

# US INVENTOR

Innovators, Inventors, Dreamers, and Builders

November 11, 2019

Patent Public Advisory Committee (PPAC)

Marylee Jenkins, Chair; Steven Caltrider, Jennifer A. Camacho, Barney Cassidy, Mark E. Goodson, Bernard J. Knight, Jr., Dan H. Lang, Jeffrey M. Sears, Julie Mar-Spinola, Members; Pamela R. Schwartz, Catherine Faint, Vernon Ako Towler, Union Representatives

Via email to: [ppac@uspto.gov](mailto:ppac@uspto.gov)

Subject: Appointments Clause

Dear Committee:

On October 31, 2019 the Court of Appeals for the Federal Circuit ruled that Administrative Patent Judges (APJs) that oversee patent invalidation proceedings at the Patent Trial and Appeal Board (PTAB) were illegally operating as Officers of the United States in violation of the Appointments Clause of the Constitution. *Arthrex v. Smith & Nephew* (Fed. Cir. 2019).

This is exactly the problem that inventors have been facing for the past 7 years:

1. APJs are not technically capable of understanding the subject matter of the inventions claimed by the patents for which they have been adjudicating validity.
2. APJs lack legal expertise to apply the law on patentability.
3. APJs have demonstrated an alarming bias against inventors, instituting review on over 75% of patents which have been challenged<sup>1</sup> and invalidating 84% of the 2,400 patents in which they have issued final written decisions.<sup>2</sup>

The *Arthrex* decision provided a proposed remedy, which is likely to be further refined by the courts and Congress. The panel effectively severed APJs from Title 5 of the United States Code to allow the USPTO Director to remove APJs without cause, which the panel determined would reclassify them as inferior officers and compliant with the Constitution.

These approximately 270 APJs need to be fully vetted, some of them must be removed, and **inventors must be granted a fair trial before competent and unbiased judges**. Over 3,000 inventors have been stripped of our patent rights in unconstitutional AIA trials since 2011. The *Arthrex* decision proves that these APJs were not properly vetted for the authority they have exercised and validates the serious concerns that have been raised about their competency and objectivity.<sup>3</sup> A sampling of such evidence is

---

<sup>1</sup> [https://www.uspto.gov/sites/default/files/documents/Chat\\_with\\_the\\_Chief\\_Boardside\\_Chat\\_Multiple\\_Petition\\_Study\\_20171024.pdf](https://www.uspto.gov/sites/default/files/documents/Chat_with_the_Chief_Boardside_Chat_Multiple_Petition_Study_20171024.pdf)

<sup>2</sup> <https://www.usinventor.org/2019/03/25/inventors-to-senate-ip-subcommittee-venue-hardship-efficient-infringement-ptab-crisis/>

<sup>3</sup> <https://www.voip-pal.com/news-interviews-more>; <https://www.ipwatchdog.com/2017/05/07/more-conflicts-interest-surface-second-ptab-judge>; <https://bannerwitcoff.com/wp-content/uploads/2016/08/ALERT-PTAB-Highlights.Shifley.07.26.2016.pdf>

attached to this letter.

We ask the PPAC to monitor and hold the USPTO accountable in response to this catastrophe.

1. We demand that the USPTO refrain from advising Congress on a legislative solution that would rubber stamp the past decisions rendered by illegal judges and precluding inventors from obtaining a rehearing before a neutral and competent panel. Inventors that lost their rights in this "Kangaroo Court" from 2012 to 2109 must be allowed a rehearing with a neutral and competent panel of adjudicators.
2. We demand the USPTO Solicitor cease advocating for the PTAB in its present form and for the minor "fixes" that leave the current APJs in office. Rather the USPTO must begin doing its job of advocating for due process and fair trials for inventors. The entire corps of APJs must be reviewed and vetted for technical and legal qualifications, objectivity, and fidelity to the Constitutional charter of "securing to inventors the exclusive right to their discoveries". Those who fail should be removed. The time has come to restore the integrity of the patent system.
3. We demand that the USPTO stop spending our user fees to lobby Congress and advocate in the courts in favor of the PTAB status quo. The Director of Governmental Affairs, Congressional Detailees, and every representative of the USPTO must immediately cease advising Congress on how to shore up and fix the PTAB. This is blatant corruption. USPTO is tricking inventors into paying for patents and then using application fees to undermine the very same patents by lobbying Congress and the courts to uphold the PTAB. We insist that the USTPO stop attacking inventors and supporting status quo at the PTAB.

