not so much to do more but for the first time in a long time to do less so they can finally do what it takes to get this economy moving again.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will be in a period of morning business until 5 p.m., with Senators permitted to speak therein for up to 10 minutes each.

The Senator from Arizona.

Mr. KYL. Mr. President, I ask unanimous consent to speak for as much time as I might consume.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

AMERICA INVENTS ACT

Mr. KYL. Mr. President, I rise today to urge my colleagues to support H.R. 1249, the Leahy-Smith America Invents Act. Some other responsibilities may take me from the Senate floor during this coming week when we will be debating the act and therefore I wanted to lay out my views at this time, strongly urging my colleagues to support the bill.

Although the present bill originates in the House of Representatives, it is actually based on and is substantially identical to the bill that passed the Senate in March by a vote of 95 to 5. Also, before Chairman SMITH brought his bill to the House floor, he negotiated final changes to the bill with the lead supporters of the measure in the Senate Judiciary Committee. The House and Senate have now been working on patent reform for 6 years. The present bill is a good bill. It reflects a genuine compromise between the House and the Senate. It is a bill that will provide substantial benefits to the U.S. economy in the coming years, so I hope that, as I said, the Senate will adopt this legislation and be able to pass it on directly to the President for his signature.

The overarching purpose and effect of the present bill is to create a patent system that is clearer, fairer, more transparent, and more objective. It is a system that will ultimately reduce litigation costs and reduce the need to hire patent lawyers. The bill will make it simpler and easier to obtain valid patents and to enforce those patents, and it will cure some very clear litigation abuses that have arisen under the current rules, abuses that have done serious harm to American businesses.

By adopting the first-to-file system, for example, the bill creates a rule that is clear and easy to comply with and that avoids the need for expensive discovery and litigation over what a patent's priority date is. By adopting a simple definition of the term ''prior art,'' the bill will make it easier to assess whether a patent is valid and cheaper for an inventor to enforce his patent. By recognizing a limited prior user right, the bill creates a powerful incentive for manufacturers to build factories and create jobs in this country. By allowing post-grant review of patents, especially low quality, business method patents, the bill creates an inexpensive substitute for district court litigation and allows key issues to be addressed by experts in the field. By eliminating the recent surge of false-marking litigation, the bill effectively repeals what amounts to a litigation tax on American manufacturing.

Let me take a few moments to describe how the provisions of this bill will provide concrete benefits to American inventors, both large and small, and to the American manufacturing economy. First, prior commercial use defense.

A new provision of the present bill that was added by the House of Representatives will provide important advantages to U.S. manufacturers. Section 5 of the bill creates a new defense to patent infringement of prior commercial use. This new defense will ensure that the first inventor of a new process, or of a product used in a manufacturing process, can continue to use the invention in a commercial process even if a subsequent inventor later patents the idea. For many manufacturing processes the patent system presents a Catch-22. If the manufacturer patents the process, he effectively discloses it to the world. But patents for processes that are used in closed factories are difficult to police. It is all but impossible to know if someone in a factory in China, for example, is infringing such a patent. As a result, unscrupulous foreign and domestic inventors will simply use the invention in secret without paying licensing fees. Patenting such manufacturing processes effectively amounts to giving away the invention to foreign manufacturers.

On the other hand, if the U.S. manufacturer does not patent the process, a subsequent party may obtain a patent on it and the U.S. manufacturer will be forced to stop using a process that he was the first to invent and which he has been using for years.

The prior commercial use defense provides relief to U.S. manufacturers from this Catch-22, allowing them to continue to use a manufacturing process without having to give it away to competitors or running the risk that it will be patented out from under them. To establish a right to this defense, however, the America Invents Act requires the manufacturer to use the process in the United States. As a result, the AIA creates a powerful incentive for manufacturers to build their factories and plants in the United States. Currently, most foreign countries recognize some prior user rights that encourage manufacturers to build facilities in those countries. This bill corrects this imbalance and creates a strong incentive for businesses to create manufacturing jobs in this country.

Second, something called supplemental examination. A provision of this bill that will particularly benefit small and startup investors is section 12, which authorizes supplemental examination of patents. It is one of the reasons the bill has such strong support in the small business community. Currently, even minor and inadvertent errors in the patent application process can lead to expensive and very unpredictable and very inequitable conduct litigation. It is often the case that startup companies or university researchers cannot afford to hire the very best patent lawyers. Their patents are prosecuted by an in-house attorney who does a good enough job but who is unfamiliar with all of the sharp corners and pitfalls of the inequitable conduct doctrine, such as the need to present cumulative studies and prior art. Later, when more legally sophisticated investors evaluate the patent for potential investment or purchase, these minor flaws in prosecution can deter the investor from purchasing or funding the development of the invention. An investor would not risk spending hundreds of millions of dollars to develop a product if a potential inequitable conduct attack may wipe out the whole investment.

