

**Colloquy on the Defend Trade Secrets Act
Between Senators Orrin Hatch and Chris Coons
Thursday, October 8, 2015**

Senator Hatch:

Mdme./Mr. President: I rise today to speak about an important form of intellectual property: trade secrets.

I am pleased to be participating in this colloquy with my friend from Delaware, Senator Chris Coons. Earlier this year we introduced the Defend Trade Secrets Act, a bill that will create a harmonized, uniform federal standard for protecting trade secrets.

Trade secrets—such as customer lists, formulas, and manufacturing processes—are an essential form of intellectual property. Yet, trade secrets are the only form of U.S. intellectual property where misuse does not provide the owner with a federal private right of action. Instead, trade secret owners must rely on state courts or federal prosecutors to protect their rights.

The multistate procedural and jurisdictional issues that arise in such cases are costly and complicated, and the Department of Justice lacks the resources to prosecute many trade secret cases.

These systemic issues put companies at a great disadvantage, since the victims of trade secret theft need to recover information quickly before it crosses state lines or leaves the country.

At a time when cyber theft of trade secrets is at an all-time high—particularly as it involves Chinese competitors—it is critically important that U.S. companies have the ability to protect their trade secrets in federal court.

Senator Coons, trade secret theft has hit some of the nation's best-known companies, including Delaware-based DuPont and its popular Kevlar synthetic fiber products.

How has trade secret theft impacted DuPont?

Senator Coons:

Thank you, Senator Hatch, for your leadership on this important issue. As you mentioned, trade secrets are the only form of intellectual property not protected from theft under federal civil law, which is particularly astonishing when you consider the value of trade secrets to the economy. According to some estimates, they are worth \$5 trillion dollars to the U.S. economy, on par with the intellectual property protected by patents. And the scope of the loss to theft and misappropriation is huge—between \$160 and \$480 billion dollars annually.

I would submit that there is not a state in the country that has not been affected by this problem, and Delaware is no exception. In the 1960s, DuPont invented Kevlar, a para-aramid fiber with extraordinary strength that is very lightweight. These properties make Kevlar extremely versatile, but its best-known use is in life-saving body armor worn by our police officers and brave men and women in the armed forces. It has saved thousands of lives, including the lives of more than 3,000 police officers here in the United States.

About 10 years ago, DuPont developed next-generation Kevlar, which is even lighter and better able to withstand penetrating trauma from a broader range of rifle rounds and IED-generated shrapnel. It represents a real breakthrough in safety, but it cost millions and millions of dollars to develop. You see, chemically, para-aramid fibers are not that complicated. But the fabrication method, which is what gives the fibers strength and flexibility, is incredibly difficult to develop and implement.

And then, one day about six years ago, a rogue employee took the know-how behind DuPont's creation of next generation Kevlar and began work on a rival manufacturing facility in Korea, using DuPont's trade secrets.

The potential loss to DuPont from this one instance of trade secret misappropriation approaches \$1 billion dollars.

Senator Hatch, if you were a CEO and your employees were ripping off your intellectual property and taking it to another country at the cost of \$1 billion dollars a pop, would that affect your willingness to invest the resources in R&D that are needed to make life saving technological breakthroughs?

Senator Hatch:

Yes, thank you, Senator Coons. You've asked what really is the critical question. If I were a CEO, responsible to my shareholders, I could not, according to my fiduciary duties, make those investments if rogue employees could just take off and render those investments worthless.

And trade secret theft doesn't just affect manufacturing.

I read recently an interesting article in *The New Republic* titled "Corn Wars" that provides a detailed account of how China is stealing proprietary corn seeds from America's farms.

Most corn in China is used as feed for livestock. This was not a problem until the country's middle class acquired an appetite for meat. Given this new demand, China is trying desperately to increase corn production amid its water shortage and lack of arable land.

That's where our country's intellectual property comes in.

Rather than spend the time and resources to develop a hybrid corn seed of its own, China would rather steal—literally right out of the ground—American high-performing seeds.

Experts from America's top seed producers confirm that acquiring the technology behind a specially-designed line of seed is equivalent to five to eight years of research and at least \$40 million dollars.

And you better believe the Chinese know the value of the seeds they steal and the numerous crimes they are committing while in our country.

Let me read an excerpt from *The New Republic* article that details an encounter a DuPont Pioneer field manager had with industrial spies from a Chinese agricultural company:

“It was early May 2011, and Mo [Hailong] and Wang Lei, vice chairman of Kings Nower Seed at the time, were driving roads in Tama County, Iowa, allegedly searching for a DuPont Pioneer test field.