Please publish this letter and relay our views and demands to the USPTO at the November 14, 2019 meeting.

Sincerely,



Randy Landreneau

President

## APPENDIX

NOVEMBER 11, 2019 LETTER TO PPAC RE: APPOINTMENTS CLAUSE

### Sample Evidence Questioning PTAB APJ Competency and Objectivity

Quinn, G. (2015, March 6). Are PTAB Proceedings Fundamentally Unfair To Patent Owners? - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2015/03/06/ptab-proceedings-unfair-to-patent-owners/id=55397/>

Quinn, G. (2016, January 6). Timely Filed Supplemental Information Does Not Need To Be Considered By PTAB In IPR - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/01/06/federal-circuit-ptab-timely-supplemental-information/id=64743/>

Quinn, G. (2016, January 15). Federal Circuit Says Same PTAB Panel Can Decide Both IPR Institution And Merits - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/01/15/federal-circuit-ptab-ipr-institution-merits/id=65031/>

Quinn, G. (2016, February 23). PTAB Gone Rogue On Covered Business Methods - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/02/23/ptab-gone-rogue-on-covered-business-methods-cbm/id=66398/>

Quinn, G. (2016, May 10). Patent Office Defends PTAB Denying Motions To Amend - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/05/10/new-patent-office-study-defends-ptab-motion-amend-practice/id=69007/>

Schifley, C. (2016, July 26). Your PTAB Judges Will Be Experts - Right? - Banner & Witcoff PTAB Highlights. *bannerwitcoff.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://bannerwitcoff.com/wp-content/uploads/2016/08/ALERT-PTAB-Highlights.Shifley.07.26.2016.pdf>

Quinn, G. (2016, October 31). Has The PTAB Compromised The Integrity Of The Patent System? - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/10/31/ptab-compromised-integrity-patent-system/id=74348/>

Quinn, G. (2016, December 29). A Rollercoaster Year For The Patent Trial And Appeal Board In 2016 - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2016/12/29/rollercoaster-year-patent-trial-appeal-board-2016/id=76231/>

Robert Schaffer & Joseph Robinson. (2017, January 1). PTAB Abused Discretion By Failing To Consider Material Evidence - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/09/01/ptab-abused-discretion-failing-consider-material-evidence/id=87535/>

## Sample Evidence Questioning PTAB APJ Competency and Objectivity

Quinn, G. (2017, January 23). The PTAB Is A Thoroughly Broken Tribunal Incapable Of Being Fixed - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/02/23/ptab-thoroughly-broken-tribunal/id=78654/>

Peter Harter & Gene Quinn. (2017, April 5). How IPR Gang Tackling Distorts PTAB Statistics - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/04/05/ipr-gang-tackling-distorts-ptab-statistics/id=81816/>

Brachmann, S. (2017, April 28). Are Conflicts Of Interest At The PTAB Leading To Preferential Decisions For Apple? - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/04/28/conflicts-of-interest-ptab-apple/id=82628/>

Sawyer, T. (2017, May 1). Dr. Sawyer Letter to Judge David Ruschke (May 1, 2017). Retrieved November 11, 2019, from [https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e\\_91dcf172e0d5494b945f81a89f842faa.pdf](https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_91dcf172e0d5494b945f81a89f842faa.pdf)

Quinn, G. (2017, May 2). If PTAB Judges Can Decide Cases Involving Former Defense Clients USPTO Conflict Rules Must Change - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/05/02/ptab-judge-former-clients-uspto-conflict-rules/id=82765/>

Quinn, G. (2017, May 3). Is The Ethical Bar For Practitioners Higher Than It Is For PTAB Judges? - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/05/03/ethical-bar-practitioners-higher-ptab-judges/id=82870/>

Gene Quinn and Steve Brachmann. (2017, May 7). More Conflicts Of Interest Surface With Second PTAB Judge - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/05/07/more-conflicts-interest-surface-second-ptab-judge/id=83012/>

Quinn, G. (2017, May 31). USPTO Response To FOIA Confirms There Are No Rules Of Judicial Conduct For PTAB Judges - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/05/31/uspto-response-foia-confirms-no-rules-judicial-conduct-for-ptab-judges/id=83914/>

Sawyer, T. (2017, June 21). Dr. Sawyer Letter to David Ruschke (June 21, 2017). Retrieved November 11, 2019, from [https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e\\_0163582e498f4fce975d1c803e55ed1f.pdf](https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_0163582e498f4fce975d1c803e55ed1f.pdf)

