

WRITTEN TESTIMONY OF DAVID J. KAPPOS

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Before the

Committee on the Judiciary
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Subcommittee on Courts, Intellectual Property,
Artificial Intelligence, and the Internet

Hearing on “Renewal of USPTO Fee Setting Authority: Giving Full Effect to the America Invents Act”

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Good morning Chairman Issa, Ranking Member Johnson, and members of the Subcommittee. Thank you for the opportunity to offer my views on renewal of the USPTO’s fee setting authority under Section 10 of the Leahy-Smith America Invents Act. I am testifying today solely on my own behalf, and no one is compensating me in connection with my testimony.

I come to this question from a particular vantage point. I served as Director of the U.S. Patent and Trademark Office (USPTO) from August 2009 through January 2013—which is to say, I ran the agency for two years before it had fee setting authority and for more than a year after. I appeared before this Committee in May 2010 and told its members that the Office could not manage its business without the ability to align its fees with its costs. I have now watched fifteen years of experience test that proposition.

Based on my experience, I want to present the Subcommittee with three critical points:

First, the USPTO costs the taxpayer nothing. The Office’s net appropriation is zero. Every dollar it spends is a dollar collected from the applicants, registrants, patent and trademark owners, and others that the Office serves. Fee setting authority is therefore not a question of how much the government spends on the patent system. It is a question of whether a self-funded agency can maintain a fee schedule that supports the services its users require.

Second, USPTO fee-setting is tightly bounded and transparent. Congress created a special fee rulemaking process that runs longer and carries more procedural obligations than an ordinary notice-and-comment rulemaking. The full process generally takes about two years, comprising a public advisory committee review, a mandatory public hearing, a published committee report, notice and comment, written notification to this Committee, and a further layover period before any fee can take effect during which Congress can legislatively block it.

Third, USPTO fee-setting has worked. In fifteen years, the Office has used this authority seven times. With it, the Office has built the operating reserve it previously lacked, retired the legacy IT systems it could not otherwise have afforded to replace, and gained the means to manage pendency and sustain examiner hiring. Average first action pendency remains well below where it stood in 2011, and after several years of increases it has begun to improve again.¹ My recommendation to the Subcommittee is simple: extend the authority, extend it for a long term, and extend it cleanly.

I. Before the AIA, the USPTO Could Not Reliably Align Revenue with Its Work.

Before 2011, most USPTO fees were fixed by statute. Apart from limited inflation adjustments,² changing them generally required Congress to amend the law. The Office therefore had little ability to respond when its costs, workload, and revenue diverged. Imagine running any enterprise in which your price list is set by an outside body, cannot be changed for years at a time, and bears no particular relationship to your cost structure. That was the USPTO's business model.

The 2009 downturn exposed the problem. When fee collections fell, the USPTO had no meaningful reserve to absorb the shock. We froze hiring, suspended training, cut overtime, and reduced contracting. By May 2010, the Office had lost 127 patent examiners that fiscal year and replaced only nine; we projected nearly 300 departures against 250 hires. These were not abstract budget choices. Examiner hiring and training determine how quickly the Office can work through its application inventory.³

The opposite problem also occurred: the Office sometimes collected fees that it was not permitted to spend. USPTO fees were—and remain—offsetting collections deposited in Treasury and available only under the terms Congress provides.⁴ In fiscal year 2010, for example, the Office projected fee collections about \$116 million above its enacted spending level.⁵ The Patent Public Advisory Committee later reported, based on audited financial statements, that more than

¹ Patent average first action pendency was 28.0 months in fiscal year 2011. USPTO, *Fiscal Year 2011 Performance and Accountability Report*, <https://www.uspto.gov/sites/default/files/about/stratplan/ar/USPTOFY2011PAR.pdf>. It averaged 20.8 months for fiscal year 2026 through July 2026, down from 22.6 months in fiscal year 2025. USPTO, *Patents Dashboard, Pendency* (data through July 2026), <https://www.uspto.gov/dashboard/patents/pendency.html>.

² See 35 U.S.C. § 41(f).

³ Statement of David J. Kappos, Under Sec'y of Commerce for Intellectual Property and Dir. of the USPTO, before the H. Comm. on the Judiciary, *USPTO Oversight* (May 5, 2010), <https://www.commerce.gov/sites/default/files/media/files/2015/kappos050510.pdf>.