Parties on both sides of these exchanges report that investors routinely walk away from inventions because of their inability under current law to resolve uncertainties whether a flaw in prosecution was, in fact, inequitable conduct. These decisions not to invest in a new invention represent important new cures never tested and brought to market and other important inventions that are never developed.

The America Invents Act provides a solution to this problem by authorizing supplemental examination of patents. This new proceeding will allow inventors or patent purchasers to return to the Patent Office with additional material and have the Patent Office reevaluate the patent in light of that material. If the patent is invalid in light of the new material, the Patent Office will cancel the claims. But if the office finds that the patent is valid, the parties will have a patent that they can be legally certain will be upheld and enforced. The authorization of supplemental examination will result in path-breaking inventions being developed and brought to market that otherwise would have lingered on the shelf because of legal uncertainty over the patent. It will ensure that small and startup companies with important and valid patents will not be denied investment capital because of legal technicalities.

Let me talk about what I think is undoubtedly the most important among

the bill's changes to current law, and that is its transition to the first-to-file system. This long overdue reform will create a system for establishing a patent's priority date that is official, simple, transparent, and fair. Priority dates not only establish priorities between competing patent applications for the same invention but are also used to measure a patent against potentially invalidating prior art.

Currently, establishing a priority date requires expensive litigation and discovery into what the inventor's notebooks show and when they show it and whether the inventor diligently perfected his invention after he conceived of it.

Also, for businesses seeking legal certainty, our current system can be a nightmare. A company hoping to bring a new product to market in a particular field of technology has no way of knowing whether a competitor that belatedly sought the patent on its new product will succeed in securing a valid patent on the product. It all depends on the invention date the competitor will be able to prove relative to the company that the company developing the product can prove.

Given that both the product developer and competitor can rely on their own secret documents that the other side will not see until litigation over the patent commences, neither of these two parties can gain a clear picture of whether a patent is valid without years of litigation and millions of dollars of discovery and other litigation costs. Under first to file, by contrast, inventors will file informal and inexpensive provisional applications. These applications need only disclose what the invention is and how to make it, information the inventor already needs to have in his possession anyway in order to establish a priority date under the current system. Under first to file, once the inventor files this information with the Patent Office, he has a priority date that is both secure and public. The application is a government document. There is no need to litigate over its priority date. We know that.

Other industry participants will be able to easily determine the patent's priority date, allowing them to measure the patent against prior art and determine if it is valid. There will be no opportunity to fraudulently backdate the priority date. That date will depend on a government document, not privately held files.

Most U.S. businesses already effectively operate under the first-to-file system. They file applications promptly because it is difficult and risky to rely on proof of invention dates to defeat a competing application that was filed earlier. Also, because the rest of the world uses first to file, U.S. investors need to secure first-to-file priority if they want their patents to be valid anywhere outside of this country.

For many U.S. businesses the America Invents Act does not change the system under which they operate. Rather, it simply allows American businesses to comply with just one set of rules rather than being forced to operate under two different systems.

Another one of the bill's clear improvements over current law is its streamlined definition of the term ''prior art.'' Public uses and sales of an invention will remain prior art, but only if they make the invention available to the public. An inventor's confidential sale of his invention, his demonstration of its use to a private group, or a third party's unrestricted but private use of the invention will no longer constitute private art. Only the sale or offer for sale of the invention to the relevant public or its use in a way that makes it publicly accessible will constitute prior art.

The main benefit of the AIA public availability standard of prior art is that it is relatively inexpensive to establish the existence of events that make an invention available to the public. Under current law, depositions and litigation discovery are required in order to identify all of the inventor's private dealings with third parties and determine whether those dealings constitute a secret offer for sale or third party use that invalidates the patent under the current law's forfeiture doctrines. The need for such discovery is eliminated once the definition of ''prior art'' is limited to those activities that make the intention accessible to the public. This will greatly reduce the time and cost of patent litigation and allow the courts and the PTO to operate much more efficiently.

