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Dictators, Property Rights and the PTAB: Why the AIA Must be Repealed



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EDITORIAL NOTE: This article was written and scheduled for publication prior to the announced death of Cuban dictator Fidel Castro. Castro committed many unspeakable crimes against the Cuban people during his reign, and confiscated much private property upon seizing power.



For months people have questioned how the fortunes of inventors and startups may change as a result of who wins the presidency. Pundits have analyzed everything from lobbying money and political influence to grandparents and uncles to paint a picture of how each candidate might change the patent system. Now that Trump has won, the discussion has narrowed to whether Trump will keep patents weak or make patents great again. From the outside perspective, it is a curious exercise to say the least.

I recently attended the IAM Patent Policy conference where Trump and his transition team were the main course of discussion examining threads into his past, the people that surround him, and any other facets of Trump that could shed light on the likelihood the USPTO will be pro-inventor or pro-big tech.

But I have to ask... why are we even asking these questions? That question doesn't get asked for other types of property rights. Property is property, right? Can you remember an election where people were asking if their deed would keep squatters out of their living room depending on who won the presidency? I don't. It seems a preposterous question. After all, the deed on your house is a property right and everybody knows the government will back it up and eject the squatters. So why then do we, or should we, have to ask whether a Trump Administration will be in favor of strong patent rights? It all seems bizarre to say the least.

In America, we seem to understand the importance of property rights. They enable the flow of capital to improve property and that capitalization effect is directly related to the strength of property rights. In fact, one of the most telling signs that a third world country will remain a third world country is the strength and stability of its property rights. If property rights are weak, or if they change from weak to strong and back again at the whim of the dictator, or every time a dictator is killed, deposed or otherwise ousted, people cannot attract capital needed to improve their property and, well, nothing improves. If you cannot be sure you will own your property tomorrow why would you ever invest in it? Real property sitting unimproved and disintegrating is an unfortunately rationale choice in third world countries, as well as those ruled with dictatorial authority.

Even though patent rights are property rights in black letter law and hundreds of years of precedent, they no longer behave like property rights. Patent rights in America now behave like a third world property rights. Since the America Invents Act, patent rights are wagging the tail on a political dog becoming stronger or weaker depending on who is president and what favors are owed to those who helped that person along the way.

It is not realistically possible to remove all politics from the USPTO. They are an agency of the Executive Branch and the presidency is by its very nature a political office. In the end, examiners and PTAB judges are employees of the president. They have career paths and they obey those higher in the chain of command, a chain of command whose apex is the president. Politics unavoidably drives the president and therefore politics unavoidably drives the USPTO. That has been the case during substantial downturns, such as during the Obama Administration, and during good times for innovators, such as during the Reagan Administration when the patent system was seen as a way to encourage innovation so America could compete with Japan.

Since the patent office was created, the president has had control of it and many presidents have made patents harder or easier to obtain within certain boundaries. Only a small fraction of patents are ever commercially viable so granting patents has seldom been a significant political issue. No human endeavor, political or not, can ever be perfect and invariably some controversial patents have slipped through the USPTO. That human inefficiency made the job of invalidating patents a significant political issue.

Prior to the America Invents Act, the job of invalidating patents was handled by lifetime appointed Article III judges who do not have a career path and are not directly subjected to political pressure. This separation of power and the American construction of the federal courts brought mostly fair decisions on the validity of

patents. For over 200 years, this system worked and created the most productive economy the world had ever seen. When the system seemed out of balance the solution in the 1980s was to create a specialized Article III court, the Federal Circuit. By doing so the integrity of property rights were maintained through a continued structure of checks and balances.

But the America Invents Act changed the property right system. It created PTAB procedures designed to invalidate patents in the USPTO, an agency of the president. The president, by and through the examiners and officials that work for the patent office, has always had the power to create a patent right, but now the same president, by and through administrative judges now also has the power to take the patent right away. This is akin to the dictatorial power of a third world country. Because of this concentration of power, the president controls the complete strength and validity of a property right. It is no secret that President Obama was closely aligned with Google, so it shouldn't surprise anyone that those former Google executives throughout the Obama Administration adopted policies and views in synch with those of Google. Those Google friendly policies favored a few at the expense of virtually everyone else. But that is how the preferences of the president, and his allies, filtered through the patent system to the detriment of many.

The unfortunate reality is that this new power to grant and take a property right based on executive fiat undermines funding of new technologies and therefore undermines our job creation engine. A patent's life spans the terms of at least three presidents, so every patent will be made stronger or weaker at least three times. A property right system will never be effective if the strength of the property right is a political dog's wagging tail. How can anyone invest in any property right if nobody knows how strong that right will be in the future?

While many believe that we just need to fix the PTAB by bringing it in line with how Article III courts invalidate patents, the internal processes of the PTAB and the employees making the decisions within those processes will always be under the management control of the president. By the very nature of the administrative branch of government, the USPTO cannot be nonpolitical and therefore PTAB's cannot be fixed to be nonpolitical. PTAB's will always be political. While the jury is still out as whether Trump will make patents weaker or make patents great again, we will always have to ask the same question in every presidential election: Which candidate will make patents stronger? Which will make them weaker?

We compete in a global economy and unfortunately, while we cripple our patent system, China is strengthening theirs. We will not only purchase goods made in China as we do now, but they will also be invented in China. The America Invents Act must be repealed.

