

September 14, 2004

The Honorable Ted Stevens  
Chairman  
Committee on Appropriations  
United States Senate  
Washington DC 20510

The Honorable Judd Gregg  
Chairman, CJS Subcommittee  
Committee on Appropriations  
United States Senate  
Washington DC 20510

The Honorable Robert Byrd  
Ranking Minority Member  
Committee on Appropriations  
United States Senate  
Washington DC 20510

The Honorable Fritz Hollings  
Ranking Minority Member  
CJS Subcommittee  
Committee on Appropriations  
United States Senate  
Washington DC 20510

Dear Senators Stevens, Byrd, Gregg, and Hollings:

On behalf of the American Bar Association, I write to express opposition to section 623 of H.R. 4754, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005 ("CJS"). Section 623 of the House CJS appropriations bill would prohibit the use of funds appropriated by the Act to issue patents on claims directed to or encompassing a human organism. Popularly known and referred to herein as the "Weldon amendment," the provision originated as a House amendment to H.R. 2799, the Fiscal Year 2004 CJS appropriations bill, and was enacted as section 634 of Division B of the Conference Report on H.R. 2673, Consolidated Appropriations Act, 2004. We urge you not to renew this expiring provision, and to strike section 623 from H.R. 4754.

The American Bar Association opposes the Weldon amendment because it does not believe that patent laws should be modified through indirect means such as funding restrictions. Changes to basic principles of patent law, such as those in the Weldon amendment restricting patentable subject matter, should only be adopted after hearings and other appropriate consideration by the Senate and House committees with subject matter jurisdiction and expertise. During consideration of the Fiscal Year 2004 CJS appropriations bill, truncated, unsuccessful 11<sup>th</sup> hour attempts were made on the House floor and in the Conference Committee to address issues of ambiguity and possible unintended over breadth of the Weldon amendment. The failure of these efforts underscores the shortcomings and dangers of proceeding other than through regular legislative order.

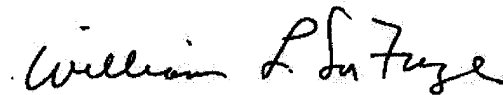
Proponents and opponents of the Weldon amendment disagree on the legal and practical effects of the amendment. Proponents claim that it merely codifies longstanding PTO policy against patenting of human beings. Opponents argue that the term "human organism" is broader than "human being," and that, for example, the amendment can be interpreted to proscribe patents on human cells and cell lines, for which patents have been heretofore issued. The uncertainty created is likely to lead to litigation and delays in the development and availability of valuable advances in science and medicine.

The fact that these potentially significant changes in the scope of patentable subject matter are made by a funding restriction rather than by a substantive amendment to patent law presents an additional dimension of uncertainty and likelihood of litigation. For example, what should be the result if the PTO issues a patent on a human organism related invention that is appropriate under patent law, but falls within the proscription of the Weldon amendment? Does the amendment

provide grounds for invalidating the patent, or is it only an instruction to the PTO on the permissible use of funding?

For these reasons, we strongly urge you not to include the language of section 623 of H.R. 4754 in the CJS Appropriations Act for Fiscal Year 2005.

Sincerely,

A handwritten signature in cursive script that reads "William L. LaFuze". The signature is written in dark ink and is centered on the page.

William L. LaFuze  
Chair  
Section of Intellectual Property Law

cc: Robert D. Evans  
Lillian Gaskin  
IPL Council