Both of these last two changes—the first to file and the new definition of ''prior art''—will also protect American inventors against theft of their invention both at home and abroad. Under current law, if an American inventor sells or otherwise discloses his invention, there is a risk that an unscrupulous third party will steal the idea and file a U.S. patent for it. If the thief claims he himself made the invention before the U.S. inventor, then the U.S. inventor will need to prove the invention was stolen from him. Current law even allows activities that occur in a foreign country to establish a priority date for a U.S. patent. Thus, if a U.S. inventor who has been a victim of theft is unable to prove that activities alleged to have occurred in China or India, say, never actually took place, he not only loses his patent but the foreign thief can obtain a U.S. patent and block the U.S. inventor from practicing his own invention.

Finally, under current law, even if the U.S. inventor files a patent application right away, his rights still are not secure. Under current law, an early filing date can be defeated by another applicant's claim that he conceived of the invention earlier. Thus a foreign thief can claim he came up with the idea in his overseas laboratory, and the U.S. inventor would bear the burden of proving that a fraud had been perpetrated in a foreign country.

Under the America Invents Act, by contrast it will be much harder for thieves, both foreign and domestic, to steal a U.S. inventor's invention. Under this bill, if a U.S. inventor publicly discloses his invention, no third party's application filed after that date can be valid because the filing date is what will determine priority, not a purported date of conception. Nor can a third party easily contrive fake prior art to defeat the patent. Under the AIA, only those actions that made the invention publicly available will constitute prior art, and these are much harder to fake than are claims of having secretly made the invention in a private laboratory, again, say, in China. Under new section 102(b)(1)(B), once the U.S. inventor discloses his invention, no subsequent prior art can defeat the invention. The U.S. inventor does not need to prove that the third party disclosures following his own disclosures are derived from him. He can thus take full advantage of the grace period and disclose his invention in academic papers and at trade shows without worrying that such disclosures will lead to theft or fraudulent invalidation of his patent.

Similarly, under the America Invents Act, once the U.S. inventor files even a provisional application, his rights will be secured. Under this bill, no one can file a later application but claim an earlier priority date because the priority date is set by the filing date. The provisional application also constitutes section 103 prior art as of its filing date. As a result, a third party's patent for a trivial or obvious variation of the patent will be invalid and will not crowd out the original inventor's patent rights.

Finally, validating prior art will depend on publicly accessible information, not private activities that take place, for example, in a foreign land. As a result, it will be impossible for a third party who derived the invention from a U.S. inventor's public disclosure or patent application to steal the invention or sabotage the U.S. inventor's patent. The only way to obtain priority or invalidate the invention would be to file or publicly disclose the invention before the U.S. inventor has done so—something that will obviously be impossible for the deriver to do.

Finally, I would like to talk about false marking for a moment. I would like to describe the bill's important reforms to the false marking statute. The America Invents Act reins in abuses that are reflected in a recent surge in false marking litigation. It allows such suits to be brought only by those parties who have actually suffered a competitive injury as a result of false marking.

Currently, such suits are often brought by parties asserting no actual competitive injury from the marking—or who do not even patent or manufacture anything in a relevant industry. Many cases have been brought by patent lawyers themselves claiming the right to enforce a fine of $500 for every marked product. One manufacturer of plastic cups who stamped his patent number on his cups was recently sued by a lawyer for $500 for each disposable

cup that was sold, for a gargantuan total of $9 trillion.

In reality, the bulk of these suits settle for their nuisance value, the costs of continuing to litigate. They represent a tax that patent lawyers are imposing on domestic manufacturing—a shift in wealth to lawyers that comes at the expense of manufacturing jobs. Well, this bill prevents such abuses by repealing the statute's qui tam action while still allowing parties who have separate actual injury from false marking to sue and allowing the United States to enforce a $500-per-product fine where appropriate. Qui tam statues are a relic of the 19th century and generally produce far more litigation than is in the public interest. Almost all of these statutes have been repealed.

The America Invents Act continues this trend. By repealing the false marking qui tam statute, the AIA will allow American companies to spend money hiring new workers rather than fighting off frivolous false marking suits.

In conclusion, the America Invents Act will provide important benefits to U.S. inventors of all sizes, to startup companies, to domestic manufacturing, and to the U.S. economy generally. I look forward to its passage by the Senate and its enactment into law.

As the majority leader stated in his remarks in leader time, I hope those who may have amendments will immediately file those amendments so the Senate can take them up in good order, have plenty of time to debate them, and dispose of them in the appropriate way. It would be my hope the Senate will end up passing the bill adopted by the House of Representatives so our action can result in sending the bill directly to the President for his signature. That is an accomplishment that could be achieved with cooperation between the House and the Senate, between Democrats and Republicans, between the legislative and executive branches, and I think it would certainly begin to mark the time when the American people could see their legislative representatives begin to work together on their behalf.

