

Justices Told AIA Reviews Cripple Patents, Harm Innovation

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Law360, New York (September 1, 2017, 8:46 PM EDT) -- Dozens of inventors, patent owners, life sciences companies and conservative groups urged the [U.S. Supreme Court](#) on Thursday to abolish America Invents Act reviews, saying the proceedings discourage innovation, unduly expand executive power and destroy the U.S. patent system.

At least 31 amicus briefs, most of them urging the justices to end the AIA's system for challenging patents, were filed in a case the court will hear [later this year](#) to determine if the reviews violate the U.S. Constitution by letting the Patent Trial and Appeal Board, rather than a court, invalidate patents.

Most of the briefs were filed in support of petitioner [Oil States Energy Services LLC](#), which argued in its [opening brief](#) last month that the Constitution's Article III and Seventh Amendment prohibit an executive branch board like the PTAB from extinguishing private property rights, which the company says only courts can do.

The briefs argued that not only did Congress flout the intent of the framers of the Constitution when it created AIA reviews, the proceedings have had a vast array of detrimental effects on patents, industry and the economy.

"Under the patent system created by the framers, the foundation of a patent right is the inventor's sweat and ingenuity," the Biotechnology Innovation Organization said in its brief. "The government's obligation is to safeguard and perfect pre-existing inchoate property rights earned by the inventor's own efforts, not to diminish them by making them revocable at the government's discretion."

A major theme of many of the briefs was that patents should be considered private property, which can only be revoked by a court, not public rights, which can be taken away by executive branch tribunals. The Federal Circuit [has held](#) that patents are public rights because they are created under federal law, and that AIA reviews are therefore constitutional. The amici strongly disputed that view.

The [Pharmaceutical Research and Manufacturers of America](#) said that its members only invest in developing new drugs because it understands that they can be protected by patents that will be respected as private property.

"Text, history and common sense all demonstrate that patents, once issued, are personal property,

not public rights," it said, noting that patents confer the right to exclude others, can be bought and sold and cannot be taken without due process. Public rights, it said, "traditionally bear none of those hallmarks of private property."

Groups of inventors and patent owners told the court that the PTAB's practices are slanted against patentees and that the high rate at which the board finds patents invalid has cast a cloud over the value of all patents that discourages innovation.

AIA reviews have "suddenly and drastically increased the probability that a contested patent will be held invalid," U.S. Inventor Inc. and over 30 other "grassroots inventor organizations" wrote in their brief.

"This has reduced incentives to invent and patent," they said. "These effects harm society, do not reflect a 'correct' adjudication of patent validity, and break society's bargain with inventors" of providing patents in exchange for disclosing inventions.

The brief said that the PTAB's decisions have led to a "near-total annihilation of property rights," citing statistics that around 80 percent of the board's final decisions invalidate at least some claims.

A group of patent owners whose patents have been found invalid by the PTAB also filed a brief saying that the idea that patents are public rights that the PTAB can revoke "threatens to destroy the integrity of the American patent system" and that "trillions of dollars of value hang in the balance."

Letting the PTAB invalidate patents means that "hard-won and costly-to-obtain private property remains in force only at the pleasure, whim and discretion of governmental civil servants subject to termination and replacement of political officers of the executive branch," the group said.

Numerous conservative groups also filed briefs saying that the AIA review system violates the separation of powers and puts too much power in the hands of the executive branch.

Patents cannot be "willy-nilly taken away in a mere administrative proceeding, any more than one's ownership right in real property or one's money in a bank account can be administratively deprived," the conservative Eagle Forum said in its brief, adding that letting the PTAB erode the jurisdiction of the courts "disrupts that rule of law."

Similarly, a brief by leaders of groups including the Tea Party Patriots and Conservatives for Property Rights said that letting the PTAB invalidate patents "destabilizes the delicate balance between the three branches of government."

"The administrative state cannot be allowed to extend this far, and the court should, by reversing the decision below, take the opportunity to set firm limits on congressional attempts to expand the power of the political branches at the expense of the federal judiciary," it said.

Response briefs are due in October. The court has not yet scheduled arguments in the case.

Oil States is represented by Allyson N. Ho, C. Erik Hawes and Judd D. Stone of [Morgan Lewis & Bockius LLP](#).

Greene's Energy is represented by George E. Quillin, John J. Feldhaus and Bradley D. Roush of [Foley & Lardner LLP](#).

BIO is represented by Jonathan Massey, Rob Park and Kenneth Goldman of [Massey & Gail LLP](#).

PhRMA is represented by Jeffrey Lamken, Eric Nitz, James Barta and Justin Weiner of [MoloLamken LLP](#) and in-house counsel James Stansel and David Korn.

The grassroots inventors groups are represented by Robert Greenspoon of [Flachsbart & Greenspoon LLC](#).

The affected patent owners are represented by Jay Knobloch of Trading Technologies International Inc.

The Eagle Forum is represented by in-house counsel Andrew Schlafly.

The Tea Party Patriots and other groups are represented by Roy Liebman of Counsel Press Inc.

The case is Oil States Energy Services LLC v. Greene's Energy Group LLC, case number 16-712, in the U.S. Supreme Court.