⁴ See GAO, *Patent and Trademark Office: New User Fee Design Presents Opportunities to Build on Transparency and Communication Success* (Apr. 2012), <https://www.gao.gov/products/gao-12-514r>.

⁵ USPTO, *PPAC Budget Update* (Mar. 3, 2010), https://www.uspto.gov/sites/default/files/documents/20100303_PPAC_Budget_Update.pdf.

\$1 billion in user fees collected between fiscal years 1992 and 2012 had not been made available to the Office.⁶

The consequences of the old model were not confined to the years in which fees were miscalibrated or collections were withheld. An organization that cannot reliably forecast its revenue has difficulty committing capital to long-lead projects, and those projects—information technology and examiner hiring above all—are the first thing cut and the last thing restored. Meanwhile applications keep arriving, inventory compounds, and application pendency increases. Every additional month of pendency is a month in which a potential American patent or trademark holder cannot enforce a right, license a technology, or raise capital against it.

The AIA addressed both sides of the problem. Section 10 gave the Director a fee-setting authority that was flexible but subject to limits and procedural safeguards. Section 22 created a separate Patent and Trademark Fee Reserve Fund for collections above the amount made available in an appropriations act and restricted patent and trademark fee revenues to their respective operations. Congress retained control over spending authority, but the new structure made excess collections more transparent, making it more likely that the USPTO would ultimately have access to them, and gave the Office a sounder basis for financial planning.⁷

What happened next shows what the Office can do once its fees and its costs are aligned. With fee setting in place, the Office substantially reduced its inventory of unexamined applications and cut both first action and total pendency, even as annual filings continued to grow.⁸ The Office attributed its progress directly to this authority. Its fiscal year 2016 annual

⁶ PPAC, *2013 Annual Report*, at 13 (“According to the Office’s audited financial statements from FY 1992 to FY 2012, over one billion dollars of the user fee collections were not available to the Office.”),

https://www.uspto.gov/sites/default/files/documents/PPAC_2013_AnnualReport.pdf.

⁷ Leahy-Smith America Invents Act, Pub. L. No. 112-29 [hereinafter “AIA”] § 22 (amending 35 U.S.C. § 42(c)); 35 U.S.C. § 42(c) (establishing a Patent and Trademark Fee Reserve Fund at the Treasury).

⁸ For example, the inventory of unexamined applications fell from 669,625 (FY 2011) to 522,149 (FY 2018); average first action pendency was cut roughly in half, from 28.0 months (FY 2011) to 14.7 months (FY 2019); and average total pendency fell from 33.7 months (FY 2011) to 23.3 months (FY 2020). These figures are for unexamined utility, plant, and reissue applications awaiting a first action, which excludes requests for continued examination and design applications. See USPTO, *Fiscal Year 2011 Performance and Accountability Report* (FY 2011 pendency), <https://www.uspto.gov/sites/default/files/about/stratplan/ar/USPTOFY2011PAR.pdf>; *Fiscal Year 2013 Congressional Budget Justification* (FY 2011 inventory), <https://www.uspto.gov/sites/default/files/about/stratplan/budget/fy13pbr.pdf>; *Fiscal Year 2020 Congressional Budget Justification* (FY 2018 inventory), <https://www.uspto.gov/sites/default/files/documents/fy20pbr.pdf>; *Fiscal Year 2021 Congressional Budget Justification* (FY 2019 first action pendency), <https://www.uspto.gov/sites/default/files/documents/fy21pbr.pdf>; *Fiscal Year 2020 Performance and Accountability Report* (FY 2020 total pendency), <https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf>; *Fiscal Year 2016 Performance and Accountability Report* (describing a reduction of more than 28 percent in the unexamined backlog through FY 2016 “in spite of an annual increase in filings of almost 4 percent”), <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf>. These comparisons illustrate what the Office was able to accomplish once it controlled its own finances, including hiring more examiners and investing in examination technology. As noted elsewhere in this testimony, inventory and pendency rose again in the years that followed; the unexamined inventory has begun to decline, though pendency has not yet followed. Stable finances are a necessary precondition to controlling inventory and pendency, but they are not sufficient—management challenges

report credits the reduction “in large part to the fee-setting authority granted by the AIA, a responsible operating reserve collected through those fees, and an expanding and highly talented nationwide workforce.”⁹

II. Congress Granted the USPTO Fee-Setting Authority with Strong Guardrails, and It Has Been a Success.

Section 10 of the AIA did not hand the Director a blank check. Congress carefully provided the USPTO with a limited authority that is coupled with procedural checks—checks that go significantly beyond what most administrative rulemaking requires.

