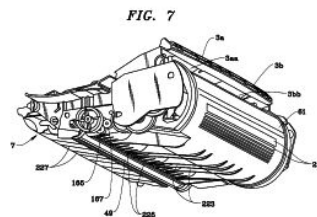
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*Arizona Cartridge Remanufacturers Ass'n,
Inc. v. Lexmark* : License Language

RETURN EMPTY CARTRIDGE TO LEXMARK FOR
REMANUFACTURING AND RECYCLING

Please read before opening. Opening of this package or using the patented cartridge inside confirms your acceptance of the following license agreement. The patented cartridge is sold at a special price subject to a restriction that it may be used only once. Following this initial use, you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, return the unopened package to your point of purchase. A regular price cartridge without these terms is available.



LEXMARK

Lexmark: Permitted Sales, Territory & Patent Exhaustion

- “We conclude that a patentee’s decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose or the location of the sale.”
- “So long as a licensee complies with the license when selling an item, the patentee has, in effect, authorized the sale. That licensee’s sale is treated for purposes of patent exhaustion, as if the patentee made the sale itself.”
- “An authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.”
- “The single-use/no-resale restrictions in Lexmark’s contracts may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain *patent rights* in an item it has elected to sell.” (emphasis added)

Impression Prods., Inc. v. Lexmark Int’l, Inc.,
137 S.Ct. 1523, 1529, 1535, 1531 (2017).

Promega: Substantial Portion



- “Having determined that the term ‘substantial portion’ refers to a quantitative measurement, we must next decide whether, as a matter of law, a single component can ever constitute a ‘substantial portion’ so as to trigger liability under §271(f)(1). The answer is no.”

Life Techs. Corp. v. Promega Corp., 137 S.Ct. 724, 741 (2017).



(19) United States

(12) Reissued Patent
Jäckle et al.

(10) Patent Number: US RE37,984 E

(45) Date of Reissued Patent: Feb. 11, 2003

(54) PROCESS FOR ANALYZING LENGTH
POLYMORPHISMS IN DNA REGIONS

H. Chen et al., *Human Mutation*, 4:208-211 (1994).
X. Y. Huang et al., *Human Molecular Genetics*,
2(9):411-415 (1993).

- “I note, in addition, that while the Court holds that a single component cannot constitute a substantial portion of an invention’s components for §271(f)(1) purposes, I do not read the opinion to suggest that any number greater than one is sufficient. In other words, today’s opinion establishes that more than one component is necessary, but does not address how much more.”

Concurrence (J. Alito).

Thank You.

Questions?