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Reflections on Denial of Cert in *Athena Diagnostics*

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Print Article

"If the Supreme Court does not function as intended in the Constitution, and has in fact transformed the structure of our government from three co-equal branches of government to two co-equal branches governed by the Supreme Court, what do we do?"

I was at the JP Morgan Healthcare Conference when I learned a week ago that the Supreme Court of the United States

(SCOTUS) had denied Athena Diagnostic's Petition for Certiorari. I was shocked. We feel the same when as a child we discover there is no Santa Claus—a trusted institution is not as represented. SCOTUS ignored a recommendation from the U.S. Solicitor General in the strongly worded *Vanda* opinion that the Court's opinions had veered away from Congress' law; a desperate plea from the U.S. Court of Appeals for the Federal Circuit that it needed better guidance and thinks the law is on the wrong path; 11 thoughtful amicus briefs; and Athena's petition. The Court was also referred to my law review article with Anthony Prosser "Unconstitutional Application of 35 U.S.C. 101 by the U.S. Supreme Court" based on almost a year of legal research. During the month after final briefing in *Athena* and after the U.S. Solicitor's opinion, we saw a significant uptick in downloads of our article (cited in the amicus brief to the Court I co-authored with Meredith Addy of AddyHart on behalf of Freenome and New Cures for Cancers)—over 30 downloads during the holiday season and prior to the Court's conference on January 10, when most IP practitioners are otherwise distracted, providing an unconfirmable assumption that the Court was reading it. All to no avail.

So, what did we learn?

1. The Supreme Court does not care about the wording of Congress' statutes (or at least patent statutes), and applies accepted statutory construction principles only when convenient to the holding.
2. The Supreme Court does not care about legislative intent.
3. The Supreme Court considers itself above Congress, instead of a co-equal branch.
4. The Constitution may be a historic document in a museum instead of the highest law controlling a carefully balanced tripartite government.

Where Do We Go From Here?

If the Supreme Court does not function as intended in the Constitution, and has in fact transformed the structure of our government from three co-equal branches of government to two co-equal branches governed by the Supreme Court, what do we do? Do we just settle in and say this problem is too big for a solution? Or do we consider options?

Term Limits for Supreme Court

When the Constitution was ratified in 1788, the life expectancy was 35-40 years. Therefore, when the framers wrote in Art. III, Sec. 1 that "The judicial Power of the United States shall be vested in one Supreme Court" and that the Justices "shall hold

their Offices during good Behavior", they could not have imagined a life expectancy that would reach 100 years or more.

A survey of the first Supreme Court Justices indicated that most served for less than 10 years (John Jay, 6 years, resigned; James Wilson, 9 years, died; John Rutledge 0.5 years, resigned; William Cushing 2 years, died; John Blair, 6 years, resigned; James Iredell, 9 years, died; William Patterson, 13 years, died; Samuel Chase, 15 years, died; and Thomas Johnson, 163 days, resigned). The exception was George Washington's nephew, Bushrod Washington, who served for 31 years and died on the Court (and he has a dubious legacy as the head of an organization trying to send all freed slaves back to Africa).

Recent Justices are serving far longer than the average of their historic counterparts. Currently, for example, Justice Ginsburg, born in 1933, at 86 has served for 26 years. Justice Breyer, born in 1938, at 81 has served 25 years and Justice Thomas, born in 1948, at 71 has served 28 years.

The pattern is clear. As life expectancy has increased dramatically, the effect of a life tenure has changed. And Justices are more often quite comfortable wanting to serve until they die or are incapacitated, a time frame which is growing on a yearly basis, resulting in a situation that renders it increasingly difficult to get fresh ideas and modern expertise on the Court. I doubt that was what the framers intended or what is best for the country.