First, the authority is limited to aggregate cost recovery. The Director may set or adjust fees only so that aggregate patent-fee revenue recovers the estimated aggregate cost of patent operations, and aggregate trademark-fee revenue recovers the estimated aggregate cost of trademark operations. Individual fees may reflect policy judgments, but the Office cannot use Section 10 simply to generate surplus revenue.¹⁰

Second, Congress protects smaller applicants through statutory discounts. The AIA created the micro-entity category, and current law—after Congress increased the discounts in 2022—provides a 60 percent reduction for small entities and an 80 percent reduction for micro entities on the fees for filing, searching, examining, issuing, appealing, and maintaining patent applications and patents.¹¹

Third, the advisory committees play a statutorily mandated, integral role in the fee-setting process. Under Section 10(d), the Director must submit any proposed fee to the Patent or Trademark Public Advisory Committee at least 45 days before publication; must give the committee 30 days to deliberate; must require the committee to hold a public hearing; must assist the committee in publicizing that hearing; must require the committee to publish a written report of its comments and recommendations; and must consider and analyze that report before acting. Section 10(c) separately requires the Director to consult the committees every fiscal year on whether fees should be reduced.

Fourth, and critically, Congress retained direct control over the result. Section 10(e) requires publication in the Federal Register with the specific rationale for the change, contemporaneous written notice to the Chair and Ranking Member of the Judiciary Committees of both chambers, a public comment period of at least 45 days, and a further 45-day layover after

and external shocks, including the COVID-19 pandemic and the examiner attrition that followed it, also drive these numbers.

⁹ USPTO, *Fiscal Year 2016 Performance and Accountability Report*, <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf>.

¹⁰ AIA § 10(a)(2); USPTO, *Fee Setting and Adjusting*, <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting>.

¹¹ Unleashing American Innovators Act of 2022, Pub. L. No. 117-328, div. W, § 107, <https://www.congress.gov/bill/117th-congress/house-bill/2617/text>.

the final rule during which the fee cannot take effect, and cannot take effect at all “if a law is enacted disapproving such fee.”

The most recent patent fee rule illustrates the process. The USPTO notified the Patent Public Advisory Committee in April 2023; PPAC held a public hearing in May and issued its report in August; the proposed rule followed in April 2024; and the final rule was published in November 2024 and took effect January 19, 2025. That is roughly twenty-one months from the initial proposal to implementation.¹²

That has been the consistent manner in which the USPTO has used the fee-setting authority over the last fifteen years. Since the AIA, the USPTO has completed four patent fee-setting rulemakings and three trademark fee-setting rulemakings, and it separately used the statutory fee-reduction process to lower certain trademark fees in 2014. Congress has not enacted a law disapproving any of those fee rules. The record is one of measured use under substantial public and congressional oversight.¹³

III. Stable Fee-Setting Authority Is Essential to the USPTO’s Workforce and Technology Investments.

The grant of fee-setting authority made two significant improvements possible:

First, the operating reserve. The very first Section 10 rulemaking, in 2013, delivered what I had asked this Committee for three years earlier and what the Office had never been able to build: a working capital reserve, targeted at roughly three months of patent operations.¹⁴ That single change transformed how the agency can plan. The reserve cushions revenue volatility and lets the Office sustain long-term commitments. During the 43-day appropriations lapse in fall 2025, for example, the USPTO remained open and operational using fee-funded reserves. That is exactly the resilience a fully fee-funded agency should have.¹⁵

¹² This timeline is based on the overview provided in the background of *Setting and Adjusting Patent Fees During Fiscal Year 2025*, 89 Fed. Reg. 91898 (Nov. 20, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-11-20/pdf/2024-26821.pdf>.