But apparently uncertain if he was in the right place or unsure of what kind of seed DuPont Pioneer was testing, Mo had Wang pull to the edge of the field, so they could question a farmer in midst of spring planting...How had these two men chanced upon his field on the very day he happened to be planting an experimental and top-secret seed under development by DuPont Pioneer?

The next day, a DuPont Pioneer field manager spotted the same car. He watched Mo scramble up a ditch bank, and then kneel down in the dirt and begin digging corn seeds out of the ground.

When confronted by the field manager, Mo grew flustered and red-faced...But before the field manager could question him further, Mo fled.”

There is no doubt that China and other foreign competitors are working furiously to steal American innovation—not just for manufacturing and agriculture, but for all sectors of the economy, including high-tech, life sciences, aeronautics, financial services, and the energy sector.

That is why Congress must act now to pass the bipartisan, bicameral Defend Trade Secrets Act.

Senator Coons, what exactly does the bill do?

Senator Coons:

Thank you, Senator Hatch. The bill is actually quite simple. It creates a federal private right of action for misappropriation of trade secrets. It uses an existing federal criminal

law, the Economic Espionage Act, to define trade secrets, and it draws heavily from the Uniform Trade Secrets Act, which has been enacted by many states, to define misappropriation.

Simply put, our bill harmonizes U.S. law. Each state has a different trade secrets law, and they vary in different ways. Not all of these differences are major, but they affect the definition of a trade secret, what an owner must do to keep a trade secret a secret, what constitutes misappropriation, and what damages are available.

The Defend Trade Secrets Act creates a single national baseline or minimum level of protection and gives trade secret owners access to both a uniform national law and the federal courts, which provide nationwide service of process and execution of judgments. It is important to note that the bill does not preempt state law, because states are free to add further protections.

The proposed legislation does one more thing, and trade secret owners tell us that this is a critical component of the law not available in the states: it creates an *ex parte* seizure ability.

You see, trade secrets are different from other forms of intellectual property because they are protected under the law only if they remain secret. Once the public learns of the trade secret, even if it does so wrongfully, the trade secret loses its legal protection. So this bill provides a limited right of action for the owner of a trade secret to go to court *ex parte* and get it back, before the misappropriator has a chance to share it with a competitor or with the world.

This really is a commonsense idea to help address a very serious problem, but when you talk about federal private rights of action and *ex parte* injunctive relief, we had to be very careful to avoid unintended consequences.

Senator Hatch, would you address how you took concerns about unintended consequences into account when we drafted this bill?

Senator Hatch:

Thank you, Senator Coons, for that helpful overview.

As a Republican, I was initially cautious when you approached me about expanding federal civil law to create a new private right of action for trade secret theft. After all, some have suggested that state law is sufficient.

But after consulting with many in the business community, I was convinced that creating a federal trade secrets law is the right approach. Soon after introduction, The Heritage Foundation confirmed the need for federal legislation.

Mr. Alden Abbott from The Heritage Foundation writes, “The lack of a federal civil remedy for victims of trade secret theft precludes owners of trade secrets from vindicating their rights under certain circumstances. Enjoining and sanctioning trade secret thieves who cross state lines is often difficult... a federal civil statutory remedy would make federal tribunals instantly available to aggrieved businesses that seek injunctions, which is particularly important when time is of the essence due to flight risks.”

Another problem we faced was ensuring that the *ex parte* seizure authority could not be used abusively or for anticompetitive purposes.

When we began the drafting process last Congress, we started from scratch and asked for input from all interested stakeholders, especially in regard to the *ex parte* provision.

We received many helpful suggestions and included them in the bill. Isn't that correct Senator Coons?

Senator Coons:

We did, Senator Hatch, and when we introduced last Congress, we wanted to make sure that the *ex parte* provision could not be used for abuse, so we required the party seeking *ex parte* review to make a rigorous showing that they owned the trade secret, that the trade secret was stolen, and that third parties would not be harmed if an *ex parte* order were granted.

We also included damages for wrongful seizure, including attorney's fees.

And we achieved consensus at that time. Isn't that right, Senator Hatch?

Senator Hatch:

Yes, that is right, Senator Coons. And as we prepared to reintroduce our bill this Congress, we were fortunate to join forces with Senator Jeff Flake. He was invaluable in fine-tuning the *ex parte* seizure language.