Mr. President, I note the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. FRANKEN). Without objection, it is so ordered.

CARSON CITY SHOOTING

Mr. REID. Mr. President, I was saddened to hear just a few minutes ago of a senseless act of violence committed in our capital, Carson City, NV. It happened at a restaurant. There are few details of what happened and what led to this tragedy that occurred just a few minutes ago, but according to early reports three people are now dead and six others have been wounded by a single gunman.

So I extend my deepest sympathies to all of those who have been affected. The victims and their families are in my thoughts and will be every day, and certainly they have been during the last several minutes. I am disturbed to hear that two of the victims were serving this Nation proudly as part of the Nevada National Guard.

I commend the brave first responders who rushed to the scene for their professionalism.

Carson City is a wonderful place. I have spent time there through three legislative sessions. There are the beautiful Sierra, NV, mountains. It is a peaceful, quiet place; and to have something such as this happen is very difficult to accept.

I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SANDERS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. SHAHEEN). Without objection, it is so ordered.

HURRICANE IRENE

Mr. SANDERS. Madam President, as I suspect you know, Vermont has been hit very hard by Hurricane Irene. The storm caused widespread flooding, resulting in a number of deaths, the loss of many homes and businesses, and hundreds of millions of dollars in damage to property and infrastructure.

I have visited many of the most hard-hit towns in the past week, including Ludlow, Wilmington, Brattleboro, Berlin, Moretown, and Waterbury. I was shocked and moved by the extent of the damage I saw. Many towns still have very limited access because the roads and bridges that link them to the world have been destroyed. This disaster will go down in history as one of the very worst natural disasters in the history of the State of Vermont.

Let me take this opportunity to personally thank the emergency rescue teams and all those aiding the victims of the floods for their outstanding work. Local crews, along with the Vermont National Guard, and Guard units from other States, such as New Hampshire, Maine, and Illinois, have airline-lifted food, water, blankets, and medicine to the worst hit towns. Police, fire, and local officials have also done an extraordinary job.

We still don't know the cost of this disaster—it probably will not be tabulated for a while—but let me share a few figures in terms of what we have experienced. Just days after the declaration of a major disaster by the President, more than 2,000 Vermonters had already registered with FEMA—2,000. To date, there have been more than 700 homes confirmed as severely damaged or destroyed.

I had the opportunity to go to some trailer parks in Berlin, in central Vermont, and I was down in the southern part of the State in Brattleboro and it is an incredibly sad sight to see. Mobile homes, where senior citizens were living, have been destroyed. They are now forced to relocate. It was a very tragic circumstance.

Further, the storm has knocked out 135 segments of the State highway system, as well as 35 State bridges, completely isolating 13 communities for several days. An unknown number of farms and businesses have been destroyed.

I was down in Wilmington, a beautiful town in the southern part of the State on Route 9. Virtually their entire downtown business community has been severely damaged, and that is clearly undermining the fabric not only of the economy of that town but of towns throughout the State.

Our Amtrak and freight rail services were completely suspended as tracks literally washed into rivers. So we had tracks underwater. The State's largest office complex is located in Waterbury, VT, a few miles from our capital, Montpelier, and I visited that facility. It had been completely flooded. There are 1,700 people who work there. For a small State, that is a lot of people—1,700 people—who work in our major office complex in Waterbury. That has now been shut down for an indefinite period of time. That impacts, obviously, the State's ability to provide services to the people of Vermont.

At least 65 public schools were impacted and could not open on time. School is just beginning, with 65 public schools not able to open on time. This is just a short list of some of the devastation that is going on in the State.

I also want to call to the attention of the Senate another extraordinary tragedy in our State, and that is the death of a gentleman named Michael Garafano. Mr. Garafano was an employee of the city of Rutland, and Rutland was very hard hit by this disaster. He and his son went up to a local dam to inspect the condition of the dam. They were hit by a flash flood and both of them lost their lives. So here we have an extraordinary public servant, trying to protect the well-being of the people of Rutland, and he gave his life in that effort. Mr. Garafano's effort will never be forgotten.

As we go forward—not just for Vermont but for New Jersey, for North Carolina, and we know upstate New York was also hard hit—I have every confidence the Senate and the House will do for Hurricane Irene as we have done for other natural disasters that have impacted different parts of our country, and I look forward to working with my colleagues to make sure, as Americans, we rebuild the communities in Vermont and in other sections of the country that were devastated by this terrible flood.