



## The Senate Must Vet Vishal Amin



By [Paul Morinville](#)  
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Vishal Amin

As Senior Counsel of the House Judiciary Committee, [Vishal Amin](#) was a primary architect of the Patent Trial and Appeal Board (PTAB), the administrative tribunal that has destroyed thousands of patents, destabilized the U.S. patent system, and sent venture capital and countless technology startups fleeing to China.

Inventors who create jobs by using U.S. patents to bring new ideas to existing companies, or to start their own are all suffering from the U.S. Patent and Trademark Office (USPTO) implementation of the PTAB created under the America Invents Act (AIA). Vishal Amin was a primary architect of the AIA. But now President Trump has nominated Mr. Amin to serve as *White House Intellectual Property Enforcement Coordinator*, sometimes referred to as the “IP Czar”. The Senate must consider the effects of the AIA in Mr. Amin’s confirmation process.

In the AIA, Congress granted the USPTO broad power in the PTAB to weed out those few patents that were granted but perhaps should not have been. However, largely due to the PTAB, the U.S. patent system now ranks 10th in the world, tied with Hungary.

The PTAB invalidates at least one claim in more than 95% of patents it reviews. Claims are selected for review by the petitioner, who is almost always the accused infringer or some company acting in their place to hide the identity of the true petitioner. Invalidating just one claim can destroy the case for infringement and thus the patent. The cost of defending a single PTAB starts at \$500,000 and burns many years of the patent’s life when you factor in the administrative process and inevitable appeal. That lost time does not come back, so it really destroys the heart of the patent’s enforceable life— that limited time when the technology will be most commercially valuable and viable. Big corporations “gang tackle” inventors by filing multiple PTABs against the same patent, thus driving the cost of defending a patent into the millions of dollars. PTAB is obscenely unfair and damaging far beyond the patent’s value.

PTAB damages capitalization of our most important new technology startups – those with innovative new technologies that must be protected by patents. These are the very companies that have historically created most of our new jobs.

While we weaken our patent system, China strengthens its patent system. China is now the global leader in patent filings with twice as many filed than the United States in 2015 and more than the top 20 countries combined. This is causing venture capital that once propelled startups here to move to China. Along with funding goes job creation and economic growth, but more importantly, the leading position in new technology creation on the world stage also goes. The loss of leading in technology will have a dramatic effect on our national security and we will be forced to purchase technology critical to our national infrastructure and potentially military from China.

Changing PTAB rules may help for a while, but cannot fix the PTAB’s systemic problems because PTAB rules will change with every new administration. While a patent’s term is 20 years, PTAB rules will likely change every four years. This leaves the patent system perpetually unstable and as such unable to drive economic growth and job creation because patents will never be able to attract investment for early stage startups.

Not surprisingly, the PTAB is the most used patent litigation venue. Far more than even the Eastern District of Texas. The PTAB, an administrative tribunal, invalidates property rights without a jury and under completely different rules than an Article III court (see [PPC Broadband, Inc. v. Corning Optical Communications](#)), which puts the PTAB in conflict with 220 years of black letter law, precedent and the U.S. Constitution.

Vishal Amin was an architect and the primary driver behind the AIA and the PTAB. He must explain his reasoning for the most damaging legislation to American innovation in U.S. history.

These questions must be asked of Vishal Amin in his confirmation hearings. Unless he can reasonably and satisfactorily explain his position on these issues, it must be assumed he is not qualified for the position of *White House Intellectual Property Enforcement Coordinator*.

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The Issues	Inventors	Vishal Amin
May private property be taken by an Article I administrative tribunal?	<b>NO</b>	?
Is an issued patent a private property right?	<b>YES</b>	?
Is a patent owner entitled to due process under the 5th amendment?	<b>YES</b>	?
Do PTAB rules provide due process for the patent owner?	<b>NO</b>	?
Is a patent owner entitled to a trial by jury under the 7th amendment?	<b>YES</b>	?
Can the USPTO "fix" patents after issuance without harming the integrity of the patent system?	<b>NO</b>	?
Is the PTAB inconsistent with the presumption of validity in §282 of the Patent Act?	<b>YES</b>	?
Should Article III courts be bound by PTAB decisions as to validity of issued patents?	<b>NO</b>	?
In light of PTAB, are patents <u>securing</u> to Inventors the exclusive Right to their Discoveries?	<b>NO</b>	?

**Tags:** [aia](#), [Leahy-Smith AIA](#), [patent](#), [Patent Trial and Appeal Board](#), [patents](#), [PTAB](#), [Vishal Amin](#)

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**Night Writer** April 23, 2017 10:20 am

It looks more and more like Google is controlling the Trump policies.