Because of Senator Flake's good work, I believe the *ex parte* provisions are where they need to be: strong, fair, and not susceptible to abuse.

Would you agree?

Senator Coons:

I would, Senator Hatch, thanks in no small part to you and to Senator Flake, who insisted last Congress and this Congress that we put everything on the table and invite all stakeholders to come forward and share their concerns. We did that and we found incredible consensus.

In addition to talking with industry, we've also gone to think tanks and academic institutions to talk about the bill. Some people that we have spoken to raised concerns that our bill as previously drafted could harm employee mobility.

Senator Hatch, I do not want to restrict employee mobility and I don't think you want to either. Isn't that right?

Senator Hatch:

That's right, Senator Coons. I never thought our bill harmed employee mobility, but when I heard those concerns I wanted to make sure that we addressed the issue.

So we included language in the bill this Congress that states explicitly that a person cannot be prevented from accepting an offer of employment because of his or her prior exposure to trade secrets. I think we have struck the right balance with the bill.

I am not aware of any stakeholder opposition to this bill. Those who operate businesses in the real world and have to protect their trade secrets on a regular basis are strong supporters of the Defend Trade Secrets Act.

The list of companies and associations that have endorsed the Act is diverse and impressive. Let me read the names of some of the businesses and organizations that support the bill:

- Adobe
- AdvaMed
- American Bar Association, Section of Intellectual Property Law
- American Intellectual Property Law Association
- Association of Global Automakers, Inc.
- Biotechnology Industry Organization
- The Boeing Company
- Boston Scientific
- BSA | The Software Alliance
- Caterpillar
- Corning Incorporated
- DuPont
- Eli Lilly and Company
- General Electric
- Honda
- IBM
- Illinois Tool Works, Inc.
- Information Technology Industry Council
- Intel
- International Fragrance Association, North America
- Johnson & Johnson

- Medical Device Manufacturers Association
- Medtronic
- Michelin North America
- Micron
- Microsoft
- National Alliance for Jobs and Innovation
- National Association of Manufacturers
- The New England Council
- Nike
- Pfizer
- Philips
- The Intellectual Property Owners Association
- The Procter & Gamble Company
- The Semiconductor Industry Association
- SAS
- Siemens Corporation
- Software & Information Industry Association
- U.S. Chamber of Commerce
- United Technologies Corporation, and
- 3M

Mdme./Mr. President: I ask unanimous consent that letters of support from these organizations be inserted into the Congressional Record.

Senator Coons, don't you think it is time that Congress acted on trade secret theft?

Senator Coons:

Thank you, Senator Hatch. I do believe that. I think when you talk about an issue like trade secret theft, which poses such a great threat to American innovation and economic growth, it really is past time that we act on this issue. This bill is truly bipartisan.

I was the lead sponsor last year, and you are the lead sponsor this year. Along the way, we have undertaken an inclusive, iterative process to make sure that we have taken into account all stakeholder perspectives so that we have legislation that creates winners only, not winners and losers.

Senator Hatch, you have been a big part of the reason that we were able to undertake such a successful process.

And I would ask you, Senator Hatch, in your view, has this process produced a bill that is ready to move in the Senate Judiciary Committee?

Senator Hatch:

Thank you, Senator Coons. You have been a great partner in advancing this bill. And I agree with you: the Defend Trade Secrets Act is ready to move, not just through the Senate Judiciary Committee, but also on the Senate floor. In fact, I think this is the type of bill that could move by unanimous consent.

At the same time, we're not closing the door or turning a deaf ear to anyone who has thoughts on this legislation.

Let me say this: if any of my colleagues has concerns or questions about the bill, come talk to me or Senator Coons. Now is the time to resolve your concerns.

If you talk to any of the companies that were initially on the fringes but are now supporters of the bill, I think they will agree that you and I are willing to address all legitimate concerns. So work with us.

I am pleased with the momentum we have already seen on this bill through industry support and here in the Senate. One way that is happening is senators on both sides of the aisle want to support this bill.

To that end, Mdme/Mr. President, I ask unanimous consent that Senators James Risch, Mike Crapo, and Roy Blunt be added as cosponsors to the Defend Trade Secrets Act (S. 1890).

I am pleased with the support we have already seen and encourage many more of my colleagues to support and help us pass this bill.

Help us make this happen. It's the right thing to do.

I yield the floor.

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