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PTAB's 'Death Squad' Label Not Totally Off-Base, Chief Says

By [Ryan Davis](#)

Law360, New York (August 14, 2014, 5:47 PM EDT) -- The Patent Trial and Appeal Board's reputation as a "death squad" for patents is "unfortunate language," but in some ways it adequately describes the mission Congress gave the board under the America Invents Act, its chief judge said at a meeting Thursday.

PTAB Chief Judge James Smith told a meeting of the [U.S. Patent and Trademark Office's](#) Patent Public Advisory Committee that while the label has been used by critics of the board concerned about the rate at which it is reviewing and invalidating patents under the AIA programs, there may be some truth to it.

"The purpose of the proceedings is to identify some limited number of patents and claims that are unpatentable and make sure the claims are removed," he said. "If we weren't, in part, doing some 'death squadding,' we would not be doing what the statute calls on us to do."

He stressed that the board certainly does not summarily review or invalidate every patent that comes before it, but carefully evaluates each case.

"The question is, are we hearing each case independently and deciding with no bias what the right answer is based on the evidence presented," he said. "That is always what we intended to do and the only thing we have done since the proceedings began."

The "death squad" label has stuck to the board since it was used by former Federal Circuit Chief Judge Randall Rader in a [speech last year](#), where he said the patent office was in tension with itself, with thousand of examiners "giving birth" to patents and hundreds of judges on the PTAB "acting as death squads, kind of killing property rights."

Judge Smith said Thursday that the term was "unfortunate language because it is not very probative as to what is going on."

"As I have thought about it more, maybe death squads isn't as pejorative as it may have been meant," he said. "Clearly, the statistics show not every claim in a patent brought forward to the board has met its death because it has been raised in a petition."

The rate at which the board has instituted reviews of patents challenged under the AIA programs has been in decline over the past year, possibly because some of the weakest patents were challenged soon after the programs began, Judge Smith said.

In fiscal 2013, the board instituted 167 reviews and denied 26 petitions challenging patents, thus reviewing patents a rate of 87 percent, he said. In fiscal 2013, with many more petitions filed, 449 trials have been instituted and 149 have been denied, a rate of 76 percent.

The AIA review programs have been considerably more popular than the USPTO had anticipated. In June, the board received a "astronomical high" of 190 new petitions, Judge Smith said, although that dropped to just over 120 in July.

"At one time, the thought was, would we ever top 100" petitions in a month, he said. "Now, our prayer is that we go a little while longer before [we] hit 200."

--Editing by Emily Kokoll.

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