Justice Ginsburg graduated from Cornell with a B.A. in government in 1954, about the same time that Watson and Crick discovered the structure of DNA. Justice Breyer graduated with a degree from Stanford in Philosophy in 1959, two years before ibuprofen was invented, and Justice Thomas graduated with an A.B. from College of the Holy Cross in 1971 in English literature, the year the measles, mumps and rubella (MMR) vaccine was licensed for use by Merck. And while Justice Thomas is credited as a constitutional originalist who follows the literal wording of the Constitution, of course, that couldn't possibly be true because he wrote the *Myriad* decision, which the public doesn't understand.

Supreme Court term limits would be political party neutral, because no one can predict who will be President when the term limit expires, and it would increase modern ideas, knowledge and fresh views. Unfortunately, it would take a Constitutional amendment to impose term limits on Justices, even if their salary and benefits are guaranteed for life to prevent potential conflicts of interest of future employment.

Specialist Supreme Court

The Constitution in Article II, Section 2, gives the President the Power to appoint Justices of the Supreme Court, subject to the advice and consent of the Senate. Would it be possible for the President to create a specialist IP Supreme Court panel and appoint specialist Supreme Court Justices who actually have scientific degrees and preferably corporate experience and who thus would have first-hand familiarity with the real-world difficulty and time involved in creating inventions and the cost of translating them into products? Would it be possible for the President to indicate that this panel of specialist Supreme Court Justices hear and decide all patent cases? It would take legal research to determine whether this is a possibility, but if so, it is intriguing. Of course, Congress has already created the specialist U.S. Court of Appeals for the Federal Circuit; however, the *Athena* denial shows how well that alone works unless also matched with a specialty Supreme Court panel. The Supreme People's Court (SPC) in China established a specialist IP Tribunal in January 2019 and decisions made by it can be regarded as final decisions by the SPC. China is appointing impressive scientifically qualified and patent trained expert judges, so they are ahead of us in this area. (And this is of course not to say that one can't be a thoughtful specialist IP Judge without such qualifications—with the excellent example of former CAFC Chief Judge Michel). Of course, the U.S. Supreme Court, which now considers itself superior to the other two branches of the U.S. government, could counter a specialist Supreme Court panel by simply refusing it on any ground it cares to.

Congressional Amendment to 101

In 2019, the revived Senate Judiciary Subcommittee on IP held three days of hearings on amendments to Section 101 to overrule the unauthorized Supreme Court case law on patent eligibility, and I appreciated the opportunity to testify. We applaud the efforts of Senators Thom Tillis (R-NC) and Chris Coons (D-DE) to fix 101. The Subcommittee has been earnestly working with a group of stakeholders to consider textual changes. My understanding is that the Senate Committee would be receptive to compromise language among stakeholders, but that the stakeholders can't agree. If that continues, the stakeholders will have to share blame for the problem, and this blog and other press should start to name names. One hold-up is mixing in changes to Section 112 with changes to 101. Any progress should start with 101 only, which is a big enough problem, and then proceed to discuss other sections as necessary in a separate proposed bill.

Congress must act decisively and strongly to reclaim its co-equal status with the Supreme Court. Congress should also consider the "Shadow of the Leader"

problem—if the Supreme Court doesn't care about the wording of Congressional statutes or legislative intent, why should the lower courts? By the way, the Senate Judiciary Committee does indeed have a Subcommittee on the Constitution—what is it doing?

What can we do as citizens? Each person who cares about these issues should (i) contact their Senators and urge support for the Tillis/Coons initiative and (ii) seek out the stakeholders speaking with the Subcommittee to demand reasonable compromises for suitable language for an amendment.

In final, I was left at the JPM Healthcare Conference wondering how many business development meetings with personal diagnostic companies, universities and research institutions were turned on their head Monday after hope vanished and the reality sunk in that their impressive inventions would not be protectable in the United States. It was also a dark day for cancer patients, as well as brilliant U.S. inventors, and emerging companies and universities with great dreams to change healthcare. And it was a dark day for those who had to accept the reality that their High School Civics textbook was wrong (at least currently).