¹³ *Setting and Adjusting Patent Fees*, 78 Fed. Reg. 4212 (Jan. 18, 2013), <https://www.federalregister.gov/d/2013-00819>; *Setting and Adjusting Patent Fees During Fiscal Year 2017*, 82 Fed. Reg. 52780 (Nov. 14, 2017), <https://www.federalregister.gov/d/2017-24390>; *Setting and Adjusting Patent Fees During Fiscal Year 2020*, 85 Fed. Reg. 46932 (Aug. 3, 2020), <https://www.federalregister.gov/d/2020-16559>; *Setting and Adjusting Patent Fees During Fiscal Year 2025*, 89 Fed. Reg. 91898 (Nov. 20, 2024), <https://www.federalregister.gov/d/2024-26821>; *Trademark Fee Adjustment*, 81 Fed. Reg. 72694 (Oct. 21, 2016), <https://www.federalregister.gov/d/2016-25506>; *Trademark Fee Adjustment*, 85 Fed. Reg. 73197 (Nov. 17, 2020), <https://www.federalregister.gov/d/2020-25222>; *Setting and Adjusting Trademark Fees During Fiscal Year 2025*, 89 Fed. Reg. 91062 (Nov. 18, 2024), <https://www.federalregister.gov/d/2024-26644>. See also *Reduction of Fees for Trademark Applications and Renewals*, 79 Fed. Reg. 74633 (Dec. 16, 2014), <https://www.federalregister.gov/d/2014-29413>.

¹⁴ USPTO, *Setting and Adjusting Patent Fees*, 78 Fed. Reg. 4212, 4215 (Jan. 18, 2013), <https://www.federalregister.gov/d/2013-00819>.

¹⁵ John A. Squires, Under Sec’y of Commerce for Intellectual Property and Dir. of the USPTO, *Thank You for Your Professionalism, Perseverance, and Performance* (Nov. 13, 2025) (stating that the USPTO remained open throughout the 43-day appropriations lapse because of its fee-funded reserves), <https://www.uspto.gov/subscription-center/2025/thank-you-your-professionalism-perseverance-and-performance>.

Fee-setting authority has also supported technology modernization. In 2023 the Office retired EFS-Web and Private PAIR in favor of Patent Center. It has also expanded artificial-intelligence tools for prior-art and design-image searching, including mandatory use of AI-assisted Similarity Search in utility and plant examination and DesignVision for design examination. These are multi-year projects. They require predictable resources for development, deployment, cybersecurity, and training.¹⁶

Second, the examining corps. The USPTO's principal asset is its people—roughly 9,500 patent examiners and trademark examining attorneys, each holding a technical or legal qualification. They handle some of the most demanding technical and legal work done anywhere in the federal government, and they do it extremely well.

Recruiting and training that workforce is a significant investment. Even with their technical and legal backgrounds, new examiners require substantial onboarding, and the Office invests continuously in their training thereafter. Attrition remains a persistent challenge despite sustained retention efforts, and it is concentrated in the first year of service, which means the Office must consistently hire above its net need simply to hold steady.¹⁷ Hiring in bursts and then freezing the pipeline is expensive and slows examination for years afterward. Stable funding does not eliminate workforce challenges, but an unstable funding mechanism would make them harder to solve.

Stable funding also buys something less obvious but equally valuable: the ability to hire nimbly. Application volumes do not distribute evenly across technologies. Demand surges in a particular field, and the Office needs to add qualified examiners in that art quickly, or applicants in exactly the most economically important areas wait longest. An agency operating month to month cannot do that. An agency with a reserve and a predictable revenue base can plan a hiring class, run it, and hold onto the people it trained.

