The Patent Bill is Unconstitutional

by Phyllis Schlafly April 29, 2011

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The biggest issue for many new Members of Congress and TEA Partiers is trying to hold the federal government within its constitutional limits. Unfortunately, the House now seems poised to pass a law in direct violation of the Constitution.

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

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

Our system perfectly implements the stated purpose of the constitutional provision "to promote the progress of science" because, as James Madison explained in Federalist #43, it serves both individual property rights and the public good. The U.S. patent system was unique when the Constitution was written and still is unique in the world today.

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

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

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

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

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

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

Grassrooters and TEA Partiers must not let Congress flout the Constitution by redefining the word "inventors" to be mean paper filers. The Constitution's framers, and the early Congresses (which included many men who had been members of the Constitutional Convention), were very clear that first-to-invent is the meaning of the word "inventors."

First-to-invent is in conformity with tradition and history, as well as consistent with originalist, strict constructionist, and textualist views of the Constitution. More than two hundred years of statutes and jurisprudence confirm the first-to-invent standard.

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

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In Evans v. Jordan (1813), Chief Justice John Marshall wrote that the Constitution guarantees the "exclusive" right "to the inventor from the moment of invention." In Shaw v. Cooper (1833), the Supreme Court upheld the law that vested "the exclusive right in the inventor only."

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

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

No matter what arguments of policy or efficiency are made by first-to-file supporters, we cannot let them violate or ignore the Constitution. Tell your Congressman to vote No on the patent bill.