Brachmann, S. (2017, June 22). Apple, APJ Clements And Final Written Decisions: A Lethal Cocktail For Patents - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/06/22/apple-apj-clements-final-written-decisions-lethal-cocktail-patents/id=83016/>

## Sample Evidence Questioning PTAB APJ Competency and Objectivity

Malone, J. (2017, July 22). The PTAB: Number One Enemy Of Inventors - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/07/22/ptab-number-one-enemy-inventors/id=85659/>

Sawyer, T. (2017, July 27). Dr. Sawyer Letter to Wilbur Ross & David Ruschke (July 27, 2017). Retrieved November 11, 2019, from [https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e\\_9d7b33391127481b8e0aea3fa2dcc9e7.pdf](https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_9d7b33391127481b8e0aea3fa2dcc9e7.pdf)

Quinn, G. (2017, August 10). PPAC Meeting Comes And Goes With No Discussion Of PTAB Conflicts Of Interest - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/08/10/ppac-meeting-ptab-conflicts-interest/id=86618/>

Quinn, G. (2017, August 23). USPTO Admits To Stacking PTAB Panels To Achieve Desired Outcomes - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/08/23/uspto-admits-stacking-ptab-panels-achieve-desired-outcomes/id=87206/>

Sawyer, T. (2017, August 31). Dr. Sawyer Letter to Wilbur Ross (August 31, 2017). Retrieved November 11, 2019, from [https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e\\_bfafedee02b24efc868d221ab12209af.pdf](https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_bfafedee02b24efc868d221ab12209af.pdf)

Quinn, G. (2017, September 1). USPTO, PTAB Refuse To Follow Supreme Court Nautilus Decision - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/09/05/uspto-ptab-refuse-follow-supreme-court-nautilus-decision/id=87580/>

Robert Schaffer & Joseph Robinson. (2017, September 8). CAFC Vacates And Remands Inconsistent Rulings By The Board On Validity Of Two SynQor Patents - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/09/08/cafc-vacates-remands-inconsistent-rulings-board/id=87757/>

Quinn, G. (2017, September 11). The Only Solution For The Transgressions Of The PTAB Is To Disband This Runaway Tribunal - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/09/11/solution-ptab-disband-runaway-tribunal/id=87844/>

Sawyer, T. (2017, October 23). Dr. Sawyer Letter to Judge Ruschke & Matal (October 23, 2017). Retrieved November 11, 2019, from [https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e\\_460fe62fc04b423a84faf31b731690f1.pdf](https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_460fe62fc04b423a84faf31b731690f1.pdf)

Josh Malone & Steve Brachmann. (2017, October 30). PTAB, Patent Trolls, Bad Patents, And Data: A Wakeup Call To AIA Apologists - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2017/10/30/ptab-patent-trolls-bad-patents-wakeup-aia-apologists/id=89609/>

## Sample Evidence Questioning PTAB APJ Competency and Objectivity

Josh Malone & Steve Brachmann. (2018, January 7). PTAB Errors Fatal To Hundreds Of Legitimate Patents - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2018/01/07/ptab-errors-fatal-legitimate-patents/id=91457/>

Gene Quinn, Steve Brachmann, Josh Malone, & Paul Morinville. (2018, January 8). PTAB Facts: An Ugly Picture Of A Tribunal Run Amok - IPWatchdog.com | Patents & Patent Law. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2018/01/08/ptab-facts-ugly-picture-tribunal-run-amok/id=91959/>

Quinn, G. (2018, March 6). PTAB Judges Shockingly Inexperienced Compared To District Court Judges. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2018/03/06/ptab-judges-shockingly-inexperienced/id=94438/>  
Quinn, G. (2019, April 17). A Story Of Ethics And Optics: Former PTAB Judge Matt Clements Now Works For Apple. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2019/04/17/story-ethics-optics-former-ptab-judge-matt-clements-now-works-apple/id=108354/>

Brachmann, S. (2019, April 24). By The Numbers: APJ Matt Clements And Potential Pro-Apple Bias At The PTAB. *IPWatchdog.com | Patents & Patent Law*. Retrieved from <https://www.ipwatchdog.com/2019/04/24/numbers-apj-matt-clements-potential-pro-apple-bias-ptab/id=108545/>

Malak, E. (2019, May 17). President Donald Trump Should Investigate The Corrupt Patent System And Passage Of The AIA. *IPWatchdog.com | Patents & Patent Law*. Retrieved November 11, 2019, from <https://www.ipwatchdog.com/2019/05/17/president-donald-trump-investigate-corrupt-patent-system-passage-aia/id=109312/>