**Randy Landreneau** April 23, 2017 10:31 am

Under the last administration the great engine of American innovation, our unique American Patent System, was kneecapped by the America Invents Act. The Innovation Act (HR 9), which I'm sure Mr. Amin supported, would have finished the job. Considering how important innovation and small business creation are to America, and how strong patent rights are key to that, how could President Trump be so misinformed?

**Anon** April 23, 2017 11:00 am

Paul,

The table of issues is profound, and may even serve as a litmus test for any conversation on the merits. Kudos for so succinctly summarizing important keys.

That being said, I do not agree fully with the answers therein.

To wit: The answer to "*Is the PTAB inconsistent with the presumption of validity in §282 of the Patent Act?*" is immaterial to the actual controlling issue.

As I have attempted to explain, the operation of the PTAB is entirely consistent with the presumption of validity in §282 if only because a patent is no longer the same granted patent once the initiation decision point occurs.

It is at that initiation decision point that the granted patent loses some of the sticks in its bundle of sticks that make up the property right of the valuable granted property. And it is only **after** that initiation decision point that the item can truly be said to be "in" the PTAB, where the Executive Branch Agency **is** being consistent with operations of items within that branch.

The problem as I have attempted to make clear is that the answer provided here **continues** to ask the wrong question.

The *proper* question is NOT whether or not the PTAB is "*consistent*" with other parts of the statute; but rather, the *proper* question is can **Congress** write a subsequent law that ignores other Constitutional protections that have inured to a property right?

The fault here is not the PTAB – it is Congress, and it is a fault of Constitutional proportions (the takings argument). This distinction is not trivial, as has been seen by the courts only too willing to answer the wrong question being put before them and **avoiding** answering the more "heavy" Constitutional question that is the real sticking point.

Along similar legal lines, I would also re-frame the last question in the table from:

*"In light of PTAB, are patents securing to Inventors the exclusive Right to their Discoveries?"*

to:

Did Congress overstep their authority as provided under the Constitutional limitation of "*securing to Inventors the exclusive Right to their Discoveries?*" by violating the precepts of proper takings (in at least, the takings are performed by the Executive [read that as political] branch, and the taking (of valuable sticks) is completed with **zero** Article III review [directly] of the initiation decision point AND **zero** remuneration of the greatly reduced value of losing that clear and convincing level of presumption as well as the invocation of BRI without an actual right to amend (the right to ask for an amendment is not – and cannot reasonably be – the same as an actual right to amend.

These issues transcend Trump; they transcend Mr. Amin, and they transcend even Congress acting as a whole in passing a Constitutionally deficient America Invents Act. It is not the first time that an Act of Congress has failed proper Constitutional scrutiny and it will not be the last.

But we must be clear in pointing out the who and the why, and not conflate the PTAB with an error belonging to Congress (as has been done several times now before the courts).

**Night Writer** April 23, 2017 11:12 am

I think the problem is the table of companies that Trump assembled. I don't think Trump has the depth of knowledge of the technology industry to understand patents and the people he is putting in charge do not either (his son-in-law with no experience) or Google sponsored people (e.g., Lee or the chap above).

We are doomed. Google has kicked our bu##s.

**Anon** April 23, 2017 11:21 am

Night Writer,

Your pessimism (while indeed real) is just not germane.

As long as a single attorney can follow the legal principles in the first instance, and continue to champion those same principles, no amount of money or bought influence will be able to maintain the charade in the long run. THAT is one of the saving graces of this country – and it is a saving grace that I personally still believe in.

**Night Writer** April 23, 2017 11:57 am

@5 Anon: Sure, Anon. How is anti-trust law doing? Labor law? Both targets of corporate money over a 20 year period. Both are mere shadows of what they used to be.

**Anon** April 23, 2017 12:05 pm

Night Writer,

If you are going to personally quit and throw up your hands, then I would prefer that you went away silently.

Others are not deterred and are taking action.

Yes, it is a difficult path.

No, it is not an impossible path.

Help, or get out of the way.

**IPdude** April 23, 2017 12:50 pm

This is not a good sign of things to come but let's wait and see who he appoints as Director. It seems to me that if Google had successfully infiltrated this administration they would have kept Lee on.

Invention Rights April 23, 2017 12:52 pm

Paul, if readers were to make appointments with their Senators in Washington, would someone from U.S. Inventor be available to join them to present these concerns? Taking down the PTAB and those responsible could be a winner if we step up and join you.

When it comes to the PTAB, I have a few thoughts. First, I think it's important to have a fair and balanced review of the PTAB's operations. I think it's important to have a fair and balanced review of the PTAB's operations. I think it's important to have a fair and balanced review of the PTAB's operations.

Just don't be shocked when I express my opinion in reply.

And, I know that I am not alone. Any inventor now sufficiently alarmed by the current state of affairs in the patent space, must be appalled at the unbelievably derogatory treatment we are subjected to, in every aspect of this supposedly legitimate patent prosecution process.

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