None of this means fee-setting authority guarantees flawless execution. For example, the inventory of unexamined applications reached 837,928 in January 2025 before beginning to come down.¹⁸ Management issues arise from time to time, and they may be appropriate subjects for oversight. But they are not evidence that the fee-setting authority itself has been misused. They are the ordinary difficulties of running a large technical organization, and they are

¹⁶ USPTO, *Patent Center Fully Replaces USPTO Legacy Systems for Filing and Managing Patent Applications Online* (Nov. 15, 2023), <https://www.uspto.gov/about-us/news-updates/patent-center-fully-replaces-uspto-legacy-systems-filing-and-managing-patent>; USPTO, *USPTO Launches New Design Patent Examination AI Tool* (July 17, 2025), <https://www.uspto.gov/about-us/news-updates/uspto-launches-new-design-patent-examination-ai-tool>; USPTO, *Advance Notice of Change to the MPEP to Provide Guidance on the Use of PE2E Search's Similarity Search Feature* (Oct. 24, 2025) (requiring Similarity Search during examination of utility and plant applications), <https://www.uspto.gov/sites/default/files/documents/simsearchmemo-oct2025.pdf>.

¹⁷ USPTO, *Quick Patent Data* (Feb. 25, 2025) (reporting first-year patent examiner attrition rates of between 26-40% for fiscal years 2015 through 2023), <https://www.uspto.gov/sites/default/files/documents/quick-patent-data.pdf>.

¹⁸ USPTO, *USPTO Turns the Corner on Unexamined Patent Application Backlog Reduction* (Apr. 10, 2026), <https://www.uspto.gov/about-us/news-updates/uspto-turns-corner-unexamined-patent-application-backlog-reduction>.

difficulties that every agency, and for that matter every large enterprise, encounters. Removing the Office's funding flexibility would not make an IT project cheaper or a backlog smaller; it would make such problems harder to manage.

IV. Congress Should Renew the Fee-Setting Authority Long-Term and Keep Unrelated Policy Disputes Separate.

Under current law, the USPTO's Section 10 authority is scheduled to expire in mid-September 2026. Congress is currently considering a short-term bridge as part of fiscal-year 2027 funding legislation. A bridge may prevent an immediate lapse, but it is not a substitute for a durable reauthorization. The reason for fee-setting authority is to permit multi-year planning; repeatedly extending it for a few months at a time defeats much of that purpose.¹⁹

I also recognize that members of the innovation community have serious disagreements with particular USPTO policies outside fee setting. Those disputes deserve consideration, and Congress has ample tools to address them. This Subcommittee can conduct oversight, require information, legislate on Office policy, and, under Section 10 itself, block an individual fee by enacting a law disapproving it. None of those powers is weakened by a long-term extension.

The risks, moreover, are asymmetric. Congress can change substantive USPTO policy whenever it chooses. A disruption to hiring, training, or technology investment cannot be repaired on the same schedule. IT modernization, examiner recruiting and training, and the integration of AI into examination take years to build and can be lost quickly. We have run this experiment already, and the patent system spent the better part of two decades paying for it.

For the same reason, I would urge the Subcommittee not to use renewal of the fee-setting authority as leverage in unrelated policy disputes. Conditioning a self-funded agency's basic financial mechanism on resolution of separate disagreements unfairly punishes applicants, patentees, trademark owners, and the Office's workforce. Congress can consider these debates and address them directly.

I would add one observation offered in the same spirit. The Public Advisory Committees are an important part of the bargain Congress struck in Section 10. That bargain works only when the committees are constituted and able to perform the role Section 10 assigns them. I would encourage the Subcommittee's continued attention to that, as a matter of making the authority function as Congress designed it.

V. Conclusion

The USPTO needs a trained examining corps, modern search and information systems, reasonable pendency, and a fee structure that can respond to changing costs while protecting

¹⁹ On Aug. 8, 2026, the Senate passed H.R. 6500 as amended; § 2015 of the Senate amendment would extend Section 10 fee-setting authority through Dec. 11, 2026. H.R. 6500, 119th Cong. § 2015 (Engrossed Amendment Senate Aug. 8, 2026), <https://www.congress.gov/119/bills/hr6500/BILLS-119hr6500eas.pdf>.

small and micro entities. All of those depend on a self-funded agency having a stable and predictable financial framework.

Section 10 has now provided that framework for fifteen years. It gives the USPTO needed flexibility while preserving cost limits, public participation, advisory-committee review, congressional notice, and Congress's ultimate legislative control. I urge the Subcommittee to renew that authority for a long term and to renew it cleanly.

Chairman Issa, Ranking Member Johnson, and members of the Subcommittee, thank you again for the opportunity to share my views. I look forward to your questions.