



## PTAB 101 (and PTAB Controversy 101) Congresswoman Marcy Kaptur on the Patent Trial and Appeal Board

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The 2011 Leahy-Smith America Invents Act (AIA) is [widely viewed](#) as the most significant patent statute enacted by Congress in over 50 years. Although the AIA made many important changes to US patent law, the most practically significant was the creation of the Patent Trial and Appeal Board (PTAB). PTAB is a tribunal within the US Patent and Trademark Office (USPTO), the federal agency responsible for reviewing patent applications and granting patents. **The AIA created PTAB and granted it authority to hear new types of administrative challenges to the validity of patents previously granted by USPTO. These challenges, which were also created by the AIA, include inter partes review (IPR) and post-grant review (PGR). [IPRs and PGRs](#) are typically decided by a panel of three administrative patent judges (APJs).**

Key term: “institution” – when PTAB agrees to hear a challenge to the validity of a patent. (When PTAB agrees to a *petition* by a party *challenging* a patent via an inter partes review (IPR) or post-grant review (PGR).)

Confusingly, PTAB statistics are measured both by [petition](#) and by [patent \(see slide 11\)](#). That is because there can be multiple (in extreme cases, over 20) petitions challenging the validity of a single patent. Only one must be *instituted* for invalidation to be considered. In the following statistic, therefore, we consider [outcomes](#) by patent challenged, not by petition filed:

In FY23, PTAB [completely invalidated 28% \(see slide 11\)](#) of patents put before them; another 38% settled, were partly invalidated, came to mixed outcomes, or ended in a request for adverse judgement. Only 27% of cases were denied or dismissed, and only 7% determined to be all patentable. For solely those cases in which a written decision was reached, only [17.1% of patent claims were fully upheld](#) – an 82.9% full or partial invalidation rate. (Fully invalidated: [67.5%](#), partly invalidated [15.4%](#).)

**Trust in PTAB has been eroded** by alleged influence from big tech. There are [allegations](#) that big tech was the biggest proponent of the PTAB, and that this was to give them a mechanism to invalidate patents that got in the way of their profits. [Some claim](#) the term “patent troll” was their invention to fuel a narrative that would put wind in the sails of their patent-busting. You may be inclined to believe more in the above assertion, or the patent troll narrative. Legitimate arguments are forthcoming for each position, and it is challenging to discern the line between legitimate concern and exaggeration on both sides.

That is why the USPTO (which oversees PTAB) did itself no favors in appointing [Michelle K. Lee](#), the [former Head of Patents Strategy at Google](#), as Director of the USPTO. Building on this legacy, according to one analysis, in 2021, Samsung, Apple, Google, Intel, and Microsoft collectively [accounted for 81% of PTAB petitions](#) filed by the top 10 petitioners during that year. Then in 2022 a [whistleblower](#) further alleged [improper influence](#) by USPTO leadership was pressuring (see [E7](#)) PTAB to deny some petitions and institute others.

**The *Balancing Incentives Act*** (“BIA” Lead: Marcy Kaptur, Co-lead: Thomas Massie) will naturally encourage PTAB to demonstrate its legitimacy without micromanaging USPTO or the PTAB. BIA Gives patent owners the option to have their patents challenged *either* in court *or* at the PTAB. Patent owners will choose to continue to work with PTAB so long as they view it as fair and legitimate.